



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

[REDACTED]
Josefina L.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
U.S. Department of Defense
Defense Education Activity,
Agency.

Appeal No. 2019004856

Hearing No. 560-2016-00323X

Agency No. PE-FY15-051

DECISION

On July 13, 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 Administrative Judge's July 10, 2019 decision, concerning her equal employment opportunity (EEO) complaint. Thereafter, on October 1, 2019, the Agency issued a final order, adopting the Administrative Judge's decision entering summary judgment in favor of the Agency. Complainant alleged 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Assistant Principal, TP-1701-LD, for the School Year 2014-2015, at the Agency's Sollars Elementary School in the Japan District.

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.

On May 6, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American),² sex (female), disability (chronic anemia, Chronic Fatigue Syndrome), and age (over 40) when:

1. On April 28, 2015, Complainant was constructively discharged when she felt forced to resign due to hostility and retaliation.³
2. The Principal made comments regarding Complainant's alleged personality flaws and intelligence, and yelled at, isolated, and micromanaged Complainant.
3. Complainant was denied upward mobility
4. The Principal denied Complainant's leave requests to attend medical appointments.
5. Complainant's requests for leave under the Family and Medical Leave Act (FMLA) were denied.
6. Complainant's request for reasonable accommodation was denied.
7. On an unspecified date, adverse information was placed in Complainant's personnel file.
8. Complainant was suspended for five days.
9. On August 25, 2014, Complainant was reassigned from the Korean District to her Assistant Principal position in the Japan District.

At the conclusion of its investigation into her EEO complaint, 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.

On July 10, 2019, the AJ determined that the 1,003-page record was adequately developed and that there were no genuine disputes of material fact. As such, the AJ granted the Agency's motion for summary judgment and issued a decision concluding no discrimination was established.

This appeal followed.⁴ On appeal, Complainant asked that this case be consolidated with another appeal (EEOC Appeal 2019001794), which had closed on September 28, 2018, and which pertained to alleged violations that predate the claims in this matter. Complainant also argued that the Agency's motion for summary judgment was premature and "served to block the Complainant from participating in discovery and provided there are genuine issues of material fact."

² The Agency's decision states that Complainant's race was not specified on the complaint, but the record shows Complainant's race as African-American.

³ Complainant withdrew her constructive discharge claim, allowing the complaint to proceed as it was no longer a mixed case.

⁴ The record indicates 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 Agency maintains that the entry of summary judgment was proper and notes that Complainant has pointed to no legal error to warrant a reversal.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). 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. 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. (as revised, August 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*).

To successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute and has not identified any discovery that would be necessary to cure any asserted deficiencies in the record. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant’s favor on any of the alleged claims.

The record shows that Complainant was promoted to Assistant Principal in 2011, at which time she was assigned to the Seoul, Korea American High School. She received excellent performance appraisals during that time. A new school principal was assigned. Complainant believed that the new school principal was violating agency policies and reported what she observed to the District Superintendent. Eventually, Complainant requested that she be reassigned to another school, and was placed as the Assistant Principal at the Agency’s Dawgu High School in the Korea District for the School Year 2013 and 2014. However, she found was also asserted the workplace at Dawgu was “toxic” and she reported her concerns to the Inspector General (IG). Complainant was then reassigned again, this time as Assistant Principal of the Sollars Elementary School in Japan. Like Complainant, the Principal of the Sollars school was also an African American female.

Disparate Treatment – 3, 4, 5, 7, 8 and 9

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, non-discriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Here, we concur with the AJ that the responsible Agency management officials articulated legitimate, non-discriminatory reasons for the disputed actions.

On August 25, 2014, the Pacific Director reassigned Complainant from the Dawgu High School in Korea to the Sollars Elementary School in the Japan District. At the same time, the Pacific Director reassigned the Dawgu Principal and two other staff members. The Pacific Director stated she made the reassignments “in an effort to boost morale and to give them each an opportunity to succeed in new situations.” Complainant acknowledged that the General and the Base Commander did not want Complainant in Korea.

Complainant alleged that for the period January 2013 to April 2015, she was passed over for promotions (“upward mobility”) to the position of school principal at other locations. However, she did not provide any evidence regarding these purported promotional opportunities.

Complainant requested “any purpose leave” for February 1, 2015, which was not approved. She also averred that her medical leave for March 16-20, 2015, and her FMLA leave request for 20 days, were initially denied, but later approved.

Agency witnesses stated that the leave requests were not approved because it was not initially clear the leave was being requested for medical purposes and because the dates later given by the medical provider were incorrect. After the dates were corrected, it is undisputed that Complainant's requests were approved.

Regarding the claim that adverse information was in her personnel file, Agency officials confirmed that they kept documents, including a letter of counseling, letter of reprimand, mid-year review and incomplete work because they pertained to Complainant's performance and conduct.

On February 9, 2015, the Principal issued Complainant a notice of proposed suspension for not performing the duties of her job, not following instructions, being AWOL, misinforming the Principal of her whereabouts, openly criticizing the Principal, and being uncooperative and disrespectful. Contending the Principal was subjecting her to a plan to "target and terminate," Complainant resigned from her position on April 28, 2015.

Once the responsible Agency officials have articulated legitimate, non-discriminatory reasons for the disputed actions, the burden is on Complainant to prove, by a preponderance of the evidence, that these proffered reasons are a pretext designed to mask the true discriminatory motivations. The weight of the evidence fully supports the AJ's conclusions that Complainant failed to meet this burden. There is simply no evidence that Complainant's race, sex, disability or age played any role in the events at issue.

Harassment – Claim 2

To prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case, her race, sex, disability or age. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Complainant averred that she was micromanaged and belittled by the Principal. Complainant also claimed that her requests for meetings were ignored and that the Principal claimed Complainant was Absent without Leave (AWOL) when she knew Complainant was hospitalized and incapacitated. Complainant averred that the Principal falsely claimed that Complainant did not follow leave procedures and did not report to duty on two occasions. Complainant contends that the attacks on her came because she refused to turn a blind eye to the Agency's practices and that she became the subject of retaliation because she stood for what was right. Complainant also alleged that a former Assistant Principal (Caucasian) under the named Principal requested to be moved because of similar harassing conduct.

The image which emerges from considering the totality of the record is that there were conflicts and tensions with the Principal's management style that left Complainant feeling aggrieved. However, the statutes under the Commission's jurisdiction do not protect an employee against adverse treatment due simply to a supervisor's personality quirks or autocratic attitude. See Bouche v. U.S. Postal Serv., EEOC Appeal No. 01990799 (Mar. 13, 2002). See also Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981) ("Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed. The essence of the action is, of course discrimination."). Discrimination statutes prohibit only harassing behavior that is directed at an employee because of his or her protected bases. Here, the preponderance of the evidence does not establish that the Principal was motivated by discriminatory animus. Complainant's claim of harassment is precluded based on our findings that she failed to establish that any of the actions taken by the Principal were motivated by her protected bases. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

Denial of Reasonable Accommodation – Claim 6

Under the Commission's regulations, an agency is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9.

Here, Complainant stated that she requested a "compassionate reassignment" on or about January 30, 2015, to a location where her spouse and family were located. In her request, she indicated she was making it for "other reasons" and not medical reasons. Her request was denied. However, Agency officials provided Complainant with a Reasonable Accommodation Information application with directions to schedule a meeting if she wished to discuss accommodations. There is no evidence in the record that Complainant ever filed the reasonable accommodation form or requested a meeting. Complainant has failed to establish her claim that the Agency did not provide her with a reasonable accommodation because there is no evidence to show that she ever requested an accommodation for her asserted disabilities.

CONCLUSION

Accordingly, we AFFIRM the Agency's Final Order adopting the AJ's decision concluding no discrimination was established.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her 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, 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 his or her 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

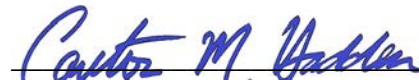
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by 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. 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

October 14, 2020

Date