



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Goldie S.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2023005084

Hearing No. 550-2023-00146X

Agency No. 4E-940-0056-22

DECISION

On September 13, 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 23, 2023, notice of final action 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. 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 action finding no discrimination.

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

- 1) Whether the EEOC Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.
- 2) Whether the Agency's final action properly found that Complainant was not subjected to discrimination as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Part Time Flexible (PTF) Mail Carrier (City) in the San Francisco Post Office in San Francisco, California. Complainant began working at the facility on December 4, 2021, and was subjected to a 90-day probationary period.

On March 3, 2022, the Agency issued Complainant a Notice of Separation During Probation Period. The Agency noted new employees were given periodic performance reviews which measured the following indicators: Work Quantity, Work Quality, Dependability, Work Relations, Work Methods, and Personal Conduct. The Notice stated Complainant received a 60-Day Evaluation which contained "Unsatisfactory" ratings in Work Quality, Dependability, and Work Methods. The Notice stated in her 80-Day Evaluation Complainant showed a "marked decline" instead of improvement. Report of Investigation (ROI) at 00118.

Complainant stated she worked with Supervisor Customer Service (S1) daily. She noted S1 completed her 60-Day Evaluation, and that Supervisor Customer Service (S2) conducted her 80-Day Evaluation and signed the separation letter. Regarding her 80-Day Evaluation, Complainant stated she spoke with S2, and that he changed the scores on four categories which were initially deemed Unsatisfactory to Satisfactory. However, Complainant claimed the 80-Day Evaluation in the record was altered to reflect Unsatisfactory on all of the categories, except Dependability which was rated Satisfactory. She claimed in addition to Dependability, the actual rating also reflected Satisfactory in Work Relations, Work Methods, and Personal Conduct. Regarding Work Quantity she stated she was rated Unsatisfactory and cited the lack of training, management support, and access to resources as apparent reasons for the rating. Regarding Work Quality she acknowledged she made some mistakes, but said she was not informed of the mistakes until her evaluation, which she claimed gave her no time to self-correct.

Supervisor Customer Service (S1) noted he discussed Complainant's unsatisfactory performance with S2 and provided input concerning her performance issues such as failure to finish the routes and her desire to not drive a postal vehicle due to the fact she had been involved in an automobile accident. S1 noted Complainant would miss some of the deliveries assigned, had timeliness issues in reporting to work, and sometimes would not complete a whole route or miss some deliveries. S1 noted prior to issuance of the Notice of Separation, he talked with her about issues and gave her feedback and instructions concerning performance. S1 noted he had suggested to Complainant on several occasions to use a pull cart, but she would choose to use the shoulder bag because she said it was faster. He noted resources were available daily for Complainant to utilize in the performance of her duties. S1 noted Complainant's performance did not show improvement at a rate necessary to be a letter carrier.

On July 8, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and age (Y.O.B. 1964) when:

On March 3, 2022, she was issued a Notice of Separation during her probationary period.

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 requested a hearing. The AJ issued a Notice of Intent to Issue Decision without a Hearing and afforded the parties the opportunity to respond. Complainant did not file a Response. The Agency filed a Reply stating a decision without a hearing was proper. On August 14, 2023, the AJ issued a decision without a hearing in favor of the Agency. The Agency subsequently issued a final action fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant provides a document she claims is copy of her 80-Day evaluation which she alleged was altered after she signed it. She states items D (Work Relations), E (Work Methods), and F (Personal Conduct) were changed from Satisfactory to Unsatisfactory.

Further, she provides two witness statements to support her claim “of unfair and unprofessional treatment,” one from a Former Coworker and one from a former union steward, which are dated October 26 and October 27, 2023, respectively.

In response to Complainant’s appeal, the Agency argues the AJ properly issued a decision without a hearing. Regarding Complainant’s claim that her performance ratings in three categories (D, E, and F) were changed from Satisfactory to Unsatisfactory, the Agency notes it is unclear how the photographs she provided demonstrated doctored evaluations. Also, the Agency notes Complainant does not explain why she did not provide a copy of the claimed evaluation with the Satisfactory ratings. However, the Agency states even assuming at one point she had Satisfactory ratings in categories D, E, and F, she was still Unsatisfactory in categories A (Work Quantity) and B (Work Quality). The Agency claims regardless of her performance ratings in categories D, E, and F, one can reasonably conclude that an employee with unsatisfactory performance in Work Quantity and Work Quality has not demonstrated the capacity for efficient service. Thus, it argues whether performance ratings in categories D, E, and F were altered is immaterial.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. §1614.109(g). An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of 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 fact is “material” if it has the potential to affect the outcome of the case.

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*).

ANALYSIS

In order 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 has 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 in Complainant's favor.

At the outset, we address the new evidence Complainant submitted for the first time on appeal. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the hearing. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.B.5 (Aug. 5, 2015). Here, Complainant has not provided arguments or evidence to show that the new materials were not available while the case was pending a hearing, or any explanation as to why they were not provided to the AJ while the case was pending a hearing. Accordingly, the Commission declines to consider any newly provided evidence on appeal.

For a complainant to prevail on a claim of disparate treatment, they must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A complainant must initially establish a *prima facie* case by demonstrating that they were subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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.

To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). A complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

We find Complainant met the first element of her disparate treatment claim based on her sex and age. Complainant also met the second element as she was subjected to an adverse action when she was separated from employment.

Next, we address element three. Complainant states that her sex and age were factors because she was the oldest worker in her training contingent. Complainant also stated as an older trainee she would be retiring sooner than her younger coworkers, which she stated may have made her a less than ideal candidate. We find Complainant failed to identify that she was treated differently than similarly situated employees outside her protected classes, or that there was some other evidentiary link between her sex or age and the Agency's actions. Therefore, we find no prima facie case of sex or age discrimination.

Further, we find the Agency presented legitimate, nondiscriminatory reasons for its actions, Complainant was separated during her probationary period due to performance deficiencies and failure to show improvement at a rate necessary to become a letter carrier. While Complainant claims on appeal that some of the elements in the 80-Day Evaluation were changed after she signed the evaluation, we note she never raised that argument with the AJ. Additionally, we note she does not provide a copy of the purported evaluation with the Satisfactory ratings.

Similarly, we find the copy of the evaluation provided does not show the evaluation was altered. Further, even assuming that Complainant received a Satisfactory rating on the four other categories, we note she does not contest that she was marked as Unsatisfactory on the two categories of Work Quantity and Work Quality. Moreover, the record reveals that Complainant failed to finish some of the routes and missed deliveries. Complainant provides no evidence beyond her bare assertion that management was motivated by her sex or age. Also, she failed to show that there were any similarly situated employees not in her protected groups who were treated differently under similar circumstances.

CONCLUSION

Accordingly, the Agency's final action 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:



Carlton M. Hadden, Director
Office of Federal Operations

December 16, 2024

Date