



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

[REDACTED]
Marissa T.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(U.S. Marshals Service),
Agency.

Appeal No. 2020003606

Hearing No. 541-2017-00044X

Agency No. USM-2016-00221

DECISION

On June 1, 2020, 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 May 5, 2020 final order concerning an equal employment opportunity (EEO) complaint claiming 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked as a probationary Management and Program Analyst, Grade GS-12, at the Agency's District of Colorado (D/CO) facility in Denver, Colorado.

On January 17, 2016, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her based on sex (female/lesbian married to a same-sex spouse), disabilities (fibromyalgia, chronic fatigue syndrome, restless leg syndrome, attention deficit

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.

disorder, attention deficit hyperactivity disorder, and anxiety), and in reprisal for prior protected EEO activity when:

1. From approximately August 2015 through December 8, 2015, the Agency subjected Complainant to ongoing harassment, including but not limited to making inappropriate comments to Complainant, criticizing her appearance, decreasing her workload, denying her training, and raising concerns with her time and attendance;
2. From approximately September 2015 through December 8, 2015, the Agency denied Complainant's request for a reasonable accommodation for her disability; and
3. On December 8, 2015, the Agency terminated her employment during her probationary period.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. On November 26, 2018, the Agency moved for motion for a decision without a hearing. Complainant objected to the Agency's motion. On April 1, 2020, the AJ issued a decision by summary judgment in favor of the Agency. On May 5, 2020, the Agency subsequently issued a final order adopting the AJ's finding no discrimination.

The instant appeal followed. On appeal, Complainant states that the AJ should have drawn more inferences in her favor. According to Complainant, she began having difficulty in her position only after co-workers became aware of her gender identity, and after she requested disability accommodations. Complainant included a news article from 2017 concerning the Agency's sudden decision to reassign Complainant's third-line supervisor who was the Chief Marshall (male, gender identity otherwise unknown). Complainant stated that the AJ should have considered testimony from other witnesses who did not support management's version of events. Complainant asserts that the AJ was unfair to her because Complainant was not represented by an attorney while the AJ was sympathetic to the Agency, by denying Complainant's motions for sanctions.

ANALYSIS AND FINDINGS

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. See 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. See 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. A "genuine issue of fact" is one that a reasonable judge could find in

favor for the non-moving party. See 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.

As an initial matter, we are not convinced the AJ abused the broad discretion over conducting EEOC hearings when the AJ did not grant Complainant’s motions for sanctions. An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Complainant has made conclusory statements attacking the record without showing facts within the record that are in dispute. Complainant has not presented further material evidence to prove the record inaccurate or inadequate.

Claims of disparate treatment are examined under the three-party analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie 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 Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, a complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993).

Here, undisputed facts fully support the AJ’s determination that the responsible management officials articulated legitimate, non-discriminatory reasons for the Agency’s actions.

In the present case, the AJ’s decision correctly rejected Complainant’s reprisal arguments because Complainant did not engage in protected activities until *after* she had been removed from Agency employment.

Regarding Claim 1, wherein Complainant accused her direct supervisor the Administrative Officer (AO) (female, heterosexual) in particular of criticizing her appearance inappropriately. We observed that Complainant had participated in joking about her attire regarding an unusually-located shirt pocket where she had placed a pen. On one occasion, the AO opined that a fountain resembled the shape of a sperm. In any event, we concur with the AJ’s assessment that such comments were not pervasive or abusive towards Complainant. We further agree with the AJ’s characterization that Complainant’s disagreements with the AO about workloads, break times, amounted to non-discriminatory personality conflicts or everyday minor indignities that are unremarkable to any workplace. Agency management officials adequately explained that Complainant did not receive Excel training because funding was not available at that time.

Regarding Claim 2, this the record fully supported the AJ's conclusion that Complainant's accommodation request was based not on disability, but instead on evidence of Complainant's personal preference to have a more flexible alternative work schedule. We find the Rehabilitation Act was not violated when management denied the request with the acknowledgment that the matter could be revisited when Complainant provided specific medical documentation that justified her need for accommodation.

Regarding Claim 3, the evidence simply did not show Complainant's accusation that she was removed as a probationary employee for illegitimate reasons. To the contrary, management witnesses consistently stated that their probationary removal decision was primarily based on Complainant's failure to be sufficiently present at her duty station. The AJ noted that Complainant's job responsibilities were sedentary and computer-based. The AO testified that she had warned that excessively frequent absence from their office during expected work times was problematic. Complainant did not deny that she often left her assigned desk but insisted that she was doing Agency work elsewhere. Therefore the AJ's properly found that the Agency had a legitimate reason to terminate Complainant's employment during the probationary period.

Aside from her own declarations, Complainant has failed to prove that unlawful animus toward her gender identity or her disabilities played any role whatsoever in the Agency's adverse actions against her. Oakley v. U.S. Postal Serv., EEOC Appeal No. 019982923 (Sep. 21, 2000).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final action implementing the AJ's finding without a hearing, finding no discrimination.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0920)

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 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, 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 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)

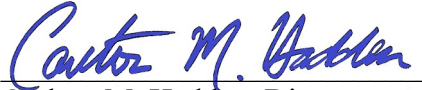
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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 18, 2021

Date