



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Kylee C.,<sup>1</sup>  
Complainant,

v.

John E. Whitley,  
Acting Secretary,  
Department of the Army,  
Agency.

Appeal No. 2020001154

Hearing No. 480-2020-00029X

Agency No. ARSHAFTER18JAN00087

**DECISION**

Simultaneously with its December 3, 2019 final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). The Agency requests that the Commission affirm its rejection of part of an EEOC Administrative Judge's (AJ) decision that sanctioned the Agency. On January 10, 2020, Complainant filed a timely cross appeal requesting that the Commission reverse the remainder of the AJ's decision finding of no discrimination.

**BACKGROUND**

At the time of events at issue, Complainant was employed by the Agency as a Security Assistant, GG-0086-05, at the Tripler Army Medical Center in Honolulu, Hawaii.

On February 20, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging violations 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.

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<sup>1</sup> 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.

Specifically, she alleged that the Agency discriminated against her based on her race (Asian), sex (female), age (54), and reprisal for prior protected EEO activity when she got a performance appraisal for the period of October 1, 2016 to September 30, 2017, with a rating of 2 – minimally successful.

Following an investigation, Complainant requested a hearing before an EEOC AJ. The Agency filed a motion for summary judgment, which Complainant opposed. The AJ issued a decision by summary judgment finding no discrimination was established. However, the AJ also sanctioned the Agency for its legal counsel's actions during the investigation's fact-finding conference, and for exceeding by about a month and a week the 180-day regulatory deadline to complete the EEO investigation.

As sanctions, the AJ ordered the Agency to do the following: (1) provide two hours of training to Agency counsel in this case on the responsibilities of representing the Agency during the EEO investigative process, including the requirements of EEOC's Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 1 – 9, Chap. 1, § IV.D (REV. Aug. 5, 2015); (2) ensure that two hours of training is provided to the DoD Investigations and Resolutions Directorate EEO investigator in this case on her responsibilities concerning fact-finding conferences and guarding against Agency intrusions during the investigative process, including the requirements of EEO MD-110 above; (3) ensure that the DoD's *A Participant Guide to Fact-Finding Conferences in Complaint Investigations* is updated to comply with the part of EEO MD-110 cited above; (4) replace the Agency counsel in this case with one who did not participate in the investigative process in this and a specified companion case; and (5) email language specified by the AJ to the Agency's Director of EEO that reiterates the 180-day deadline for completing investigations and admonishes the Agency for failure to meet the deadline in this case.

The Agency's final action accepted the finding of no discrimination but rejected the finding that there was a conflict of interest and rejected all sanctions.

### ANALYSIS AND FINDINGS

#### *Performance Appraisal – Complainant's Cross Appeal*

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255.

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. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

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. While Complainant has, in a very general sense, asserted that facts are in dispute, she has failed to point with any specificity to particular evidence in the investigative file or other evidence of record that indicates such a dispute. For the reasons discussed below, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in her favor.

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Here, the evidence of record fully supports the AJ's conclusion that the responsible management officials articulated legitimate, non-discriminatory reasons for the performance rating issued, which Complainant failed to prove, by a preponderance of the evidence, was a pretext masking discrimination or retaliatory animus.

For new hires, Complainant conducted in-processing, which included initiating background investigations, updating personnel records, and fingerprinting. Citing to the record, the AJ found that during the appraisal period, Complainant's performance of her security functions generated multiple complaints by customers and coworkers. Specifically, customers variously complained of major delays caused by Complainant being disorganized, distracted, going off-topic and having a bad attitude to the point of dysfunction, being told to go away and threatening to revoke the customer's clearance, and being so rude that a customer complained of feeling attacked and appalled. Two coworkers, who were temporarily assigned to assist Complainant, variously reported that she was disorganized, her files were in disarray, and she only did a small fraction of her work due to prolonged discussion about her personal life with numerous others who stopped by.

One of the temporary assistants reported that Complainant treated her customers with disrespect. Some examples were saying within hearing distance of a customer who interrupted her with a question, “who does she think she is... am I supposed to drop what I am doing to wait on her when I have a customer”, and another time when asked if she was ready to see a customer barked “I guess so” - indicating she did not want to be bothered. This assistant reported that Complainant encouraged her to do less work, did not act with any sense of urgency as numerous customers sat in the queue, and took long lunches and breaks. She also reported that Complainant lost a huge stack of papers on contractors containing their personally protected information (PII) and fingerprints which delayed their start dates and took no action to fix the situation. Instead, the temporary assistant took care of this, including taking new fingerprints.

As a result of the above-described incidents, management witnesses explained Complainant was rated minimally successful in accountability, communication, and collaboration. Among other things, Complainant’s appraisal specifically referred to her loss of PII. The AJ noted Complainant did not contest the loss, or show she was disparately treated.

On appeal, Complainant, via counsel, provides no argument supporting a reversal of the AJ’s conclusion that Agency witnesses provided legitimate, non-discriminatory reasons for the disputed performance appraisal, and Complainant did not meet her evidentiary burden of proving pretext. We agree with the AJ that Complainant did not prove discrimination on any basis.

#### *Sanctions – Agency’s Appeal*

It is undisputed that in the present case the Army delegated the EEO investigation to the Department of Defense (DoD), Investigations and Resolutions Directorate, which is a separate Defense Department entity from the Army.

The Directorate opened the investigation with an Intake Services Assistant making a tailored and comprehensive request to the Agency for relevant documents. Report of Investigation (ROI), Sec. 7.6, at Bates Nos 568 – 569. Following receipt of the documents, the assigned Directorate investigator chose to hold a transcribed Fact-Finding Conference (FFC). The investigator also gave both parties an opportunity to submit additional documentation. *Id.*, at Bates Nos. 581 – 582.

Complainant, her supervisor, and two human resources specialists (hereinafter all referred to as witnesses) gave transcribed statements at the FFC. Complainant was represented by legal counsel at the FFC, as was the Agency. The transcript reveals that the investigator elicited statements from each witness using a question and answer format. After eliciting a statement from an individual witness, the investigator gave counsel for Complainant an opportunity to have the witness add to their statement by asking follow-up questions, and then gave Agency counsel the same opportunity. *See* DoD’s *A Participant Guide to Fact-Finding Conferences in Complaint Investigations*.

Shortly after receiving Complainant's hearing request and with no prompting from the parties, the AJ issued an Order to Show Cause requiring the Agency to show that the FFC process used had not violated EEO MD-110 and various cited EEOC cases which forbid the intrusion of the Agency's defensive function into the EEO investigative process. The AJ identified the participation of Agency counsel in the FFC as potentially intrusive, as well as the fact that the same Agency attorney who represented the Agency at the FFC did so during the AJ hearing process. He warned that failure to show cause could result in various sanctions.

In response to the Order to Show Cause, the Agency argued that since the DoD Investigations and Resolutions Directorate is fully independent and separate from the Army and decides which investigator to assign and how to conduct the investigation without Agency supervision, this separates the Agency's representative from the EEO investigatory functions. It argued that while the transcript showed the Agency counsel actively participated in the FFC, this did not constitute an improper intrusion of the Agency's defensive function into the EEO investigation because the investigator was fully independent from the Agency and its counsel, and all parties were treated equally. The Agency also argued that using the same person to represent the Agency at the FFC and before the AJ did not constitute an intrusion because the investigator was fully independent.

The Agency conceded that it had exceeded the 180-day regulatory deadline for completing the investigation by about a month and a week. It argued that this was due to staffing and resourcing issues at the DoD's Investigations and Resolutions Directorate, and affirmative steps were being taken to remedy the situation. It represented that that this was supported by a declaration, to which the AJ later referred.

After receipt of the Agency's arguments, the AJ issued a decision concluding that the investigative function is the responsibility of the Agency regardless of the entity that actually performed the investigation and the Agency cannot use the DoD Investigations and Resolutions Directorate as a shield to "launder" improper intrusions/actions by Agency representatives. The AJ identified Agency counsel's intrusions at the FFC as "cross examining" Complainant (asking her questions), "speaking objections" (asking if a comparator's appraisal was relevant), commenting on testimony (apparently by saying it was okay to allow leeway with hearsay), and "directing" the method of providing documents to the investigator (asking the human resources witness to coordinate gathering the documents requested by the investigator and Complainant's attorney so that multiple Agency staff were not fulfilling the same document request), which the AJ viewed as potentially limiting the gathering of relevant documents.

The AJ also identified as potential Agency intrusions actions by *Complainant's* attorney at the FFC – her questioning witnesses and making "objection[s]" based on hearsay and relevance. The AJ found that the actions of Complainant's attorney were a foreseeable result of convening the FFC without appropriate safeguards and that the investigator – and therefore the Agency – failed to regain control of the FFC and return it to its investigative function, but rather allowed to devolve to a "quasi-mini-hearing" by permitting the representatives of Complainant and the Agency to question witnesses as if at a trial.

In sum, the AJ concluded that Agency counsel's participation in the FFC and before the AJ violated the requirement that the Agency keep its investigatory and defensive functions separate. Likewise, the AJ found that DoD's *A Participant's Guide to Fact-Finding Conferences in Complaint Investigations* needed to be updated to ban such intrusions. In support of the above findings, the AJ cited to language in Annalee D. v. General Services Administration (GSA), EEOC Appeal No. 0120170991 (Oct. 10, 2018) that the "agency representative should not have a role in shaping the testimony of witnesses or the evidence gathered by the EEO investigator," which occurred in that case when agency counsel accompanied a supervisor accused of discrimination to an EEO investigative interview.

The AJ also found that the Agency's missing the 180-day deadline to complete the EEO investigation had a negative effect on the integrity of the EEO process, albeit this was partially mitigated by the representation by DoD Investigations and Resolutions Directorate regarding the efforts it was taking to avoid similar delays in other cases.

As already noted, the AJ sanctioned the Agency by ordering it to do the following: (1) provide two hours of training to Agency counsel in this case on the responsibilities of representing the Agency during the EEO investigative process, including the requirements of EEO MD-110, at 1 – 9, Chap. 1, § IV.D; (2) ensure that two hours of training is provided to the DoD Investigations and Resolutions Directorate EEO investigator in this case on her responsibilities concerning FFCs and guarding against Agency intrusions during the investigative process, including the requirements of EEO MD-110 above; (3) ensure that the DoD's *A Participant Guide to Fact-Finding Conferences in Complaint Investigations* is updated to comply with the part of EEO MD-110 cited above; (4) replace the Agency counsel in this case with one who did not participate in the investigative process in this and a specified companion case; and (5) email language specified by the AJ to the Agency's Director of EEO that reiterates the 180 day deadline above and admonishing the Agency for failure to meet the deadline in this case.

On appeal, the Agency reiterates arguments it made below. It also argues that shortly after the AJ issued his decision, the Commission granted GSA's request to reconsider the decision in Annalee D., upon which the AJ relied, vacating the sanctions and modifying the decision. See Annalee D. v. GSA, EEOC Request No. 2019000778 (Nov. 27, 2019). Applying the modified language in Request No. 2019000778, the Agency argues that its defensive function did not intrude on the EEO investigation in this case. It also argues that a sanction is not warranted in this case for missing the 180-day regulatory deadline by a little over a month.

In opposition to the appeal, Complainant argues that that the AJ's sanctions should be upheld.

Essentially, the AJ found that the DoD's Investigations and Resolutions Directorate investigator holding a "quasi-mini-hearing" (the FFC) with the participation of both Agency and Complainant's legal counsel was an intrusion of the Agency's defensive function into the EEO investigation violating EEO MD-110, at 1 – 9, Chap. 1, § IV.D. We disagree.

The Commission's Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 1 – 9, Chap. 1, § IV.D (REV. Aug. 5, 2015) requires that:

H heads of agencies must manage the dual obligations of carrying out fair and impartial investigations of complaints... [of] discrimination... and defending the agency against claims of employment discrimination....

... [A] clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the... integrity of the EEO complaints process....

EEO MD-110 goes on to explicitly permit an EEO investigator to collect and discover factual information by being “a presiding official at a fact-finding conference”. *Id.*, at 6-6, Chap. 6, § V.B. See also, 29 C.F.R. § 1614.108(b). The “presiding” of an investigator at an FFC anticipates that someone other than the investigator is asking questions. The most obvious “someone” is the parties. Thus, the question to be determined is whether or not the participation of legal counsel from either party should be allowed at a fact-finding conference.

As an initial matter, we find that permitting *Complainant's counsel* at the FFC to ask witnesses follow-up questions after the EEO investigator elicited a statement from each witness, as well as questioning the admissibility of testimony, did not constitute an improper intrusion of the Agency's defensive function into the EEO investigation. In sum, we fail to see how Complainant's attorney has anything to do with the Agency's defensive function. Moreover, our regulations explicitly provide that at “any stage in the processing of a complaint . . . the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.”

With regard to the participation of *Agency counsel* in a fact-finding conference, we look to Annalee D. v. GSA, EEOC Request No. 2019000778 (Nov. 27, 2019), issued after the AJ's decision, which contains an extensive discussion of the Agency attorney intrusion issues. In recognizing the disparate yet vital responsibilities of the agency's EEO office and agency defense counsel, EEO MD-110, at 1 – 9, Chap. 1, § IV.D recognized these entities will inevitably interact with each other. EEO MD-110 sets out the parameters for these interactions and seeks to ensure that neither entity inappropriately interferes with the functions of the other. The Commission found that its prior Annalee D. decision set forth an absolute rule prohibiting agency defense counsel from participating in the pre-hearing stages of EEO matters, including the investigation. In reconsidering this decision, the Commission found nothing in MD-110 explicitly bans agency defense counsel from assisting an agency manager in the preparation of their affidavit during an investigation or acting as a legal representative for the Agency under the appropriate circumstances. Rather, the issue of utmost concern to the Commission is whether the actions of agency defense counsel improperly interfered with or negatively influenced the EEO process, such as formulating the questions asked by the investigator, altering or withholding statements/records from management officials/witnesses, instructing officials to make untrue

statements, or changing any affidavit without the affiant's approval of such changes, and limiting the individuals whom the investigator can interview. Id.

Applying these standards to the instant case, we find that the structure of the DoD Directorate's FFC, as set forth in its participant's guide and implemented here, does not breach the requirement that the Agency maintain a proper separation between the Agency's defensive and EEO investigatory functions. As ruled in EEOC Request No. 2019000778, there is no absolute rule that prohibits agency defense counsel from participating in the pre-hearing stages of EEO matters, including the investigation. Agency counsel and investigators are cautioned however that the decision in Annalee D., Request 2019000778, limited that participation. The agency's own guidance on FFCs explicitly states that the investigator "conducts and controls" the FFC and Agency counsel's role is limited to soliciting clarifying information from witnesses called and questioned by the investigator as deemed appropriate by the investigator. The investigator and EEO officials maintain primary responsibility for developing the impartial record necessary for a final agency decision. If such a record is not developed and a hearing before an EEOC AJ is requested, the Commission's regulations provide that the AJ will supplement the record. In this appeal, however, the AJ and the Commission determined that the record, as developed during the investigation, was sufficiently developed for summary judgment.

The Commission's determination concerning possible intrusion by Agency counsel must be made on a case-by-case basis. We find no evidence of improper intrusion by the Agency's legal counsel at this FFC. The record, which includes the transcript of the FFC, shows that none of the actions by Agency counsel directed, controlled, interfered with, or overruled the investigator. The AJ's finding to the contrary does not account for all the work done by DoD's Directorate prior to the FFC to secure the relevant comprehensive documents, soliciting both parties to name relevant witnesses with a brief explanation of their expected testimony, and giving both parties the opportunity to submit additional documentation. It also does not account for the investigator at the FFC first eliciting a statement from each witness using a question and answer format, thereby creating a record regarding that witness' testimony before giving legal counsels for Complainant and the Agency the opportunity to ask follow-up questions. Likewise, we disagree with the AJ that Agency counsel's "speaking objections" (rhetorically asking if the comparator's appraisal was relevant), commenting on testimony (apparently suggesting that it was okay to allow leeway with hearsay), or attempting to facilitate the provision of documents to the investigator (asking the human resources witness to coordinate gathering the documents requested by the investigator and Complainant's attorney) were intrusions of the Agency's defensive function into its EEO program. At any point during the FFC, the investigator could have shut either counsel down if their conduct interfered with the development of an impartial record.

The Agency concedes that it exceeded the 180-day regulatory deadline to complete the EEO investigation by about a month and a week. Given the length of this delay together with the mitigating circumstances cited by the AJ, we find that this alone, without other sanctionable conduct, does not warrant a sanction in this case.



### CONCLUSION

The Agency's final action fully implementing the AJ's finding of no discrimination is AFFIRMED. The Agency's final action rejecting all of the AJ's sanctions is AFFIRMED.

### 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).

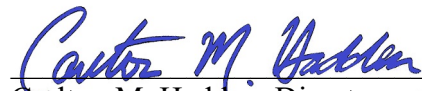
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

April 22, 2021  
Date