



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

[REDACTED]
Nerissa S.,¹
Complainant,

v.

Gina M. Raimondo,
Secretary,
Department of Commerce
(Bureau of the Census),
Agency.

Appeal No. 2023003635

Hearing No. 440-2021-00209X

Agency No. 63-2020-00553-D

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated May 25, 2023, finding no discrimination regarding her 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 finding no discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Recruiting Assistant (RA), AD-0303-08, at the Agency's Evansville, Indiana Area Census Office, Chicago Regional Census Center.

The record indicates that the Agency framed Complainant's complaint filed on June 25, 2020, as alleging discrimination and harassment based on sex (female) and in reprisal for prior EEO activity when:

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.

1. On unspecified date(s), Recruiting Manager, Complainant's former supervisor (FS1) gave her undesirable assignments unlike her two male coworkers although she had higher recruiting numbers.
2. Between the start of her employment and March 2020, she was required by FS1 to complete certain paperwork, D-1252 forms, unlike her male counterparts.
3. Since March 2020, Complainant's new first line supervisor (S1), Recruiting Manager, began micromanaging her work and timesheets.
4. On or around May 20, 2020, she was terminated by S1.

Complainant has not challenged the Agency's framing of her complaint. 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 EEOC Administrative Judge (AJ). 29 C.F.R. § 1614.108(f). Complainant requested a hearing. The Agency filed a motion for summary judgement. Complainant filed no response. The AJ dismissed claims 1 and 2 for untimely EEO Counselor contact since FS1 left the Agency on March 19, 2020, and Complainant did not contact an EEO Counselor until May 21, 2020, which was beyond the 45-day time limit. The AJ issued a decision, without holding a hearing, finding no discrimination regarding claims 3 and 4.

Complainant was hired as a RA on January 15, 2020, on an excepted service appointment not to exceed June 29, 2020. Complainant was responsible for, in part, recruiting applicants for temporary Decennial employment; attending meetings and distributing recruiting packets to communities, including state and local agencies; and contacting, scheduling and testing job applicants.

Regarding claim 1, Complainant indicated that FS1² assigned recruitment assignments at two universities to two male coworkers and not to her, and when she asked him about that, FS1 said those assignments were not right for her. S1 indicated that Complainant mentioned about her assignments to unfamiliar and undesirable territories and she talked to FS1. FS1 told S1 that he tried to accommodate Complainant by not assigning recruitment at high school basketball games (which were held at night) because Complainant told FS1 that she did not like to drive after dark. Complainant acknowledged that she did not like to drive after dark. S1 stated that all workers were treated fairly, and Complainant and FS1 had a difficult relationship because Complainant did not always follow FS1's direction.

² FS1 left the Agency on March 19, 2020, and he did not provide an affidavit or statement regarding the alleged incidents.

Regarding claim 2, S1 stated that all RAs, including Complainant, were required to complete D-1252 forms. The D-1252 form was a customer relationship management entry form that all RAs were required to submit to document contacts with the community and other local entities in order to track their recruiting contacts.

Regarding claim 3, S1 stated that she did not micromanage Complainant. S1 indicated that during the time when everyone was working from home during COVID-19, management was looking at everyone's timesheets, including Complainant's timesheet.

Regarding claim 4, S1 stated that she recommended to terminate Complainant for falsifying her report of daily activities on May 14 and 16, 2020. Specifically, S1 indicated that based on an audit conducted on May 18, 2020, Complainant logged in calls as having been made when they were not made. S1 also indicated that on April 9, 2020, she issued Complainant a written warning for her unprofessional behavior when on April 7, 2020, she accused S1 of trying to confuse her or cause problems for her when she was questioned about her daily work activities and her recording times. The Area Census Office Manager ultimately decided to terminate Complainant as recommended.

The Agency's final order implemented the AJ's decision. Complainant appeals from the Agency's final order.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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 this case, we find that the AJ properly issued a decision without a hearing because no genuine dispute of material fact exists.

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Complainant must initially establish a prima facie case by demonstrating that Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. 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).

Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. See U.S. Postal Serv. Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

To establish a claim of harassment, Complainant must establish that: (1) Complainant belongs to a statutorily protected class; (2) Complainant was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on Complainant's statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); see also Oncale v. Sundowner Offshore Service, Inc., 23 U.S. 75 (1998). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Therefore, to prove Complainant's harassment claim, Complainant must establish that Complainant was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

Upon review, we find that the Agency properly dismissed claims 1 and 2 as untimely. The alleged incidents occurred on or prior to March 19, 2020, but Complainant did not contact on EEO Counselor until May 21, 2020, which was beyond the 45-day time limit. See 29 C.F.R. § 1614.107(a)(2). Complainant provided no justification to warrant an extension of the time limit for contacting an EEO Counselor.

Regarding her termination, assuming *arguendo* that Complainant established a *prima facie* case of discrimination, the AJ determined, and we find that the Agency articulated, legitimate, nondiscriminatory reason for its action. Complainant was terminated on May 20, 2020, during her excepted service appointment not to exceed June 29, 2020, because the Agency's audit on her work reports revealed that she falsified her report of daily activities on May 14 and 16, 2020. Complainant failed to show that there were any similarly situated employees not in her protected groups who were treated differently under similar circumstances.

Regarding her claim of harassment, considering all the events, including the dismissed claims, we find that Complainant failed to show that they were related to any protected basis of discrimination. As a supervisor, FS1 and S1 were responsible for assigning work to their employees, including Complainant, monitoring their daily work activities, and reviewing their timesheets and D-1252 entry forms. The Commission has held that routine work assignments, instructions, admonishments, and addressing performance deficiencies do not rise to the level of harassment because they are common workplace occurrences. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120130465 (Sept. 12, 2014); Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). We note that anti-discrimination statutes are not civility codes designed to protect against the "ordinary tribulations" of the workplace. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale, 23 U.S. at 81. Upon review, we find that Complainant failed to make such showing here. Based on a thorough review of the record, considering all statements submitted on appeal, we find that Complainant failed to show that the Agency's actions were motivated by discrimination as she alleged.

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is AFFIRMED.

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).

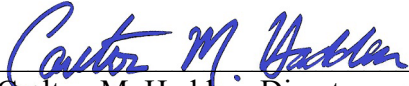
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 22, 2024
Date