



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

[REDACTED]
Scarlet G.,¹
Complainant,

v.

Pete Hegseth,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 2023004476

Hearing No. 480-2023-00059X

Agency No. PE-FY22-084

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 July 12, 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 that Complainant did not establish 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 English as Second Language (ESL) Teacher at the Agency's Sollars Elementary School in Misawa, Japan.

On May 6, 2022, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and harassment on the bases of race (Hispanic),² national origin (Puerto Rico), sex (female), and color (Brown) when:

1. on unspecified dates, Complainant's first-line supervisor ("Supervisor") wrote "negative things" in Complainant's progress reports and referred to her as "the last one in the building to complete tasks";
2. in January 2021, the Supervisor told Complainant that she would be getting "Unacceptable" ratings on her performance review; made "false" comments about her performance; and offered to move Complainant to another school as a Spanish teacher because she is "Spanish"; and
3. on February 24, 2022, the Supervisor issued Complainant a Notice of Proposed Removal, and on April 6, 2022, management issued a Decision on Proposed Removal, sustaining the removal action effective April 30, 2022.³

The EEO investigation revealed that Complainant averred that on April 30, 2021, the Supervisor informed her that an Instructional Systems Specialist stated that Complainant was the last one to sign up for a virtual meeting with the Instructional Systems Specialist. When Complainant asked the

² The Commission notes that the term "Hispanic" typically denotes national origin rather than race. However, herein the Commission acknowledges Complainant's self-identification of her race as Hispanic.

³ The Administrative Judge (AJ) noted that claim 3 was a mixed-case claim, and the Agency notified Complainant that it would process it separately. As such, the AJ dismissed claim 3 from the instant complaint. The record showed that Complainant was removed for her failure to request leave and placement on an absence without leave status for 79 days. While Complainant emailed her intent to retire on December 5, 2021, she did not complete the paperwork, resulting in her removal. Report of Investigation at 52-7, 59-61, 166, 465, 497.

Instructional Systems Specialist if she made this statement, she looked surprised and did not want to comment. Report of Investigation (ROI) at 457-8.

Complainant claimed that during a post-observation meeting on April 30, 2021, the Supervisor stated that Complainant would receive "1s" on her mid-term evaluation. The Supervisor also allegedly commented that Complainant would be better at teaching Spanish because she was "Spanish," and the Supervisor offered to help Complainant find another position. ROI at 458-9.

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. Over Complainant's objections, the AJ granted the Agency's motion and issued a decision without a hearing on July 8, 2023. The AJ found that even if Complainant could establish that the identified events were based on a discriminatory animus, the evidence was insufficient to suggest that they altered her work performance; were hostile or abusive; or severe or pervasive to create a hostile work environment.

The AJ noted that the only "negative" comment in claim 1 was that Complainant was the last to schedule a meeting, but there was no evidence of any discriminatory animus. For claim 2, the Supervisor informed Complainant that she would receive Unacceptable ratings, and the AJ found that advising an employee of a possible negative performance review alone did not suggest discriminatory animus. The AJ assumed a discriminatory animus for the Supervisor's comment that Complainant was "Spanish." However, the AJ determined that this single comment was insufficient to create a hostile work environment. The AJ concluded by granting the Agency's Motion for Summary Judgment for claims 1 and 2.

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 requested an attorney, but she did not file a statement in support of her appeal.

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

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 offered no arguments on appeal and has failed to establish such a dispute. 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.

Harassment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that 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), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).; 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. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove her hostile work environment claim, Complainant must establish that she 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; in this case, her color, national origin, sex, or race. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The Supervisor denied making the alleged comment in claim 1, and the Instructional Systems Specialist responded that she had no knowledge of this event. Regarding claim 2, the Supervisor explained that Complainant shared that she used to work as a FLES [Foreign Language Elementary School] teacher until the program was terminated, and she became an ESL teacher. Complainant stated that she loved teaching Spanish and struggled with being an ESL teacher. The Supervisor denied offering to move Complainant to a Spanish-speaking school because she did not know of such schools. She also disagreed with Complainant's allegation that she told Complainant that she would receive a "1" rating because no ratings were given to employees at mid-year. Complainant ultimately received a "3" rating for her final appraisal. ROI at 471, 508, 481-2.

For the purposes of analysis, we will credit Complainant's version of events. However, there is no connection between the comments that Complainant was the last to schedule a meeting, and that she would receive "1s" or Unacceptable ratings, with any of her protected categories. The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). There is no evidence that these work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class.

The statement that Complainant should become a Spanish teacher because she is "Spanish" would be related to Complainant's national origin and/or race. However, we do not find that this isolated comment was severe to rise to the level of unlawful harassment. In looking at the totality of the circumstances, the Supervisor discussed Complainant's career and performance and suggested that she consider a position as a Spanish teacher based on her Spanish-language skills.

Accordingly, we find that Complainant did not establish that the Agency subjected her to harassment based on her color, national origin, sex, or race.

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, **filings 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

February 6, 2025

Date