



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Katherina A.,<sup>1</sup>  
Complainant,

v.

Martin J. O'Malley,  
Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2023003212

Hearing No. 530-2020-00383X

Agency No. PHI-20-0128-SSA

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 13, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, we AFFIRM the Agency's final order.

ISSUES PRESENTED

The issues presented concern whether the Agency subjected Complainant to discrimination with regard to her appraisal and harassed her in terms of working conditions, assignment of duties, time and attendance, and medical documentation.

BACKGROUND

During the relevant time, Complainant worked as a Claims Technical Expert, GS-0105-12, at the Agency's Area 3, Field Office 316 facility, in Martinsburg, West Virginia.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On January 2, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of national origin (Hispanic) and in reprisal for prior protected EEO activity raising the following claims:

1. Whether the Agency subjected Complainant to disparate treatment based on national origin (Hispanic) and in reprisal for prior protected activity when, on October 30, 2019, she received an overall score of three on her Performance Assessment and Communication System (PACS) appraisal; and
2. Whether the Agency subjected Complainant to harassment (non-sexual) based on national origin (Hispanic) and in reprisal for prior protected activity between June 30, 2018, and the present, in terms of working conditions, assignment of duties, time and attendance, and medical documentation.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On July 12, 2021, the Agency filed a motion for a decision without a hearing Over Complainant's objections, the assigned AJ granted the Agency's July 12, 2021, motion for a decision without a hearing and issued a decision without a hearing on March 27, 2023.

As to claim 1, the AJ found that Complainant did not offer any valid comparators to establish a prima facie case. The individuals offered by Complainant as comparators either had different positions or had been in their position less time than Complainant. Citing to pages 239-242 of the ROI, the AJ found that even if Complainant had established a prima facie case, the un rebutted evidence of record showed that Complainant's rating of "three" on her performance appraisal was due to her performance.<sup>2</sup>

As to claim 2, the AJ found that Complainant did not prove that any of the Agency's actions were due to her protected classes. The AJ ultimately concluded that a manager advising an employee that they may seek medical documentation from the employee for unscheduled leave requests, issuing a related counseling memorandum after the employee requested unscheduled leave 14 times over a three-month period, and assigning an employee the same workload as other employees, albeit "heavy," amounted to nothing more than a supervisor overseeing their subordinates' duties.

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<sup>2</sup> According to pages 239-242 of the ROI, which contain Complainant's appraisal, management rated Complainant's performance as successful. However, they did not deem her performance to be outstanding because they were concerned about Complainant's interpersonal skills, as Complainant spent too much time "researching who did something incorrect" instead of correcting the needed actions and engaging in face-to-face interactions with employees. Management also had concerns about Complainant's ongoing struggle with planning tasks, meeting deadlines, and efficiently managing her workload.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant then filed the instant appeal, largely reiterating her prior arguments.

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged. In finding no discrimination, we acknowledge that the AJ did not address Complainant's allegation that management adversely affected her working conditions by informing her that she could not speak Spanish in the workplace unless she was assisting a claimant. Here, our review of the record shows that after management observed Complainant holding Spanish language Bible study sessions while on duty, management told Complainant that she could not hold Bible study on duty and instructed her to stop. ROI at 15-16. As we agree with the AJ's ultimate conclusion that management's actions amounted to nothing more than a supervisor overseeing their subordinates' duties, we AFFIRM the Agency's final order implementing the AJ's decision.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

January 31, 2024

Date