



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Pamela B.,¹
Complainant,

v.

Mark Averill,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2023005380

Agency No. ARCEPORT20MAR01199

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 1, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination or harassment on the bases of race, age, and reprisal.

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 Geotechnical Engineer, GS-0810-11, at the Agency's Army Corp of Engineers, Portland District in Portland, Oregon.

On April 18, 2020, Complainant filed an EEO complaint alleging, as amended, that the Agency discriminated against her and subjected her to a hostile work environment based on race (African American), age (54), and in reprisal for prior protected EEO activity with respect to assignment of duties, terms and conditions of employment, and disciplinary action by her first-line supervisor (S1), Design Section Chief, when:

1. From May 2018 to present, S1 denied her training opportunities;
2. On June 8, 2018, S1 requested her college transcripts from the Civilian Personnel Advisory Center (CPAC);
3. From September 2018 to present, S1 has tried to change her position description based on her college transcripts;
4. From April 2019 to present, S1 has assigned her duties based on her college transcripts;
5. On March 2, 2020, she received a notice of proposed suspension;
6. On or around May 2020, she received her annual performance appraisal, covering the period from April 1, 2019 to March 31, 2020, with the rater's comments contradicting her rating;
7. On May 27, 2020, S1 issued her a written counseling; and
8. On June 17, 2020, Complainant's second-level supervisor (S2), Design Branch Chief/Supervisory Civil Engineer, downgraded her proposed suspension and instead issued her a letter of reprimand.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

The Agency found in its final decision that management articulated legitimate, nondiscriminatory reasons for its actions.

Regarding claim 1, S1 denied some of Complainant's training requests due to budgetary constrictions. The Agency found that Complainant had received the third most training opportunities among the 13 employees under S1's supervision. Because funds for employee training were limited, management wanted to distribute such funds fairly among the employees and therefore denied some of Complainant's requests. S1 also averred that some of the training courses Complainant requested had prerequisites that Complainant did not appear to meet. The Agency also concluded that the employees Complainant named as being outside of her protected classes but who were granted training in fact had different job grades/series from Complainant and therefore were not similarly situated.

Regarding claims 2, 3, and 4, which involved Complainant's transcripts, the Agency found that S1 had requested the transcripts of all his employees. Management was in the process of developing a five-year plan, part of which included assessing employees' knowledge, skills, and abilities (KSA) and matching employees' educational backgrounds to their position descriptions. Complainant initially did not provide the transcript, despite S1's multiple requests. Ultimately, she provided S1 with a transcript that S1 described as "home-made, contained errors, and had courses that were unlike any other degree [he] had ever seen." ROI at 613. Because S1 doubted the authenticity of the document, he requested Complainant's transcript from CPAC.

Once S1 received Complainant's transcript, he realized that her education did not show any courses in geology or geotechnical engineering and lacked senior design electives that he believed would have been part of such a degree program. As a result, S1 decided that Complainant's position description should be changed from that of a geotechnical engineer to a civil engineer, and this decision was made in conjunction with S2 and the division's Administrative Officer (AO). According to S1, the recommended changes were intended to align Complainant's duties with her KSA and allow her to be more successful in her performance.² S2 averred that the proposed position description change seemed reasonable based on Complainant's education and demonstrated skillset. Complainant opposed the changes to her position description, and ultimately upper management did not go through with the change.

² S1 stated that two of his other employees also displayed a mismatch between their education and duties—they were civil engineers with degrees in environmental engineering—and that both employees were subsequently directed to more appropriate career paths.

While the position description issue was still pending, S1 proceeded with the assumption that Complainant's position description would change. S1 felt that Complainant "lack[ed] the KSA to be a geotechnical engineering specialist." ROI at 615. S2 also felt that Complainant's education did not include the coursework of a geotechnical engineer, as demonstrated by her inability to develop "bearing pressures" for a structure that was under design, which "is fundamental knowledge that is obtained by all geotechnical engineers." ROI at 638. S2 further noted that a senior geotechnical engineer who had reviewed Complainant's work indicated that the work was inadequately performed. Therefore, S1 assigned Complainant tasks that he felt were within her qualifications and experience, per her resume and transcripts. Complainant disagreed with S1's assignments and refused to accept several of them.

Regarding claims 5 and 8, which involved the proposed suspension and later mitigation to Letter of Reprimand, S1 issued Complainant a Notice of Proposed Suspension on March 2, 2020. Complainant was charged with "Refusal to Accept Assignments" on two occasions. ROI at 51. On December 12, 2019, S1 had tasked Complainant to be the leader of the Inspection of Completed Works Program (ICW) Team. The next day, at a section meeting, S1 tasked Complainant with performing Dam Safety as the ICW Team leader. In an email to S1 and S2 on January 31, 2020, Complainant stated that she would no longer perform environmental restoration inspections or drain inspections, which were part of the ICW duties. S1 felt that Complainant exhibited insubordination. In the Notice of Proposed Suspension, S1 noted that Complainant had previously been counseled for an unwillingness to perform work as assigned and that Complainant had declined meeting invitations to discuss these assignments.

Several months later in June 2020, S2 issued a Notice of Decision on Proposed Suspension, which mitigated the proposed suspension to a Letter of Reprimand. S2 sustained the charges within the Notice of Proposed Suspension, finding that various emails showed Complainant's refusal to perform work reasonably assigned to her. S2's reason for mitigating the charge was due to his belief that the relationship between Complainant and S1 was strained and that "both parties played some role in the situation." ROI at 642. In this regard, S2 noted that Complainant had previously complained of harassment by S1, and while the Agency's investigation found "no harassment based specifically on EEO guidelines," S1's communication style was found to be "condescending, overly loud, and insulting." Id. at 639.

The Agency's final decision also found that the two employees Complainant named as having refused to do assignments but never being disciplined were not similarly situated. One refused to work on a holiday weekend, and the other had not refused work assignments but had been on parental leave.

Regarding claim 6, Complainant alleged that S1's narrative for Complainant's performance appraisal (covering the period from April 1, 2019 to March 31, 2020) indicated that she did not meet the expectations of her position even though she was rated as Fully Successful. S1, Complainant's rating official, averred that he intended to give Complainant an Unsuccessful rating, which would have aligned with the narrative he wrote, but S2, who was the reviewing official, felt that they did not have "enough documentation" for an Unsuccessful rating. ROI at 645. As a result, S1 raised his rating to Fully Successful. S1's narrative identified shortcomings he observed in Complainant's performance, and S2 averred that he "agreed with [S1's] narrative" and that "it was an accurate portrayal of [Complainant]'s performance." Id.

Regarding claim 7, S1 issued Complainant a written counseling on May 27, 2020. S1 consulted with AO prior to issuing the written counseling, and AO averred that it was common in the office to utilize the written counseling form to document discussions between supervisors and employees and that the form is not part of any official personnel record. S1 stated in the counseling form that Complainant failed to complete two of her tasks on time and that she failed to attend a section meeting without informing S1 or explaining her absence.

The Agency found that Complainant failed to establish that the Agency's explanations were pretext for discrimination or reprisal and that she merely challenged the wisdom of management's business decisions. The Agency also concluded that management's actions were not influenced by discriminatory or retaliatory animus and therefore did not rise to a hostile work environment.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that S1 is guilty of unconscious bias against African American women like herself and "[m]icroaggressive" behavior that made her dread being in his presence. She argues that S1 misled CPAC to obtain her college transcripts, and that he did so to try and prove she was not a qualified geotechnical engineer.

She argues that her team leads did not have a problem with her work and that she met all of her deadlines, but that S1 never valued her as an employee. Complainant maintains that four other employees got an opportunity to go to a training in the Seattle District and that they have not implemented the training into their work, whereas she would have done so if S1 had shared the opportunity with her. She claims that S1 "capped" her training to prevent her from reaching full success. Complainant maintains that S1 "[w]eaponize[d]" the verbal counseling forms by writing her up several times, such as for missing meetings, while "others" have missed meetings and were never written up and just got a "verbal talking to." Complainant also argues that S1 is not good at supervising women engineers.

In its brief opposing the appeal, the Agency argues that Complainant's brief does not specially respond or challenge the findings in the final Agency decision and that she merely recounts her allegations. The Agency also notes that Complainant's arguments about S1's alleged bias against women is not relevant because Complainant did not raise sex as a basis of discrimination in her complaint, and that she does not appear to challenge the conclusions in the final decision regarding age or reprisal. The Agency argues its final decision was correct in finding that Complainant failed to show that management's explanations for its actions were pretextual.

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, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

At the outset, we note that Complainant has not challenged the Agency's framing of the complaint and sex is not a basis in the complaint.

To prevail in a disparate treatment claim, 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 of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas); see Homer B. v. Dep't of Interior, EEOC Appeal No. 2019005980 (Dec. 21, 2020).

To establish a prima facie case of disparate treatment based on race or age, Complainant must show that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) she was treated differently than similarly situated employees outside her protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nannette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (Mar. 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008), request for recons. denied, EEOC Request No. 0520080545 (June 20, 2008).

For a reprisal claim, Complainant may establish a prima facie case by showing that: (1) she engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, she 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); see Carr v. U.S. Postal Serv., EEOC Appeal No. 0120065298 (June 26, 2007); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13; Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. 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 Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (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 cannot establish a prima facie case of disparate treatment based on race or age. While Complainant meets the first two prongs of the prima facie case, the record fails to establish an evidentiary link or causal relationship between Complainant's race or age and the Agency's actions. Other than Complainant's own feeling that S1 had a bias against African American women and that he treated her less favorably than her coworkers, Complainant has not presented any facts that reasonably give rise to an inference of discrimination.

Regarding reprisal, we find Complainant established a prima facie case. She engaged in protected activity when she complained about alleged harassment by S1, management was aware of this complaint, she was subjected to adverse actions, and there was temporal proximity between her prior EEO activity and the alleged incidents.

Next, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. S1 denied several of Complainant's training requests because she had already completed training in the prior fiscal years and there was a limited budget for such training that S1 wanted to equally disburse among his employees. S1 requested Complainant's transcripts after her refusal to provide them, and he subsequently relied on the information in her transcripts when he attempted to change Complainant's position description so that it was more applicable to her experience and KSA. Similarly, he assigned her duties that he felt were more in line with her demonstrated abilities and her prior coursework. After Complainant refused to do several of these assignments, S1 proposed a suspension for Complainant's insubordination. S2 sustained the charged misconduct, though he mitigated the suspension to a Letter of Reprimand given that both Complainant and S1 had played a role in their contentious working relationship.

As for her performance appraisal, S1 had intended to give Complainant an Unsuccessful rating because her work was not sufficiently advanced, so the narrative he wrote for the appraisal explained how Complainant's work did not rise to her grade level and that she was successful in only limited parts of the mission.

S2, who reviewed S1's ratings, was concerned that they did not have enough documentation to support an Unsuccessful rating, but S2 averred that he agreed with S1's narrative of Complainant's performance. S1 issued Complainant a written counseling form because she had not delivered certain assignments on time and had been absent from a section meeting without informing S1. AO stated that the written counseling forms, which were not part of an employee's personnel file, were frequently used between supervisors and their employees to document discussions and set expectations.

We find that Complainant fails to establish that the articulated reasons were pretext for discrimination or retaliation. Complainant's arguments on appeal consist of her own subjective beliefs and do not specify any record evidence that casts doubt on the Agency's explanations. It is undisputed that S1 asked for the transcripts of all his employees, not just Complainant's. This led S1 to also find that two of his other engineers had inappropriate position descriptions based on their coursework. Therefore, Complainant's argument that S1 asked for her transcripts solely as a means to claim she was unqualified is not supported by the record. We also find Complainant's bare assertion that her team leads had no problems with her work is insufficiently persuasive to show that S1 and S2's evaluation of her performance is unworthy of belief. Other than arguing in general terms that "others" got more training opportunities or did not receive written counseling forms, Complainant has not shown that similarly situated employees outside of her protected bases were treated more favorably; nor has she established that the Agency's explanations are not credible.

A finding of a hostile work environment is precluded by our determination above that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision finding no discrimination.

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

February 18, 2025
Date