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

[redacted]
Ela O.,[1]
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023005055

Hearing No. 410-2022-00186X

Agency No. 200I-0534-2021103324

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 August 11, 2023 final order concerning an 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.

ISSUE PRESENTED

Whether the EEOC Administrative Judge's decision properly found no discrimination by summary judgment regarding Complainant's claim that the Agency subjected her to a hostile work environment?

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Registered Nurse in Charleston, South Carolina.

[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.

On July 13, 2021, Complainant filed a formal EEO complaint claiming that the Agency discriminated against her based on her race (African American) and in reprisal for prior protected EEO activity (opposing alleged discrimination). By letter dated August 19, 2021, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claims:

1. On March 2, 2021, management failed to address false allegations about Complainant made by a [named co-worker].

2. On March 2, 2021, Complainant was subjected to a drug test.

3. On March 2, 2021, [a named Nurse Manager] initiated internal investigations involving Complainant.

4. On March 2, 2021, management detailed Complainant.

5. Effective April 26, 2021, Complainant was forced to resign her position and transfer to another facility.

After an investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation 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 assigned to the case granted the Agency's March 2, 2023 motion for a decision without a hearing[2] and issued a decision by summary judgment on August 9, 2023. The AJ's decision found no discrimination or unlawful retaliation was established.

Specifically, the AJ set forth that:

> Complainant fails to present evidence that the incidents in question involved or were based on Complainant's race or protected EEO activity…Complainant's hostile work environment claim centers around an accusation of drug diversion…against Complainant [by a named co-worker]. As a result of the accusation,…an investigation ensued, Complainant was instructed to take a drug test, and was reassigned out of patient care until the conclusion of the investigation. Complainant alleges that [a named co-worker] had a history of making false accusations against people of color and that management's inaction of this known behavior created a hostile work environment. The evidence of record does not support this allegation. The evidence demonstrates that [the co-

[2] The Agency's March 2, 2023, motion was a renewed motion for summary judgment. The Agency's initial motion was filed on September 21, 2022. Complainant submitted a response to the Agency's renewed motion for summary judgment.

> worker] made allegations regarding a lot of employees within the Agency regardless of race and for differing violations. AJ Decision at 4.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination or unlawful retaliation as alleged.

The instant appeal followed. Complainant does not submit a statement or brief in support of her appeal.

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 AND FINDINGS

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.

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 failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find for Complainant.

Disparate Treatment Analysis

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

The Agency articulated legitimate, nondiscriminatory reasons for the actions at issue. The record contains an affidavit from the Chief Nurse, Acute Care. Therein, she asserted that the actions at issue (drug testing, initiating an investigation, temporary detail during the investigation) occurred because of a report from one of Complainant's peers of alleged drug diversion by Complainant.[3] Report of Investigation (ROI) at 000175-000178. The Chief Nurse asserted these actions are consistent with the Agency's practices when there is an allegation of drug diversion. Id.

[3] The allegation against Complainant was not substantiated. ROI at 000136, 000192.

The record contains affidavits from the Nurse Manager and a Human Resource Specialist.[4] Their affidavits corroborate the testimony of the Chief Nurse. ROI at 000136-000141, 000150-000151.

We further find that Complainant failed to establish pretext for the Agency's articulated reasons for its actions. While Complainant asserts that the co-worker who made the allegation against her has a practice of making false allegations against "people of color," we concur with the AJ that the record reflects that this co-worker made various types of allegations against other Agency employees, including Caucasian employees (i.e. the record reflects that the co-worker reported a Caucasian employee for an alleged violation of the absence and leave policy). See Agency's Responses to Interrogatories, Question 12.

Harassment/Hostile Work Environment Analysis

To establish a claim of harassment a complainant must show that: (1) they belong to a statutorily protected class; (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances.

In other words, to prove her harassment/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 or prior protected activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Here, Complainant did not establish her claim of discriminatory harassment because she did not establish that the alleged harassment was based on her protected classes. As set forth above in the section entitled "Disparate Treatment Analysis," the Agency's management witnesses articulated legitimate, non-discriminatory reasons for the actions at issue, which Complainant failed to establish was pretext for race discrimination and/or retaliation. Complainant's claim of harassment is precluded based on our findings that she failed to establish that any of the actions taken by the Agency were motivated in any way by her protected bases.

[4] The Human Resources Specialist was the Drug Free Workplace Coordinator for the facility.

See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000). Moreover, while Complainant asserts that she was "forced" to transfer to another Agency facility to avoid harassment, as set forth above, we found that Complainant failed to establish a claim of harassment based on her protected classes.

CONCLUSION

Based on a thorough review of the record, we AFFIRM the Agency's final order implementing the AJ's decision by summary judgment finding no discrimination or unlawful retaliation was established 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

January 29, 2024
Date