



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

[REDACTED]
Keturah F.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2021004046

Hearing No. 470-2021-00008X

Agency No. BOP-2020-0620

DECISION

On June 30, 2021, 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 June 10, 2021 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. For the following reasons, the Commission VACATES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Psychology Technician, GS 7 in the Psychology Department at the Agency's Federal Medical Center in Lexington, Kentucky. On January 3, 2020, Complainant contacted an EEO Counselor and filed a formal EEO complaint on March 30, 2020, alleging that the Agency discriminated against her on the basis of reprisal for her association with her husband, another Agency employee, due to his protected EEO activity, from December 12, 2019 to April 8, 2020, the Agency unlawfully harassed her when:

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.

- a. she was issued a minimally satisfactory log entry which contained false and irrelevant information;
- b. her access to the electronic inmate central file was taken away;
- c. she was denied access to institution keys;
- d. she was delegated multiple jobs that were not her responsibility but that of the team leader; and
- e. she was not included in department emails and meetings.

Complainant is married to another Agency employee, a Drug Treatment Specialist (DTS). His first-line supervisor is the Drug Treatment Coordinator (DTC), who reports to the Chief Psychologist (CP). CP is also Complainant's first-line supervisor. See Report of Investigation (ROI) at 59. Complainant stated that, on December 11, 2019, DTS's union representative requested official time to permit DTS to complete his EEO complaint, which was filed later that day. See ROI at 17, 59.

On December 12, 2019, Complainant stated that she was called into CP's office and given a negative log entry, which is a performance evaluation that can be given at any time during the year and counts towards the official quarterly evaluation. See ROI at 62. She explained that she received an evaluation of "Minimally Satisfactory" on three elements of her evaluation, when she had never before received a "Minimally Satisfactory" rating. See ROI at 63. She stated that the DTC was in CP's office at the time she was given this negative evaluation, which she believed was intended to intimidate her. See ROI at 64.

Later, in January 2020, Complainant stated that she realized that her access to the electronic inmate central file had been revoked and requested to have her access restored. See ROI at 65-66. CP denied her request, stating that access is only given when necessary and none of Complainant's duties required her to have access to the inmate central file. See ROI at 126-27. Complainant disagreed with CP, stating that her duties include hiring a department orderly, an inmate who cleans and does work around the department, and she needs access to the inmate central file in order to investigate the background of any inmate prior to hiring them. See ROI at 67.

With respect to the institution keys, Complainant stated that she first requested access to the keys in November 2019 but then reiterated her request in January 2020, at which time CP gave her a completely different set of keys that did not include the key to the backdoor of psychology services which leads to the housing unit. See ROI at 67-68. She explained that not having the backdoor key has impeded her ability to respond quickly to institutional emergencies, which could potentially harm other staff members. See ROI at 68-69.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). The AJ issued a decision without a hearing finding no discrimination.

The AJ concluded that Complainant failed to establish a prima facie case of retaliation because the evidence in the record indicates that CP did not become aware of Complainant's protected EEO activity until February or March 2020, after the alleged incidents of harassment occurred. He noted that the only incident of alleged harassment which occurred after CP became aware of Complainant's protected activity was the assignment of additional duties. However, the AJ found that the additional duties were minimal and only continued for a "week or two," and therefore would not deter a reasonable person from engaging in protected activity. The AJ therefore granted the Agency's motion for summary judgment.

The Agency's final action implemented the AJ's decision.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ's decision is not supported by the record and that the AJ erroneously failed to view the facts in the light most favorable to Complainant. Specifically, Complainant argues that the AJ's finding that CP was not aware of DTS's protected activity is not supported by the record and that the record is replete with indications of CP's hostility towards both Complainant and DTS due to their protected activity.

The Agency did not file a response in opposition to Complainant's appeal.

STANDARD OF REVIEW

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 Chap. 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").

ANALYSIS AND FINDINGS

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. 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. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (February 24, 1995).

After a careful review of the record, we find that the AJ erred when they concluded that the record was adequately developed. Specifically, we find that the record has not been adequately developed as to when CP became aware of DTS's protected activity.

During the investigation, CP was asked and answered when he became aware of *Complainant's* protected activity. See ROI at 120, 138. We emphasize, however, that the basis of Complainant's reprisal claim in the instant complaint is not Complainant's protected activity but the protected activity of DTS, her husband employed at the same Agency. CP stated that he is aware that DTS has also engaged in protected activity, but he did not specifically answer when he became aware of it. See ROI at 120.

We further note that DTC, the official against whom DTS filed his EEO complaint, was not interviewed during the investigation, so it is not clear when DTC became aware of DTS's protected activity and when he may have told CP about it. This is particularly concerning because of DTC's presence in CP's office when Complainant was issued the negative log entry. CP himself acknowledged that Complainant and DTC do not work directly with each other and DTC was not involved in any way in the issuance of the log entry. See ROI at 122, 124. CP did not give any explanation for why DTC was in his office for his meeting with Complainant nor is there any other evidence in the record providing a legitimate reason for DTC's presence. We therefore find that the record was not adequately developed and additional evidence from CP and DTC is necessary. This should have been included during the development of the ROI. Absent that, the AJ should have ordered the parties to engage in discovery on the issue to ensure it was fully investigated in order to properly address it. Therefore, a remand is appropriate for collection of evidence from all relevant witnesses.

We are also concerned by the numerous statements made by CP in the record indicating a hostility towards Complainant due to the instant complaint. When asked if he was aware of Complainant's prior EEO activity, his response was, "she filed a false, frivolous, and malicious claim against me in late Feb[ruary] or early March, a complaint that should not have been accepted by the agency." See ROI at 120. CP further stated that he was aware that Complainant's husband "filed a false, frivolous and malicious claim against [DTC]." See ROI at 120. Thereafter, in response to many of Complainant's assertions, he repeatedly stated, "she is knowingly and intentionally false swearing, and should be held accountable with a disciplinary referral for making false statements, in a frivolous EEO that she maliciously filed." See ROI at 123-24. CP continued to express his opinion that Complainant should be disciplined for her "false," "frivolous," and "malicious" EEO complaint. See ROI at 128, 130, 133, 135, 136. He also stated that he believed the frivolous EEO filings were intended to harass him and DTC. See ROI at 125. On remand, Complainant should be given the opportunity to amend the instant complaint, if she so chooses, to add a claim of unlawful reprisal due to her own protected activity based on these comments.² Any amendments must also be thoroughly investigated.

We further find that the AJ erred in concluding that there were no genuine issues of material fact in this case. DTC's presence at Complainant's negative log entry meeting creates an issue of material fact regarding the circumstances of the issuance of said negative log entry.

² We note that Complainant's husband's EEO complaint is not before us currently. However, considering these comments, we remind the Agency of its obligation to have a workplace free from unlawful retaliation.

With respect to Complainant's allegations concerning her denial of access to the inmate central file and certain institution keys, Complainant stated that such access would allow her to perform her duties in a more thorough and efficient manner. For example, Complainant explained that access to the Sentry database, which is what CP told her she should use to look into an inmate's background, provides very little information about an inmate and does not show an inmate's full charges or offenses. See ROI at 67. CP asserted that access to the inmate central file or to the institution keys was not necessary for Complainant's position. See ROI at 126-30. We note, however, that one of Complainant's coworkers, the Advanced Care Level Psychologist (ACP) agreed with Complainant that access to the inmate central file would allow Complainant to perform her job as expected. See ROI at 194. ACP also stated that, although he is not certain exactly which institution keys Complainant has been denied, he agreed that Complainant's limited access to institution keys could hinder her ability to perform her duties depending on what Complainant was asked to do. See ROI at 199. He explained that, because Complainant's duties require her to interact with other departments, it would be easier if Complainant had access to those other departments herself, rather than having to use a radio to contact someone else in order to gain access to another department. See ROI at 199. We note that the fact that Complainant's lack of access to the inmate central file or the institution keys has not completely prevented her ability to perform her job is not material. If the lack of access to the inmate central file or to various institution keys would inconvenience or otherwise negatively affect Complainant's ability to efficiently complete her duties, such an inconvenience, could deter a reasonable person from engaging in protected activity. We find that, taken both individually and in their totality, these issues create a dispute of fact and raise credibility issues which should have precluded the issuance of summary judgment.

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." See EEO MD-110 at Chap. 7; 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 (Mar. 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (Apr. 25, 1995). In summary, there are unresolved issues which require additional information and an assessment as to the credibility of CP, Complainant, and their coworkers. Therefore, judgment as a matter of law for the Agency should not have been granted as to Complainant's complaint. The case shall be remanded for a hearing.³

³ As the Commission is remanding the entire complaint, we shall not address the other alleged incidents of harassment in this decision.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and REMANDS the matter to the Agency 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, Indianapolis District Office, within fifteen (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 Indianapolis District Office 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 (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).

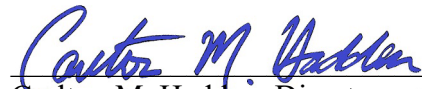
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

May 17, 2022
Date