



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

[REDACTED]
Raquel T.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Drug Enforcement Administration),
Agency.

Appeal No. 2023003309

Hearing No. 470-2022-00165X

Agency No. DEA-2021-005239

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 21, 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.

ISSUE PRESENTED

The issue presented is whether the Administrative Judge properly issued a decision without a hearing finding no discrimination as alleged.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Accounting Technician (GS-7) at the Agency's Detroit Field Division in Detroit, Michigan. She began her position on July 5, 2020, and was subject to a one-year probationary period. Report of Investigation (ROI) at 431.

On November 29, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of national origin (Croatian) and age (70), and in reprisal for prior protected EEO activity, when:

1. Complainant was allegedly denied a promotion from a GS-7 to a GS-8, despite successfully completing a probationary period;
2. Complainant was required to appear in the office each business day and was notified that she was required to assume Purchase Card Holder duties, even though those duties were not outlined in her job description;
3. in November 2021, Complainant learned that her annual appraisal contained a rating of Unacceptable;
4. on or about March 25, 2022, Complainant was issued a letter of proposed removal;
5. on or about March 25, 2022, Complainant was placed on administrative leave until April 4, 2022; and
6. on or about March 25, 2022, Complainant was told that when she returned to work on April 4, 2022, her duties would be limited to those specifically assigned by her first-line supervisor ("Supervisor"), and Complainant would be required to limit her movement to the first floor, which, among other limitations, prevented her access to her current workstation.

The EEO investigation revealed that Complainant's position included three primary duties: Imprest Fund Cashier; Travel Card Liaison; and Purchase Card Holder. Complainant explained that the Imprest Fund was the principal cashier who gave money to agents. ROI at 308, 101-2.

Complainant was eligible to be promoted to the GS-8 level in July 2021, but the Supervisor and the Administrative Officer stated that they could not promote Complainant because she did not want to get the purchase card. Complainant admitted that she did not want a purchase card and her promotion was held up because she refused to perform Purchase Card Holder duties. ROI at 100, 105, 110, 120.

On July 28, 2021, the Administrative Officer emailed Complainant the link for purchase card training and instructed her to complete it by September 1st. ROI at 457. The Administrative Officer memorialized a meeting held on August 2, 2021, during which it was explained to Complainant that she had three primary duties of Imprest Fund; Travel Card; and Other duties to include being a Purchase Card Holder, and she stated that she would not take the training for the Purchase Card Holder duties. ROI at 398-9, 458.

On October 6, 2021, the Administrative Officer emailed Complainant that she learned that Complainant was not in the office during the designated Imprest Fund hours, without notifying her management officials. The Administrative Officer highlighted that the Imprest hours were designated as Monday, Wednesday, and Friday from 10:00 a.m. to 2:00 p.m., and that personnel rely upon these times to plan their operations. She instructed Complainant to be in the office during these times and contact the Supervisor or the Administrative Officer if she was unable to report in. ROI at 407. On October 25, 2021, the Assistant Special Agent in Charge directed Complainant to be in the office Monday to Friday from 10:00 a.m. to 3:00 p.m. for primary cashier duties. ROI at 464.

On or about November 10, 2021, the Supervisor issued Complainant's performance rating of Unacceptable, noting that Complainant did not perform all her duties and only some of her performance outcomes were met. For example, Complainant's Purchase Card Holder duties were not accomplished. ROI at 411-16. On November 19, 2021, the Supervisor revised Complainant's performance appraisal to Successful. ROI at 417-23. The Supervisor explained that after they issued the Unsuccessful rating, they learned that Complainant needed to be on a Performance Improvement Plan (PIP) before she could be rated Unsuccessful. ROI at 329-30.

On March 25, 2022, the Acting Special Agent in Charge issued Complainant a proposed removal for Failure to Follow Written or Oral Instructions. On July 28, 2021, the Administrative Officer sent Complainant the link to start the purchase card training for completion by September 1, 2021. However, on August 2, 2021, and again on October 25, 2021, Complainant repeatedly expressed that she would not complete the training. The Acting Special Agent in Charge noted that Complainant was not performing all her functions and still refused to complete the training required for her duties. He considered the nature and seriousness of Complainant's conduct and proposed the removal action. ROI at 424-9.

The Acting Special Agent in Charge simultaneously placed Complainant on administrative leave until April 4, 2022, for a cooling-off period to allow Complainant to address the charges and for the Agency to figure out what to do moving forward. ROI at 221-2. The Administrative Officer assigned Complainant temporary duties upon her return to file and organize case files and boxes in the Case File Maintenance Room. ROI at 466-8.

On June 14, 2022, the Deciding Official issued the decision on Complainant's proposed removal. After considering Complainant's oral responses and additional materials, he found that the charge was fully supported by preponderant evidence. However, the Deciding Official mitigated the penalty to a 14-day suspension. Agency Motion for Summary Judgment, Exhibit B. Complainant served the suspension and subsequently resigned, effective August 26, 2022. Agency's Motion for Summary Judgment, Exhibits C and D.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. When the Complainant did not object, the AJ granted the Agency's motion and issued a decision without a hearing on March 23, 2023.

The AJ agreed with the Agency's statement of material facts and legal analyses showing the Agency's legitimate, nondiscriminatory reasons for the actions. Complainant did not offer any evidence of pretext, and the record lacked evidence that the Agency's reasons were suspect. The AJ concluded that there were no genuine disputes of material fact and granted the Agency's motion in its entirety.

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.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant states that the AJ granted the Agency's motion for summary judgment because she failed to respond within 14 days, which she was not aware of.²

² The AJ's Initial Conference Order issued on December 1, 2022, specified that an opposition to a motion for summary judgment was due within 14

She also complains about the EEO process; for example, Complainant claims that the EEO Investigator mostly asked questions that only required a “yes” or “no” response without delving into the reasons for the actions.

Complainant contends that she was not treated equally as compared to two Accounting Technicians, and the only discernible difference was her national origin. When Complainant was told about her three duties, she asked why the two comparators were not assigned these duties, and management officials responded that Complainant could not choose her duties. Complainant confirmed that the Administrative Officer instructed her to complete Purchase Card Holder training on July 28, 2021, and she did not do so. Complainant repeats her allegations of discrimination and retaliation,³ and she requests relief.

The Agency opposes the appeal, asserting that the AJ properly found no genuine issues of material fact. The Agency contends that Complainant offered no evidence to link any of the actions to a protected class, and that there were legitimate, nondiscriminatory reasons for the actions. Further, there was no record evidence to show that the proffered reasons were pretexts for discrimination or retaliation. The Agency requests that the Commission affirm the final order on the AJ’s summary judgment decision.

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 (EEO MD-110), 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

days after the motion was filed. The AJ also noted that Complainant confirmed her email address and did not object to service by email. The Agency served its motion to Complainant at her provided email address.

³ Complainant raises a claim of a constructive discharge for the first time on appeal. However, the Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep’t of Homeland Security, EEOC Appeal No. 01A40449 (Apr. 22, 2004).

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 EEO MD-110, at Chap. 9, § VI.B. (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

Decision Without a Hearing

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.

On appeal, Complainant accuses the EEO Investigator of mostly asking "yes" or "no" questions, without delving into the reasons behind the actions. However, we find Complainant's assertion to be inaccurate. The record contains transcripts of oral examinations, which clearly show that the EEO Investigator asked follow-up questions to obtain full responses from Complainant and management officials. For example, the EEO Investigator asked the Administrative Officer to confirm that the reason Complainant was not recommended for a promotion was because she did not perform the Purchase Card Holder responsibilities, and he asked the Acting Special Agent in Charge, "do you know any reason why...a removal was proposed and not something less?" ROI at 266, 220. We find that the record was adequately developed on Complainant's claims for a decision without a hearing.

Complainant also raises arguments that she was treated less favorably than two comparators. However, she did not show that they were similarly situated. Among other things, to be considered "similarly situated," the comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. See Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001), reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002). Assuming that the named comparators were outside of Complainant's protected classes of age and national origin, she did not claim that either refused to take training for any of their assigned duties. Complainant readily admitted that she was instructed to complete the purchase card training course but she "didn't take any action on this request." Complainant Appeal Brief at 4. As such, it would not be expected that Complainant and her comparators be treated in the same manner.

Complainant repeats her allegations on appeal, but she did not cite to any evidence to show that there is a genuine dispute of material fact, and a review of the record does not reveal any genuine disputes of material facts. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden 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 reverts back to 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 Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainants may establish a prima facie case of discrimination by providing evidence that: (1) they are a member of a protected class; (2) they suffered an adverse employment action; and (3) either that similarly situated individuals outside their protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

It is undisputed that Complainant belongs to protected classes based on her age and national origin. Complainant named two comparators who were purportedly treated more favorably, but as discussed above, she did not assert that they acted in a similar manner to prove that they were similarly situated. Further, Complainant did not show that the circumstances of any of the complained actions gave rise to an inference of discrimination. As such, we find that Complainant did not establish a prima facie case of discrimination based on her age or national origin.

Complainants may establish a prima facie case of reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant does not have prior EEO activity, and she initiated the instant complaint on or about September 20, 2021. ROI at 96-7. Claim 1 occurred in July 2021, prior to Complainant's EEO activity, and as such, she did not establish a prima facie case of reprisal for claim 1.

The EEO Investigator did not ask the Supervisor when she learned of Complainant's protected EEO activity, but the EEO Counselor spoke with the Supervisor on October 15, 2021. ROI at 15. The Assistant Special Agent in Charge stated that she was aware of Complainant's prior EEO activity, but she could not recall the date she learned of it. ROI at 235.

For the sake of argument, we will assume that the Assistant Special Agent in Charge learned of Complainant's EEO complaint prior to her instruction that Complainant report to the office five days per week on October 25, 2021. The Acting Special Agent in Charge disclosed that he learned of Complainant's EEO activity on January 12, 2022. ROI at 217.

A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001). We find that the responsible management officials learned of Complainant's prior protected EEO activity within a few months of the events at issue, and we will credit a temporal nexus for a prima facie case of reprisal for claims 2-5.

We now turn to the Agency's articulated legitimate, nondiscriminatory reasons. For claim 1, the Supervisor responded that grade increases are not automatic, and that Complainant was not given a promotion in July 2021 because she did not do her job and refused to take purchase card training. The Administrative Officer corroborated that when an employee is eligible for promotion, there is no guarantee, and Complainant was not promoted because she refused purchase card duties and was not performing all her major duties. The Assistant Special Agent in Charge added that completing a year of service does not entitle an employee to a promotion. ROI at 302, 305-6, 260-1, 265, 239. The Special Agent in Charge testified that he met with Complainant and specifically asked that she perform Purchase Card Holder duties, and she refused because she did not want to "deal with" a purchase card. He agreed that if an employee would not perform duties, there should not be a recommendation for promotion. ROI at 205-6.

In claim 2, Complainant alleged that the Purchase Card Holder duties were not outlined in her job description. However, a Human Resources Specialist stated that management can assign Complainant purchase card duties even if it is not specified in the position description based on the "other duties as assigned," if it is within the scope and grade of her position. ROI at 348. The Administrative Officer averred that Complainant was previously a contractor and aware that her predecessor had the same three duties, and Complainant applied for the position knowing the responsibilities. ROI at 273-4.

The Supervisor explained that every Imprest Fund Cashier had to be available five days per week, but when COVID-19 happened, they were more flexible, and they temporarily established set hours for agents to come in and get money three days per week. ROI at 319-21.

The Assistant Special Agent in Charge stated that prior to setting the 10:00 a.m. to 3:00 p.m. schedule, Complainant was contacted a few times about a money pick-up, but she was not available even after she was instructed to meet an agent by the Supervisor or Administrative Officer. Based on the needs of the mission, they brought Complainant back for regular hours from Monday through Friday because an Imprest cashier needs to be available to disburse cash. ROI at 242-5. The Supervisor clarified that Complainant's remaining hours were performed remotely from home. ROI at 330.

For claim 3, the Supervisor noted that Complainant did not accomplish Purchase Card Holder duties in her performance rating. ROI at 411-16. The Supervisor conceded that Complainant would have received a higher rating had she accepted her Purchase Card Holder duties. ROI at 332. The Human Resources Specialist confirmed that she informed Complainant's managers that they had to change the rating and could not give Complainant an Unacceptable because she was not on a PIP. ROI at 349.

Regarding claim 4, the Acting Special Agent in Charge responded that he proposed Complainant's removal primarily for her refusal to do part of her job, and he did not see a reason for a lesser sanction. He also placed Complainant on administrative leave until April 4, 2022 (claim 5), based on a recommendation from Human Resources for a cooling-off period for an employee to address the charges and for the Agency to determine next steps. ROI at 220-2.

In response to claim 6, the Administrative Officer explained that Complainant was assigned duties to box files for archive on the first floor to minimize any disruption to the other staff. The Administrative Officer moved Complainant's equipment and personal items so there was no need to access her workstation. If Complainant needed anything, such as supplies, she just needed to ask for them. ROI at 291.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008). Complainant did not show that the proffered reasons are not worthy of belief.

Rather, she consistently acknowledged that she refused the directions to take the Purchase Card Holder training. ROI at 110, Complainant Appeal Brief at 4.

The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency's actions. Further, the Commission has long held that "[p]articipation in the EEO process does not shield employees from uniformly applied standards of conduct and performance; nor are the statutory anti-retaliatory provisions a license for employees to engage in misconduct." Berkner v. Dep't of Commerce, EEOC Petition No. 0320110022 (June 23, 2011).

Complainant's bare assertions that management officials discriminated against her are insufficient to prove pretext or that their actions were discriminatory. Accordingly, we find that Complainant did not establish discrimination based on her age or race, or in reprisal for prior protected EEO activity.

CONCLUSION

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

December 16, 2024
Date