



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

[REDACTED]  
Tara L.,<sup>1</sup>  
Complainant,

v.

Christine Wormuth,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2020003827

Hearing No. 451-2017-00070X

Agency No. ARBLISS16JUN02316

**DECISION**

On June 19, 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 20, 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.

**BACKGROUND**

During the period at issue, Complainant worked as a Medical Protection System (MEDPROS) Training Coordinator, Grade GS-9, in Medical Readiness at the Agency's CONUS Replacement Center, in Fort Bliss, Texas.

Complainant's probationary period began on July 13, 2015. Complainant's first line supervisor was Chief Medical Readiness ("Supervisor") (African American). In Medical Readiness, Complainant had two co-workers: a Mobility Coordinator ("CW1") (Indian) and a Management Assistant ("CW2") (Caucasian). Complainant's second-line supervisor was Deputy Commander for Health and Readiness.

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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.

That position was at first occupied by a Lieutenant Colonel (“LTC”) (African American). After January 1, 2016, a Colonel (“COL”) (Caucasian) became Complainant’s second-line supervisor.

On August 3, 2016, Complainant filed a formal EEO complaint alleging the Agency discriminated against him based on race (African-American) and in reprisal for EEO protected activity<sup>2</sup> when:

- a. On August 22, 2015, Supervisor charged Complainant absent without leave (AWOL) while Complainant was conducting change of command inventories with her military unit;
- b. On August 22, 2015, Supervisor took Complainant’s unattended Common Access Card (CAC) and made Complainant report to Supervisor to get the CAC back, even though no disciplinary action had been taken against CW1 when CW1 left his CAC unattended;
- c. On February 17, 2016, Supervisor requested an Army Reserve Drill schedule memorandum from Complainant but did not request an Army Reserve Drill schedule memorandum from CW1;
- d. From April 4, 2016 to April 25, 2016, while Supervisor was on leave, Complainant was the only employee required to report when she got to work, report the number of students she trained each day and report when she left work for the day; and
- e. On May 27, 2016, Complainant was terminated from her position during her probationary period.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On February 7, 2020, the AJ assigned to the case issued notice of intent to issue summary judgment in favor of the Agency. The AJ gave the parties until February 24, 2020 to respond. After neither party responded, the AJ issued a decision by summary judgment in favor of the Agency on February 26, 2020. On May 5, 2020, the Agency subsequently issued a final order adopting the AJ’s finding of no discrimination.

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<sup>2</sup> In Complainant’s appellate brief, her legal counsel clarified that that her prior protected activity was she told Supervisor that Supervisor was making the workplace hostile.

On appeal and through legal counsel, Complainant argues that she did not have adequate notice of the AJ's notice of intent to issue an order of summary judgement. Counsel states that at the time of AJ's notice of intent, Complainant was attending professional military training at Joint Base San Antonio, Texas.

Counsel stated that neither party was aware of the AJ's notice prior to the deadline. Counsel stated that even after she obtained legal representation, Complainant was unable to respond until she completed the course. On March 27, 2020, Complainant filed an Unopposed Motion to Respond to the AJ's notice. Apparently, as a denial of the motion, the AJ reissued the decision without a hearing immediately. Counsel argues that the AJ should have instead granted the Unopposed Motion to Respond.

Next, Counsel for Complainant contends that the record reflects Supervisor's animus toward other African American employees. Specifically, Complainant stated that the Supervisor had made comments disparaging only African American employees as lazy and held Complainant to higher standards than her comparators. Counsel asserted that CW1 and CW2 had been given preferential treatment. Counsel stated that when Supervisor had caught either CW1 or CW2 leaving their CACs unattended, they only received verbally counselling, whereas Complainant was written-up for making the same mistake. Counsel for Complainant further states that Supervisor allowed CW1 to take leave without advance notice and to sleep at his desk, whereas Supervisor arbitrarily scrutinized Complainant's presence and leave.

In response, the Agency acknowledges that it was likely that Complainant did not receive the AJ's Notice of Intent to Issue an Order of Summary Judgement. However, the Agency simultaneously maintains that the AJ's decision without a hearing was proper.

### 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. 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.

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 not presented further material evidence to prove the record inaccurate or incomplete. We find that Complainant has not sufficiently evidenced a material factual dispute within the record.

On appeal, Complainant contested the AJ's declining to grant Complainant's Unopposed Motion to Respond. EEOC gives the AJ wide latitude to manage the terms, conduct, and course of hearings. For example, the AJ could have *sua sponte* rendered a decision without a hearing by summary judgment. 29 C.F.R. § 1614.109(g)(3). Ultimately, this AJ's conclusion was based on there being insufficient evidence of pretext regarding the Agency's articulated reasons for each allegedly discriminatory action. The defective notice argument did not reach a "high bar" for reversible error because Complainant failed to show that the AJ had abused discretion or had prejudicially adjudicated her case. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sep. 13, 2016). In other words, Counsel did not persuade us that, if Complainant had responded timely the Notice of Intent to Issue Summary Judgment, the AJ would have decided the matter differently. We now turn to the merits of the case.

We first analyze Complainant's claims in the context of harassment or a hostile work environment. To establish her hostile work environment claim, Complainant must show she was subjected to conduct that was either so severe or so pervasive that a reasonable employee in Complainant's position would have found the conduct was abusive. Enforcement Guidance on Harris v. Forklift Sys., Inc., EEOC Notice No. 915.002 (Mar. 3, 1994). Complainant must also prove that the conduct was motivated by animus against at least one her protected characteristics. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997). Only if Complainant establishes both of the elements – hostility and a discriminatory motive – can the Agency be held liable for harassment. Wibstad v. U. S. Postal Serv., EEOC Appeal No. 01972699 (Aug. 14, 1998).

Here, the record reflects that Complainant was not subjected to a hostile work environment because of discrimination. In the main, normal everyday workplace indignities, such as many of Complainant's allegations, simply do not rise to the level necessary to establish a pervasive or abusive work environment in violation of the anti-discrimination statutes. Silvia B. v. Dep't of the Treasury, EEOC Appeal No. 0120173290 (Oct. 24, 2018). Moreover, Complainant has failed to meet her burden of proving that her race was wrongfully factored into the disputed adverse actions. The responsible management officials have articulated a legitimate, nondiscriminatory reasons for the Agency actions at issue. See U.S. Postal Svc. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

Regarding Claim a., we concur that the record reflects that Complainant was not charged AWOL.

Regarding Claim b., we concur with the AJ, in that Complainant was not a proper comparator because unlike CW1 or CW2 who were verbally counselled for leaving their CACs unattended within the workday, Supervisor documented Complainant's unattended CAC because Complainant had left it overnight.

Regarding Claim c., we acknowledge that Complainant may not have been able to provide Supervisor with hard-copies of her official orders prior to attending to reserve military duty obligations. However, CW1 did not receive preferential treatment because of his race. CW1 kept Supervisor better informed of projected absences, whether reserve-related or otherwise scheduled. In contrast, Complainant had requested thirty days of military leave, and then it became difficult for Supervisor to contact after the initial period of military leave was extended. COL stated, that as a matter of professional courtesy, civilian employees who were to communicate their dates of unavailability to their direct supervision as far in advance as possible. Here, Complainant failed to do.

Regarding Claim d., CW1, CW2, LTC, and COL all concurred with Supervisor, that Complainant's presence was irregular throughout workdays. Therefore, it was reasonable to require that Complainant document her whereabouts and accountability. Furthermore, given Complainant's position title, *Training Coordinator*, it was reasonable for Supervisor to require Complainant track how many people she had trained. We observed that CW1 was also a probationary GS-9 employee, but CW1 had a different role, Mobility Coordinator. Meanwhile, CW2 was a GS-6, Management Assistant, whose job was to administratively support Supervisor, Complainant, and CW1.

Regarding Claim e., to the extent that the termination is viewed in the context of a disparate treatment claim, due to race or in reprisal for prior protected activity, testimony and contemporaneous documentation supported the Agency's position that Complainant was legitimately terminated because of insubordination and for poor performance. Complainant did not demonstrate those reasons were pretextual. See Reeves v. Sanderson Plumb. Prod., Inc., 530 U.S. 133, 143 (2000).

In sum, we find the AJ correctly decided that Complainant failed to prove, with preponderant evidence, that any of the Agency's actions were motivated by her race or unlawful retaliatory animus.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final decision 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

October 19, 2021

Date