



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Nubia H.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2021005092

Agency No. 2001-0509-2020106400

DECISION

On September 20, 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 August 26, 2021, final agency decision (FAD) 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, we AFFIRM the Agency's FAD.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a probationary Supervisory Police Officer (SPO), GS-0083-06, at the Agency's Charlie Norwood Medical Center in Augusta, Georgia.

On October 5, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black), sex (female), disability (major depressive disorder, anxiety, adjustment disorder, and pain), and in reprisal for prior protected EEO activity under Title VII and the Rehabilitation Act. Following several amendments to her complaint, the Agency accepted the following claims for investigation:

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.

1. Effective August 20, 2020, Complainant was placed on a detail.
2. From August 20 to September 22, 2020, Complainant was subjected to a fact-finding investigation.
3. From August 20 to September 22, 2020, Complainant was denied a Performance Improvement Plan (PIP).
4. From August 20 to September 22, 2020, Complainant was denied leave.
5. From August 20 to September 22, 2020, Complainant was charged as Absent Without Official Leave (AWOL).
6. On September 14, 2020, Complainant was reassigned.
7. Effective September 22, 2020, the Chief of Police (Chief) suspended Complainant's police authority.
8. On October 13, 2020, the Chief issued Complainant a Proposed Notice of Removal, which the Director mitigated to a demotion from Supervisory Police Officer, GS-08, Step 5, salary \$54,285, to Police Officer, GS-06, Step 10, salary \$58,178, effective November 22, 2020.
9. On or about November 6, 2020, the Chief Financial Officer (CFO) and the Major terminated Complainant's detail.
10. On or about November 9, 2020, the CFO and the Major required Complainant to attend firearms training.
11. From November 9, 2020, to January 28, 2021, the Lieutenant charged Complainant with AWOL.
12. From November 13, 2020, to February 7, 2021, Complainant's reasonable accommodation request for reassignment was delayed in processing.
13. On or about February 2, 2021, Complainant was denied leave under the Leave Donation Program.
14. On February 12, 2021, Complainant was not selected for the position of Emergency Management Specialist, CBTB-10942698-JA, Series GS-0089-09, Augusta, Georgia.
15. As of March 5, 2021, Complainant's request for reassignment as a reasonable accommodation had not been provided.
16. On March 9, 2021, Complainant was not selected for the position of Program Specialist, CBTB-11030769-LD, Series GS-09, A0340-9, in Augusta, Georgia.
17. On March 15, 2021, the Operations Analysis Officer requested that Complainant provide medical documentation.

At the conclusion of the investigation, 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). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), which concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

In its decision, the Agency first addressed claims 12 and 15, concerning Complainant's denial of reasonable accommodation claims.

While the Agency acknowledged that Complainant's disabilities limited her ability to lift, carry, bend, pull, walk, focus, concentrate, and remember, the Agency found that management was not legally obligated to immediately grant her request for reassignment, as the Commission has long held that reassignment is an accommodation of last resort. Given the Commission's longstanding precedent, the Agency emphasized that management had every right to request medical documentation from Complainant to determine whether she could be effectively accommodated in her current position. The Agency further emphasized that when she provided medical documentation establishing a need for reassignment, management provided Complainant with an interim accommodation in the form of reassignment to the mailroom, where she could work within her medical restrictions during the pendency of the Agency-wide search for vacant, funded positions. While the Agency acknowledged that it encountered difficulties in finding a suitable permanent position for Complainant due to the severity of her disabilities, the Agency found that the interim accommodation provided by management effectively mitigated any delay in finding a permanent position. Given these circumstances, the Agency concluded that Complainant could not prevail on the merits of claims 12 and 15.

With regard to claims 1-3, 6-8, and 9-10, the Agency found that the detail, reassignment, suspension of her police authority, and termination of the detail were in response to accusations of harassment that other officers had made about Complainant. While the Agency considered Complainant's contention that the underlying actions were based on her protected bases, the Agency emphasized that the internal factfinding investigation substantiated the allegations against Complainant and noted that the Chief initially proposed to remove Complainant from federal service. However, the Director mitigated the proposal to a demotion and allowed Complainant to return to the police force upon the completion of refresher firearms training. While the Agency acknowledged that Complainant was not afforded a PIP prior to her demotion, the Agency found that management was not obligated to do so because the reason for her demotion was conduct not performance. Furthermore, the Agency emphasized that as a probationary SPO, Complainant was not entitled to a PIP.

For claims 4-5, 11, and 13, the Agency found no persuasive evidence that management discriminatorily denied her leave and marked her as AWOL. Contrary to Complainant's assertions, the Agency found that the underlying actions were attributable to her failure to follow proper leave procedures.

As for claims 14 and 16, the Agency attributed Complainant's non-selection for both vacancies to her failure to adequately respond to the interview panel's questions. The Agency ultimately found no persuasive evidence that Complainant's non-selection was based on her protected bases.

Lastly, the Agency addressed claim 17, concerning Complainant's claim of harassment when she was asked to provide medical documentation to corroborate her need for reassignment as a reasonable accommodation for her mental disabilities. The Agency determined that the request was not sufficiently severe or pervasive to constitute harassment.

Based on the foregoing, the Agency concluded that Complainant could not prevail on the merits of her complaint. This appeal followed.

Complainant did not submit any contentions in support of her appeal.² The Agency opposes the appeal and maintains that Complainant “has not raised any viable arguments on appeal to support the position that the Agency’s FAD was factually and/or legally incorrect.”

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency’s decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § VI.A. (Aug. 5, 2015) (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 begin with claims 1-11, 13-14, 16-17, concerning Complainant’s allegations of disparate treatment. For Complainant to prevail, she must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Complainant must initially 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 Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14.

² Complainant filed two motions in January 2022, asking us to order the Agency to reverse its decision to reassign her to a non-law enforcement position. In December 2022, Complainant filed a motion titled, “Appellant’s Motion Relating to Involuntary Separation,” wherein she alleged that the Agency’s actions compelled her to resign. While we are mindful of these motions, we note that the Commission has long held that it is not appropriate for a complainant to raise new claims for the first time on appeal. As such, we decline to consider her motions. See Shela O. v. Dep’t of the Army, EEOC Appeal No. 0120113826 (Dec. 18, 2015), citing Torres v. U.S. Postal Serv., EEOC Appeal No. 01934108 (June 10, 1994). Should she wish to pursue these claims, Complainant is advised to contact an EEO counselor to begin the administrative process.

Furthermore, on May 12, 2022, Complainant submitted a document addressing a matter which was decided by the Merit Systems Protection Board which will be docketed as a petition for review.

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

Assuming arguendo that Complainant established a prima facie case of discrimination on the alleged bases, we find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions. Ultimately, we find that Complainant cannot establish pretext for the reasons articulated in the Agency's FAD. In reaching this conclusion, we note that Complainant has not offered any arguments as to why the Agency erred in finding no discrimination on these claims.

As for claims 12 and 15, concerning Complainant's denial of reasonable accommodation claims, we note that federal agencies are required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless they can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). To prevail on her denial of reasonable accommodation claim, Complainant must show that: (1) she was an individual with a disability; (2) she was a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002).

We note that reassignment is the reasonable accommodation of last resort and is required only after it has been determined that there are no effective accommodations that will enable a complainant to perform the essential functions of his or her current position or all other reasonable accommodations would impose an undue hardship. King W. v. U.S. Postal Serv., EEOC Appeal No. 2019001070 (Mar. 20, 2019). As the record persuasively shows that the Agency's inability to reassign Complainant was based on the severity of her disabilities and that the Agency provided Complainant with an interim effective accommodation, we are disinclined to find discrimination here.

Regarding Complainant's hostile work environment claim, we find that, under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), Complainant's claim of a hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). Furthermore, a finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's FAD.

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).

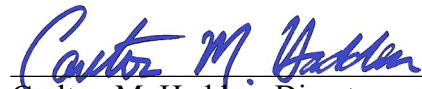
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

May 1, 2023
Date