



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

[REDACTED]
Nannette T.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2023005138

Agency Nos. HS-CBP-00715-2022, HS-CBP-01006-2022

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 21, 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 decision finding no retaliation.

ISSUE PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to retaliation for prior EEO activity.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment at the Agency's Customs and Border Protection (CBP).

The record indicates that on December 26, 2021, Complainant contacted an EEO Counselor regarding her complaint. Unable to resolve the matter informally, Complainant filed her complaint, Agency No. HS-CBP-00715-2022, on February 3, 2022, alleging retaliation for prior EEO activity when:

1. On December 23, 2021, she learned that the Credibility Assessment Division (CAD) Director ("Director") may have unduly influenced her polygraph examiner, which resulted in her June 28, 2021 failure of her Polygraph Examination (PE).

The record also indicates that on January 26, 2022, Complainant contacted an EEO Counselor regarding her subsequent complaint. Unable to resolve the matter informally, Complainant filed a formal complaint, HS-CBP-01006-2022, on March 9, 2022, alleging retaliation for prior EEO activity when:

2. On January 26, 2022, she learned that the CAD officials annotated her polygraph file in 2014 and 2015 with repeated references to her EEO activity to include a chronology which she believed negatively impacted the outcome of her 2019 and 2021 PEs.

The Agency consolidated the complaints for processing. 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 Administrative Judge or a final Agency decision. When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected her to retaliation as alleged.

The record indicates that the Agency CAD administered PEs as part of the hiring process for CBP Officers and Agents to assist in determining suitability for employment and in support of internal and counterintelligence investigations. Complainant indicated that she failed the Agency's PEs on several occasions in 2014, 2019, and on June 28, 2021.

On July 17, 2021, Complainant previously contacted an EEO Counselor alleging discrimination in reprisal for prior EEO activity when she was not hired for employment at the Agency. ROI at 298. On July 22, 2021, Complainant withdrew that informal complaint, Agency No. HS-CBP-0162-2021. Id.

The record indicates that on April 7, 2015, Complainant filed a complaint, Agency Nos. HS-CBP-02586-2015, alleging discrimination based on her sex regarding her not being hired by the Agency due to her failed PE. Complainant subsequently withdrew this complaint. On July 12, 2019, Complainant filed a complaint, Agency Nos. HS-CBP-01648-2019, alleging discrimination based on sex regarding, in part, her not being hired by the Agency on April 30, May 31, and September 24, 2019, due to her failed PEs. The Agency issued a decision finding no discrimination concerning the complaint. Upon Complainant's appeal, the Commission, in EEOC Appeal No. 2021003691 (Oct. 13, 2022), request for reconsideration denied, EEOC Request No. 2023000730 (May 3, 2023), affirmed the Agency's final decision finding no discrimination.

Complainant indicated that on September 6, 2021, she filed a Freedom of Information Act (FOIA) request for, in part, email communications between the Director and an Investigative Program Specialist (IPS), GS-13, who conducted her June 28, 2021 PE, and her full polygraph report. ROI at 172.

Regarding claim 1, Complainant stated that while reviewing the FOIA response, she noticed that there were some redacted materials which proved there were email correspondences between the Director and the IPS. Complainant claimed that the only reason she failed her June 28, 2021 PE was retaliation for filing her prior EEO complaints. The IPS stated that the Director had no involvement in the administration or the resulting determination of Complainant's PE, and he was not influenced by the Director.

In response to Complainant's FOIA request, on September 29, 2021, the Director indicated that he found no email correspondence between him and the IPS on Complainant's June 28, 2021 PE. ROI at 268. The Director indicated that as a CAD Director, he was responsible for the policies and standard operating procedures of the polygraph process, but he had no role in the administration of PEs (including Complainant's PE), and resulting determinations. ROI at 255.

The Director stated that Complainant failed her 2021 PE because both her PE examiner (i.e., the IPS) and a Quality Control reviewer found "Significant Response"² to PE relevant questions regarding illegal drug activity and serious criminal activity, and she failed to explain these results during the post-test. ROI at 256.

Regarding claim 2, Complainant claimed that based on the FOIA response, she discovered that CAD officials annotated her polygraph file in 2014 and 2015 with repeated references to her EEO activity and other incidents which negatively impacted the outcome of her 2019 and 2021 PEs. Complainant submitted a copy of the FOIA response which included her polygraph report and CAD Technical Report. ROI at 193-207.

Complainant's CAD Technical Report included, in part, Assessment Information, Quality Control Information, Admission Information, and Correspondence Information. Under the Correspondence Information section, there are entries noting that on a number of occasions in November and December 2014, and January 2015, *Applicant* called complaining about her exam; she felt CAD intentionally failed her and CAD was out to get her; and she asked for EEO contact information. ROI at 199, 200. Complainant does not dispute her calling CAD as indicated above.

The Director indicated that he did not know who entered the foregoing notations, but the Correspondence Information section entry was accessed by supervisors and those assigned collateral duties of entering/reviewing correspondence of CAD and CAPS (Credibility Assessment and Polygraph Services) administrators. ROI at 262. The Director stated that the polygraph file did not contain any annotations of Complainant's EEO activity for the PE examiners' review; rather it contained information regarding prior polygraph examination assessment numbers. ROI at 257. The Director also stated that PE examiners had access to the Assessment Information section. ROI at 260. The Assessment Information section does not have any annotations regarding Complainant's EEO inquiries or activity. ROI at 193. The Director noted that the CAD's database was certified for use through a Privacy Threat Assessment process and was approved by the Department's Privacy Officer.

² "Significant Response" referred to the physiological responses to relevant questions that were consistent with individuals who were withholding relevant information.

The IPS and a CAD officer who conducted Complainant's 2021 and 2019 PEs, respectively, stated that they did not recall Complainant's EEO activity or other annotations at issue, and even if they did, it would not have affected the outcome of Complainant's PE.

Complainant acknowledged that she told the IPS about her EEO activity and other issues with her prior PEs. ROI at 20. Complainant stated that it was her decision to tell such and the Director, against whom she filed her prior EEO complaint, should not have said anything. Id. The Director denied having any conversations with the IPS in regard to Complainant.

Based on the foregoing, the Agency concluded that Complainant failed to establish that the Director either negatively influenced her June 28, 2021 PE or that any inappropriate mention of EEO activity was involved in her 2019 and/or 2021 PEs. The Agency stated that the record was devoid of any evidence in support of Complainant's claims. The Agency found that Complainant failed to prove that the Agency discriminated against her. Complainant appeals from the Agency's final decision.

CONTENTIONS ON APPEAL

Complainant filed her notice of appeal on September 16, 2023. On November 16, 2023, the Agency files its response to Complainant's appeal. Therein, the Agency contends that there is no evidence the Director influenced the IPS or PE examiners through email conversations regarding Complainant. Further, the Agency contends that the IPS or PE Examiners who conducted Complainant's 2019 and 2021 PEs would not have been able to view any information referencing Complainant's prior EEO activity because that information was not in her polygraph file. The only brief submitted by Complainant was submitted on December 16, 2023, challenging the Agency's response to her appeal.

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, we find that Complainant's appeal brief is untimely. EEOC Regulation 29 C.F.R. § 1614.403(d) provides, in relevant part, that any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Complainant filed the instant appeal on September 16, 2023. However, Complainant did not file her brief until December 16, 2023, which was beyond 30-day time limit set by the regulations. The Agency's final decision explicitly informed Complainant of the 30-day time limit to file her brief. Complainant has not requested an extension to file a brief; nor has she provided any justification warranting her untimely filing of a brief. Based on the foregoing, we find that Complainant filed her brief in an untimely manner. Thus, we will not consider Complainant's untimely brief herein.

Turning to Complainant's complaint, 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 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).

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.

We find that Complainant failed to establish a prima facie case of reprisal for prior EEO activity. Complainant was engaged in prior EEO activity. The Director was aware of Complainant's EEO activity. However, we find that other than her bare assertion, Complainant failed to provide any evidence the Director influenced, via email correspondence, the IPS concerning her June 28, 2021 PE (claim 1). Also, we find that other than her bare assertions, Complainant provided no evidence that any inappropriate mention of EEO activity was involved in her 2019 and/or 2021 PEs (claim 2). Complainant has not shown any nexus between her prior protected activity and the PEs at issue in this complaint.

Based on a thorough review of the record, we find that Complainant failed to show that the Agency's actions were motivated by retaliation as she alleged.

CONCLUSION

Accordingly, the Agency's final decision finding no retaliation 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 12, 2024
Date