



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

[REDACTED]
Jutta A.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2023003852

Hearing No. 540-2020-00245X

Agency No. BOP-2019-01015

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 June 1, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, we AFFIRM the Agency's final order.

ISSUES PRESENTED

The issues presented are: (1) whether the AJ's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing; and (2) whether the Agency discriminated against Complainant based on her race (African American), sex

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.

(heterosexual female), and in reprisal when it allegedly subjected her to various acts of discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Correctional Officer at the Agency's Federal Correctional Institute facility in Phoenix, Arizona. Complainant's direct supervisor varied by shift. However, during the period, the Lieutenant was one of Complainant's direct supervisors. The Lieutenant was, in turn, supervised by the Captain. See Report of Investigation (ROI) at 65.

On October 2, 2019, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination on the bases of race (African American), sex (heterosexual female),² and in reprisal for prior protected EEO activity when:

1. from February 2019 through July 2019, the Lieutenant subjected Complainant to harassment in the form of bullying and degrading tactics in front of co-workers, (February and April 2019), in the terms and conditions of Complainant's employment, when she was denied a union representative during counseling meeting(s) that she perceived to be a form of discipline; when the Lieutenant made inappropriate comments that made her feel uncomfortable; shared incorrect information with other staff to create a hostile work environment; used bullying tactics that made her feel uncomfortable and to feel trapped in the office space; and when she was ordered to leave early from her overtime post (May – June 2019); and

² In Bostock v. Clayton County, the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. 644 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

2. on July 6, 2019,³ Complainant was denied a 10-hour overtime (OT) shift, and limited to eight hours by the Lieutenant, but then allowed to work 10 hours by Lieutenant-2; and on July 11, 2019,⁴ when her OT was cancelled.

At all times relevant to this complaint, the relevant responsible management official (RMO) was the Lieutenant. The Lieutenant stated that she believed Complainant was African American. The Lieutenant stated that while she did not make any assumptions about Complainant's sex, she generally referred to Complainant using female pronouns. As for Complainant's sexual orientation, the Lieutenant stated that she made no assumptions regarding that basis. The Lieutenant also added that she was unaware of Complainant's prior protected EEO activity. ROI at 101.

Claim 1

Complainant alleged that on February 25, 2019, an unspecified date in May 2019, and on June 11, 2019, the Lieutenant subjected her to harassment in the form of bullying and degrading tactics in front of co-workers. Complainant stated that in each incident, the Lieutenant spoke to her in a degrading and humiliating manner that made her uncomfortable. Complainant attributed the allegedly humiliating treatment to her sex and contended that the Lieutenant, as a "homosexual female," made it a point to assert her authority over Complainant because Complainant was a heterosexual female. ROI at 67-69; 95. Complainant also contended that the Lieutenant liked to assert her authority over African Americans and humiliated her because of her race. ROI at 72.

Regarding the February 25, 2019, incident, Complainant alleged that the Lieutenant publicly berated her for arriving to work late. Complainant stated that she informed the Lieutenant that her attitude was harsh and disrespectful, and that the next time the Lieutenant wanted to speak with her, she wanted a union representative to be present. ROI at 67.

³ Complainant clarified during the EEO investigation that this incident occurred on July 6, 2019, not July 4, 2019, the date originally identified by the Agency. ROI at 86; 98.

⁴ Complainant clarified during the EEO investigation that this incident occurred on July 11, 2019, not July 10, 2019, the date originally identified by the Agency. ROI at 87.

The Lieutenant denied Complainant's allegation and responded that on February 25, 2019, Complainant arrived at her post late. The Lieutenant recalled that after she heard Complainant using profanity towards another staff member, she pulled Complainant to the side and reminded her that staff must always be professional. The Lieutenant denied degrading Complainant. ROI at 103.

In May 2019, Complainant stated that she spoke with the Lieutenant regarding concerns that her colleagues had with her work. Complainant felt that the conversation could lead to disciplinary action and requested a union representative, which she stated was denied to her in violation of her Weingarten rights. Complainant also asserted that during the conversation, the Lieutenant told Complainant that she wanted to be close with Complainant and showed how close by crossing her index and pointer fingers. Complainant stated that the Lieutenant's actions made her feel uncomfortable. ROI at 68.

Regarding the May 2019 incident, the Lieutenant replied that she met with Complainant to discuss concerns that two of Complainant's colleagues had with Complainant's work. During the meeting, they discussed whether Complainant needed any assistance, which Complainant declined. The Lieutenant stated that she reminded Complainant that she could always ask for assistance at any time. ROI at 104.

The Lieutenant also added that Complainant was not legally entitled to a union representative for the May 2019 incident, as Complainant was never the subject of potential discipline. However, as a common courtesy, she would allow any employee to have a union representative present. The Lieutenant emphasized, however, that Complainant never requested one. The Lieutenant further denied that Complainant's protected classes were a factor in any of her interactions with Complainant. ROI at 103; 106; 108.

On or about June 10, 2019, Complainant claimed that while sitting in the Camp Message Center Office, the Lieutenant walked in and berated her. Complainant asserted that she was no longer allowed to switch assignments with her coworker (CW), she was told that she was rude and unprofessional, that Complainant owed her, and when Complainant tried to leave the office, she was physically barricaded from leaving. Complainant explained that the comment of "owe me" was a "huge trigger" for her because she perceived the comment to be sexual in nature and did not know what exactly the Lieutenant wanted. Complainant emphasized that the only thing that she has was her "physical person" and that she did not want to give that up to anyone against her will. ROI at 68; 72; 75; 90.

The Lieutenant, however, explained that she was informed that CW and Complainant had been swapping assignments without a supervisor's approval. According to the Lieutenant, she advised CW and Complainant that employees were not allowed to swap posts without approval. The Lieutenant denied degrading Complainant, stating to Complainant that she "owed" her, or preventing Complainant from leaving the conversation and/or space. ROI at 106-110.

On June 21, 2019, Complainant was sent home early. Complainant alleged that the Lieutenant told her that she was sending Complainant home for insubordinate behavior. However, the Lieutenant explained that Complainant was scheduled to work overtime to cover an employee who requested leave for a medical appointment. After that employee cancelled the appointment, the Lieutenant had sufficient employees to cover the shift, and no longer needed Complainant to work overtime. The Lieutenant denied discriminating against Complainant. ROI at 111-112; 154.

Claim 2

Complainant alleged that on or about July 6, 2019, the Lieutenant adjusted her OT shift from 10 hours to eight hours, but Lieutenant-2 allowed her to work the full 10 hours. Complainant also alleged that on July 11, 2019, Lieutenant-3 called her and informed her that her overtime morning shift had been cancelled.⁵ Complainant believed that the Lieutenant was responsible for the cancellation. When asked why she believed these incidents were based on her race and sex, Complainant reiterated that the Lieutenant liked to assert her authority over her because of Complainant's status as a heterosexual African American female. She also attributed these incidents to reprisal "because the more I let others know the more she made a point to bully and forcefully assert her power over me." ROI at 15-16; 89.

The Lieutenant could not recall the rationale for reducing Complainant's shift hours but noted that the policy was that 10-hour shifts were no longer approved and that individuals were selected for eight-hour posts instead due to potential shift conflicts. ROI at 87; 114. Lieutenant-2 explained that he changed Complainant's shift back to 10 hours because the post that Complainant wanted was a 10-hour post. Lieutenant-2 stated that he did not know the post was limited to eight hours until two days later when the Captain addressed the Lieutenants. ROI at 15.

⁵ Lieutenant-3 retired and did not provide an affidavit. ROI at 406.

As for the Captain, he explained that the shift was for a newer post where the Agency was attempting to accommodate compressed work schedules. He noted there was a lot of confusion and miscommunication because the facility did not previously have 10-hour shifts. He stated that if Complainant was ultimately given an eight-hour shift it was likely a communication issue. The Captain noted that the policy has since been clarified. ROI at 136.

While the Lieutenant did not recall why Complaint's OT was cancelled on June 11, 2019, Lieutenant-4 surmised that if Complainant's OT had in fact been cancelled, "it was due to having extra staff on shift, that may have been overlooked and that she may have been the last person to sign up for overtime." However, Lieutenant-4 conceded that he did not have direct knowledge about the incident because he had been assigned to another part of the institution at the time. ROI at 237-238.

Post Investigation

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for a decision without a hearing, to which Complainant responded.

Over Complainant's objections, the AJ issued a decision without a hearing on April 25, 2023. After thoroughly reviewing the ROI and the submissions of the parties, the AJ determined that the record was adequately developed for summary disposition, and that there were no genuine disputes of material fact and no questions of credibility. The AJ entered summary judgment in favor of the Agency. 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

Complainant requests a hearing because she believes she has substantial proof of harassment, discrimination and intimidation based on her protected classes. Complainant does not believe that the Agency presented enough evidence that summary judgment was appropriate.

The Agency opposes the appeal and asserts that the AJ's decision demonstrated that there were no genuine issues of material fact or error in the application of the law that would warrant overturning the 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, 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 factfinder could not find in Complainant's favor.

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, they 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. McDonnell Douglas, 411 U.S. at 802, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

In order to establish a prima facie case of discrimination based on race and sex, a complainant must show: (1) they are a member of a protected group; (2) they were subjected to an adverse employment action; and (3) they were treated less favorably than other similarly situated employees outside of their protected groups. We note that, although a complainant bears the burden of establishing a "prima facie" case, Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

For a claim of reprisal, a complainant must show that: (1) they were 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). A complainant can also establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder 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).

At the outset, we find that Complainant has not established a prima facie case of discrimination based on race and sex. While it is undisputed that Complainant is a member of a protected class by virtue of her race and sex and was subjected to adverse employment action when she was ordered to leave early from her overtime post, and had her overtime reduced and cancelled, we find that she failed to show that she was treated less favorably than other similarly situated employees outside of their protected groups. As for her claim of reprisal, the probative record fails to demonstrate that the Lieutenant was aware of her EEO activity.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. The Lieutenant explained that Complainant was scheduled to work overtime to cover an employee who requested leave for a medical appointment. After that employee cancelled the appointment, the Lieutenant had sufficient employees to cover the shift, and no longer needed Complainant to work overtime.

Regarding the shift change from 10 hours to 8 hours, both the Lieutenants and the Captain noted that there was a policy change that resulted in the change in hours and confusion. As for the cancellation of Complainant's OT shift on July 11, 2019, the EEO investigator was unable to obtain any relevant testimony about this incident as Lieutenant-3 had retired and the Lieutenant could not recall the incident. However, Lieutenant-4 surmised that the cancellation of Complainant's OT could have been due to a variety of reasons, such as having too many staff scheduled.

Without proof of a demonstrably discriminatory motive, the Commission will not generally second-guess the Agency's personnel decisions. see Chavez v. U.S. Postal Serv., EEOC Appeal No. 0120055246 (Jan. 5. 2007); see also Carson v. Bethlehem Steel Corp., 82 F.3d 157, 159 (7th Cir. 1982) (noting that "the question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason [was discriminatory]").

We ultimately find no evidence that Complainant's protected classes were a factor. Based on the record, we concur with the AJ that Complainant has not met her burden of proving that she was discriminated against regarding these incidents. While Complainant alleged that the Lieutenant sent her home early because the Lieutenant liked to assert her authority, we find such allegations to be insufficient to establish pretext. While the record suggests that the confusion regarding the new post led to the reduction and cancellation of Complainant's overtime hours, we have long held that mistakes and errors are insufficient to establish pretext. See Marvin W. v. Dep't of Homeland Sec., EEOC Appeal No. 0120170438 (Dec. 12, 2018) (pretext inquiry is not concerned with bad judgment, impeccability, dislike, or a mistake). As Complainant failed to provide persuasive evidence of pretext, we conclude that Complainant cannot prevail on her allegations.

Hostile Work Environment

In order to establish a prima case of harassment, a complainant must prove, by a preponderance of the evidence that: (1) they are a member of a statutorily protected class; (2) they were subjected to unwelcome conduct related to their protected class; (3) the harassment complained of was based on their protected class; (4) the harassment had the purpose or effect of unreasonably interfering with their work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances.) See Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

Regarding Complainant's allegation of retaliatory harassment, Complainant only needs to show that such actions are the type of action that would dissuade a reasonable employee from making or supporting a charge of discrimination. See Burlington Northern & Santa Fe Railroad. Co. v. White, 548 U. S. 53 (2006); see also EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Having reviewed the record, we find that the alleged incidents were not sufficiently severe or pervasive to amount to a hostile work environment.

While Complainant alleges that the Lieutenant physically prevented her from leaving and made inappropriate comments and gestures, we find that Complainant failed to meet her burden of proof, as the record shows that the Lieutenant categorically denied her allegations.

While Complainant takes issue with the decisions made by the Lieutenant, we note that the Commission has long held that ordinary exercise of managerial authority and discretion does not constitute harassment. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (June 16, 2017); Furthermore, we note that anti-discrimination laws are not civility codes. Shealey v. Equal Emp't Opp. Comm'n, EEOC Appeal No. 0120070356 (Apr. 18, 2011) (noting petty slights and simple lack of good manners, alone, do not constitute discrimination). Complainant's subjective belief of discriminatory animus, alone, is not sufficient to establish that the Lieutenant was motivated by discriminatory animus. Furthermore, we find that the alleged incidents would not dissuade a reasonable employee from making or supporting a charge of discrimination. To the extent that the Lieutenant violated Complainant's Weingarten rights by denying Complainant union representation, we note that the Commission has no jurisdiction over such matters. See Lloyd E. v. U.S. Postal Serv., EEOC Appeal No. 2020004071 (Nov. 16, 2021). Ultimately, we find no persuasive evidence that Complainant was subjected to an actionable hostile work environment.

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.

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