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

Enola L.,[1]
Complainant,

v.

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

Appeal No. 2023004995

Hearing No. 430-2022-00439X

Agency No. ARBRAGG22JAN00811

DECISION

On September 6, 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 final order dated June 8, 2023,[2] concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

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

[2] Because the Agency does not challenge the timeliness of Complainant's appeal and in the absence of any evidence as to when Complainant actually received the Agency's final order, we exercise our discretion and accept Complainant's appeal as timely. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 2022004875 (Nov. 2, 2023).

ISSUES PRESENTED

Whether the AJ correctly issued summary judgment in the Agency's favor, finding that Complainant did not establish that she was denied a reasonable accommodation or subjected to discrimination as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Military Pay Technician at the Agency's Fort Bragg Finance Office in Fort Bragg, North Carolina.

On March 3, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (physical) when:

1. On September 15, 2021, the Military Pay Supervisor (Supervisor) directed an Auditor to critique Complainant while Complainant was conducting a finance briefing to a senior enlisted soldier. After the briefing was completed, the Auditor issued Complainant a counseling statement criticizing the overall brief;
2. In October 2021, while Complainant was assisting customers with scanning documents, the Supervisor asked Complainant, "what are you doing," and when Complainant responded, the Supervisor told Complainant, "Go back to your office, you have work to do and if not I will send someone." Complainant's coworker responded with, "that was uncalled for and very rude;"
3. On January 3, 2022, the Supervisor denied Complainant's reasonable accommodation request to telework after a positive Covid-19 test;
4. On January 6, 2022, the Supervisor issued Complainant a memorandum, Subject: Termination During Probationary Period, with an effective date of January 6, 2022.

Complainant began working for the Agency on August 31, 2020, subject to a two-year probationary period. See Report of Investigation (ROI) at 525-28. Complainant stated that she suffers from anxiety, depression, migraines, and that post-Covid, she developed vertigo and severe ringing in her ears and that she also has QT syndrome, a heart condition.[3] See ROI at 537.

[3] Complainant did not submit medical documentation of her conditions.

She acknowledged, however, that her conditions are managed by medication and that they do not prevent her from performing any of her duties. See ROI at 538-39.

The record indicates that shortly after Complainant began her employment, she was late reporting to work on numerous occasions resulting in a Memorandum for the Record dated September 23, 2020 and that in the following months, Complainant was counseled multiple times regarding her continued tardiness, both in arriving at work and in logging in for telework, as well as her failure to timely complete her assignments. See ROI at 230-255. The record indicates that Complainant's frequent tardiness to work were for a wide variety of reasons, including being in an accident, having a court appearance, having an unspecified telephonic appointment, the weather, a "situation at her house with the roofers," traffic, and other reasons. See ROI at 230-255. The record also indicates that Complainant was counseled numerous times for being unavailable while teleworking. In a Letter of Warning dated September 30, 2021, the Supervisor warned Complainant about her frequent tardiness and noted that Complainant's start time had been delayed from 8:00 a.m. to 8:30 a.m. in order to assist Complainant with being on time but that the schedule change had not been effective. See ROI at 33-34. The Letter of Warning gave Complainant notice that if she continued to be late for work and have issues with completing her assignments on time, she would not be allowed to telework. Complainant was denied telework due to her ongoing tardiness and performance issues in a text message sent on September 30, 2021. See ROI at 626.

On December 27, 2021, Complainant tested positive for Covid and on January 3, 2022, Complainant requested to telework due to her positive Covid test, specifically stating that she had "no symptoms," but that because she had already been out of work for a week and half due to her mother's passing, she did not want to take any additional leave if she could not report to work due to needing to quarantine. See ROI at 624-27. The Supervisor explained that Complainant did not officially request a reasonable accommodation at all but only asked to be allowed to telework and was told that she could not because her telework agreement had previously been revoked. See ROI at 560-61. The Supervisor clarified that Complainant only told her around October 2021 that she suffered from migraines and some memory loss issues and had submitted a form for Family and Medical Leave Act (FMLA) leave in November 2021. See ROI at 558-60.

Complainant was issued a Notice of Termination during Probationary Period on January 6, 2022, informing Complainant that she was being terminated due to her failure to perform assigned duties in a timely manner. See ROI at 325-26. The Supervisor stated that she began having discussions with her own supervisor and with HR beginning in October 2021 to about the possibility of terminating Complainant due to her continuing issues with tardiness and performance. See ROI at 28-31; 564-65. Complainant insisted that her termination was unfair because the Supervisor had previously told her that her performance had improved and that the Supervisor had no complaints. See ROI at 545.

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 April 24, 2023, motion for a decision without a hearing and issued a decision without a hearing on May 11, 2023. The AJ found that Complainant had not established that she was entitled to a reasonable accommodation because Complainant did not have a disabling condition only because she had tested positive for Covid. The AJ further found that the Agency articulated legitimate, nondiscriminatory reasons for terminating Complainant and Complainant did not establish that the Agency's reasons were a pretext for discrimination. 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 reiterated that the Supervisor subjected her to harassment by denying her telework and challenging the veracity of the Supervisor's explanation for why she was denied telework.

The Agency did not file 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 does not make any arguments specifically challenging the AJ's issuance of summary judgment aside from insisting that the Supervisor's explanations should not be credited but without offering evidence to support her assertions. 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

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (2012) (as amended) requires that an Agency make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the Agency can demonstrate that doing so would impose an undue hardship. 29 C.F.R. § 1630.9(a) (2017); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance) (revised Oct. 17, 2002). Once an employer becomes aware of the need for an accommodation of an employee's disability, the employer may engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3) (2019). An Agency may choose among reasonable accommodations as long as the chosen accommodation is effective, and while the preference of the individual with a disability should be given primary consideration, an Agency has the ultimate discretion to choose between effective accommodations. See Enforcement Guidance, supra, at Q. 9.

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" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See, e.g., Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016).

We agree with the AJ that Complainant did not establish that she was entitled to a reasonable accommodation. We emphasize that in this case, Complainant was not requesting accommodation for any of her existing conditions but only because she had tested positive for Covid and Complainant herself acknowledged that at the time she was not suffering from any Covid symptoms. Complainant does not contend that she requested telework as an accommodation for any of her other conditions, only indicating that she wanted to be able to telework in order to avoid taking leave due to being required to quarantine after her positive Covid test. Having tested positive for Covid alone does not establish that Complainant had a disability within the meaning of the Rehabilitation Act and as such, Complainant was not entitled to a reasonable accommodation because of it. See Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120122572 (Dec. 4, 2014) (finding no evidence of qualifying disability within the meaning of the ADAAA when Complainant had a leg injury with a recuperation period of no more than two to four weeks).

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 note that Complainant did not identify any similarly situated individuals not of her protected class who were treated more favorably. We acknowledge, however, that Complainant has established a prima facie case because the Supervisor admitted that Complainant told her that she suffers from migraines and Complainant was issued the Notice of Termination immediately after returning from leave due to Complainant's health issues. We find, however, that the Agency articulated legitimate, nondiscriminatory reasons for terminating Complainant. The memorandum of Complainant's termination stated that it was being issued due to Complainant's failure to adequately perform her work and there is ample, contemporaneous evidence in the record to indicate that Complainant had been repeatedly counseled for her performance issues as well as her tardiness.

We find that Complainant did not establish that any of the Agency's reasons are a pretext for discrimination. While we acknowledge that one of Complainant's coworkers stated that she agrees with Complainant that Complainant was treated unfairly, see ROI at 584-85, the coworker offered no evidence to support her assertions. 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). It is well-settled that agencies have broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation, which is not present here. See Kip D. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2021003970 (Dec. 15, 2021).

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 disability. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

We find that Complainant did not establish that she was subjected to unlawful harassment. The Commission has long recognized that ordinary managerial and supervisory duties include monitoring subordinates, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and otherwise managing the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (Jun. 16, 2017). To the extent that Complainant takes issue with the Supervisor ordering Complainant to go back to her office and noting that one of Complainant's co-workers characterized the incident as "very rude," we emphasize that the EEO laws are not a civility code. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). Finally, we emphasize that there is no evidence in the record 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).

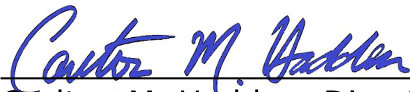
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

November 18, 2024
Date