



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

[REDACTED]
Raylene B.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2023005101

Hearing No. 430-2023-00206X

Agency No. HS-TSA-02933-2022

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 22, 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. For the following reasons, we AFFIRM the Agency's final order.

ISSUES PRESENTED

1. Whether the EEOC Administrative Judge (AJ)'s grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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. Whether the Agency's final order properly found that Complainant was not subjected to discrimination and harassment based on race and in reprisal for prior EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer (TSO), E-Band, at the Agency's Transportation Security Administration, Screening Unit, Columbia Metropolitan Airport in Columbia, South Carolina.

On October 9, 2022, Complainant filed a formal complaint, which was subsequently amended, alleging discrimination and harassment based on race (African American) and in reprisal for prior EEO activity when:

1. In March 2022, management did not select Complainant for the position of Lead TSO under vacancy announcement number CAE-22-008238.
2. From May – August 2022, management denied Complainant the opportunity to coach new hires.
3. On August 11, 2022, management did not properly investigate Complainant's issues against a management official and did not allow her to have a witness at a meeting she was required to attend.
4. On October 21, 2022, management denied Complainant's administrative leave request for October 2022.

The Agency investigated the complaint. 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 EEOC AJ. 29 C.F.R. § 1614.108(f). Complainant requested a hearing.

On May 16, 2023, the Agency filed a motion to dismiss claim 1 for untimely EEO Counselor contact. The Agency stated that Complainant applied for the position at issue in February 2022, was interviewed on March 22, 2022, but was not selected on April 24, 2022, i.e., the effective date of the selection. The Agency indicated that Complainant contacted an EEO Counselor regarding the matter on September 1, 2022, which was beyond the 45-day time limit under 29 C.F.R. § 1614.105(a)(1).

In response to the motion, Complainant forwarded to the AJ her April 25, 2022 email which was sent to management asking for her interview feedback. On June 14, 2023, the AJ, during an Initial Conference, granted the Agency's motion to dismiss claim 1 for untimely EEO Counselor contact.

On June 28, 2023, the AJ issued a Notice of Intent to Issue a Decision without a hearing. The parties responded to the notice. On August 17, 2023, the AJ, noting the dismissal of claim 1, issued a decision without holding a hearing, finding no discrimination regarding claims 2 - 4.

The record indicates that regarding claim 2, Complainant stated that she had been a coach since 2016, and did not have any disciplinary action against her preventing her from coaching new hires in May – August 2022. The Deputy Assistant Federal Security Director (DAFSD), J-Band, stated that another TSO employee (E1), White, was given the opportunity to coach because E1 was a primary On-the-Job Training (OJT) Coach. The DAFSD indicated that although not required, the Agency preferred utilizing an OJT Coach instead of a non-OJT Coach, i.e., Complainant. ROI, Exhibits (Exh.) F-4 and F-4f.

Regarding claim 3, the DAFSD indicated that upon receiving Complainant's concerns about her not being given the opportunity to coach, described in claim 2, he specifically instructed a Transportation Security Manager (TSM1) to look into the matter because he was an hour and a half away from the airport where Complainant worked whereas TSM1 was physically at the airport. TSM1 accordingly held a meeting with Complainant to discuss her concerns. The DAFSD stated that there was no witness needed at the meeting because it was not in reference to her negative performance or conduct resulting in discipline. Id. At the meeting, Complainant asked for a witness and TSM1 invited TSM2.

Regarding claim 4, the record indicates that Complainant did *not* request administrative leave (which was only approved by the Federal Security Director level) for October 22, 2022. ROI, Exh. F-4j. Rather Complainant requested "other paid leave" for October 22, 2022, which was approved by her Manager on October 12, 2022. The record indicates that the Agency's time record system automatically generated a denial of Complainant's paid approved leave for October 22, 2022, due to her being marked as separated. Id. Complainant transferred from the Agency to a different federal agency on October 22, 2022. TSM1 indicated that management had no control by what was automatically generated in the time record system.

The Agency indicated that Complainant was paid for her October 22, 2022 leave. Complainant does not dispute this.

The AJ found that Complainant failed to establish she was subjected to discrimination as alleged. The Agency's final order implemented the AJ's decision. Complainant appeals from the Agency's final order.

CONTENTIONS ON APPEAL

Complainant, reiterating her allegations, contends she was discriminatorily denied the position, described in claim 1. Complainant, disputing management's utilizing an OJT Coach to coach new hires, claims that she was denied the opportunity to receive an OJT Coach incentive. Complainant also contends that she was denied her own representative during the August 11, 2022, meeting. On appeal, Complainant also raises matters that are not related to the alleged incidents.

In response to Complainant's appeal, the Agency contends that Complainant fails to address her untimely EEO Counselor contact regarding claim 1. The Agency also contends that Complainant failed to establish a prima facie case of discrimination, retaliation, or harassment and the Agency articulated legitimate, nondiscriminatory reasons for its actions, as set forth above in detail. The Agency requests the Commission affirm its final order.

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 (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").

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 EEO MD-110, 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 retaliatory 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.

Dismissal – Claim 1

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides, in relevant part, that the Agency shall dismiss a complaint that fails to comply with the applicable time limits contained in 29 C.F.R. § 1614.105. EEOC Regulation 29 C.F.R. §1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within 45 days of the alleged discriminatory event, or the effective date of an alleged discriminatory personnel action.

The record indicates that in March 2022, Complainant was interviewed for the position but was not selected for the position on April 24, 2022. Complainant did not contact an EEO Counselor regarding the matter until September 1, 2022, which was beyond the 45-day time limit set by the regulations. Complainant fails to provide any justification to warrant an extension of the applicable time limit for contacting an EEO Counselor. Thus, we find that the Agency properly dismissed claim 1 for untimely EEO Counselor contact.

Disparate Treatment

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, 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).

In order to establish a prima facie case of reprisal, Complainant must show that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802).

Harassment

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.

Regarding Complainant's allegation of retaliatory harassment, Complainant only needs to show that such actions are the type of action that would dissuade a reasonable employee from making or supporting a complaint of discrimination. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Upon review, we find that Complainant established a prima facie case of race discrimination regarding claim 2 since E1, White, was given the opportunity to coach new hires whereas Complainant was not. The Agency, however, provided a legitimate, nondiscriminatory reason that E1 was given the opportunity to coach new hires because E1 was a primary OJT Coach, whereas Complainant was not. Upon review, we find that Complainant failed to show that the Agency's articulated reason was a mere pretext for discrimination.

Complainant failed to establish a prima facie case of retaliation since she failed to provide any evidence that there was any nexus between the protected activity, i.e., her prior complaint filed in 2021, and the denial to coach new hires in 2022.

Regarding claim 4, there is no evidence Complainant requested administrative leave for October 22, 2022, as alleged. Complainant requested paid leave, and she was indeed paid for the October 22, 2022 leave. Thus, we find that Complainant failed to establish a prima facie case of discrimination for race or retaliation for claim 4.

Based on a thorough review of the record, considering all statements submitted on appeal, we find that Complainant failed to show that the Agency's actions were motivated by discrimination or retaliation as she alleged. Because we have found that claims 2 and 4 were not discriminatory or retaliatory, we similarly find such claims cannot be part of the harassment claim. We find the remaining actions in claim 3 were not sufficiently severe or pervasive so as to constitute a prima facie case of harassment based on Complainant's protected classes. We further find that the alleged actions in claim 3 were not reasonably likely to deter Complainant or others from engaging in protected activity.

CONCLUSION

Accordingly, the Agency's final order 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

January 15, 2025
Date