



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

[REDACTED]  
Gabriele G.,<sup>1</sup>  
Complainant,

v.

Deb A. Haaland,  
Secretary,  
Department of the Interior  
(Office of Surface Mining Reclamation & Enforcement),  
Agency.

Appeal No. 2023005080

Agency No. DOI-OSM-22-0163

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated September 14, 2023, finding no discrimination regarding her 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we AFFIRM the Agency's final decision finding no discrimination.

ISSUES PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination and harassment on the bases of race, sex, and age concerning a desk audit and her request to be excused from a meeting.

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<sup>1</sup> 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 GS-14, Human Resources (HR) Specialist, Employee Benefits and Employee Relations, the Office of Surface Mining, Office of the Director Deputy Director, Office of HR, in Washington, D.C.

The record indicates that on February 4, 2022, Complainant filed a formal complaint raising the following claims:

1. Whether Complainant has been subjected to disparate treatment based on race (African American), age (over 40), and sex (female) when on September 21, 2021, her supervisor (S1), GS-15, the Human Capital Officer, singled her out and requested an Office of Personnel Management (OPM) desk audit resulting in a recommended demotion from her GS-14 grade.
2. Whether Complainant has been subjected to harassment when, in addition to the foregoing, on October 28, 2021, S1 verbally harassed her during an ad-hoc staff meeting whereby he aggressively questioned her request to temporarily be excused from a meeting.

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 EEOC Administrative Judge or a final Agency decision. 29 C.F.R. § 1614.108(f). In accordance with Complainant's request, the Agency issued a final Agency decision pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency, dismissing claim 1 for failure to state a claim, concluded that even assuming it did state a claim, Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged in her complaint.

Regarding claim 1, S1 indicated that in 2019, the Agency was undergoing an HR transformation review, and he was tasked to review each HR program and employees' position descriptions, including Complainant's position description. Report of Investigation (ROI) at 114. Complainant acknowledged that in 2019 she became aware of the HR transformation review, desk audits, and reassignment of some of the Benefits section duties to another Bureau. ROI at 63, 64.

S1 indicated that since Complainant's position description (last updated in 2015) was outdated, he requested an OPM desk audit for Complainant's position in 2021. The record indicates that on June 22, 2021, OPM emailed Complainant to notify her it was conducting a desk audit of her position. ROI at 235. On August 12, 2021, OPM issued Position Classification Evaluation and Recommendation on Complainant's position and recommended her position be classified at the GS-12 grade level (from GS-14). ROI at 238 – 251. S1 informed Complainant of this recommendation on September 21, 2021. ROI at 252.

The record indicates that Complainant has not been downgraded and her position has not been reclassified to a GS-12 grade level as recommended by the OPM. ROI at 264. S1 stated that there were 12 HR Specialists at the Agency who were downgraded after OPM's desk audits from their GS-12 or GS-13 grade level to GS-11s. ROI at 119, 120.

Regarding claim 2, Complainant claimed that on October 28, 2021, she attended a staff phone meeting that was past her tour of duty, which ended at 3:30 pm. Complainant stated that since she had scheduled a meeting to speak with an EEO Specialist at 4:00 pm, she was concerned that the meeting would go past 4:00 pm. Complainant thus made an announcement at the beginning of the meeting that she would be stepping away to take a call but would return to the meeting after that call. S1 then questioned her about her leaving the meeting. Complainant did not tell S1 about her scheduled meeting, but, instead, told S1 that the phone call would be only a few minutes and she would return to the meeting after that. Later, when the EEO Specialist called her, Complainant excused herself from the meeting and returned to the meeting approximately five minutes later.

S1 did not recall the incident. Complainant's coworker (C1), a GS-13, HR Specialist, indicated that she recalled a conversation took place between Complainant and S1 during the staff phone meeting at issue. C1 stated that she did not consider S1 asking Complainant about her leaving the meeting was harassing in nature. ROI at 93.

In its decision, the Agency stated that claim 1 failed to state a claim since Complainant was not demoted upon receiving the OPM's desk audit result on September 21, 2021. 29 C.F.R. § 1614.107(a)(1). The Agency noted that it has not demoted Complainant. The Agency concluded that even assuming arguendo claim 1 did state a claim, Complainant failed to establish a prima facie case of discrimination as alleged.

The Agency further stated that the Agency was going through the HR transformation review, and S1 was tasked to review each HR program and employees' position descriptions, including Complainant's. Thus, stated the Agency, it had a legitimate, nondiscriminatory reason for the alleged incident in claim 1. The Agency also concluded that Complainant failed to show that she was subjected to discriminatory harassment as alleged in claim 2. Complainant appealed from the Agency's final decision.

### CONTENTIONS ON APPEAL

Complainant does not provide any contentions on appeal.

The Agency, reiterating its findings in its final decision, contends that it has not demoted Complainant as a result of the OPM desk audit. The Agency reiterates that claim 1 fails to state a claim and Complainant failed to establish that the Agency subjected her to discrimination and harassment as alleged.

### 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 (EEO MD-110), Chap. 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

Initially, although the Agency dismissed claim 1 for failure to state a claim, since the Agency investigated and further analyzed it on its merits, we will address the merits of the claim without addressing the dismissal.

#### *Disparate Treatment – Claim 1*

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

In order to establish a prima facie case of discrimination based on race, sex, and age, Complainant must show that: (1) Complainant is a member of a protected class; (2) Complainant was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) Complainant was treated differently than similarly situated employees outside Complainant's protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. McCreary v. Dep't of Defense, EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Navy, EEOC Request No. 05950927 (Jan. 9, 1998); Trejo v. Soc. Sec. Admin., EEOC Appeal No. 0120093260 (Oct. 22, 2009).

Here, Complainant failed to establish a prima facie case of discrimination as alleged. Complainant did not identify any similarly situated employees outside her protected classes who were treated differently regarding the OPM desk audit or show that there was some other evidentiary link between her membership in the protected classes and the alleged action.

Furthermore, the Agency stated that as a result of its HR transformation review which started in 2019, they reviewed each HR program and its employees' position descriptions. Upon the Agency's request, OPM conducted desk audits for HR employees, including Complainant.

Despite the OPM desk audit recommendation, there is no evidence Complainant's position was downgraded to a GS-12 grade level. Based on the foregoing, we find that the Agency articulated legitimate, nondiscriminatory reasons for the OPM desk audit on Complainant's position. Upon review, we find that Complainant failed to show that the Agency's articulated reason was a mere pretext for discrimination.

### *Harassment – Claim 2*

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 Complainant is a member of a statutorily protected class; (2) that Complainant was subjected to unwelcome conduct related to Complainant's protected class; (3) that the harassment complained of was based on Complainant's protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with Complainant's 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 (April 29, 2024).

In other words, to prove Complainant's hostile work environment claim, Complainant must establish that Complainant 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. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

In the instant case, we find that Complainant failed to establish a prima facie case of harassment because there is no evidence that S1 asking her about her being excused during a staff phone meeting (of which she merely responded that she would return to the meeting after a few minutes of a phone call) was due to any of her protected bases. Complainant was allowed to leave from the meeting to make her scheduled phone call and to rejoin the staff meeting.

Furthermore, the incident in claim 1 about the audit can no longer be part of the harassment claim due to our finding of no discrimination in claim 1.

We note that anti-discrimination statutes are not civility codes designed to protect against the ordinary tribulations of the workplace. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." See Oncale v. Sundowner Offshore Service, Inc., 23 U.S. 75, 81 (1998). Upon review, we find that Complainant failed to make such showing here.

Based on a thorough review of the record, we find that Complainant failed to show that the Agency's actions were motivated by discrimination as she alleged. Also, we find that considering all the events, Complainant failed to show that the Agency subjected her to harassment as she alleged.

### CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is AFFIRMED.

### 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

November 25, 2024  
Date