



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

[REDACTED]
Barbara C.,¹
Complainant,

v.

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

Appeal No. 2023005126

Hearing No. 520-2023-00023X

Agency No. 4B-020-0044-22

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 23, 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 order finding no discrimination.

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 discriminatory harassment based on race, sex, and age.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an EAS-17, Supervisor, Customer Services at the Agency's Brookline Post Office in Brookline, Massachusetts.

The record indicates that on February 10, 2022, Complainant contacted an EEO Counselor regarding her complaint. Unable to resolve the matter informally, Complainant filed her formal complaint on May 19, 2022.

The Agency identified the claims of the complaint as whether Complainant was subjected to discriminatory harassment based on race (Black), sex (female), and age (over 40) when:

1. On dates to be specified, she had been excluded from meetings and issued disciplined.²
2. On January 25, 2022, management told her that she was no longer allowed to settle discipline in the office.
3. On January 27, 2022, and other dates to be specified, Complainant's Manager (M1), EAS-21, in the Brookline Post Office, has subjected her to verbal abuse.
4. On January 31, 2022, M1 approached her on the workroom floor shaking his hands in her face.
5. On February 9, 2022, management changed her start time.

² On June 9, 2022, the Agency, accepting Complainant's claims, stated that although Complainant noted that she had experienced harassment for the past 18 months, any discrete actions, such as disciplinary action, which occurred more than 45 days prior to her February 10, 2022 EEO Counselor contact, were untimely. The Agency noted that these untimely incidents however would be considered as part of the overall harassment claim.

6. On February 10, 2022, her desk was moved to the rear of the building, and she was instructed to monitor bathroom breaks.

Complainant has not challenged the Agency's framing of her 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. Complainant requested a hearing. On July 24, 2023, the AJ issued a Notice of Intent to Issue a Decision Without a Hearing. Both parties responded to the notice. The AJ issued a decision without holding a hearing, finding no discrimination.

Regarding claim 1, Complainant claimed that she was excluded from daily operational meetings held in the mornings. M1 stated that he called for meetings as needed, and Complainant attended every meeting unless she refused to come. M1 stated that Complainant never told him about her concerns about the meeting.³

M1 indicated that Complainant was previously disciplined for failure to perform on August 8, 2021, but it has been expunged and no record was kept. Report of Investigation (ROI) at 123. Complainant stated that on August 13, 2021, she was given a pre-disciplinary interview, which resulted a letter of warning on September 3, 2021, because she was locked out of the training she was supposed to complete and also because she failed to make sure her clerks finished their training. ROI at 118, 119. M1 indicated that it was Complainant's responsibility, as a supervisor, to make sure her clerks finished their training as well as hers. The record indicates that the September 3, 2021 letter of warning was expunged in December 2021. ROI at 15. Complainant did not specify any subsequent disciplinary actions she was issued.

Regarding claim 2, Complainant indicated that a Manager of Newton (MN1)⁴ told her not to settle any discipline because MN1 was not happy with the way a disciplinary action against Complainant's employee (E1), a clerk, was settled via a grievance. ROI at 88. MN1 had no authority on the Brookline

³ The record indicates that M1 no longer works in the Brookline Post Office. M1 moved to a different job in another district effective September 30, 2022.

⁴ MN1 did not submit her affidavit during the investigation of the instant complaint due to her extended leave; she subsequently retired in August 2022. ROI at 145.

Post Office operations; rather she was solely in the Brookline Post Office to assist M1. ROI at 142.

Regarding claim 3, Complainant did not identify any specific incident of M1's verbal abuse toward her which purportedly occurred on or prior to January 27, 2022.

Regarding claim 4, Complainant stated that on January 31, 2022, when M1 arrived at the office around 6:30 am, he was upset due to various emails he received during the night. M1 then came storming out to her work area and yelling at her and shaking his hand in her face. Complainant did not describe what M1 was saying/shouting about.

M1 indicated that the incident did not happen as described by Complainant. M1 stated that on that day, he was instructing Complainant that the packages behind her by the return to sender mail must be worked and he pointed in the direction of the packages. M1 noted that the packages were in a location they were not supposed to be, and he was making sure Complainant was aware of their location.

M1's supervisor (M2), Level 23, indicated that Complainant reported to him about M1's January 31, 2022 conduct that M1 was yelling at her and shaking his finger at her. M2 then had a discussion with M1 whose version was very different than Complainant's version, and informed him of the Agency's zero tolerance. Complainant does not indicate she was subsequently subjected to a similar action by M1.

Complainant's employee (E2) (male, race and age not specified) Level 6, Sales, Service/Distribution Associate, stated that he witnessed M1 shouting and pointing his finger in Complainant's face on January 31, 2022. ROI at 108. E2 also indicated that M1 did the same shouting and pointing his finger at E2 on February 10, 2022. Id. E2 did not describe what M1 was saying/shouting about.

Regarding claim 5, M1 indicated that Complainant's start time, approved by M2 and the District manager, was changed from 6:00 am to 8:00 am (by two hours) due to the needs of the Agency service and operations. ROI at 134. M1 stated that Complainant was needed to reduce clerk hours during the day and to watch the window operations. ROI at 143. M2 stated that Complainant's operation was "struggling," and changing her start time would promote operational needs. ROI at 184.

Regarding claim 6, M1 indicated that Complainant was in charge of the clerks' distribution which was located in the rear of the building. M1 stated that Complainant's desk was moved to the rear of the building because she complained that she could not do her paperwork and also watch her clerks at the same time because of the location of her desk. ROI at 137. M1 denied instructing Complainant to monitor bathroom breaks for E1. M1 stated that E1 was disappearing for 20 minutes for every hour and when M1 consulted such with Labor Relations office, M1 was told management could ask E1 if she needed any accommodation. Complainant indicated that M1 told her that Labor Relations office *confirmed* that management could monitor the bathroom breaks of employees (specifically, E1 and E2), but she was not comfortable with that. ROI at 99. Complainant did not indicate she was actually required to monitor her employees' bathroom breaks.

The AJ found that Complainant failed to establish that the alleged claims were based on her race, sex, or age, or that she was subjected to harassment. The Agency's final order implemented the AJ's decision. Complainant appeals from the Agency's final order.

CONTENTIONS ON APPEAL

Complainant contends that she had been harassed by M1 for two years while working with him. Complainant submits a copy of her medical records, including her Workers' Compensation Program claim documentation (dating from February 23, 2022, to May 11, 2022), for her anxiety and stress purportedly resulted from the January 31, 2022 incident. Some of these documents were already submitted to the AJ.

The Agency does not submit a brief in response to the appeal.

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.

Disparate Treatment – Claim 5

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).

Regarding claim 5, upon review, we find that Complainant failed to establish a prima facie case of discrimination as alleged. Complainant failed to show that she was treated differently than similarly situated employees outside her protected class or there was some other evidentiary link between her membership in her protected classes and her start time being changed for two hours. Further, the Agency stated that Complainant's start time was changed due to the Agency's service and operational needs. The Agency indicated that Complainant's Customer Services operations were struggling and she, as a supervisor, was needed to reduce clerk hours and watch the window operations during the day. We find that Complainant failed to show that the Agency's articulated legitimate, nondiscriminatory reasons were pretextual.

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 (Apr. 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.

Because we have found that claim 5 was not discriminatory, we similarly find such claim cannot be part of the harassment claim. Regarding claim 1, Complainant, other than her assertions, did not identify a specific incident when she was excluded from meetings or issued disciplinary action in 2022. The Agency indicated that Complainant was not excluded from meetings and was not issued any disciplinary action in 2022. Although Complainant indicated letters of warning were issued in 2021, they are not at issue since they were expunged. Regarding claim 2, there is no evidence MN1's remark about settling a disciplinary action Complainant issued to her employees was related to Complainant's protected classes. Furthermore, such instruction if it happened is not harassing or hostile.

Regarding claim 3, Complainant did not specify any verbal abuse on the part of M1 which purportedly occurred on or prior to January 27, 2022. Regarding claim 4, Complainant claimed that on January 31, 2022, M1 was yelling and pointed his finger at her. M1 denied pointing his finger at Complainant on that occasion. Rather, stated M1, he was instructing Complainant about the misplaced packages to be worked on and pointing his finger at that direction. Upon Complainant's complaint about M1's conduct, M2 conducted a discussion with M1 regarding M1's alleged unprofessional

conduct and the Agency's zero tolerance policy. Complainant does not claim that she was subjected to similar conduct on the part of M1 thereafter.

Regarding claim 6, M1 stated that Complainant's desk was moved for her to be closer to her clerks' work area after she complained about her desk location. Complainant indicated that M1 told her that Labor Relations *confirmed* that management could monitor the bathroom breaks of her employees. There is no evidence Complainant was required to do so nor that she was subjected to any adverse action for failure to do so.

We find that Complainant failed to establish a prima facie case of harassment because she failed to show that any of the alleged harassing incidents were somehow related to race, sex, or age (element 3 of the prima facie case). Furthermore, the prima facie case of harassment fails for all alleged bases because Complainant has not shown 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.

CONCLUSION

Accordingly, the Agency's final order 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 2, 2024 _____
Date