



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

[REDACTED]
Ayanna B.,¹
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(Centers for Disease Control and Prevention),
Agency.

Appeal No. 2023003650

Hearing No. 410-2022-00375X

Agency No. HHS-CDC-0445-2021

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from an EEOC Administrative Judge (AJ)'s April 29, 2023 decision, which effectively became the Agency's decision, pursuant to 29 C.F.R. § 1614.109(i), 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 GS-9, Public Health Advisor assigned to the Deputy Director for Infectious Diseases, the Division of STD (Sexually Transmitted Diseases) (DSTD) at the Agency's Center for Disease Control and Prevention in Atlanta, Georgia.

The record indicates that Complainant contacted an EEO Counselor regarding her complaint on September 20, 2021.

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.

Unable to resolve the matter informally, Complainant filed her complaint on December 23, 2021, which was amended, alleging that she was subjected to retaliatory harassment for prior EEO activity when:

1. On August 16, 2021, she was issued a written counseling for inappropriate and unprofessional behavior.
2. Beginning in 2008 through present, when management officials changed her work conditions by removing her from major Public Health Advisor duties and responsibilities.
3. On or around March 16, 2022, she was issued an Official Reprimand.

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. On February 13, 2023, the AJ issued a Notice of Proposed Summary Judgment. Both parties responded to the notice. On April 19, 2023, the AJ issued a decision without holding a hearing, finding no discrimination.

Regarding claim 1, the record indicates that Complainant's first level supervisor (S1), a Public Health Advisor, issued Complainant a Written Counseling – Inappropriate and Unprofessional Behavior, dated August 16, 2021. Therein, S1 stated that from July 16 - August 2, 2021, Complainant sent emails to S1, the Associate Director, and the Deputy Director wherein which she made inappropriate comments attacking S1 and Division leadership. S1 indicated that Complainant's consistent attacks to her supervisors and coworkers and arguments on what conditions she was willing to accept regarding supervisory direction were serious issues that were not acceptable and would not be tolerated.

Specifically, S1 stated that on July 16, 2021, Complainant, in a Return-to-Work Survey sent by S1 to his employees (clearly informing *not to reply all*), she replied to all on the email list indicating, in part, that: "I also expect to receive subpar treatment from DSTD management and leadership," and "I don't believe you know how to talk and treat people who you and only you believe are less than you." S1 further stated that in July and August, 2021, Complainant emailed to S1 and the DSTD leaders indicating, in part, that: "I took company time to my legal case the claim I have against DSTD management and leadership because I am allowed to do so;" "I never asked for permission from any DSTD supervisor can I be excused so I can file a [sic] EEO, Merit System [sic] Protection Board, IG complaint or an Office of Specialist Counsel complaint – I will tell you if I want too [sic];" "I didn't ask for you [sic] permission to submit my complaints to her because I don't have too [sic];" she won't attend her mid-year review since S1 had the option to "skip over me;" and she was ordered to work using "phony emails reassignments;" and she would report to work, "sit and do nothing after my leave ends [the Deputy Director]. My wish is that I be left alone and at peaceful [sic]."

Complainant acknowledged that the incidents occurred as described in the Written Counseling. Complainant however indicated that she accidentally hit “reply all” for her July 16, 2021, email.

Regarding claim 2, Complainant alleged that her duties were changed and removed starting in 2008, and she complained to S1 on May 13, 2018, about that. Complainant acknowledged that her former supervisor told her that she could “pick out” her own position description, and she did so. Later, Complainant was disappointed with the duties she picked (i.e., administrative duties) and tried to change them but unable to do so. S1 indicated that when he arrived at the DSTD in June 2016, and became Complainant’s first level supervisor, he reviewed Complainant’s position goals with her. When Complainant mentioned that she was working outside of the scope of her position description, the Office of Human Resources did a classification review and determined that her duties were within the scope of her position description. S1 stated that he did not remove any duties from Complainant and if any duties were taken away, it was done prior to his arrival in June 2016. The AJ stated that claim 2 was untimely raised since Complainant did not contact an EEO Counselor regarding the alleged incidents until September 20, 2021, which was beyond the 45-day time limit, thereby failing to exercise due diligence in pursuit of her rights.

Regarding claim 3, the record indicates that S1 issued Complainant a letter of Official Reprimand, dated March 14, 2022, for her unacceptable behavior. S1 charged Complainant with inappropriate and unprofessional conduct on three occasions. Specifically, on February 10, 2022, when S1 asked Complainant about a status of an Office of Financial Resources’ (OFR) inquiry regarding FedEx accounts, she said to S1, in part, “Please stop treating like I am not responsibility [sic]. I am not a child.” On February 11, 2022, when an identified OFR employee asked Complainant about FedEx and Division accounts, Complainant said, in part, that “What word should I use that you need to see that will inform you that I do not know” and “please stop asking questions that I cannot answer.” On February 14, 2022, when S1 asked Complainant to be considerate in her response to the OFR employee, she responded to S1 that “what u think and what is fact r two different things. I asked her to stop asking me questions I do not know the answer to, and I can do that;” and “This Fed ex is not my job.” Complainant agreed about the incidents as described, but disagreed her conduct was disrespectful or inappropriate.

The Agency did not issue a final order after the AJ’s decision. Thus, the AJ’s decision effectively became an Agency’s final decision. See 29 C.F.R. § 1614.109(i). Complainant appeals from the Agency’s decision.

STANDARD OF REVIEW

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 rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order implementing 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 AJ's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo).

ANALYSIS AND FINDINGS

Disparate Treatment

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).

Harassment

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.

In this case, we find that the AJ properly issued a decision without a hearing because no genuine dispute of material fact exists. Upon review, we find that claim 2 was untimely raised with an EEO Counselor. Complainant acknowledged that her duties were changed/removed in 2008, and she had been unsuccessful in trying to "fix" that. There is no evidence Complainant's duties were changed/removed since S1 became her supervisor in 2016. Complainant did not contact an EEO Counselor regarding this matter until September 20, 2021, which was beyond the 45-day time limit set by the regulations. Complainant failed to provide any justification to warrant an extension of the time limit for initiating EEO contact. Thus, we find that the Agency properly dismissed claim 2 as untimely pursuant to 29 C.F.R. §1614.107(a)(2).

In the instant case, assuming arguendo that Complainant established a prima facie case of discrimination, the AJ determined, and we find that the Agency articulated, legitimate, nondiscriminatory reasons for its actions.

Regarding claim 1, Complainant was issued a Written Counseling due to sending several emails to her supervisors and coworkers making inappropriate comments, i.e., complaining about leadership and her work assignment and declining to participate in her mid-year review.

Regarding claim 3, Complainant was issued an Official Reprimand when she responded in an unprofessional manner concerning S1's inquiry about her work assignment and the OFR employee's inquiry about the Division accounting issues. The Agency's characterization of Complainant's behavior as being unprofessional is not unreasonable on its face and is a legitimate, nondiscriminatory reason for the Official Reprimand. We find that Complainant failed to show that there were any similarly situated employees not in her protected groups who were treated differently under similar circumstances. We find that Complainant failed to show that the Agency's articulated reasons were a mere pretext for discrimination. Even if Complainant's actions in claim 3 could be characterized as acceptable (rather than unprofessional), there is no indication that the Agency characterized them as unprofessional based on retaliation. There is also no evidence that other persons in the office exhibited similar behavior and were treated differently.

Regarding her claim of harassment, considering all the events, including the dismissed claim, we find that Complainant failed to show that it was related to any protected basis of discrimination. 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 29, 2024
Date