



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

[REDACTED]
Erline S.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2023004211

Hearing No. 480-2023-00154X

Agency No. ARIMCOMHQ22AUG03308

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 16, 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, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

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

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Army Community Services (ACS) Specialist at the Agency's ACS in Fort Irwin, California.

On October 6, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her sex (female), and in reprisal for prior protected EEO activity, when she was issued a Letter of Reprimand on July 7, 2022.

The EEO investigation revealed that on February 7, 2022, the Deputy Garrison Commander was informed of anonymous complaints against the ACS Chief alleging retaliation; harassment; bullying and "leading like a tyrant"; and scare tactics. He subsequently appointed an Investigating Officer to investigate the accusations on March 2, 2022. Report of Investigation (ROI) at 182, 201-3.

On May 5, 2022, the Investigating Officer submitted her Findings and Recommendations to the Deputy Garrison Commander. She noted that most of the sworn statements, 12 out of 14, reflected that ACS was a positive work environment. However, Complainant described the work environment as "hostile and abusive," and she stated that the Chief was a loose cannon, who is "bipolar, delusional, and irrational," but Complainant did not provide any specific incident, example, or evidence to substantiate her assessments. Witnesses expressed frustration at the negative environment caused by other coworkers and Complainant. Specifically, Complainant complained loudly and displayed anger and aggression, and she was described as "almost violent." The Investigating Officer recommended counseling or other appropriate administrative/disciplinary action for Complainant. ROI at 34-7.

On July 7, 2022, the Deputy Garrison Commander issued Complainant a Letter of Reprimand for Discourteous Behavior and Creating a Disturbance in the Workplace. He stated that the investigation disclosed that Complainant often acted in a discourteous manner, and her statement that the Chief was bipolar was inappropriate; lacked professionalism; and demonstrated a lack of respect for her position as the chief. It was also reported that Complainant consistently complained loudly, such as stating that "volunteers are whiney babies" and "I work with incompetent, lazy people." The Deputy Garrison Commander found that Complainant demonstrated a lack of teamwork, and her complaints were not an appropriate method to get her

concerns addressed. He advised Complainant that future incidents may result in more severe disciplinary action. ROI at 20-1.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On May 8, 2023, the AJ determined *sua sponte* that the complaint did not warrant a hearing and issued a Notice of Intent to Issue Decision Without a Hearing. The AJ noted that, since the Agency offered nondiscriminatory reasons for the action, *prima facie* considerations were unnecessary. The Deputy Garrison Commander explained that his decision was based on comments that the Chief was bipolar; delusional; and irrational, and another coworker described Complainant's negative influence in the workplace. The AJ observed that Complainant could not dispute her comments about the Chief, and there was no evidence that anyone made similar comments or were similarly disruptive as Complainant. The AJ invited the parties to respond to the notice, and both parties timely submitted their responses.

Over Complainant's objections, the AJ issued a decision without a hearing on May 24, 2023. The AJ found that Complainant's response did not offer any new facts or evidence, and that it was undisputed that she levied hyperbolic and unprofessional insults against the Chief. While Complainant contended that her testimony during the investigation constituted protected activity, the AJ disagreed because Complainant's statements in the investigation did not reference or suggest discrimination. The AJ concluded by granting summary judgment in the Agency's favor.

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

Through her non-attorney representative, Complainant states that she made the original anonymous charge of unlawful harassment against the Chief on February 4, 2022, and that she participated in the Agency's internal investigation. Complainant contends that, after deducing that she made the original charge, the Deputy Garrison Commander issued the Letter of Reprimand. Complainant filed another charge, the instant EEO complaint,

alleging retaliation for the reprimand. Complainant argues that the AJ should have issued a summary judgment decision in her favor finding that she made a charge to oppose discrimination and was subsequently disciplined. In addition, an EEO representative informed Complainant that her new charge would need to be investigated, and she asked him to remove the charge, which shows that she was dissuaded from making or supporting a charge of discrimination. Complainant further asserts that a male employee was not disciplined for his disruptions to the work environment. Complainant requests that the Commission reverse the AJ's summary judgment and find in her favor.

The Agency did not respond to Complainant's appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also EEO MD-110, at Chap. 9, § VI.B. (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

Decision Without a Hearing

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 offered no arguments to raise any genuine dispute of material fact. A review of the record does not reveal any genuine disputes of material facts. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainants may establish a prima facie case of discrimination by providing evidence that: (1) they are a member of a protected class; (2) they suffered an adverse employment action; and (3) either that similarly situated

individuals outside their protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

Complainant is a member of a protected class based on her sex, and she contends that a male coworker ("Coworker") was treated more favorably when he was not disciplined.² However, Complainant did not show that the Coworker was similarly situated. Among other things, to be considered "similarly situated," the comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. See Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001), reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002). Complainant did not describe any of the Coworker's actions to show that it would be expected that he be treated in the same manner with the issuance of a Letter of Reprimand. ROI at 168. The Deputy Garrison Commander explained that the Coworker's conduct was not at the same level as Complainant's because he only played loud music at his cubicle to drown out Complainant's loud conversations. ROI at 177-8. As such, we find that Complainant did not establish a prima facie case of sex discrimination.

Complainants may establish a prima facie case of reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). Complainant averred that she engaged in protected EEO activity when she made an anonymous complaint of workplace harassment against the Chief on February 3, 2022. She stated that she was the only witness who made negative comments about the Chief during the investigation, and that it was reasonable for the Deputy Garrison Commander to deduce that she made the initial anonymous complaint. ROI at 165-6. For the sake of argument, we will credit that the Deputy Garrison Commander was aware that Complainant made the anonymous complaint and subsequently issued the reprimand, and that Complainant established a prima facie case of reprisal.

² Complainant noted that another female employee received a counseling, but this comparator is in the same protected class and would not support a prima facie case of sex discrimination. Complainant Appeal Brief at 2.

The Deputy Garrison Commander proffered a legitimate, nondiscriminatory reason for issuing the Letter of Reprimand based on the Investigating Officer's recommendation and a review of the statements produced during the investigation. For example, Complainant accused the Chief of being bipolar, and a witness reported that Complainant made statements such as "I am not here to spoon feed anyone"; "volunteers are whiney babies"; and "I should not have to thank volunteers." ROI at 174-7. The Investigating Officer's report reveals that she only recommended disciplinary action for Complainant. ROI at 37.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008). Complainant was provided an opportunity to submit a rebuttal, but she did not do so. ROI at 415. Further, the record contains the statements by Complainant and a witness containing the comments that were the bases for the Letter of Reprimand. ROI at 214-22, 226-31.

Complainant did not offer any evidence to show that the reasons were not worthy of belief, and her bare assertions that the Deputy Garrison Commander discriminated against her are insufficient to prove pretext or that the Letter of Reprimand was discriminatory or retaliatory. In addition, the Commission has long held that "[p]articipation in the EEO process does not shield employees from uniformly applied standards of conduct and performance; nor are the statutory anti-retaliatory provisions a license for employees to engage in misconduct." Berkner v. Dep't of Commerce, EEOC Petition No. 0320110022 (June 23, 2011).

Complainant further argues that she was dissuaded from making or supporting a charge of discrimination when she was informed that her EEO complaint would need to be investigated. However, a complainant must show that a reasonable person would have found the challenged action materially adverse, i.e., an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination in the future. Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S.

53 (2006). We find that an EEO official's disclosure of the need to follow the Commission's regulations to conduct an impartial and appropriate investigation into any discrimination claim would not reasonably dissuade protected EEO activity. See 29 C.F.R. § 1614.106(e)(2).

Accordingly, we find that Complainant did not establish sex discrimination or reprisal when she was issued a Letter of Reprimand.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order adopting the AJ's decision without a hearing.

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, 2025

Date