



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

[REDACTED]
Candi R.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2023004664

Agency No. 22-63126-01680

DECISION

On August 16, 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 August 16, 2023, final decision 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 decision.

ISSUES PRESENTED

Whether the Agency properly determined that Complainant did not meet her burden in proving that she was subjected to discrimination in the form of constructive discharge and harassment based on race.

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 a Computer Scientist at the Agency's Naval Air Warfare Command (NAVAIR), Weapons Division facility in Point Mugu, California. Complainant's first-level supervisor was a Supervisory Computer Scientist (RMO1), and her second-level supervisor was the Division Head of Science and Technology reinvention Laboratory (RMO2).

On January 6, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of race (Asian) when RMO1 subjected her to harassment throughout her employment and pressured her to resign on August 29, 2022.

The investigation into Complainant's claims revealed that Complainant was hired on June 6, 2022, to serve a three-year probationary period. In Complainant's testimony, she alleged that she was harassed nearly every day during her employment. Complainant specifically identified four other employees, as non-Asian, who she believed were treated more favorably than she. For instance, Complainant testified that unlike other employees, she was required to email her supervisor four times per day and take a one-hour lunch break. However, RMO1 testified that Complainant was required to email him as a result of her pattern of arriving late to work and not adhering to the lunch break requirement. Complainant alleged that she was given more difficult assignments, as compared to her coworkers; she was given a 48-point ticket (representing the number of hours to complete the task).

Complainant stated that she was reprimanded for low-level misconduct, including for her phone usage and for her tardiness, whereas, other non-Asian employees were rarely, if ever reprimanded. RMO1 stated that on August 25, 2022, after the implementation of a new cell phone policy, another management official (Complainant's third-level supervisor) had to have multiple conversations with Complainant regarding her excessive use of her personal cell phone at her desk and during work hours. RMO also testified that another employee's (non-Asian) personal phone usage was questioned after the implementation of the new phone policy.

According to Complainant, she was also falsely accused of producing low-quality work, and that even though she did not have an accent, RMO1 made fun of her speech and accused her of using incorrect grammar. Complainant testified that other employees were offered assistance with their assignments while she was told not to consult with other team members.

However, RMO1 denied telling Complainant that she could not consult with other team members. RMO1 also denied accusing her of incorrect grammar and denied making fun of her speech.

Complainant recalled that RMO1 took issue with her participating in online give-a-ways while at work, but she noted that she participated in this activity after completing her work and having no other work tasks. Relatedly, Complainant denied management's representations that she engaged in online gambling at work.

More generally, Complainant alleged that RMO1 had shown disdain for Asians when making fun of her speech and racial characteristics of Asians. She further alleged that RMO1 made snide remarks, regarding race. For example, Complainant recounted that RMO1 questioned why she did not attend Massachusetts Institute of Technology (MIT), as if all Asians go to MIT. She also alleges that she was accused of being "stand-offish," after she did not attend a lunch celebration on June 19, 2022.

Complainant testified that on August 29, 2022, RMO1 informed her that if she did not resign, she would be terminated. Complainant indicated as a result, she was forced to resign. Complainant stated that she did not report the harassment she faced, because of fear of retaliation.

According to RMO1, in consultation with RMO2 and Human Resources (HR), he made the decision to terminate Complainant during her probationary period. RMO1 testified that Complainant had been tardy; observed sleeping; and using government computers to enter sweepstakes.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the investigative file (IF) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant contends that the Agency improperly dismissed her claim of harassment on the basis of race when it reframed her complaint to include a singular claim of constructive discharge. Complainant also argues that the Agency improperly included new evidence in the investigation file to support its Final Agency Decision. Complainant also argues that there are credibility issues that must be resolved on appeal.

The Agency maintains that Complainant's conduct and performance led to the ending of her probationary period. The Agency also contends that she was not constructively discharged; and the Agency did not subject Complainant to harassment. The Agency also denies submitting new evidence.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), 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").

ANALYSIS

New Evidence in the Record

Complainant alleged that the Agency submitted new evidence on appeal as there were pages included in the appeal file that were not included in the copy of the investigative file that Complainant previously received. In response, the Agency argued that it did not submit new evidence. We agree with the Agency. The record reveals that the Agency included and referenced documents submitted to the Agency for the Final Agency Decision including Complainant's identified deficiencies in the record, Complainant's election for a Final Agency Decision, and the Agency's Final Agency Decision itself.

We find that there are no documents in the appeal file that were not in the investigative file that represent new evidence. Complainant was aware of all documents prior to their inclusion in the appeal file. Therefore, we find that the Agency did not improperly include new evidence on appeal as Complainant alleges.

Dismissal of Harassment Claim

In its Final Agency Decision, the Agency modified Complainant's claim for clarity. See FAD at 1 n1. In doing this, Complainant alleged that the Agency failed to address her claim of harassment based on race. In reviewing the record, we find that the Agency did in fact accept and investigate Complainant's overall harassment claim but did not address it in its FAD. While we note that the Agency did not discuss its determination of Complainant's harassment allegation, we find that there is sufficient information in the record to make a fair and reasoned determination on this claim on appeal.

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); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001).

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. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014).

It is undisputed that Complainant is a member of a protected class for her race. However, we find that the complained of conduct did not occur as Complainant described, or it was related to the management of Complainant's assignments, performance, and conduct.

In Complainant's harassment claim, she alleged several instances of harassment. Complainant first alleged that she had to email RMO1 every day of her employment with her shift times and was forced to take a one-hour lunch break in addition to her 9-hour shift. In response, RMO1 stated that Complainant was asked to email him when she started her shift, took her lunch break, returned from break, and when she finished her workday as a direct result of Complainant's pattern of arriving to work late. IF at 413. RMO1 stated that Complainant arrived at her orientation one hour late on her first day of work and 30 minutes late on the first day she started working on her project. Id. RMO1 also stated that other management officials reported to him that Complainant was consistently arriving to work after the core hour start times determined in the office. Id.

Regarding Complainant's lunch break, RMO1 stated that all employees at Complainant's position level were required to take a one-hour lunch break. IF at 413. In support of his assertion, RMO1 cited Employee Handbook provisions regarding core hours and lunch periods. Id. RMO1 stated that he explained the provisions to Complainant during orientation, and on June 29, 2022, he met with Complainant again to reiterate the time and attendance policy. Id. RMO1 stated that in this meeting, Complainant requested to take a 15-minute break instead of the one-hour outlined in the Employee Handbook, but after speaking with management and HR, he told Complainant that she at least needed to take 30 minutes of the one-hour break. Id. RMO stated that Complainant formally requested to adjust her work schedule to reflect the 30-minute lunch break and that he did ultimately change it. However, RMO1 testified that Complainant still did not report to work on time. Id. In reviewing this allegation, we note that Complainant did not deny that she was late to work on several instances.

In this claim, Complainant also alleged that she was singled out, reprimanded, and terminated for low-level misconduct such as phone usage and tardiness. In response, RMO1 stated that other management officials reported to him that Complainant was excessively using her personal phone at her desk during work hours. IF at 413. RMO1 stated that on June 23, 2022, he reminded Complainant that she was not to be using her personal phone during business hours. Id.

Complainant's Project Lead stated based on Complainant's extended and regular use of her personal cellphone during work hours and outside of breaks, the team leads implemented a team policy to have all employees on the team place their phone in a central location in the room to attempt to prevent further abuse. IF at 503. The Team Lead stated that he discussed Complainant's personal phone use during work hours no less than four times. Id. In addition to RMO1's response to Complainant's first instance of harassment, RMO1 listed three days where Complainant arrived to work late *after* her schedule was changed as she requested. See IF at 414.

Complainant stated that she was falsely accused of producing low-quality work and also falsely accused of using grammatical incorrect syntax. As an example, Complainant detailed an incident when RMO1 corrected her from saying "yeah" by stating, "you mean, yes?" RMO1 stated that he did not accuse Complainant of using incorrect grammar in her assignment; only that it failed to meet the requirements of the assignment. IF at 415. RMO1 stated besides his feedback on that assignment, he never made fun of Complainant's speech. Id. RMO2 added that Complainant's performance was not acceptable as she was observed visiting websites that are inappropriate for government IT systems, was observed sleeping at her desk, and spending copious amounts of time on her personal phone instead of completing her assigned tasks. IF at 447. RMO2 also stated that she never heard that Complainant had poor grammar or that RMO1 was making fun of her speech. Id.

Complainant also alleged that she was excluded from information vital to her job duties then unfairly faulting her for not having the withheld information. RMO1 denied this allegation. RMO1 stated that Complainant was tasked with researching the network module and drafting a document on her research. In the absence of another management official, RMO1 was asked to review Complainant's work. RMO2 testified that in order to review the work, the management official provided him with some high-level information regarding the network module that was supposed to be covered in Complainant's research. IF at 415. As a result, RMO1 asserted that Complainant was not "unfairly faulted" for not having the information that was provided to him, as that information was expected to have been found during Complainant's research assignment. Id. To simplify it, RMO1 stated that that the information he was provided was akin to an answer key for Complainant's research assignment since he was not familiar with the topic. Id. In reviewing Complainant's research along with the management official (after returning to the office), RMO1 found that Complainant's report was overall deficient, and the management officials provided her with feedback to make the report more academic. IF at 416.

Complainant alleged that she was told she could not consult with team members while working on a project, but another employee was offered assistance by management. RMO1 again denied this allegation. RMO1 stated that on August 12, 2022, he reminded Complainant that the project leads wanted her to be more academic about her tasking and spend more time researching than seeking quick answers from team members. IF at 416. The Team Lead testified that Complainant was not told she could not consult team members. Instead, the Team Leader stated that Complainant sought vastly more help with a specific assignment than has historically been needed by other team members to complete similar work, which created a drag on the productivity of Complainant's mentors. IF at 517. Regarding Complainant's general allegation of disparate treatment between her and a coworker, the Technical Lead for the assignment added that another employee was in fact given a less difficult, or less time-consuming ticket than Complainant, for this particular assignment, but that both employees were qualified to take tickets worth 48 points. IF at 522.

On appeal, Complainant generally asserts that there are credibility issues that must be resolved. Unfortunately, Complainant did not request for a hearing before an EEOC Administrative Judge, and, as a result we do not have the benefit of an Administrative Judge's credibility determinations of the witnesses in this case. Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant fails to meet that burden. See Lore v. Dep't of Homeland Security, EEOC Appeal No. 0120113283 (Sept. 13, 2013) (complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made); Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (Aug. 23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where complainant requested a final decision and an Administrative Judge did not make credibility determinations).

We find that Complainant's performance and conduct issues are well documented in the record. We also find that Complainant has not successfully presented evidence to establish that the Agency's actions were related to or taken because of her race, and not merely the Agency's management of her assignments, performance, and conduct. Therefore, Complainant has failed to establish that she was subjected to harassment based on her race.

Constructive Discharge

A discriminatory constructive discharge occurs when an employer, motivated by discriminatory animus, creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in Complainant's position would feel forced to resign. See Cullors v. Dep't of Defense, EEOC Appeal No. 01A41560 (Jun. 27, 2006). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) the conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. Clemente M. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120160661 (Mar. 11, 2016), citing Walch v. Dept. of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

The Commission has found that an extremely difficult and upsetting employment situation is not enough for a reasonable person to find working conditions intolerable. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120121920 (Jun. 25, 2014) ("dissatisfaction with work assignments, a feeling of being unfairly criticized or difficult or unpleasant working conditions are not so unreasonable as to compel a reasonable person to resign," quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)). To compare, the Commission found a constructive discharge after an employee resigned due to the open and repeated use of racial epithets in front of multiple witnesses in Complainant v. Department of the Air Force, EEOC Appeal No. 0120123332 (September 10, 2014).

Given our previous finding on Complainant's harassment claim, we find that a case of constructive discharge is precluded based on our finding that Complainant did not establish that any actions taken by the Agency were motivated by her race. As a result, we find that Complainant has not established that she was constructively discharged when she resigned from her probationary position.

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 Decision finding no discrimination.

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 21, 2025
Date