



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Verna G.,¹
Complainant,

v.

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

Appeal No. 2024000994

Agency No. 4G-300-0199-23

DECISION

On November 14, 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 27, 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

The issue is whether Complainant was subjected to discrimination regarding her removal during her probationary period based on her race (African-American), color (Black), and age (YOB: 1986).

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

During the period at issue, Complainant worked as a PSE Sales and Services Distribution Associate, PS 6 at the Agency's facility in Athens, Georgia. Complainant began working in that position on November 19, 2022, in a 90-day probationary period. Report of Investigation (ROI) at 67, 119, 148. Under the applicable collective bargaining agreement, the Agency has the right to remove any probationary employee during the probationary period and these probationary employees do not have access to the grievance procedure. ROI at 148, 189.

The Agency's Employee and Labor Relations Manual notes that an employee's failure to be regular in attendance may result in disciplinary action, including removal from the Agency. The Manual defines tardiness as any employee failing to report at his or her scheduled time. ROI at 213-214.

On December 19, 2022, Complainant's supervisor ("Supervisor") issued Complainant's 30-Day Probationary Report. Supervisor did not recommend Complainant for retention, stating that Complainant "couldn't make it to work on time – Consistently late." ROI at 124.

From December 19, 2022, to January 19, 2022, Complainant arrived late to work 15 times. ROI at 125-130.

On January 19, 2022, Supervisor issued Complainant's 60-Day Probationary Report. Once again, Supervisor noted she would not recommend Complainant for retention because she was "continuously late." ROI at 123.

From January 19, 2022, to January 31, 2022, Complainant arrived late to work an additional 6 times. ROI at 130-132.

On January 31, 2023, the Agency removed Complainant from employment. The Letter of Separation stated that Complainant's employment was terminated because her attendance was unsatisfactory and because she did not demonstrate any improvement during her probationary period. The Letter of Separation listed 21 instances where Complainant failed to report to work on time. ROI at 122.

On May 3, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), color (Black), and age (YOB: 1986), when, on January 30, 2023, she was terminated from employment during her probationary period.

The agency conducted an investigation into the complaint. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). 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 (FAD) 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. This appeal followed.

CONTENTIONS ON APPEAL

Complainant did not submit a brief with her appeal. The Agency did not submit a response to Complainant's 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, 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

Disparate Treatment Based on Age

As a preliminary matter, we address Complainant's age discrimination claim. The Age Discrimination in Employment Act (ADEA) provides that all personnel actions taken by a federal agency with regard to an employee, who is at least forty (40) years old, "shall be made free from discrimination based on age." 29 U.S.C § 633a. See also 29 C.F.R. § 1614.103(a) (processing of discrimination complaints from aggrieved individuals "at least 40 years of age"). The record reveals that Complainant was 36 years old at the time of the alleged discrimination. ROI at 119.

Therefore, she was not covered by the ADEA and the Agency correctly dismissed this basis of discrimination.

New Evidence on Appeal

The Commission will not consider new evidence on appeal, unless the party attempting to submit the new evidence affirmatively shows that the evidence was not reasonably available prior to or during the investigation. EEO Management Directive 110 at Ch. 9, § VI.A.3 (citing 29 C.F.R. § 1614.404(b)). Here, Complainant submitted on appeal new evidence that was not previously part of the record. Complainant has not demonstrated that this evidence was not reasonably available earlier. Therefore, we decline to consider this new evidence. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 01A54872 (Nov. 10, 2005) (declining to consider new evidence complainant submitted on appeal because he did not demonstrate that this evidence had not been reasonably available earlier).

Disparate Treatment Based on Race and Color

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment, and (3) they were treated differently than similarly situated employees outside their protected class, or there was some evidentiary link between membership in the protected class and the adverse employment action. See Nanette 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); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

Once a complainant has established a prima facie case, the burden of production 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). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant satisfied the first prong of the prima facie case because she established that she is a member of a protected class (African-American and Black). ROI at 67. Complainant also satisfied the second prong of the prima facie case because she showed that the Agency subjected her to an adverse employment action by terminating her employment during her probationary period. ROI at 122.

However, Complainant did not satisfy the third prong of the prima facie case because she did not show that she was treated differently from similarly situated employee outside her protected class. It is well established that in order for comparative evidence relating to other employees to be considered relevant, all relevant aspects of the employees' work situation must be identical or nearly identical, i.e., that the employees report to the same supervisor, perform the same job function, and work during the same periods. Cantu v. Dep't of Homeland Sec., EEOC Appeal No 01A60528 (Jul. 14, 2006), citing Anderson v. Dep't of Treasury, EEOC Appeal No. 01A22092 (Mar. 13, 2003); Stewart v. Dep't of Def., EEOC Appeal No. 01A02890 (Jun. 27, 2001); Jones v. U.S. Postal Serv., EEOC Appeal No. 01983491 (Apr. 13, 2000). Moreover, to be considered "similarly situated," the comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. See Grappone v. Dep't of the Navy, EEOC Appeal No. 01A10667 (Sept. 7, 2001), req. for recon. denied, EEOC Request No. 05A20020 (Dec. 28, 2002) (additional citations omitted). When an alleged discriminatory action is an agency's response to "problem conduct," where the proffered comparator's conduct was materially distinguishable from that of complainant, he or she is not "similarly situated" to Complainant. See Grappone, see also Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120132983 (Jun. 10, 2015) (complainant failed to prove a disciplinary action was discriminatory where comparator received lighter disciplinary action, because complainant and comparator did not commit similar infractions).

Complainant alleged that five comparators were similarly situated to her because they all had problems with attendance, but none were terminated from employment. ROI at 73-76, However, one of those comparators reported to a different first-level supervisor. ROI at 104. Complainant has not provided sufficient evidence that the remaining four comparators were "similarly situated" because she has not shown that they engaged in the same "problem conduct" of consistently reporting to work late without justification. ROI at 99, 104. Therefore, Complainant did not establish a prima facie case for discrimination based on her race and color.

Even assuming, for the sake of argument, that Complainant could establish a prima facie case of discrimination, the Agency has articulated a legitimate, nondiscriminatory reason for its action, and we find no persuasive proof of pretext. While the burden upon the agency to articulate a reason is not an onerous one, Commission precedent holds that the agency must set forth with sufficient clarity, reasons for complainant's involuntary detail such that she has a full and fair opportunity to demonstrate that those reasons are pretext. See Parker v. U. S. Postal Serv., EEOC Request No. 05900110 (April 30, 1990); Lorenzo v. Dep't of Defense, EEOC Request No. 05950931 (November 6, 1997).

The Agency's legitimate, nondiscriminatory reason for terminating Complainant's employment during her probationary period was that she consistently failed to report to work on time. As evidence, the Agency presented attendance documents from Complainant's "Employee Everything" Report establishing that Complainant reported to work after her scheduled start time on December 31, 2022, and January 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 23, 25, 26, and 27, 2023. ROI at 125-132. The Agency also provided the relevant portions of its internal policies establishing that employees may be removed from the Agency if they fail to be regular in attendance. ROI at 213.

Supervisor testified that Complainant's team was verbally instructed in December 2022 to be regular in attendance and report to work as scheduled. ROI at 98. Supervisor testified that despite this instruction, Complainant was consistently late to work by 15 to 25 minutes and failed to correct this behavior even after Supervisor warned Complainant on her 60-Day Probationary Report. While Complainant asserted that Supervisor gave her a "perfect" evaluation, Supervisor testified that she rated Complainant as only "Satisfactory" and instructed Complainant to improve on her tardiness. Supervisor further stated that Complainant said she would "work on those 10 or 15 minutes," indicating that Complainant knew her tardiness was an issue. ROI at 97. Supervisor testified that Complainant did not show any improvement or concerns to show up to work on time, and the Agency terminated her employment because she did not improve. ROI at 98. Complainant's 60-day Probationary Report corroborates Supervisor's statements and states that Supervisor discussed her expectations with Complainant. Complainant signed her initials next to this statement. ROI at 123.

We next turn to Complainant to show pretext. Proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of Agency policy, deviations from standard procedures without proper explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (Dec. 10, 2020) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant failed to show pretext because she failed to establish a link between her termination and her race or color. Furthermore, she did not present evidence to refute management's explanations regarding her tardiness or to show that management unequally applied Agency policy. Complainant asserted that other employees had attendance problems, but she did not substantiate these assertions. Complainant also asserted that her toe was injured on the job, but she did not link this injury to any discriminatory treatment from management. ROI at 71, 98. Complainant also asserted that when her apartment flooded, she asked Supervisor if she could move her report time from 3:00am to 3:30am or 4am until she handled the problem, and Supervisor told her not to worry about coming in on time. ROI at 77. However, Supervisor stated that she only permitted Complainant to take a couple of days off if needed and never agreed to change Complainant's schedule. ROI at 103.

We ultimately find no evidence that Complainant's protected classes were a factor in the Agency's actions. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory animus. Vivian F. v. Dep't of Agriculture, EEOC Appeal No. 2024001031 (May 16, 2024). Complainant failed to carry this burden. Complainant was also a probationary employee; and it is not mandatory that an employer show just cause for the termination of a probationary employee. See Johnson v. Army & Airforce Exch. Serv., EEOC Appeal No. 01821882 (Dec. 13, 1982). Thus, we find that Complainant was not subjected to discrimination as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

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 9, 2024
Date