



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Detra W.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2023003268

Hearing No. 460-2021-00018X

Agency No. ARPOLK20MAR00743

DECISION

On May 11, 2023, 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 May 18, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

¹ 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.

ISSUES PRESENTED

The issue presented is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not discriminated against regarding admonishment, performance evaluation, and discipline based on her sex (female) and age (over 40).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Safety Director, GS-0018-13, at the Agency's Joint Readiness Training Center in Fort Polk, Louisiana. Complainant, 68 (born in or around 1952), is female. Report of Investigation (ROI) at 341-42. Complainant's first-line supervisor (Supervisor 1, male [born 1975]) was the Chief of Staff. He was aware of Complainant's protected bases, believing she was over 40. ROI at 137 and 362-65. Complainant's second-line supervisor (Supervisor 2, male [born 1967]) was the Commanding General. He was also aware of Complainant's protected bases and believed she was over 40. ROI at 419-22. A Safety and Occupational Health Specialist (Subordinate, male [born 1958]) was Complainant's subordinate who she proposed as a witness. ROI at 8-11, 142, and 434-36.

On March 30, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and age (over 40) when:

1. In or about 2019, Complainant alleged that she was called at 1900h by Supervisor 1, who admonished Complainant about her safety matrix;
2. On or about January 2, 2020, Supervisor 1 stated that Complainant's performance was "very poor" in two elements of Complainant's mid-year appraisal review for the period of April 1, 2019, through March 31, 2020;
3. On or about February 4, 2020, Complainant received a Letter of Reprimand (LoR) from Supervisor 1 for misconduct and to promote the efficiency of the service;
4. On or about February 18, 2020, Supervisor 1 served Complainant with a Notification of Unacceptable Performance with a Performance Improvement Plan (PIP) in a meeting after duty hours;

5. On or about February 18, 2020, Complainant was placed on a 30-day PIP with a possible reduction in grade, reassignment, or removal;
6. On or about February 18, 2020, Supervisor 1 failed Complainant on her PIP by stating that a document was due on September 1, 2019, to which Complainant replied that she "had no clue what that document was or where to find it";
7. On or about February 24, 2020, Complainant was given a performance review in which Supervisor 1 stated that Complainant was "not worth the GS-13 paycheck" and he had already noted that Complainant failed before the meeting started;
8. On or about March 2, 2020, Complainant was advised that her performance was still below acceptable for all performance elements in accordance with the PIP;
9. On or about March 9, 2020, Complainant was advised that her performance was still below the acceptable level for all four performance elements in accordance with the PIP;
10. On or about March 18, 2020, Supervisor 1 issued Complainant's performance review, in which Complainant allege that three out of four of the Performance Elements were written as unsatisfactory prior to the review; and
11. On or about March 27, 2020, Supervisor 1 presented Complainant with a Notice of Failure of PIP, after which Complainant allegedly told Supervisor 1 that no matter what Complainant did he would likely fail her, to which he replied, "you are probably right."

The Agency conducted an investigation into the complaint. The investigation contains Complainant's statement that Supervisor 2 required her to submit a safety matrix to show where every Safety Officer would be during every rotation and when. She explained that on August 24, 2019, Supervisor 2's aide de camp (whose name she did not recall) called her at 1900 hours (7:00 p.m.) and told her to call Supervisor 2. According to Complainant, her subsequent conversation with Supervisor 2 was "one-sided," wherein he told her he was going to give her a General Officer's LoR because she could not accomplish what he told her to do on numerous occasions.

Complainant believed that Supervisor 2's conduct was inappropriate because she worked tediously on the safety matrix and submitted it to Supervisor 2 three times, but was told it was not received. Complainant asserted that Supervisor 2's aide de camp told her that the one she sent was wrong, and she had better send the right one. She also stated that Supervisor 2's conduct humiliated her because she was out for her birthday dinner with friends when the call took place. ROI at 344-45.

According to Complainant, on or about January 2, 2020, Supervisor 1 stated that Complainant's performance was "very poor" for two performance elements (Safety and Occupational Health Program Management and Technical Expertise) during her mid-year appraisal review. She disagreed with Supervisor 1's assessment, explaining that Supervisor 1 and Supervisor 2 had never been briefed on the Command Safety Program she managed and did not know the regulations or programs the Commander was ultimately responsible for. Complainant stated that when she tried explaining this, she was "shut down as if [she was] a private." Complainant asserted that Supervisor 1 further stated that she had not taken initiative for continuing education or professional development, and had not produced any accident prevention media. Complainant believed that Supervisor's 1 assessment was unjustified because she did her job to the best of her ability and completed the mission satisfactorily by regulation. ROI at 346-47.

Complainant alleged that on February 4, 2020, Supervisor 1 issued her a LoR for submitting an incorrect safety matrix and a late submission of an accident report. According to Complainant, the safety matrix was incomplete at the time of submission because there was "so much happening" with personnel and the rotation "getting off to a rough start." She explained that the matrix in question showed that Subordinate would cover several portions of the rotation, when in fact he had to take personal time off and Complainant had not adjusted the impacted time periods before hitting the "send" button. Complainant stated that the late submission of the accident report was not misconduct and "happens more times than not." She described the accident at issue as a "difficult situation," and attributed the accident report delay to her not finding out about the accident until several days after it took place, the Board president doing anything until after Christmas break, a participant having to recuse him or herself, among other things. She asserted that she discussed the LoR with Supervisor 1 and told him it was a performance-related situation and should not be disciplinary, but he "begged to differ." ROI at 348-50.

Complainant stated that on February 18, 2020, Supervisor 1 notified her after her duty hours that he was placing her on a 30-day PIP because her performance was unacceptable and she had four deficiencies in relation to her performance elements. She explained that the secretary called her to report to Supervisor 1's office at 4:00 p.m. (1600 hours), but it was well after 5:00 p.m. (1700 hours) before Supervisor 1 allowed her into his office to notify her of this, which Complainant believed was deliberate to cause her embarrassment and humiliation by having her be held "at bay" by the Chief after duty hours. Complainant believed that Supervisor 1 placed her on the PIP to make her quit her job to produce some higher-grade vacancies to hire other persons into "made up" positions to suit their needs. She also believed that her placement on the PIP was unjustified because she was already doing everything she was being graded on in her evaluation report. Complainant asserted that the PIP was management's way of "putting it in writing" that her performance was not what they wanted. According to Complainant, one of the items Supervisor 1 told her she was failing was a document that was due on or about September 1, 2019, which Complainant still has no clue what that document is or where to find it. ROI at 350-53.

Complainant alleged that when she arrived for her scheduled PIP meeting with Supervisor 1 on February 24, 2020, Supervisor 1 already had a typed statement laying on the table stating she had failed to provide the required products for the meeting. Complainant explained that she had the products with her and gave them to Supervisor 1, but he did not look at them, although he did eventually change the document to reflect that she provided the documents as required. Complainant stated that Supervisor 1 told her that she was "not worth a GS-13 paycheck" as he was telling her how her work products did not meet his requirements. According to Complainant, it was inappropriate for Supervisor 1 to fail her without even giving her a chance. ROI at 353-54.

Complainant alleged that on or about March 2, 2020, Supervisor 1 advised her that her performance was still below acceptable for all four performance elements identified in her PIP because she did not submit the rotational training unit (RTU) safety officer packet in writing as Supervisor 1 instructed. Complainant indicated that she had submitted it on digital versatile disc (DVD) due to file-size; and that she was told that her Command Safety Plan was too vague and did not reflect the Commander's campaign plan, despite there not being a regulation requirement and no higher headquarters plan to work from.

Complainant stated that she did not submit a safety concern in writing, as instructed; and that she did not obtain four-night vision devices and train all personnel on their use within the time specified, which she stated was impossible to complete in thirty days. Complainant believed that Supervisor 1's assessment was inappropriate because the whole PIP was unjustified, wherein this incident was just a routine way of producing a "paperwork trail" to make her feel she was not good enough to continue in her job. ROI at 355.

Complainant stated that on or about March 9, 2020, Supervisor 1 advised her that her performance for all four performance elements identified in her PIP was still below acceptable. She explained that Supervisor 1 gave her documents indicating she had failed to complete the weekly required tasks before she was even given the opportunity to provide him with her work products. Complainant also explained that she knew she did not complete her required tasks to "their standard," but stated that Supervisor 1 never gave her any form of written/verbal instructions or provided her with an opportunity to request assistance or ask for more time. Complainant believed that Supervisor 1's conduct was unjustified because he told her she was not the right person for the job and was trying to "railroad" her so they could put someone else in the position. ROI at 356.

Complainant alleged that on or about March 18, 2020, Supervisor 1 wrote her performance for three of the four performance elements identified in her PIP. Complainant indicated that the elements were written as unsatisfactory before the performance review. She explained that when she arrived at their meeting, Supervisor 1 presented documents to her stating she had failed the tasks for that week before she was even allowed to present the work products she brought with her. Complainant disagreed with Supervisor 1's assessment because she did produce the required products, including the Command Safety Plan, training/certification for driving at night with night vision goggles (NVGs), and safety matrix, but Supervisor 1 determined they were unacceptable. According to Complainant, the Command Safety Plan was a new document and the Commander did not tell her what he wanted for his program; the NVG training was delayed due to the lack of a master driver and no available vehicle; and she only had two or three personnel who were expected to provide 24-hour safety coverage. Complainant stated that regardless of anything she provided, it was not acceptable and no matter what she did, it would never be good enough. ROI at 357-58.

Complainant alleged that on or about March 27, 2020, Supervisor 1 presented her with a memorandum notifying her she had failed her PIP.

She stated that she told Supervisor 1 that no matter what she did he would fail her, to which he replied, "you are probably right." ROI at 358-59. Complainant believed that Supervisor 1 failed her as part of his plan to develop written documents to show she was not worth her paycheck. She also believed that Supervisor 1's decision was unjustified because she was not given adequate time to accomplish the tasks specified in the PIP, which convoluted tasks and sub-tasks with time limits that were not humanly possible. Complainant explained that at the end of the session, she asked Supervisor 1 whether he was going to reassign her, reduce her in grade, or remove her from government service, to which he responded he would be recommending to the Commander that she be removed. ROI at 358-59.

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

After reviewing the entire hearing record, as well as conducting an initial conference with the parties to afford them the opportunity to supplement the record, the AJ assigned to the case found that further development of the record was unlikely to lead to a finding of discrimination; and that preponderant evidence failed to show that Complainant was subjected to discrimination. On April 11, 2023, the AJ issued a decision without a hearing in favor of the Agency.

According to the AJ, Complainant could not establish a prima facie case as to her claims. The AJ observed that Complainant was a 68-year-old female during the relevant period and, thus, was a member of two statutorily protected classes. Nevertheless, asserted the AJ, she had not articulated facts which, if unexplained, reasonably gave rise to an inference of discrimination. The AJ also observed that in her affidavit, Complainant stated that Supervisor 1 and Supervisor 2 knew her sex by visual observation. On the other hand, Complainant was "not certain [that either of them] ever knew [her] age." ROI at 343-344.

Even assuming, arguendo, that Complainant could establish a prima facie case of disparate treatment as to her claims, the AJ found that the Agency had legitimate, non-discriminatory reasons for its actions, and that the record did not contain evidence sufficient to create a genuine issue of material fact with respect to the question of pretext.

The AJ stated that the undisputed facts revealed that, during the relevant period, Complainant submitted an incorrect safety matrix and a late accident report. Complainant was placed on a PIP due to four deficiencies, but she did not meet the requirements of the 30-day PIP.

The AJ noted that the Agency had consistently provided the same reasons for its actions. According to the AJ, Complainant, however, had failed to provide sufficient reasons for her errors. The AJ noted Complainant's statement that the safety matrix was incomplete at the time of submission because "there was so much happening with personnel and the rotation getting off to a rough start." Similarly, she explained that late submissions "happen more times than not," and was caused, in part, because she was departing the office on personal leave. The AJ asserted that this report, however, concerned an accident where a civilian died after colliding with a Fort Polk military vehicle. ROI at 348-49. Nevertheless, Complainant continued to indicate that her failures did not rise to the level of misconduct.

The AJ further found that Complainant had not identified, and that the record did not contain, any evidence that called into question the truthfulness of the Agency's explanations for its actions. The AJ observed that there was no evidence, for example, that the Agency deviated from any established policy or procedure, or that it treated Complainant more harshly than any similarly situated comparators. Most importantly, asserted the AJ, Complainant could not establish a nexus between her sex or age and the Agency's actions. Complainant also could not specify one remark, joke, gesture or epithet made by Agency management based on her gender or age.

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.

CONTENTIONS ON APPEAL

Neither Complainant nor the Agency submitted an appeal brief.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the

record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

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*).

ANALYSIS

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 fact-finder could not find in Complainant’s favor.

Disparate treatment based on sex and age (Claims 1-11)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was

some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

A complainant may establish a prima facie case of age discrimination by showing that he or she is in the protected group (over age 40) and was treated less favorably than someone substantially younger than the complainant. See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996); Nevin v. Tennessee Valley Authority, EEOC Appeal No. 01992795 (February 14, 2002).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden is onto Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on sex, and age.

Complainant is female, and she is over the age of 40. Complainant did not identify any other similarly situated employees outside of her protected classes, including anyone substantially younger than her, who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on any of her protected classes. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management action; and we find no persuasive proof of pretext.

Regarding Claim 1, Supervisor 1 recalled speaking with Complainant about the safety matrix in late August 2019, but did not remember whether or not he called her at 1900 hours on August 24, 2019. He also recalled that there was a training rotation beginning late August 2019, and Complainant failed to submit the safety matrix on time for his review and Supervisor 2's approval by the suspense given to her. ROI at 365-66.

The record reflects that on August 27, 2019, Supervisor 1 issued Complainant a memorandum, "Subject: Initial Counseling for [Complainant]" for the purpose of clarifying the Commanding General's (Supervisor 2) expectations and to provide additional guidance as needed to assist in fulfilling those expectations. Therein, Supervisor 1 notified Complainant of the expectation that she brief Supervisor 2 on her coverage plan prior to the start of each rotation, which Supervisor 2 referred to as a "safety matrix." See ROI at 114-15 for Initial Counseling Memorandum.

Regarding Claim 2, Supervisor 1 was Complainant's Rating Official for the appraisal period at issue. He recalled that Complainant displayed very poor performance for the "Safety and Occupational Health Program Management" and "Technical Expertise" performance elements. According to Supervisor 1, Complainant's Command Safety Plan required significant revisions and lacked the proper signature block, the clarity and specificity needed to be effective, specific timelines and associated actions, and was too broad in scope, wherein she failed to incorporate his guidance provided to her on February 18, 2020, and February 24, 2020. He also explained that Complainant missed the suspense for providing the status of training and certifications for the safety team and failed to develop a written continuing education plan for her and her subordinate employees. ROI at 366-68.

The record reflects that on January 2, 2020, Supervisor 1 issued Complainant her mid-year performance review. Therein, Supervisor 1 assessed Complainant's performance as "very poor" for performance elements 1 (Safety and Occupational Health Program Management) and 2 (Technical Expertise), and identified questions or concerns pertaining to performance elements 3 (Management and Leadership) and 5 (Tactical Expertise). See ROI at 105-12 for Mid-year Review.

Regarding Claim 3, Supervisor 1 stated that he issued Complainant a LoR for the reasons delineated therein. He explained that he made the decision to issue the LoR on or about January 15, 2020, based on personally observing no improvement in Complainant's performance despite both formal and informal counseling, and feedback from Supervisor 2, who was very dissatisfied with Complainant's performance as the Safety Director. Supervisor 1 asserted that he issued the LoR, which was considered the least severe formal disciplinary action, based on advice and assistance from a Human Resources officer (HR Officer). ROI at 369-70 and 372. See ROI at 465-66 for HR Officer's supporting statements, including that she advised Supervisor 1 on the type and level of discipline, the gathering of evidence, the preparation of the Douglas Factors, the content of the LoR, and the filing period.

She stated that Supervisor 1 followed her advice and guidance, and that his actions complied with Agency regulations and policies pertaining to the disciplinary action at issue.

The record reflects that on February 4, 2020, Supervisor 1 issued Complainant a memorandum, "Subject: Letter of Reprimand," for Complainant's failure to perform her assigned duties and follow directives and policies. Therein, Supervisor 1 based his decision on Complainant's submission of a safety matrix that was "seriously deficient" and "incorrect," and her failure to quickly alert the Command of a Class A vehicular accident involving Fort Polk soldiers that resulted in a civilian death, which caused Fort Polk not to meet its regulatory suspense for conducting an investigation and Accident Board. See ROI at 98-100 for LoR.

Regarding Claims 4-6, Supervisor 1 stated that based on advice, guidance and assistance from HR Officer, he placed Complainant on a 30-day PIP for the purpose of assisting Complainant with improving her performance, wherein he was very diligent in outlining her areas of unsatisfactory performance and a plan to improve with clearly defined goals and suspense dates. He stated that his decision was "completely justified" after he observed no improvement in Complainant's performance despite written counseling, verbal counseling, and issuing her the LoR. He acknowledged notifying Complainant of her PIP during a meeting at 5:00 p.m. (1700 hours) because it was the only time he had available on his calendar that day and he wanted to ensure he was able to devote his attention to the counseling without interruption. ROI at 373-74. See ROI at 398 for calendar screenshot.

According to Supervisor 1, Complainant's allegation that he placed her on the PIP based on a document due September 1, 2019, that she was not aware of is "not quite" correct. He explained that one of the tasks identified in his notification of her placement on the PIP under the "Safety and Occupational Health Program Management" element is the development of an annual Command Safety Plan, which he noted is usually published on or about September 1st of each year to coincide with the start of a new fiscal year and was a clearly defined requirement in Complainant's performance element. ROI at 375-77. See ROI at 160 for 2020 performance plan.

The record reflects that on February 18, 2020, Supervisor 1 issued Complainant a memorandum, "Subject: Notification of Unacceptable Performance and Opportunity to Improve."

Therein, Supervisor 1 notified Complainant that her performance was unacceptable for four (4) of her critical performance elements, including performance element numbers: (1) Safety and Occupational Health Program Management; (2) Technical Expertise; (3) Management and Leadership; and (5) Tactical Expertise. Supervisor 1 further stated he was providing Complainant an opportunity to improve her performance to a minimally successful level through a PIP for thirty (30) calendar days, wherein her failure to achieve acceptable performance for each element may result in her removal or reduction in grade. See ROI at 92-6 for PIP.

Supervisor 2 provided supporting statements. According to him, Supervisor 1 notified him that Supervisor 1 was placing Complainant on the 30-day PIP, which was directly linked to the numerous public discussions and direct guidance issued to Complainant regarding the Safety and Occupational Health actions required for the Brigade Combat Team rotations. Supervisor 2 stated that Supervisor 1's decision was based primarily on Complainant's inability to meet her professional expectations, which could lead to exceptionally dangerous circumstances if preventative safety conditions are not established. ROI at 424-26.

Regarding Claim 7, Supervisor 1 rejected Complainant's allegation that he told her she was "not worth a GS-13 paycheck." According to Supervisor 1, Complainant's claim is false, and he would never discuss an employee's personal worth in terms of the pay they receive. ROI at 377-78.

The record reflects that on February 24, March 2, March 9, and March 18, 2020, Supervisor 1 issued Complainant memoranda, "Subject: Performance Review," documenting his weekly review of Complainant's performance as referenced in the PIP. Therein, Supervisor 1 discussed key points of their discussions, reviewed the PIP, identified upcoming suspense dates, provided guidance or clarifications, and documented his weekly assessment of her performance. See ROI at 404-05 for the February 24 review; 406-08 for the March 2 review; 409-11 for the March 9 review; and 412-15 for the March 18 review.

Regarding Claim 8, Supervisor 1 asserted that he advised Complainant on or about March 2, 2020, during their PIP performance review meeting that her performance was still below acceptable for all four of her performance elements. ROI at 378-79. The record reflects that on March 27, 2020, Supervisor 1 issued Complainant a memorandum, "Subject: Notification of Failure – Performance Opportunity Period," notifying Complainant that her overall performance since the start of the PIP has been less than satisfactory

for three of the four performance elements. Specifically, Supervisor 1 stated that while Complainant was minimally successful for performance element 3 (Management and Leadership), she ultimately failed performance elements 1 (Safety and Occupational Health Program Management), 2 (Technical Expertise) and 5 (Tactical Expertise). See ROI at 92-6 for PIP; 406-08 for March 2 review; and 416-18 for PIP Failure memo.

Regarding Claim 9, Supervisor 1 asserted that he advised Complainant on or about March 9, 2020, during their PIP performance review meeting that her overall performance since the beginning of the PIP on February 18, 2020 was still below the acceptable level for all four of her performance elements. He referred to the counseling memorandum issued to Complainant on this date detailing the reasons for his assessment, which includes Complainant's Command Safety Plan requiring significant revisions and her failure to follow his instructions that she submit a written report. ROI at 379-81. See ROI at 191-93 for March 9 review.

Regarding Claim 10, Supervisor 1 stated that he wrote a draft of Complainant's performance review prior to beginning of the performance review meeting at issue. According to Supervisor 1, he and Complainant went through the review document together and both agreed it was accurate before signing it. ROI at 381. See ROI at 194-97 for March 18 review.

Regarding Claim 11, Supervisor 1 asserted that he conducted a final counseling with Complainant on March 27, 2020, wherein he notified her that her overall performance since the start of the PIP opportunity period was less than satisfactory for three of the four performance elements identified in the PIP. He stated that while Complainant was minimally successful for performance element 3 (Management and Leadership), she ultimately failed performance elements 1 (Safety and Occupational Health Program Management, 2 (Technical Expertise), and 4 (Tactical Expertise) due to deficiencies related to the Command Safety Plan, Continuing Education Plan, Rotational Unit (RTU) report, and Night Vision Goggles (NGUs), as well as her failure to follow written and verbal instructions. ROI at 382. See ROI at 78-80 for PIP Failure Memo. Supervisor 1 did not recall Complainant stating, "No matter what she did [he] would fail her," nor did he recall replying "You are probably right." ROI at 382-83.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or

inadequately explained inconsistencies in the evidentiary record. See Ricardo K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (Dec. 10, 2020) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant raised several arguments in her complaint. For example, to support her belief that discrimination occurred, Complainant stated her belief that management's conduct was motivated by her sex because she was the only female safety director, and they were uncomfortable with a woman in her position because they had to curtail their vulgar language during staff meetings and other gatherings. Complainant also believed that management's conduct was motivated by her age because they told her she could not follow written and verbal instructions to complete tasks and did not know how to manage her time and resources adequately to support the mission, which inferred she may be feeble and short in brain functions. ROI at 360.

Complainant also reiterated her allegations in her rebuttal statement, rejecting Supervisor 2's failure to recollect that he called to verbally admonish her after hours. Complainant asserted that Supervisor 2 never spoke to her during several previous safety huddles when she was the only female in the group, despite her being the senior safety professional in the room. ROI at 479-80. Complainant however failed to provide any evidence demonstrating that the challenged management actions were motivated by discriminatory animus based on any of her protected bases. We also agree with the AJ's assertion that most importantly, Complainant could not establish a nexus between her sex or age and the Agency's actions; and that Complainant could not specify one remark, joke, gesture or epithet made by Agency management based on her gender or age.

Moreover, Complainant did not dispute management's statements that her performance evaluation, LoR, and counselings supporting the PIP were objectively based on quantifiable metrics; and that their actions were motivated by Complainant's performance. ROI at 383-84, 384-85, and 431-33.

We note HR Officer's statements that in late fall of 2019, Supervisor 1 notified her that Complainant's performance was at the failing level and requested her assistance in addressing it.

She explained that she provided Supervisor 1 instruction regarding how the PIP would work, the process for issuing it to Complainant, the obligation to hold regular meetings with Complainant and follow up on taskings, and to write up summaries of his meetings with Complainant to document them. She stated that Supervisor 1 was obligated to place Complainant on the PIP in accordance with Department of Defense Instruction (DoDI) 1400.25, Volume 431, which states when an employee is failing, they should be placed on a PIP. ROI at 463 and 467. See ROI at 240-53 for DoDI. She also explained that she advised Supervisor 1 to be very specific in his guidance to Complainant in fulfilling the PIP out of fairness, as she needed to know what had to be done in order to be successful. ROI at 470.

We also note HR Officer's stated belief that there was some "unconscious bias" on the part of Supervisors 1 and 2 because they wanted someone in the job who was willing to go to the field, drive tactical vehicles, use night vision devices, and talk to RTU commanders, which in 2020, would most likely be a recently retired male military person. She believed that if Complainant would have completed the PIP tasks, she would have passed it regardless of her age. ROI at 477. HR Officer also stated that ultimately, Complainant was issued the LoR and placed on the PIP because of her inaction, and not her sex or age. ROI at 477-78.

Complainant identified three male employees, all over age 40, who she asserted that Supervisors 1 and 2 treated like the "good 'ole boys" in staff meetings as if they could do no wrong. ROI at 360. See ROI at 142-46 for employment data. The identified employees are however not similarly situated to Complainant, and they were all within her protected age class. The identified employees are a Comptroller, GG-0505-15, G-8, Resource Management Directorate; a Deputy/Supervisory Program Integrator, GG-0301-14, Plans and Training Directorate; and a Supervisory Intelligence Specialist, GG-0132-13, Intelligence Division. Complainant worked as a Safety Director, GS-0018-13, at the Joint Readiness Training Center when the alleged management actions were taken. There is also no evidence that Complainant and the identified employees were in the same supervisory chain of command. See Colene M. v. U.S. Postal Serv., EEOC App. No. 2020000924 (Jun. 14, 2021) ("[C]omparator evidence relating to other employees is considered relevant when they are 'similarly situated.' . . . In other words, all relevant aspects of the employees' work situation are identical or nearly identical, i.e., the employees report to the same supervisor, perform the same job function, work during the same time periods")

Supervisor 1 also compared Complainant to another employee, a Protocol Officer (male, over age 40 [born 1971]), who displayed similar tendencies and performance. According to Supervisor 1, if that employee had not elected to resign from his position, Supervisor 1 would have issued the employee a LoR and placed him on a PIP similar to Complainant. ROI at 137, 372. and 374.

Importantly, it is well established that poor performance is a legitimate, non-discriminatory reason for an adverse employment action. See, e.g., Brennan v. U.S.P.S., EEOC Appeal No. 2019000701 (Feb. 11, 2020); Mayorkas v. Dep't Homeland Sec., EEOC Appeal No. 2020003777 (Nov. 4, 2021); Nash v. Millenium Challenge Corp., EEOC Appeal No. 0120150482 (Oct. 12, 2017).

The Commission has also repeatedly recognized that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures, monitoring subordinates, distributing the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and otherwise managing the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (Jun. 16, 2017). Employees will not always agree with supervisory communications and actions, but absent discriminatory motives, these disagreements do not violate EEO law. Steven T. v. Dep't of the Treasury, EEOC Appeal No. 2020003020 (Sept. 19, 2020).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision and the Agency's final order adopting it.

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

December 9, 2024
Date