



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

[REDACTED]
Daisy W.,¹
Complainant,

v.

Martin J. O'Malley,
Commissioner,
Social Security Administration,
Agency.

Request No. 2024004639

Appeal No. 2023003475

Agency No. ATL-21-0520-SSA

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2023003475 (July 15, 2024).

ISSUE PRESENTED

The issue is whether Complainant's request for reconsideration of EEOC Appeal No. 2023003475 meets the criteria detailed in 29 C.F.R. § 1614.405(c).

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 Customer Service Representative Trainee, GS-08 at the Agency's Birmingham District Office in Birmingham, Alabama.

On September 9, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her in reprisal for prior protected EEO activity under Title VII when:

1. On August 6, 2021, Complainant learned that she was not selected for promotion to a GS-09 Benefit Authorizer position in the Birmingham office under Vacancy Announcement Number: SB-11108969-21-VC;
2. On August 9, 2021, management sent Complainant several instant messages (IMs) scrutinizing Complainant's work performance and urging Complainant to complete her work without sending messages to other Agency employees; and
3. On August 9, 2021, management reassigned Complainant extremely aged Representative Payee cases of a retiring employee to process.

During the investigation, Complainant testified that she engaged in protected EEO activity when she previously filed an EEO complaint against the Agency. She alleged that the Selecting Official for the Benefit Authorizer position was likely aware of her prior EEO activity because he would have had access to this information through his role as a Division Manager. Complainant alleged that the Selecting Official deviated from the non-competitive selection guidelines and instead relied on a "slanderous" recommendation from her supervisor to avoid hiring her. Specifically, Complainant testified that her supervisor lied in her recommendation in characterizing Complainant's performance as merely satisfactory. She asserted that the Agency should have selected her because she had previously worked as a Benefits Authorizer for several years before leaving the position in 2010. See Report of Investigation (ROI) at 124-27 and 131.

The Selecting Official, however, denied any knowledge of Complainant's prior protected EEO activity and maintained that he had never met Complainant. He emphasized that he did not learn of Complainant's prior EEO activity until after Complainant filed the complaint at issue, which was well after he determined which Agency employees would fill the Benefit Authorizer positions.

While the Selecting Official acknowledged that Complainant had prior experience as a Benefits Authorizer, he emphasized that the responsibilities of the position had become significantly more complex since Complainant left the position in 2010. ROI at 140-43.

According to the Selecting Official, the selection criteria ranged from service computation dates (SCD), time in grade (TIG), positions held within the Agency, awards, and most recent appraisal ratings. Because the candidates were not interviewed, the candidates were assigned scores based on their most recent appraisal and recommendations from their supervisors. The Selecting Official recalled that Complainant only received "satisfactory" scores from her supervisor in several performance evaluation categories, including overall work performance, organization of work and following established priorities, written communication skills, oral communication skills, dependability/reliability, interpersonal skills, and ability to work with others. Complainant ultimately received 22 out of 40 points from her supervisor. In contrast, the Selectees all received "High Recommend" recommendations from their supervisors. ROI at 140-43 and 896-98.

Regarding the second claim, Complainant testified that her supervisor sent her two or three "demanding" messages via instant message requesting she complete an interview. Complainant stated that these instant messages occurred "during the time" of her application for the Benefit Authorizer position. Complainant found the messages from her supervisor to be distracting and unnecessary. Complainant testified that she was particularly upset about the messages from her supervisor because she did not believe her supervisor was sending similar messages to other Agency employees. Complainant testified that, when she asked her supervisor to stop sending the messages, her supervisor complied. According to Complainant, she did not have copies of the instant messages because they were allegedly removed. Complainant's supervisor denied sending the alleged messages to Complainant and emphasized that she was not aware of Complainant's prior protected EEO during the relevant period. ROI at 128 and 135-36.

Finally, regarding the third claim, Complainant testified that her supervisor redistributed approximately 10 to 15 aged representative payee cases to her on two separate occasions. Complainant testified that, because of her work hours, she was unable to complete the cases and the cases continued to age while in her workload. Complainant testified that her supervisor assigned these cases to make Complainant appear as if she was not completing her work. Complainant also testified that her supervisor intended to make Complainant appear as though she did not know how to process the cases.

Complainant stated she never actually worked on the age cases, as they were redistributed to other Agency employees. ROI at 124-28.

While Complainant's supervisor did not specifically recall the exact cases at issue in this case, Complainant's supervisor noted that she regularly reassigned dozens of cases to Agency employees each day. Additionally, Complainant's supervisor stated that she would sometimes have to email Complainant multiple times for the status of a case. ROI at 137-38.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). The AJ ultimately granted the Agency's August 3, 2022, motion for summary judgment without a hearing and issued a decision without a hearing on May 1, 2023. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

In EEOC Appeal No. 2023003475 (July 15, 2024), we found that Complainant failed to establish a prima facie case of discrimination. While we found that Complainant engaged in prior protected EEO activity, we determined that she could not establish the requisite nexus between her non-selection and her protected EEO activity, as the probative record suggested that none of the responsible management officials were aware of her prior protected EEO activity.

However, regarding Claim 1, we observed that even if Complainant could establish a prima facie case of discrimination, we found that the Agency had articulated a legitimate, nondiscriminatory reason for not selecting her. According to the Selecting Official, the Agency used objective selection criteria to assess the candidates. The selection criteria ranged from service computation dates (SCD), time in grade (TIG), positions held within the Agency, awards, and most recent appraisal rating. Because the candidates were not interviewed, the candidates were assigned scores based on their most recent appraisal and recommendations from their supervisors. The Selecting Official ultimately chose the candidates that were highly recommended and had high appraisal ratings. The Selecting Official maintained that the tepid recommendation from Complainant's supervisor, as well as her poorly written application, led to her non-selection for the position.

We ultimately found no evidence that Complainant's protected classes were a factor. At all times, we stated, the ultimate burden remained 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 based on discriminatory animus. Regarding her non-selection, Complainant asserted that she should have been selected because she had previously worked as a Benefits Authorizer. While we certainly understood Complainant's contention, the probative record shows that the duties of the Benefits Authorizer position had changed significantly since Complainant last worked in that role. As such, we found that the Selecting Official was well within his discretion to give more weight to each candidate's most recent appraisal rating and supervisory recommendation. While Complainant characterized her supervisor's tepid recommendation as slanderous, we could find no persuasive evidence in the record to demonstrate that it was based on retaliatory animus. We also found that a finding of discrimination on Claim 1 was precluded based on our finding that Complainant failed to establish that the Agency's actions were motivated by discriminatory or retaliatory animus.

Regarding harassment and retaliatory harassment (Claims 2 and 3), we stated that even if we assumed, for the purposes of our analysis, that Complainant's supervisor was aware of her prior protected EEO activity and took the alleged actions, we found the alleged messages concerning Complainant's duties and workload to be entirely within the realm of managerial discretion. Additionally, we found that, because aged cases were typically assigned to Complainant and other Agency employees, the assignment of these cases would not dissuade a reasonable employee from making or supporting a charge of discrimination. We ultimately concluded that Complainant could not prevail on her allegations of harassment.

CONTENTIONS ON REQUEST

On request, Complainant reiterates her previously raised and considered arguments regarding each of her claims, asserting that the Commission's decision contained a clearly erroneous interpretation of material facts and law.

In response, the Agency requests that Complainant's request be denied, reiterating its explanations for the challenged management actions; and asserting that Complainant failed to meet the rigorous standard for reconsideration.

STANDARD OF REVIEW

EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

ANALYSIS

We have reviewed the submissions by Complainant in support of the instant request for reconsideration. However, we determine that there is no reason to disturb the Commission's prior decision. Complainant raises little argument to support her request for reconsideration as she presented no basis to support a finding that the Agency violated Title VII in this case.

A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Complainant has not done so here.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2023003475 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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

November 20, 2024

Date