



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

[REDACTED]
Sharolyn S.,¹
Complainant,

v.

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

Appeal No. 2023005233

Hearing No. 470-2022-00120X

Agency No. 1F-341-0010-22

DECISION

On September 21, 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 September 21, 2023, final order 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. For the following reasons, the Commission VACATES the Agency's final order.

ISSUE PRESENTED

Whether the EEOC Administrative Judge (AJ) properly issued a decision by summary judgment finding that Complainant was not subjected to unlawful discrimination based on race, sex, and/or reprisal as alleged.

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 worked as a Level 4 Mail Handler on Tour 2 at the Agency's South Bend Processing and Distribution Center (P&DC) in South Bend, Indiana. Complainant is an African American woman. Complainant identified her prior protected EEO activity as contacting an EEO counselor on October 9, 2021, to initiate the instant EEO complaint and participating in a REDRESS mediation session on November 17, 2021.

On September 28, 2021, Complainant was operating a forklift that she stated had minimal battery charge. Complainant parked the forklift adjacent to the maintenance shop, and the forks were not lowered to the floor. Complainant averred that the battery died before she could get the forks safely to the ground. The Acting Manager of Transportation Operations (Manager-1: White female) approached Complainant and asked her to turn off the forklift lights. Complainant averred that she turned off the lights and that Manager-1 yelled at her, accusing her of committing a safety violation because the forks were still in a raised position. According to Manager-1, Complainant became loud and disruptive on the workroom floor, yelled, and failed to follow instructions. Complainant stated that she told Manager-1 to stop yelling at her and said something to the effect that Manager-1 was "fucking crazy" and could not talk to Complainant that way because "you didn't push me out of your vagina." Report of Investigation (ROI) at 299.

Complainant alleged that Manager-1 told her to report to the Tour Office for an investigation and that she responded that she would not report to the office without her union representative, who was gone for the day. According to Complainant, Manager-1 followed her, blocked her path, and yelled at her to swipe out. Complainant alleged that, although Manager-1 yelled that she needed a supervisor, when they approached an Acting Supervisor (Supervisor-1: African American male), Manager-1 told Supervisor-1, "not you, I need a real one." ROI at 296. Complainant averred that she commented that Supervisor-1, who was African American, was apparently not good enough for Manager-1 under the circumstances, which Complainant characterized as racist. *Id.* According to Manager-1, Supervisor-1 was acting in a supervisory position, she needed "a real Form 50 management official" to avoid a potential conflict of interest, and the Tour 3 Manager Distribution Operations (Manager-2: female)² was the only "actual manager" present at

² Manager-2 retired effective December 31, 2021, and did not respond to the request for affidavit the EEO investigator mailed to her last known address,

the time. Complainant Opposition to Summary Judgment (CSJ) Ex. 10 at 124-29. Complainant stated that, as she swiped out, Manager-1 and Manager-2 approached her, and Manager-2 told Complainant to clock out and go home on Emergency Placement and that she would be notified when to report for an investigative interview.

On September 29, 2021, Manager-1 conducted an investigative interview with Complainant and a Union Steward (Union-1: Caucasian male). During the investigative interview, Manager-1 informed Complainant that the reason for the Emergency Placement was that she engaged in inappropriate conduct and failed to observe safety policy. Complainant alleged that her race and sex were the reasons she was placed on Emergency Placement. Complainant explained that Manager-1 had a history of not holding Caucasian male employees accountable for the same safety violations for which she disciplined African American female employees. Complainant returned to work from the Emergency Placement on October 2, 2021.

Complainant stated that there were three Level 5 employees on Tour 2, and she would fill in for these Level 5 employees on their scheduled days off, vacation days, and sick days. Complainant averred that management assigned these duties based on seniority but the two Level 4 Mail Handlers on Tour 2 with more seniority (Coworker-1: Caucasian female; and Coworker-2: Caucasian female) declined these duties. According to Complainant, on or about October 2, 2021, a Supervisor Maintenance Operations (Supervisor-2: Caucasian male) informed her that she had been displaced from her Level 5 dock duties. Complainant alleged that a Caucasian male Mail Handler who worked on Tour 1 (Coworker-3) was assigned to the dock and his schedule was changed to 4 a.m. to 12:30 p.m. and that she had less seniority than Coworker-3, so he would fill in for the higher-level duties on Tour 2 instead of Complainant.

Complainant stated that it was "ironic" that the change in Coworker-3's schedule began on the day she returned to work from the Emergency Placement, resulting in fewer opportunities for Complainant to perform Level 5 duties. ROI at 302-04. Manager-1 stated that Coworker-3 had technically been a Tour 1 employee because his start time was 3:30 a.m., while Tour 2 started at 4 a.m.

which, according to the USPS Tracking information, was delivered on February 22, 2022. Manager-2's race was not identified in the record.

According to Manager-1, the Acting Plant Manager (Manager-3: female)³ was aligning employee start times with the start times for tours and changed the start time for Coworker-3's bid position to align with the start time for Tour 2. The record contains a September 29, 2021, letter from Manager-3 to Coworker-3, stating that, due to operational needs, it was necessary to change his schedule to 4 a.m. to 12:30 p.m. effective October 9, 2021. ROI at 393. The record also contains a second September 29, 2021, letter from Manager-3 to Coworker-3, stating that the schedule change would be effective October 2, 2021. ROI at 394. According to Complainant, management created the second version of the letter around October 27, 2021. ROI at 67. Complainant stated that the union filed a grievance about Coworker-3's position not being properly posted and that, as part of the settlement, she received Level 5 backpay.

Complainant alleged that, on October 18, 2021, Manager-3 and Manager-1 forced her to perform Clerk/Expeditor duties when they instructed her to color code mail, which was not part of her job duties. According to Manager-1, she was in the Plant Manager's Office with Manager-3 when they received a page from a Clerk/Expeditor (Coworker-4: Caucasian female) asking for a supervisor to come to the dock. Manager-1 stated that Coworker-4 said that Complainant was not willing to put the dock plates down and raise the dock doors. Complainant averred that opening the dock door is not part of a Mail Handler's duties. Manager-1 averred that she told Coworker-4 to lower the plates and open the dock doors because that was what Clerk/Expeditors had historically done. According to Manager-1, Manager-3 said that, since Coworker-4 would be opening doors and dropping plates, she would have Complainant label and color code pallets. Manager-1 stated that she asked Manager-3 if she was sure, and she responded yes. According to Complainant, Manager-1 provided her with a quick crash course in color coding and labeling, and she took over part of Coworker-4's job responsibilities for the shift. Manager-1 averred that she later spoke with Manager-3, and Manager-3 said that she thought labeling and color coding were Mail Handler duties.

³ Manager-3 went on extended leave in December 2021 while under investigation for delayed mail and retired effective March 31, 2022. CSJ Ex. 10 at 44-45, 59-61; ROI at 202. Manager-3 did not respond to the requests for affidavit the EEO investigator emailed to her and mailed to her address of record, which, according to the USPS Tracking information, was delivered to her address of record on February 19, 2022. ROI at 944-50. Manager-3's race was not identified in the record.

Complainant stated that the union sent an email to Manager-3, and management agreed to have Clerk/Expeditors perform labeling and color-coding shipments, as they had historically done at the South Bend P&DC.

On October 19, 2021, Manager-1 issued Complainant a Notice of Removal (NOR) dated October 18, 2021. ROI at 576-78. The NOR charged Complainant with Unacceptable Conduct for the incident that occurred on September 28, 2021, including disregarding multiple safety policies, disregarding Manager-1's instructions, and yelling at Manager-1 that she was "not her child, she did not push you out of her vagina, therefore she cannot tell you what to do." ROI at 576. Manager-1 stated that, when determining the appropriate penalty, she considered that Complainant had previously been on Emergency Placement, although the Emergency Placement was no longer "live" and Manager-1 did not have firsthand knowledge of the facts and circumstances that led to the Emergency Placement and did not recall reviewing any documents related to the Emergency Placement. CSJ Ex. 10 at 148-49. The NOR notified Complainant that she would be removed effective November 26, 2021, and that she had the right to file a grievance within 14 days of receipt of the NOR. ROI at 576-78.

Complainant timely grieved the NOR. On October 26, 2021, Manager-1 issued a Step 1 decision denying Complainant's grievance. CSJ Ex. 10, Deposition (Depo.) Ex. CA-Q at 1-2. On October 26, 2021, Complainant appealed the grievance to Step 2, and Manager-2 signed the Standard Grievance Form on October 28, 2021. CSJ Ex. 10, Depo. Ex. CA-Q at 3. The record contains a November 12, 2021, decision signed by Manager-3, which denied the Step 2 grievance, and a November 12, 2021, letter to Complainant's union steward (Union-2: Caucasian male), which was also signed by Manager-3. CSJ Ex. 10, Depo. Ex. CA-Q at 4-5. On November 16, 2021, Union-2 sent a letter to Manager-3 as the Agency's Step 2 representative, stating that the union would be appealing to Step 3. CSJ Ex. 10, Depo. Ex. CA-Q at 6. According to Union-2, if the union decided to proceed with a Step 3 grievance, the union would file the Step 3 grievance form and all relevant documentation to the Plant Manager and the Step 3 representatives for both the Agency and the union. CSJ Ex. 2 at 3-4.

Complainant alleged that Manager-3 seemed to have a very limited role in the Step 2 grievance process and was helped by Manager-1, who handled the Step 1 process and had a motive to treat Complainant negatively.

Manager-1 denied involvement in the Step 2 process for Complainant's grievance, including any conversations with the Step 2 designee or the union, and she stated that her role in the process ended when she informed her manager that Step 1 had been completed and provided the Step 1 documents to be logged by the Operation Support Specialist (OSS-1: female) who functioned as the Plant Manager's secretary at the time. CSJ Ex. 10 at 50-53, 61-62, 160-62, 165-68, 195. According to Manager-1, OSS-1 processed grievance documentation for the entire South Bend P&DC and would log it into the Agency's Grievance and Arbitration Tracking System (GATS).⁴ CSJ Ex. 10 at 50-52. Manager-1 stated that Manager-3 did not initiate a lot of discipline and was not very familiar with GATS. CSJ Ex. 10 at 50-54, 162-63. According to Manager-1, her understanding was that Manager-3 was not involved in Step 2 for Complainant's grievance and that Manager-2 input the information into GATS and signed the PS Form 2608,⁵ while Manager-3 signed the letter. CSJ Ex. 10 at 162-63.

A Labor Relations Specialist for the Greater Indiana District (LR-1: Black male) stated that the management officials who met with the union were responsible for logging information into GATS at each step of the grievance procedure. CSJ Ex. 9 at 35-36. LR-1 averred that Labor Relations did not automatically receive Step 2 grievances and that it was the responsibility of local management, particularly the manager who issued the discipline, to inform Labor Relations of any grievance activity. According to LR-1, Labor Relations was the Step 2 designee for the entire state for NORS and was supposed to meet on all Step 2 grievances for removals and proposed removals. LR-1 stated that this process was not followed in Complainant's case and, as a result, Labor Relations was not involved at Step 2 or even aware that Complainant had filed a grievance concerning the NOR. Manager-1 stated that, at the time she was not aware that Labor Relations should have handled the Step 2 grievance procedure. CSJ Ex. 10 at 163.

According to Complainant, on October 29, 2021, she was in the Union Office during her break when Manager-1 knocked on the door and told Complainant she could not be in the Union Office without requesting union time. Complainant stated that she told Manager-1 she was on her break.

⁴ Union-2 stated that the union did not have access to GATS. CSJ Ex. 2 at 3.

⁵ PS Form 2608 is the Agency's Grievance Summary – Step 1 form. See CSJ Ex. 10, Depo. Ex. CA-Q at 2. The form signed by Manager-2 on October 28, 2021, was the Standard Grievance Form for appealing a grievance to Step 2. CSJ Ex. 10, Depo. Ex. CA-Q at 3.

Manager-1 averred that the Union Office was not a break room and that she told Complainant that she needed to take her break in a designated area. According to Manager-1, the South Bend P&DC had an issue with employees being in the Union Office while on break, which made it difficult to tell when an employee was on break or on union time.

Complainant averred that, on November 9, 2021, Manager-1 informed her that she was using unauthorized overtime, accused her of "clock creeping," and instructed her to clock out at her scheduled end tour. According to Complainant, she reminded Manager-1 that she was on the overtime desired list and said that she had stayed to finish the remaining mail. Complainant stated that, in the past week, no other supervisor had told her she was using unauthorized overtime. Complainant alleged that she was not allowed to work overtime for 10 days and that other Mail Handlers were allowed to work overtime, including Coworker-3, who was allowed to work overtime on November 9, 2021. Manager-1 stated that overtime was based on the needs of the service and that no overtime was available at the end of Tour 2 because the mail volume did not require overtime. According to Manager-1, overtime was available before the start of Tour 2 because of the morning dispatch of trucks, which left around 5 or 5:15 a.m., and Coworker-3 would come in an hour or two early to work overtime.

According to Complainant, Wednesday, November 24, 2021, was her last day of work pursuant to the NOR. ASJ Ex. 1 at 55. Complainant stated that the union had filed a pending Step 3 grievance on her behalf and that it was her understanding that she would not be removed from the Agency rolls until a decision was issued on her grievance. LR-1 averred that, when an employee timely grieved a NOR, there was a contractual prohibition against removing the employee until the grievance process had run its course. CSJ Ex. 9 at 47, 82. Section 16.5 of the Collective Bargaining Agreement (CBA) between the Agency and Complainant's union states that, in the case of discharge or a suspension of more than 14 days, the employee "shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance arbitration procedure." ROI at 1181. According to Manager-1, at the time, she was not aware that disciplinary actions such as removals were held in abeyance pending the grievance process. CSJ Ex. 10 at 169-70.

LR-1 stated that, sometime between December 10 and 13, 2021, he participated in a conference call with various managers in the South Bend P&DC, including Manager-1, Manager-2, Manager-3, and OSS-1, to discuss issues involving multiple employees. CSJ Ex. 9 at 62-68. LR-1 averred that,

during this conference call, Manager-1 informed him that Complainant did not have a pending grievance. CSJ Ex. 9 at 62-66. Manager-1 stated that she did not recall speaking with LR-1 between December 10 and 13, 2021. CSJ Ex. 10 at 168. LR-1 averred that, based on Manager-1 stating that Complainant did not have a pending grievance, he submitted a request to the Human Resource Shared Service Center (HRSSC) to remove Complainant on December 13, 2021. LR-1 averred that he copied Manager-1 on the email to HRSSC, which was marked as important, so she would know the action had been initiated. The record contains a December 13, 2021, email from LR-1 to a HRSSC Separations mailbox with a request to terminate Complainant's employment. ROI at 869. The importance of the message was marked as "High," and Manager-1 was copied. Id. Manager-1 did not respond to the email. Manager-1 stated that she did not inform LR-1 about the pending Step 3 grievance because "I did not feel that was within my right, to overstep a Labor Relations official, they know their job better than I know their job. So it's not my responsibility to notify Labor Relations whether a Step 3 was or was not filed, because that's handled by their office and not mine." CSJ Ex. 10 at 167. According to Manager-1, she knew that, since she was the Step 1 designee, "I would have never told anybody at any point in time that I did not set a Step 1 on that," and LR-1's boss, the Labor Relations Manager for the Greater Indiana District (LR-2: female),⁶ apologized to Manager-1 about accusing her of telling Labor Relations that a grievance had not been filed. CSJ Ex. 10 at 169, 176-77.

On December 20, 2021, Complainant's grievance regarding the NOR was settled at Step 3, and the settlement reduced the NOR to a seven-day time served suspension, returned Complainant to work "as soon as administratively possible, but no later than December 25, 2021," and provided for back pay. ROI at 1065. On Monday, December 20, 2021, LR-2 emailed Manager-3 and Manager-1, attaching a copy of the Step 3 settlement and stating that Complainant should be scheduled to return to work by December 25, 2021. LR-2 did not copy LR-1 on the email. On Wednesday, December 22, 2021, Manager-1 asked LR-2 to review a draft letter instructing Complainant to return to work, noting that, because Complainant's nonscheduled days were Thursday and Friday, she would not be scheduled to return until Saturday.

⁶ The record does not contain an affidavit, declaration, statement, or deposition from LR-2, and LR-2's race is not specified in the record.

On December 22, 2021, Manager-1 sent Complainant a letter by Express Mail, instructing her to return for duty on her next regular scheduled workday in accordance with the attached settlement and that, if that day fell on Christmas Day, she had "the right to elect to work the designated holiday." ROI at 595-96. Complainant stated that, on December 22, 2021, she received a copy of the settlement and a letter from Manager-1 stating that she would be returned to work.

On December 22, 2021, the HRSSC processed Complainant's removal for unacceptable conduct, effective November 26, 2021, and sent Complainant a letter with information about her benefits options "as a result of her separation from the U.S. Postal Service." ROI at 598-603. Complainant alleged that, on December 22, 2021, she logged into an Agency website and found a PS Form 50 showing that she had been removed from the Agency. According to Complainant, the next morning she was locked out of the Agency website. Complainant returned to work on December 25, 2021. Because various Agency systems, including the time and attendance system, reflected that she had been removed, Complainant was instructed to complete PS Form 1260 to record her work hours manually. Complainant alleged, however, that her supervisor (Supervisor-3: Black female) told her that her time could not be manually entered into the system, either, which meant Complainant would not receive a paycheck. On December 27, 2021, Union -2 emailed the Acting Plant Manager (Manager-4: Black male), stating that Complainant had returned to duty but had been removed from the rolls, which meant she could not enter her hours of work into the timekeeping system for pay and benefits purposes. ROI at 602. Manager-4 responded on December 27, 2021, stating that they had sent messages to get Complainant back in the timekeeping system. ROI at 602. LR-1 stated that, during his time in Labor Relations, Complainant was the only employee he was aware of who was wrongly removed from the rolls while a grievance was pending, and Labor Relations meeting on all Step 2 grievances in the state was meant to be a safeguard to prevent this from happening. According to LR-1, because he did not know that Complainant had filed a Step 1 grievance and Labor Relations was the Step 2 designee, he did not think to check to see if a Step 3 grievance was pending. CSJ Ex. 9 at 87-88.

Manager-1 was not at work from December 25, 2021, until January 3, 2022, but she stated that, upon her return, she went "above and beyond to try to assist" Complainant with the issues related to being removed from the rolls. CSJ Ex. 10 at 173-76. On January 3, 2022, Manager-1 responded to LR-1's December 13, 2021, email to HRSSC, requesting that HRSSC reinstate Complainant with a reinstatement date of December 25, 2021. ROI at 872.

On January 3, 2022, LR-2 emailed Manager-4 and Manager-1, requesting an update about Complainant's grievance and asking if anyone had been in contact with HRSSC about Complainant. ROI at 877. LR-2 stated that LR-1 had been told that no grievance was filed on Complainant's NOR, which led to her being improperly removed from the rolls and meant she would not be paid properly for her work. ROI at 877. According to LR-2, Labor Relations was the Step 2 designee for all NORs, stating, "We have set this up so that we can properly track these grievances to prevent situations like this." ROI at 877. On January 3, 2022, Manager-1 responded to LR-2, stating that Complainant returned to work on December 25, 2021, while Manager-1 was on annual leave, and that Manager-1 had contacted HRSSC about reinstating Complainant earlier that day. ROI at 877.

On January 3, 2022, LR-2 emailed Manager-1, "From what I [am] hearing, you told a Labor rep no grievance was filed. Normally the employee won[']t go off the rol[l]s until disposition of the grievance. I am trying to figure out where we had the breakdown in order to not run into this situation in the future. So were you not aware of the grievance that local management met on?" ROI at 876. On January 4, 2022, LR-2 emailed Manager-1, stating that she apologized because, "After speaking with [LR-1], it was another management official that told him no grievance was filed. I will reach out to that management official⁷ to get more information on that later. . . . I wanted to personally reach out to you to apologize on the incorrect information I received." ROI at 876. LR-2 stated that her biggest worry was getting Complainant placed back on the rolls and suggesting that she be paid administrative leave for the days she was scheduled to work but could not based on the error. ROI at 876. Manager-1 responded, thanking LR-2 for the apology and stating, "I would also like to apologize for the miscommunication between the South Bend team and the Labor team regarding this issue. I can most certainly understand the frustration on situations like this especially when said issues can be avoided." ROI at 875.

The record contains a PS Form 50 showing that, on January 4, 2022, the HRSSC processed an action with an effective date of November 26, 2022, to reactivate Complainant in order to continue her appointment pursuant to a December 20, 2021, settlement. ROI at 749. Complainant stated that, on January 5, 2022, she spoke to Manager-4 and HR, who told her that she had been reinstated in some computer systems but would need to update her direct deposit information and re-apply for benefits.

⁷ The record does not contain documentation of any communication between LR-2 and any management official regarding this matter.

According to Complainant, she was not paid correctly and was also wrongly assessed with 12 hours of unpaid leave, although the leave balance issue was later settled through the grievance process. The record contains a January 5, 2022, Notice of Debt Determination sent to Complainant based on an overdrawn balance of 28 hours of annual leave at the time of her separation. ROI at 715-17. Complainant stated that she only had a negative balance of six hours of annual leave as of November 24, 2021, but that the balance increased after she returned to work. ASJ Ex. 1 at 68-69. On February 16, 2022, Manager-4 sent a letter to Union-2, stating that management had reached out to HRSSC to have Complainant's benefits reinstated. ROI at 657.

On January 3, 2022, Union-2 emailed Manager-4, asking if Complainant could get a pay advance that week, and Manager-4 responded on January 4, 2022, that he would see what their options were. ROI at 873. On January 4, 2022, Manager-4 forwarded the message to an unidentified South Bend P&DC management individual, asking if they could do something like a pay advance and who they would need to speak with. ROI at 873. On January 8, 2022, Supervisor-3 emailed Manager-4, asking if it was possible to provide a pay advance for Complainant because she had not received a paycheck that week since she was not in the system when she returned to work. ROI at 879. On January 5, 2022, Manager-1 received an email from a Time & Attendance Compliance Specialist stating that she could submit an AdjustPay adjustment with a pay advance for Complainant on or after January 7, 2022. ROI at 881. Complainant averred that she contacted Payroll Services, who informed her that she was eligible for a 65 percent payroll advance because she had not received a paycheck. According to Complainant, on or about January 10, 2022, she was paged over the intercom three times, twice by Supervisor-3 or OSS-1 and once by Manager-1. ROI at 325-26. Complainant alleged that she spoke to Supervisor-3 who asked Complainant if she wanted to page her union steward because she would need to request the payroll advance directly from Manager-1. ROI at 325. Complainant stated that she had already informed Supervisor-3, her direct supervisor, and Manager-4, the Acting Plant Manager, that she wanted a pay advance, so she questioned why she had to ask Manager-1 directly and explained that she felt humiliated by having to request an advance directly from Manager-1 given her recent history with Manager-1. ROI at 325; Agency Motion for Summary Judgment (ASJ) Ex. 1 at 64-66. Manager-1 averred that Supervisor-3 did not have access to the AdjustPay system to complete a salary advance.

According to Manager-1, she informed Complainant about the pay advance process, which would pay 65 percent of the total gross amount of her paycheck, be provided as a money order, and be subject to repayment when the full paycheck was received. Manager-1 stated that Complainant was probably paged two times that day: once when Manager-1 explained the pay advance, and a second time when Manager-1 informed her that she had completed the adjustment. CSJ Ex. 10 at 192. Manager-1 averred that she spoke with Union-1 about the pay advance but informed Union-1 that Complainant would need to make the request directly to Manager-1, explaining that "I was not going to complete and adjustment on an employee that has previously filed an EEOC complaint against me, as that opens up a can of worms if the employee didn't request for me to touch her time." CSJ Ex. 10 at 193. When Manager-1 was asked if she was cognizant that being named in an EEO complaint could have repercussions, she responded, "Well, I know that – that anything regarding an EEOC complaint can be twisted in that nature, so yes." CSJ Ex. 10 at 193. In a signed January 9, 2022, statement, Union-1 stated that during a January 7, 2022, conversation with Manager-1 about Complainant's pay and benefits, Manager-1 said that Complainant would have to request a pay advance directly from Manager-1 because she was the only supervisor who could process it and because Manager-1 did not want there to be any "other issues with this" since she and Complainant "have had issues in the past." ROI at 34, 611.

Complainant stated that she received a payroll advance for the wrong amount because Manager-1 ignored her when she pointed out an error. Complainant averred that Manager-1 subsequently completed a second payroll advance calculation with the same error and, although the amount was lower than it should have been, Complainant reluctantly agreed to accept the payroll advance because she had not received a paycheck in some time. According to Complainant, the first paycheck she received in 2022 validated that her calculations for the payroll advance had been correct. Manager-1 stated that, when she reviewed her calculations, she came up with the same total gross amount. CSJ Ex. 10 at 185-86. According to Manager-1, Complainant did not explain the difference was between her calculation on the salary advance form and what Complainant thought it should be. CSJ Ex. 10 at 184-89. In Manager-4's February 16, 2022, letter to Union-2, Manager-4 stated that Complainant had "received a pay advance and the balance will be paid by HR at a later date." ROI at 657.

The record contains a January 11, 2022, AdjustPay Certification, reflecting 32 hours of other paid leave, 8 hours Christmas work, 8 hours of holiday leave, and 8 hours of Sunday premium pay. ROI at 613-15, 892-94.

Based on Complainant's hourly Level 4 pay rate of \$21.3524, the total gross amount was \$982.21, and the authorized pay advance was \$640.00, which represented 65 percent of the total gross amount, rounded up to the nearest \$5.00. ROI at 615, 894. On January 13, 2022, Complainant emailed Manager-1, stating that Manager-1 had incorrectly calculated her pay advance and that, when she tried to raise the issue with Manager-1 on January 10, 2022, it "fell on deaf ears." ROI at 884. Complainant stated that her calculations were attached and requested that Manager-1 review them at her earliest convenience, attaching copies of her manual pay records from December 25, 2021, to December 29, 2021, with handwritten calculations. ROI at 617-21. Complainant's time records reflected that, on Sunday December 26, 2021, she performed Level 5 work, for which her hourly rate was \$22.0682, which resulted in \$176.55 for eight hours of work, plus \$44.14 in Sunday premium. ROI at 618. Complainant's total gross amount was \$1,160.20, and she calculated that 65 percent of that amount was \$754.13. ROI at 621. Rounded up to the nearest \$5.00, this would have resulted in a pay advance of \$755.00. The record contains a second January 14, 2022, AdjustPay certification, reflecting Level 4 pay for 32 work hours, 8 hours of Christmas work, 8 hours of holiday pay, and 8 hours of Sunday premium pay. ROI at 622-24. The January 14, 2022, AdjustPay certification again resulted in a total gross amount of \$982.21 and an authorized pay advance of \$640.00. ROI at 624. During her deposition, Manager-1 was shown an exhibit that included a paystub, which showed that Complainant's gross pay was \$1,160.20 for the dates in question. ROI at 187-88. Manager-1 responded that this information had not been provided to her and that no one had provided her with "any evidence" to show that her calculations were incorrect. CSJ Ex. 10 at 184-89.

Complainant alleged that, on March 23, 2022, she logged into her Electronic Official Personnel Folder (eOPF) and became aware that management had placed inaccurate disciplinary documents in her eOPF. According to Complainant, she saw a PS Form 6075, Notice of Removal or Separation for Disability (not OWCP) dated December 13, 2021, and two copies of the October 18, 2021, NOR. The record contains a PS Form 6075 signed by Labor Relations on December 13, 2021, which states that Complainant received a NOR on October 18, 2021, and that appeal rights were not exercised, so the removal must be processed with an effective date of November 26, 2021. ROI at 737. Complainant averred that she reported the matter to Supervisor-3 and her union steward, and Supervisor-3 provided Complainant with PS Form 8043, Request to Amend Electronic Official Personnel Folder. Complainant stated that the creation and the publication of the PS Form 6075 in her eOPF caused her great stress and discomfort.

Manager-1 stated that she did not have any control over items placed in or removed from employees' eOPFs, which were controlled by HRSSC, and she denied contacting HRSSC to place any documents in Complainant's eOPF.

On October 9, 2021, Complainant initiated contact with an EEO Counselor. On November 4, 2021, the EEO Counselor notified Manager-1 and Manager-3 that an "EEO Complaint has been filed" by Complainant, who had named them as the responsible management officials. ROI at 83. On November 10, 2021, the EEO Counselor notified Complainant, her representative, Manager-1, and Manager-3 that a REDRESS Mediation Conference had been scheduled for November 17, 2021. ROI at 58-59.

On January 12, 2022, Complainant filed a formal EEO complaint, alleging that the Agency discriminated against her on the bases of race (African American), sex (female), and reprisal for prior protected EEO activity under Title VII (initiating the instant complaint) when:

1. On September 28, 2021, she was placed off duty on Emergency Placement;
2. On October 2, 2021, she was displaced from her Level 5 dock duties;
3. On October 18, 2021, she was forced to perform Clerk/Expeditor duties;
4. On October 18, 2021, she received a NOR;
5. On October 29, 2021, she was instructed not take her break in the Union Office;
6. On November 9, 2021, management accused her of unauthorized overtime and she was not allowed to work overtime for a period of 8-10 days;
7. On December 22, 2021, she became aware that, despite an ongoing grievance, she had been formally separated from the Agency and ceased to exist in various systems, she was not paid correctly, was wrongly assessed with 12 hours of unpaid leave, and her paycheck was delayed;
8. On January 10, 2022, in an attempt to humiliate her, management paged her several times and informed her she would have to ask Manager-1 for a payroll advance; and
9. On March 23, 2022, she became aware that management had placed inaccurate disciplinary documents in her eOPF.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ).

The Agency filed a motion for summary judgment. Complainant filed a response in opposition to the Agency's motion for summary judgment. The Agency also filed a reply to Complainant's response.

The AJ determined that there were no genuine issues of material fact to be resolved at a hearing and issued a decision without a hearing. The AJ's decision incorporated by reference the Agency's motion for summary judgment, finding that the Agency correctly identified the accepted claims, the undisputed material facts, the applicable legal standards, and the grounds upon which the case should be decided without a hearing. The AJ concluded that Complainant could not establish that she was subjected to discrimination as alleged.

The Agency's final order implemented the AJ's decision without a hearing finding no discrimination. The instant appeal followed.

CONTENTIONS ON APPEAL

Neither party submitted a statement or brief on appeal.

STANDARD OF REVIEW

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*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250.

In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrener, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (Feb. 24, 1995).

After a careful review of the record, we find that the AJ erred when they concluded that there was no genuine issue of material fact or the need to assess credibility in this case. In finding no discrimination, the AJ relied on the undisputed material facts as set forth in the Agency's motion for summary judgment. However, at the summary judgment stage, the AJ must believe the non-moving party's evidence and draw all justifiable inferences in the non-moving party's favor.

The record is devoid of evidence regarding the Step 2 grievance process and why the normal procedures were not followed. Manager-1, who handled the Step 1 process, stated that she provided the documents to the Plant Manager's secretary to be logged. It does not appear that OSS-1, who performed these secretarial duties, was asked to provide an affidavit or statement, and there is no explanation in the record as to why South Bend P&DC management did not notify Labor Relations, the Step 2 designee for all NORs in the state, that a grievance had been filed. It is also not clear who actually handled the Step 2 process on behalf of management, as Manager-2 signed the Step 2 Standard Grievance Form on October 28, 2021, but Manager-3 signed the November 12, 2021, decision and the November 12, 2021, letter. CSJ Ex. 10, Depo. Ex. CA-Q at 3-5. Manager-3's decision stated that the Step 2 grievance had been discussed with the union but did not specify when the discussion took place. This is material given the extremely close temporal proximity between Complainant initiating EEO counseling, the issuance of the NOR on October 19th, the October 26th Step 1 decision, the EEO Counselor notifying Manager-1 and Manager-3 about Complainant's EEO contact and the REDRESS mediation, the November 12th Step 2 decision, the November 17th REDRESS mediation, Manager-1 allegedly telling LR-1 that Complainant did not have a pending grievance between December 10th and 13th, and Complainant's removal from the Agency's rolls.

The Agency's motion stated that the EEO Counselor contacted Manager-3 on November 5, 2021, and contacted Manager-1 on November 8, 2021. However, the record reflects that, on November 4, 2021, the EEO Counselor emailed Manager-1 and Manager-3, stating that an "EEO Complaint has been filed" by Complainant, who had named them as the responsible management officials. ROI at 83.

There also is the need to assess the credibility of Manager-1 and LR-1 regarding the December 2021 conversation during which LR-1 alleged that Manager-1 told him that Complainant did not have a pending grievance. Manager-1 stated that she did not recall speaking to LR-1 at any time between December 10 and 13, 2021. CSJ Ex. 10 at 166-68. While Manager-1 was certain that she did not tell LR-1 or anyone that she did not participate in Step 1 grievance process, she did not specifically deny stating that Complainant did not have a pending grievance. CSJ Ex. 10 at 168-69. Moreover, Manager-1 did not indicate whether she was aware that, at the time, Complainant had a pending Step 3 grievance. CSJ Ex. 10 at 166-69. Two of the individuals who were allegedly present for the December 2021 conversation, Manager-2 and Manager-3, retired and did not provide a statement, and it does not appear that the other individual who was allegedly present, OSS-1, was contacted to provide a statement. Manager-1 stated that the January 4, 2022, apology from LR-2 supported her testimony that she did not tell LR-1 that Complainant did not have a pending grievance. On January 4, 2022, LR-2 stated, "I apologize to you. After speaking with [LR-1], it was another management official that told him no grievance was filed. I will reach out to that management official to get more information on that later. But my biggest worry now is trying to get the employee placed back on the rolls." ROI at 876. However, there is no evidence in the record showing that LR-2 subsequently contacted any other management officials regarding this matter, and LR-2 did not provide a statement. Moreover, Manager-1 also apologized to LR-2 for the "miscommunication" between South Bend P&DC management and Labor Relations. ROI at 875.

Regarding the pay advance, it is not clear why Manager-1 made Complainant request a pay advance directly from her. By that time, Complainant and the union had requested a pay advance from Supervisor-3, Complainant's direct supervisor, and Manager-4, the Acting Plant Manager. Manager-1 stated that Supervisor-3 could not process the pay advance for Complainant because she did not have the needed access to AdjustPay, but this does not explain why Manager-1 required Complainant to come to the office and personally request a pay advance from Manager-1. Manager-1's affidavit and deposition were inconsistent on this point, calling her credibility into question.

In her affidavit, Manager-1 denied stating that Complainant needed to ask her directly for a pay advance. ROI at 783-84. However, in her deposition, Manager-1 stated that she told Union-1 that Complainant would need to approach her directly if she wanted a pay advance, explaining, "I was not going to complete an adjustment on an employee that has previously filed an EEOC complaint against me, as that opens up a can of worms if the employee didn't request for me to touch her time." CSJ Ex. 10 at 193. Here, however, Complainant had made multiple requests for a pay advance when she did not receive a paycheck after being removed from the rolls. Drawing all justifiable inferences in favor of Complainant, Manager-1's comment, taken together with Complainant's unambiguous requests for a pay advance, could lead a reasonable finder of fact to conclude that Manager-1's actions were motivated by Complainant's prior protected activity. Manager-1 was informed that she could process a pay advance for Complainant on or after January 7, 2022, but she did not do so for the first time until January 10, 2022. Complainant stated that she objected on January 10, 2022, that the pay advance calculated by Manager-1 was too low. Manager-1 stated that Complainant did not explain why she thought the calculations were incorrect, but Manager-1 did not indicate whether she reviewed Complainant's January 13, 2022, email with the handwritten calculations before completing the second calculation on January 14, 2022.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of Manager-1, LR-1, Complainant, and other witnesses.

Therefore, judgment as a matter of law for the Agency should not have been granted. To avoid fragmenting Complainant's harassment claim, we remand the entire complaint for hearing. See Complainant v. Dep't of the Treasury, EEOC Request No. 0520130425 (Oct. 29, 2013).

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and REMANDS the matter to the Agency in accordance with this decision and the ORDER below.

ORDER

Within **fifteen (15) calendar days** of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's Indianapolis District Office a renewed request for hearing on behalf of Complainant, a copy of the complete complaint file, and a copy of this appellate decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Within **five (5) calendar days** of the date of assignment of the new hearing number, the Agency shall provide written notification to the Compliance Officer. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (R0124)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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 21, 2025
Date