



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

[REDACTED]
Britany N.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency.

Appeal No. 2019003505

Hearing No. 480-2018-00551X

Agency No. 1F-901-0147-17

DECISION

On April 26, 2019, 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 March 28, 2019 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., 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 VACATES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Mail Processing Clerk at its Los Angeles Processing and Distribution Center located in Los Angeles, California. Complainant filed an EEO complaint dated October 21, 2017, alleging that the Agency discriminated against her on the bases of sex (female) and age (46) when she was removed from her detail as an Acting Supervisor (204-B) and has not been allowed to act as a 204-B since that time.

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.

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). Complainant timely requested a hearing. The AJ assigned to the case determined, *sua sponte*, that the complaint did not warrant a hearing and over Complainant's objections,² issued a decision without a hearing on March 18, 2019. The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged. The instant appeal followed.

According to Complainant, S1, the Lead Manager, Distribution Operations told her that S2, the Plant Manager, stated that "there were too many 204Bs on Tour 2," and that her detail as a 204-B was being terminated.³ Complainant stated, however, that management continued using 204-Bs on Tour 2, after her detail was terminated, and that "presently has five 204-B supervisors who have been stood up since [she] was sat down." According to Complainant, CW1, a younger male from Tour 1, and CW2, a younger female, CW3, a younger male, CW4, a younger female, CW5, a younger female, CW6, a younger female, CW7, a younger female, CW8, a younger female, and CW9, an older male employee, were all treated differently than she was treated.

S1 stated that with respect to Tour 2, "[i]n management there is a ratio of supervisors to employees and I was over the cap of supervisors." She also stated that attendance and work performance were also indicators in the decision. When asked how it was determined which 204B's would continue in their details, S1 answered, "[p]erformance and drive and these are detail position." S1 maintained that Complainant was given the reason that her detail was terminated. S1 did not provide any specific information about Complainant's attendance or work performance. In her opposition to the AJ's notice of intent to issue a decision without a hearing, Complainant stated that at no time did S1 ever tell her that she had a concern about her job performance.

With regard to the comparators, S1 stated that: CW1 was only used for 1 or 2 days; CW2's detail was ended; she was not aware of any difference in treatment regarding CW3; CW4 was not treated differently to her knowledge; with respect to CW5, she was not aware of any difference in treatment; she was not aware of any difference in treatment regarding CW6; with respect to CW7, she stated that she was allowed to continue in the 204-B detail after Complainant's detail ended, but she did not provide a reason why; with regard to CW8, she stated that she was not aware of any difference in treatment; and with respect to CW9, she stated that he was allowed to continue in his detail after Complainant's ended, but she did not provide a reason why.

Finally, S1 stated that A1, Acting Manager, Distribution Operations, was also involved in the decision to terminate Complainant's 204-B detail.

² Unlike Complainant, the Agency did not respond to the AJ's notice of intent.

³ At various places in the record, this incident is described as having taken place in either May or June 2017.

S2 stated that he had no information regarding Complainant's detail position and explained that as the Senior Plant Manager, he did not get involved in the selection process for details nor was he involved in any other aspect of details to front line supervisor positions. He stated it was the various managers who made those decisions. He also testified that he did not know which manager was responsible for ending Complainant's detail.⁴

The AJ found that the record did not indicate that Complainant's sex or age influenced management's decision to remove her from her detail. Specifically, she noted that, "[t]he record reflects that Complainant's detail as a 204-B supervisor ended because Tour 2 was over its allotted supervisory ratio and that management relied on factors such as attendance, drive, and work performance in determining which 204-B supervisory details to end."

ANALYSIS AND FINDINGS

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").

We must determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. *Id.* at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. *Id.* at 255.

⁴ The Investigator's report contains a note that a supplemental affidavit was sent to S2 but was not returned.

A “genuine issue of fact” is one that a reasonable judge could find in favor for 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 “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Issuing a decision without holding a hearing is not appropriate for a case that can only be resolved by weighing conflicting evidence. If the non-moving party “has not had the opportunity to discover information that is essential to his opposition,” then a decision without a hearing is inappropriate. Anderson, 477 U.S. at 250. The AJ must enable the non-moving party to engage in sufficient discovery to respond to a motion for a decision without a hearing. After receiving an opposition to a motion for a decision without a hearing, an AJ may order discovery as necessary. 29 C.F.R. § 1614.109(g)(2).

We have carefully reviewed the record and find that it was inadequately developed. Further, the AJ improperly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ’s issuance of a decision without a hearing was inappropriate. In reaching this determination, we disagree with the AJ’s determination that the Agency articulated a legitimate, non-discriminatory reason for removing Complainant from her detail. Although the record indicates that S1, whether it was her own decision or whether, as Complainant stated, S2 told her to do so, was under an obligation to reduce the number of supervisors on Tour 2, the record is void of any evidence as to why she selected Complainant or any other employee for the termination of their detail. S1 provided vague generalities such as “attendance, work performance, and drive,” as factors for the decision, but she did not provide any information about Complainant’s specific attendance record, work performance, or drive, nor was she asked any questions about these matters. Moreover, the record contains no information about these factors with respect to any of the comparators; specifically, CW7 and CW9, individuals who are outside of Complainant’s protected groups and who were retained in their 204-B positions.⁵ We also note the absence of an affidavit from A1, the official that S1 stated was also involved in making the decision to terminate Complainant’s detail. Finally, although S1 seemingly addressed why Complainant was removed from her detail assignment, she was neither asked nor did she provide an explanation for why Complainant has subsequently not been allowed to serve as a 204-B since her detail was ended. The AJ never discussed this aspect of Complainant’s claim even though it was an accepted issue.

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.”

⁵ The Investigator’s report contains a note that, among other things, copies of Complainant and the comparator’s Time and Attendance Control System (TACS) records were requested but had not been received as of the time of the report. The Investigator indicated that they would be added to the report when they were received. There is no indication that they were ever received, and they are not part of the record herein.

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 (October 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 the various management officials, co-workers, and Complainant. Therefore, judgment as a matter of law for the Agency should not have been granted as to Complainant’s claim that the Agency discriminated against her on the bases of sex and age when she was removed from her detail as an Acting Supervisor (204-B) and has not been allowed to act as a 204-B since that time.

CONCLUSION

Therefore, after a careful review of the record, the Commission VACATES the Agency’s final action and remands the matter to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit of the Los Angeles District Office within 15 calendar days of the date this decision becomes final. 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. 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party’s timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant’s request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency’s request must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

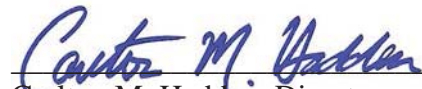
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 his or her 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

August 24, 2020
Date