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

[redacted]
Lela M.,[1]
Complainant,

v.

Todd Hunter,
Acting Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2023004744

Hearing No. 520-2023-00006X

Agency No. 200H-632-2022-142894

DECISION

On August 22, 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 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

[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.

ISSUES PRESENTED

Whether the AJ correctly issued summary judgment concluding that the Agency did not violate the Rehabilitation Act and did not subject Complainant to harassment based on her race, age, disability, and/or reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Practical Nurse at the Agency's Northport VA Medical Center in Northport, New York.

On January 26, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), disability (rib fractures, neck and spine trauma), age (YOB: 1959), and reprisal for protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:

1. As of November 4, 2021, Complainant was denied reasonable accommodation;
2. From November 4, 2021 to December 19, 2021, Complainant was forced to use leave;
3. As of December 21, 2021, Complainant was placed in an Absent Without Leave (AWOL) status;
4. As of March 15, 2022, and continuing, management has failed to process Complainant's Family and Medical Leave Act (FMLA) request;
5. On March 7, 2022, Complainant became aware that a light duty assignment had been available to her as a reasonable accommodation, which would have prevented her from having to take a leave of absence.

Complainant stated that she suffered a fall on February 14, 2021, and as a result, sustained trauma to her neck and cervical spine and numerous rib fractures, which resulted in being unable to lift, pull, or carry, as well as having limitations on walking, standing, and going up and down stairs. See Report of Investigation (ROI) at 83. She was out on annual/sick leave as a result of her injuries and returned to work on April 12, 2021.

She requested a reasonable accommodation on October 7, 2021, requesting a position which did not require heavy lifting, carrying, pushing, or pulling. See ROI at 85. She asserted that her request was denied but she later discovered that two Caucasian employees had received light duty assignments while the Nurse Manager told her that there was no light duty assignment available for her "as a black woman." See ROI at 85-86. She asserted that this was discriminatory based on her race and age and insisted the Agency was trying to encourage her to leave her job because of her age and should have realized that her injuries were exacerbated due to her age. See ROI at 86. She stated that due to the Agency's denial of her request for light duty and/or reassignment, she was forced to take leave and then was placed on AWOL after she used up all of her annual and sick leave. See ROI at 86-88. Complainant withdrew her request for a reasonable accommodation on March 1, 2022, stating that she no longer required them and was able to return to full duty. See ROI at 188.

The Nurse Manager explained that due to Complainant's limitations in lifting, pushing, pulling, walking, or standing, she could not perform the essential job functions of her position. See ROI at 97. She asserted that she explained this to Complainant after consulting with nursing leadership and the Reasonable Accommodation Coordinator (RA Coordinator) and that she told Complainant to contact the RA Coordinator about being placed on the list for a reassignment. See ROI at 97-98. She asserted that she contacted Complainant prior to her annual and sick leave running out and told Complainant that she would be placed on AWOL after her leave ran out unless Complainant applied for FMLA leave. See ROI at 99. She explained that Complainant initially submitted her request for FMLA leave through the VISN HR portal that was provided to all supervisors but that her medical documentation was submitted through another HR portal, which she discovered after Complainant inquired as to the status of her request for FMLA leave and it was only afterwards that Complainant's request was resubmitted. See ROI at 100. She denied that two Caucasian employees were treated differently in being provided light duty assignments, explaining that one of the employees was an approved Office of Workers' Compensation Programs (OWCP) placement for light work post-surgery and with a limitation on the number of hours worked, while the other employee was not under the same limitations as Complainant. See ROI at 103. She further denied that she ever said to Complainant that there was no light duty available to her "as a black woman," asserting that she only told Complainant that there was no light duty available due to her restrictions. See ROI at 104.

Complainant's third-line supervisor, a manager in the Nursing Service (Manager) explained that light duty assignments are only provided for employees with approved OWCP claims. See ROI at 112.

The position description for Complainant's position as a Licensed Practical Nurse stated that her duties included providing direct nursing care to adult and geriatric patients including "turning and positioning and ambulating" patients and "providing for lifting, moving, transferring, and/or moving patients." See ROI at 117. The position description further notes that the position "requires potentially long periods of continued walking, standing, stooping, sitting, bending, pulling, and pushing." See ROI at 120.

The RA Coordinator stated that in Complainant's reasonable accommodation request, she requested that most of the physical requirements for her position be removed and did not request anything, such as special equipment, that would allow her to perform the essential functions. See ROI at 453. He explained that he forwarded Complainant's request to a management official who he identified as Complainant's supervisor, and that management official denied the request.[2] See ROI at 453. He explained that after the denial, he asked Complainant if she would like to move on to reassignment as the accommodation of last resort and Complainant said yes so, he had Complainant submit her resume and forwarded it to staffing for a job search. See ROI at 453. During the search, Complainant told him that she was only interested in positions in Orlando, Florida, and was not interested in any virtual positions. See ROI at 426. He asserted that no available jobs were returned in the job search and then on March 1, 2022, Complainant submitted a doctor's note stating she was able to return to full duty, so he closed the request as withdrawn. See ROI at 453.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's May 25, 2023, motion for a decision without a hearing and issued a decision without a hearing on July 27, 2023. The AJ found that Complainant was not a qualified individual with a disability because Complainant's physical restrictions made her unable to perform the essential functions of her position.

[2] We note that the management official who denied Complainant's request for light duty was not the Nurse Manager.

The AJ further found that there was no evidence to support Complainant's assertions that the Agency was motivated by discriminatory animus. 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.

Complainant appealed.

CONTENTIONS ON APPEAL

On appeal, Complainant insists that the Agency violated the Rehabilitation Act because it did not engage in the interactive process before concluding that Complainant could not perform the essential functions of her position and that the Agency's failure to accommodate her forced Complainant to take leave, which Complainant reiterates was discriminatory.

The Agency did not submit a brief in response.

STANDARD OF REVIEW

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

Issuance of Summary Judgment

We must first determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant insists that there are material facts in dispute because of her disagreement with the AJ's conclusions. It is well settled that mere assertions of a factual dispute without more are not sufficient to defeat a motion for summary judgment. See Darrell C. v. U.S. Postal Serv., EEOC Appeal No. 10200181833 (July 12, 2019); Quartermain v. U.S. Comm'n on Civil Rights, EEOC Appeal No. 0120112994 (May 21, 2013). Upon our review of the record, we find that the AJ correctly determined that Complainant failed to establish a dispute of material fact. Accordingly, we find that the AJ properly issued a decision without a hearing.

Denial of Reasonable Accommodation

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), (p). In order to establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is a "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

After showing that Complainant is an individual with a disability, she must then establish that she is a qualified individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

At the outset, we first address Complainant's contention that the Agency failed to engage in the interactive process. We do not find that the record supports this contention and note that in any event, an agency cannot be held liable solely for a failure to engage in the interactive process. Liability for a failure to engage occurs when the failure to engage in the interactive process results in the agency's failure to provide reasonable accommodation. Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002), req. to recon. den., EEOC Request No. 05A30114 (Jan. 9, 2003). The sole purpose of the interactive process is to facilitate the identification of an appropriate reasonable accommodation, and an agency's failure to engage in this process does not give rise to a separate cause of action because the interactive process is not an end in itself. Broussard, EEOC Request No. 05A30114.

In this case, Complainant insists that the Agency violated the Rehabilitation Act when it did not offer her light duty and failed to find her a reassignment that would permit her to continue working rather than taking leave. We reject Complainant's contention. The position description for Complainant's position as a practical nurse clearly indicated that the position required "potentially long periods of continued walking, standing, stooping, sitting, bending, pulling, and pushing," in order to provide patient care.

Complainant's medical documentation stated that she was unable to do any heavy lifting, pushing or pulling, as well as being restricted from any extended periods of standing or walking. See ROI at 143-44. The Commission has recognized that an agency is not required to remove any of the essential functions of a position as a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002), General Principles. See also Larraine S. v. Dep't of Agriculture, EEOC Appeal No. 0120180647 (Aug. 15, 2019); Carlton T. v. Dep't of the Navy, EEOC Appeal No. 0120151566 (Feb. 7, 2018); Timika O. v. Dep't of the Navy, EEOC Appeal No. 0220140008 (Mar. 9, 2017). We find that the evidence in the record shows that Complainant was not a qualified individual because she could not perform all the patient care functions of her position, either with or without an accommodation, and contrary to Complainant's contention, she was not entitled to light duty as a form of reasonable accommodation. Moreover, the record indicates that there were no vacant positions within Complainant's restrictions to which she could have been reassigned. In addition, to the extent Complainant argues that she was forced to use up her leave because the Agency did not provide her with an accommodation, we note that permitting the use of accrued paid leave or unpaid leave is a form of reasonable accommodation. See Celinda L. v. U.S. Postal Serv., EEOC Appeal No. 2019005338 (Oct. 2, 2020), citing EEOC Enforcement Guidance on Reasonable Accommodation. Finally, it is well established that a complainant is not entitled to the accommodation of her choice. See Willa B. v. Dep't of Veterans Affs., EEOC Appeal No. 2021000628 (April 27, 2022). We therefore affirm the AJ's conclusion that the Agency did not violate the Rehabilitation Act when it denied her light duty or a reassignment to another position. See Ager v. U.S. Postal Serv., EEOC Appeal No 0120121644 (June 21, 2013).

Disparate Treatment

Applying the McDonnell Douglas burden-shifting standard defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a complainant initially must establish a prima facie case of discrimination by presenting facts which, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affs. v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253.

Once the agency has met its burden, the complainant has the responsibility to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-5 3; McDonnell Douglas, 411 U.S. at 804.

Complainant may establish a prima facie case of discrimination by providing evidence that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) either that similarly situated individuals outside her 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).

We find that Complainant did not establish a prima facie case based on any of her protected bases. While Complainant insists that two Caucasian employees were permitted light duty assignments and that the Nurse Manager told her that light duty was not available for her as a "black woman," the evidence does not support Complainant's assertions that these employees were, in fact, similarly situated or that the Nurse Manager made such a remark. We also note that the evidence in the record indicates that the Nurse Manager, even if she made such a comment, was not involved in denying Complainant light duty. The Nurse Manager explained that one of the employees had an approved OWCP claim providing for light duty and that the other employee did not have the same restrictions as Complainant. There is also nothing in the record to indicate that the other employees in fact held the same position as Complainant. Complainant asserts her protected activity is requesting a reasonable accommodation but offered nothing beyond her bare assertions to indicate any nexus between her protected activity and the Agency's actions. Complainant's bare assertions alone are not sufficient to establish a prima facie case. See Sheldon M. v. Dep't of Veterans Affs., EEOC Appeal No. 2023001605 (Aug. 20, 2024).

We further find that, even if Complainant could establish a prima facie case, the Agency articulated legitimate, nondiscriminatory reasons for its actions. The Manager explained that light duty is only provided for employees who have approved OWCP claims.

In addition, the evidence does not support Complainant's assertion that management deliberately delayed in processing Complainant's request for FMLA leave, rather that there was some confusion regarding the submission of Complainant's request because Complainant's request and her supporting documentation appear to have been submitted through different HR portals causing a delay in the processing.

We find that Complainant did not establish that any of the Agency's reasons are a pretext for discrimination. There is absolutely no evidence in the record to support her assertions of any discriminatory animus and the Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination are insufficient because subjective belief, however genuine, does not constitute evidence of any unlawful motive. See Leif S. v. Dep't of the Treasury, EEOC Appeal No. 2021004037 (April 28, 2022); Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019). At best, Complainant only established that she disagreed with the Agency's decisions, but it is well settled that mere disagreement with the Agency's actions are not sufficient to establish discrimination. See Eryn M. v. Dep't of the Army, EEOC Appeal No. 2022000871 (April 10, 2023). Finally, to the extent there appears to have been some confusion regarding Complainant's request for FMLA leave resulting in a delay in the request being processed, we note that a mistake made by an agency is not evidence of pretext unless there is evidence that the mistake was based on a complainant's protected classes, which is not present here. See Concha E. v. U.S. Postal Serv., EEOC Appeal No. 0120161847 (Sept. 20, 2017).

Hostile Work Environment

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 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 at § III.B.3.d (Apr. 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 race, age, disability, and/or reprisal for her protected activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

In this case, Complainant's harassment claim is predicated almost entirely on her denial of reasonable accommodation, which we have already found was not in violation of the Rehabilitation Act. To the extent that Complainant bases her harassment claim on the alleged comment by the Nurse Manager that light duty was not available to her as a "black woman," there is no evidence in the record supporting Complainant's assertion that the comment was made but even if it had been, it appears to have been a single, isolated remark, which the Commission has held is generally insufficient to constitute an unlawful hostile work environment. See Sunday S. v. U.S. Postal Serv., EEOC Appeal No. 2022003721 (Oct. 25, 2023). Ultimately, there is no evidence in the record beyond Complainant's unsupported assertions to indicate that any of the Agency's actions were due to a protected basis and absent such evidence, Complainant's claim of unlawful harassment cannot succeed. See Dotty C. v. Dep't of State, EEOC Appeal No. 2022000511 (Jan. 17, 2024).

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 finding that Complainant did not establish that she was subjected to discrimination as alleged.

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

March 6, 2025
Date