



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

[REDACTED]
Beverlee C.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023003981

Hearing No. 460-2022-00012X

Agency No. 2003-0104-2021101761

DECISION

On July 5, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. §1614.403(a), from the Agency's June 6, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission VACATES the Agency's final order.

ISSUES PRESENTED

- 1) Whether the EEOC Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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.

- 2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Systems and Procedures Analyst, GS-11, in the Financial Payroll Service, at the Agency's Financial Services Center (FSC) in Austin, Texas.

Complainant stated she has had Cerebral Palsy since birth. She used a wheelchair and on occasion forearm crutches facilitate her movement.

During the relevant time, Person A served as the Director of Payroll Service and Chief of Payroll-HR Systems Division. Person A was Complainant's second level supervisor and then her first level supervisor.

Person B was a Supervisory Program Specialist. Person B was Complainant's first level supervisor until March 2020, when Person B left the Agency.

Person C was the Director of Payroll Service since June 2020, and Complainant's second level supervisor.

Person D was employed as a Management Analyst (Coordinator), GS-13, with the Financial Payroll Service at FSC in Austin, Texas. Person D was Complainant's coworker.

Complainant stated a team was created to write payroll procedural guidance for the Agency in June 2018 (Procedures Team). Complainant noted she and Person D were the original two team members and were respectively at the GS-11 and GS-13 levels. Complainant stated there was no delineation of duties between her and Person D. Complainant stated over the two and a half years they were on the team together, Person D had three or four surgeries and was frequently absent. Complainant stated that as a result, she was left to carry the work of the team on her own but not compensated for performing duties at the GS-13 Senior Management Analyst level. Complainant noted she complained to Person B in 2019, Person A in 2020, and Person C in 2020, as well as Human Resources about not being paid at the proper level, but no action was taken.

Person B noted on October 1, 2018, Complainant and Person D were realigned and placed under Person B's supervision. Person B stated, "[t]he employees were performing the duties of the position prior to being

realigned; it was my understanding there was no change in the duties and/or position descriptions. Therefore, the work was being done by both employees." ROI at 000176. Further, Person B stated during additional discussions with the employees, it was noted new position descriptions were needed to further define what duties should fall under the lower grade level due to how closely the positions were aligned; however, "the position descriptions were not updated prior to me leaving the [A]gency." Person B stated due to changing policies and procedures and extended absences, employees may be required to "perform other duties as assigned." Id.

Person A stated she discussed concerns regarding Complainant's pay with Complainant. Person A stated the duties Complainant was responsible for were different than the GS-13 duties. Person A stated there were only two people on the team and that Person D was the Lead of the team and managed the day-to-day workflow. Person A noted when Person D was out sick, Complainant was the only remaining person on the team and had no one to lead. Person A stated that the first level supervisor managed the day-to-day workflow when Person D was gone. Person A stated she discussed the issue with FSC Director and Deputy Director but "[n]ever received a copy of their response." ROI at 000134. Person A stated she and FSC senior leadership disagreed with Complainant's contention that she was performing GS-13 duties.

Person B stated he did not discuss concerns about Complainant's pay with her. He stated he received an email from Complainant on September 1, 2020, and replied on September 3, 2020, unaware that Complainant had already raised the matter to FSC senior leadership. He stated when he found out later that day that FSC senior leadership was involved, he told Complainant he would step aside and let senior leadership address her concerns. Person B stated he was unaware of any duties Complainant performed that were above her pay grade.

Person D stated she had been a Management Analyst (Coordinator) since January 2016. Person D stated she was a Coordinator (Lead) for the Special Actions Team, which later was separated to be procedures development only (Procedures Team). Person D stated that initially she and Complainant had a good working relationship but that the working relationship changed when the Procedures Team was moved under Person B's supervision in October 2018. Person D stated after returning from surgery in December 2018/January 2019, she learned Person B had restricted the coordinator part of her job and "would not permit me to lead/coordinate the Procedures Team even though this title was in my position description." ROI at 000141.

Person D stated the result was that if she and Complainant had a disagreement, they had to wait for Person B to make a decision. Person D stated that when Person B left in February 2020, Person A became the Procedures Team supervisor on March 15, 2020, and reinstated the coordinator (lead) part of her position.

Person D stated that in 2019, Complainant mentioned to her that she felt she was working at the GS-13 level; however, neither of them were working as a coordinator/lead. Person D stated that between February 2019 and January 2020, they were still under the supervision of Person B. Person D noted Person B restricted her from performing the coordinator part of her job and Person B directed assignments to Complainant. Person D noted that around October/November 2019, Person B realized Person D's position did have coordinator as part of the title/role. Person D stated that Person B instructed her to assign Complainant projects but that she had to tell Person B what was being assigned and Person B would assign the project to Complainant.

Person G worked during the relevant time as a Management Analyst, GS-13, at the FSC. Person G stated, "I saw [Complainant] doing work that was at least at the GS 12 level." ROI at 000180. Person G stated, "I was in the same code, and I saw [Complainant] be assigned work by [Person A] that was above a GS 11, it was more like what her co-work[er] GS 13 was doing." Id. at 000190.

The ROI also includes multiple instant messages (IMs) between Complainant and Person D. According to the chat dated September 3, 2020, Person D stated, "I DO appreciate all that you have done & agree that you have been working above your grade. However, you have also expressed concern about the higher grades that have been added to the team. Unfortunately, I don't have any say on who is brought in to help us." ROI at 000951. In a subsequent chat the same day, Person D stated, "You & I were both tasked with impossible work deadlines...as I said, I agree you were working above a GS 11." Id. at 000956.

On March 23, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (Cerebral Palsy) and in reprisal for prior protected EEO activity when:

1. From June 1, 2018 thru January 30, 2021, Person C, Financial Payroll Service Director, and Person A, Division Chief, failed to

compensate Complainant for performing duties above her pay grade at the GS-13 Senior Management Analyst salary level.

2. From February 2019 thru January 2020, Person C, Financial Payroll Service Director, and Person A, Division Chief, assigned the duties of a GS-13 Senior Management Analyst to Complainant.
3. From February 2019 thru January 7, 2021, Person C and Person A failed to respond after Complainant reported the harassing behavior of Person D, Senior Management Analyst (a coworker).
4. In March 2019, Person D demeaned Complainant when she told Complainant she did not understand the instructions and described her work on the variable schedules as being incorrect.²
5. On October 4, 2019, and March 18, 2020, Person D denied Complainant the opportunity of participating in the revision of the Credit Hours document for Full-Time Physicians.
6. On October 23, 2019, Complainant became aware that Person D revised the Credit Hours document and falsely submitted it to the supervisor as Complainant's work.
7. In November 2019, Complainant became aware Person D modified her work document before it was submitted to the supervisor as being incorrect.
8. On January 14, 2021, Person D demeaned Complainant during a staff meeting by interrupting her during the presentation of her section on the variable work schedule project.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. The AJ issued a Notice of Proposed Summary Judgment and afforded the parties the opportunity to respond. Both parties filed responses. On June 1, 2023, the AJ issued a Decision and Order Entering Judgment.

² This claim was defined as involving Person A, but Complainant subsequently clarified the incident involved Person D.

Assuming Complainant established a prima facie case of discrimination, the AJ determined Complainant failed to establish a genuine dispute of material fact that the responsible management officials took the actions complained of based on her disability or in reprisal for her opposition to discriminatory employment practices. The AJ stated there was no evidence Complainant performed the duties of a GS-13 for the few months that her coworker was on leave. Further, the AJ stated that even if Complainant had been performing the duties of a GS-13, there was no evidence that the Agency refused to compensate Complainant for the temporary assumption of duties because Complainant was disabled or in reprisal for her opposition to discriminatory practices.

Additionally, the AJ found no evidence that the disputes with Complainant's coworker amounted to anything more than routine workplace disputes. The AJ noted while Complainant believed her coworker did not value her work, minimized her contributions, and took credit for Complainant's work, there was no evidence that the coworker was motivated by discriminatory or retaliatory animus. Thus, the AJ found Complainant's allegations that management failed to act on her allegations that the coworker was harassing her must fail because there was no evidence the coworker was harassing Complainant based upon any protected bases. The AJ further found Complainant failed to present evidence that the coworker's explanations for the various actions were pretextual under a disparate treatment theory. Moreover, the AJ found Complainant failed to establish she was subjected to a hostile work environment based on her disability or in reprisal for her opposition to discriminatory employment practices.

The Agency subsequently issued a final order on June 6, 2023. The Agency's final order fully implemented the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant argues summary judgment was inappropriate as genuine issues of material fact are in dispute. Complainant notes the record was unclear on how much supervisory authority Person D exercised over her. Complainant also argues from June 2018 through January 2021, she performed additional duties assigned to both Person D (GS-13) and herself without receiving higher pay. Further, Complainant states Person D was out on leave frequently over the two-year period they were on the same team and that in Person D's absence she performed Person D's duties without receiving higher compensation.

In support of her argument that she was not compensated properly, Complainant cites to Person G's testimony that she saw Complainant doing work above her paygrade. Also, Complainant notes that Person D admitted that she was performing work above her paygrade.

In response to Complainant's appeal, the Agency contends there are no genuine issues of material fact in dispute. Regarding claim 1, the Agency argues Complainant did not perform all the roles that Person D performed, as Person D managed the day-to-day workflow. Further, the Agency notes that when Person D was out on extended leave, the first line supervisor, not Complainant, managed the day-to-day workflow by assigning Complainant tasks and consulting with Complainant on tasks. Further, the Agency argues Complainant failed to provide specifics about the work she performed that was both not within her own position description, but within the GS-13 Management Analyst position description. Regarding claim 2, the Agency argues both Complainant and her witness, Person G, failed to identify specifics or evidence of Complainant being assigned duties above her GS-11 level. The Agency claims its clear Complainant and Person D do not have the same position as Person D's title denotes "Coordinator," while Complainant's does not.

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.

In the instant case, we find that the AJ failed to view the evidence in a light most favorable to Complainant and improperly determined that there are no genuine issues of material fact that merited a hearing. Complainant claims she was paid less than a comparative outside her protected class who performed equal work but was paid at a higher rate. Complainant states that she performed the same duties as Person D but received pay at the GS-11 level while Person D was paid at the GS-13 level.

In his decision, the AJ stated there was no evidence that Complainant performed the duties of a GS-13 while her coworker was on leave. We note, however, that the record *does* contain evidence that Complainant was performing duties above her GS-11 level during the relevant time. Specifically, Person G, who worked during the relevant time as a Management Analyst, GS-13, stated she saw Complainant assigned work that was above the GS-11 level and more like the work done by Complainant's coworker, a GS-13. Additionally, in the IM chat dated September 3, 2020, Person D agreed Complainant was working above the GS-11 level.

In addition, we note Person B appeared to acknowledge that Complainant and Person D were performing the same work. Person B also noted that there was a lack of clearly defined position descriptions defining which duties fell under the lower graded level.

We note that Person A stated Complainant's duties as a GS-11 were different than those of Person D, a GS-13. Person A stated Person D was the Lead and managing the day-to-day workflow. Person A noted when Person D was out sick, the first line supervisor would manage the day-to-day workflow. Person A also said Complainant was not working above the GS-11 level. However, we find that Person A's stated reason that Complainant was not paid at a higher level, because she was not performing work above her GS-11 level, is contradicted by evidence in the record, which raises both a credibility issue and issues of material fact that require a hearing and strident cross-examination. Moreover, we note the testimony from both Person B and Person D indicate that Person D was not performing coordinator work for at least some of the time during the relevant period.

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995). We find that a hearing is necessary to resolve these issues of material fact and to make a credibility determination with regard to Person A's testimony. We find that the remainder of the complaint should also remain consolidated with the pay issues in claims 1 and 2 and should be the subject of one decision from the AJ and one final decision by the Agency.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we find that a decision without a hearing was not proper. We VACATE the Agency's final order, and REMAND the complaint to the Agency for further processing in accordance with the ORDER herein.

ORDER

The Agency shall submit to the Hearings Unit of the New Orleans Field Office a request for a hearing within 15 calendar days of the date this decision is issued. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within 15 calendar days of the date this decision is issued. The Agency shall provide written notification to the Compliance Officer at the address set forth herein that the complaint file has been transmitted to the Hearings Unit.

Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (R0124)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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

November 25, 2024
Date