



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

[REDACTED]
Marina A.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal Nos. 2022003347
2023001051

Hearing Nos. 520-2019-00235X
520-2020-00447X

Agency Nos. 200H-0561-2018103102
200H-0561-2020101325

DECISION

Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission),² pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 6, 2022, and November 7, 2022 final orders 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.

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.

² The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. See 29 C.F.R. § 1614.606. Accordingly, the Commission exercises its discretion to consolidate the captioned cases.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Audiology Health Technician at the Agency's Medical Center in East Orange, New Jersey.

Agency Case No. 200H-0561-2018103102 (Complaint 1)

On April 26, 2018, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and harassment on the bases of national origin (Caribbean-Haitian), sex (female, pregnancy), color (Brown), and disability (physical), and in reprisal for prior protected EEO activity, when from March 2017 to the present, Complainant was subjected to a hostile work environment with respect to comments about her pregnancy and expressing while at work; taking time off to care for her baby; and scrutinizing her more than others; and:

1. In or about March 2017, Complainant's Supervisor failed to process Complainant's Family and Medical Leave Act (FMLA) paperwork.
2. From November 27, 2017, through January 9, 2018, the Supervisor utilized advanced sick leave for Complainant without her authorization.
3. On February 28, 2018, the Supervisor lowered Complainant's performance rating because she had taken time off during her pregnancy.
4. On or about February 22, 2018, through April 2, 2018, the Supervisor would only authorize Complainant to use leave without pay (LWOP) to take time off when her daughter was hospitalized.

The Agency accepted the above claims for investigation, noting that claim 1 was an untimely discrete act and would only be considered as part of the harassment allegation. The Agency dismissed Complainant's claim related to her non-selection for a Voluntary Services Specialist position as untimely and not like or related to Complainant's accepted claims. The Agency also dismissed the basis of parental status.³ Report of Investigation (ROI) 1 at 28-33.

Complainant subsequently requested to amend her complaint to include:

5. On May 1, 2018, and other dates, the Supervisor held Complainant accountable for misplaced hearing aids and missing supplies.
6. On May 8, and 15, 2018, and other dates, the Supervisor assigned Complainant tasks that were not within her regular duties, such as scheduling patients, and then blamed her because her work was not allegedly being done.
7. On May 15, and 16, 2018, and other dates, the Supervisor interrupted Complainant while she was with a patient and required her to see another patient.

³ The Commission has the discretion to review only those issues specifically raised in an appeal. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015). On appeal, Complainant did not contest the Agency's procedural dismissals. As such, we will not address them in the instant decision.

8. On May 18, 2018, the Supervisor yelled at Complainant because B-Clinic did not have a patient, and she yelled in a rude manner, “that’s your job to fill in the open slot.”
9. On May 14, 2018, and other dates, the Supervisor asked doctors and clerks to monitor Complainant.
10. On June 27, 2018, the Supervisor blamed Complainant because hearing aids were missing.

The Agency informed Complainant that her request was accepted as additional evidence, but not an amendment. ROI 1 at 351-4. At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI 1 and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing for Complaint 1.

Following a prehearing conference, the AJ issued a Case Management Order to delineate the claims on November 22, 2019. The AJ identified claims 2-4 as timely claims of disparate treatment based on color, national origin, sex, disability, and reprisal. For the hostile work environment claim, the AJ included claims 1-4, and 10, and further noted that the following incidents from Complainant’s formal complaint were a part of the claim:

11. The Supervisor told Complainant that she was upset that Complainant was pregnant.
12. On February 20, 2018, the Supervisor lowered Complainant’s performance appraisal, claiming that she did it because Complainant was pregnant and had to utilize sick leave. The Supervisor told Complainant, “you took time off during your pregnancy.” Complainant submitted a doctor’s note for each absence.
13. The Supervisor returned Complainant’s FMLA paperwork that her physician had given her, even though she was pregnant for more than one month. Complainant had to go to the Chief to get the Supervisor to submit the forms.
14. The Supervisor, without Complainant’s authorization, utilized advanced sick leave for Complainant, despite knowing that her newborn was disabled with a serious medical condition. Complainant never requested or authorized advanced sick leave.
15. The Supervisor refused to permit Complainant to take time off after her daughter was rushed to the Emergency Room and was hospitalized. The Supervisor would not allow Complainant to use annual leave and would only authorize LWOP. The Supervisor claimed that Complainant had no sick leave, the result of the Supervisor’s use of advanced sick leave.
16. On February 5, 2018, the Supervisor gave Complainant a difficult time when she wanted to pump. Complainant had to send out an email to request time.
17. Upon Complainant’s return to work in February 2018, the Supervisor told Complainant that she had just finished with maternity leave and was now “starting again” by asking for time to care for her baby. Complainant had requested time to take her baby to the doctor for a medical procedure.

18. The Supervisor was always around Complainant's work area, watching and micromanaging her, which made her uncomfortable. The Supervisor did not micromanage others to the same degree.

Agency Case No. 200H-0561-2020101325 (Complaint 2)

On January 7, 2020, Complainant filed another EEO complaint alleging discrimination based on her color, disability (sick child), national origin, and sex, and in reprisal for prior EEO activity, when:

19. From November 2019 to the present, Complainant was subjected to a hostile work environment with respect to comments about her attendance and constant distractions.
20. On November 1, 2019, Complainant was issued a performance appraisal that was lower than what she felt she deserved.⁴

Complainant timely requested a hearing for Complaint 2. Over Complainant's objections, the AJ granted the Agency's motions for a decision without a hearing and issued a decision for Complaint 1 on April 29, 2022, and a decision for Complaint 2 on October 31, 2022, concluding that Complainant did not establish discrimination or harassment as alleged.

The Agency issued final orders adopting the AJ's decisions. Complainant filed the instant appeals and submitted briefs in support of her appeals. The Agency did not respond to Complainant's appeals.

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 the 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

⁴ Complainant averred that the Supervisor stated that the justification for her lower rating was Complainant's absence due to her sick child. ROI 2 at 4, 66.

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

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).

After a careful review of the record, we find that the AJ erred when concluding that there was no genuine issue of material fact in this case because the records were not adequately developed for Complainant’s claims. Specifically, we find that Complainant alleged that the Supervisor made comments exhibiting discriminatory animus, such as incidents 3, 11, 12, 16, and 17.

Complainant also asserted that the Supervisor mocked her pregnancy related light duty by asking, “is that 10 pounds?”; gave her a difficult time when she wanted to pump; and stated that as a “Black woman”, Complainant needed to “learn how to deal with it” like the Supervisor. ROI 1 at 72-3. For Complaint 2, Complainant averred that the Supervisor stated that the reason for lowering her performance rating from Excellent to Fully Successful (claim 20) was Complainant’s caring for a “sick relative,” meaning her child. ROI 2 at 66-7. However, neither EEO Investigator asked the Supervisor for a response to any of these alleged statements.

The Supervisor testified that the accusations of harassment in Complaint 1 were unfounded. The Supervisor added that she was not aware of comments about Complainant taking time off to take care of her baby or additional scrutiny aimed at her. ROI 1 at 231. The record also contains an email chain related to Complainant’s claims of harassment, in which the Supervisor replied that she was “not quite sure where the harassment, abuse, and intimidation are occurring” and would “love to address and eradicate it immediately” because it should not be tolerated. ROI 1 at 136-7. The Supervisor also countered that she would “not be wrongfully accused,” to another email in which Complainant stated the Supervisor was creating a hostile work environment. ROI 1 at 139-40. For Complaint 2, the Supervisor was asked if she made “comments about [Complainant’s] attendance,” and she responded that she had “no knowledge as to why the Complainant has made this allegation.” ROI 2 at 77.

For Complaint 1, the Chief explained that Complainant raised issues, such as communication challenges with the Supervisor, but that he did not recall Complainant mentioning harassment by the Supervisor, and they addressed Complainant’s concerns. ROI 1 at 245-6. Various management officials gave general responses that they had no knowledge of any alleged discrimination or harassment for Complaint 2. ROI 2 at 86, 89, 92, 96, 100. However, no witness, including the Supervisor, was asked about the specific statements that Complainant attested were made. Moreover, the Chief and the Assistant Chief were copied on Complainant’s emails in which she raised harassment and a hostile work environment. ROI 1 at 134, 139, 142. As such, these management officials should be questioned at a hearing about their responses that they were unaware of Complainant’s harassment allegations.

Further, Complainant named a Witness and provided her signed statement, in which she stated that the Supervisor “harassed [Complainant] throughout her difficult pregnancy.” ROI 1 at 75, 172. The EEO Investigator failed to contact this Witness to obtain an affidavit or provide any explanation for not contacting this Witness. As such, we find that additional testimony from this Witness is needed, and that the record is not sufficiently developed for a decision without a hearing.

To the extent that the Supervisor denies or fails to address making any discriminatory or harassing comments, we find that this raises a need for credibility determinations by an AJ at 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).

In addition, Complainant alleged discrimination and harassment based on reprisal for her multiple complaints, including prior EEO complaints. ROI 1 at 70. The Chief also noted that Complainant filed a reasonable accommodation request in September 2017.⁵ ROI 1 at 245. Complainant made notes about the Supervisor’s conduct, such as asking others to monitor Complainant, which she felt was abusive and bullying. ROI 1 at 162. Complainant also stated that the Supervisor pulls her to see patients while she is seeing other patients and sent walk-ins when she is writing reports or seeing another patient, which she believes is done to get Complainant to drop her EEO case or resign. ROI 2 at 67-8. The Commission has a policy of considering reprisal claims with a broad view of coverage. Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. See Carroll v. Department of the Army, EEOC Request No. 05970939 (April 4, 2000). Here, we find that the complained of conduct could reasonably deter protected EEO activity, and that further examination of the witnesses is needed for Complainant’s retaliation claims.

The EEO Investigator merely asked the Supervisor if the actions were based on Complainant’s protected bases, without any follow up to the Supervisor’s response that she did not know what Complainant’s protected bases were for Complaint 1. The Supervisor was only asked if Complainant’s protected bases, including reprisal, were factors for the claims in Complaint 2, and she responded, “no.” ROI 1 at 238, ROI 2 at 81. Again, the Supervisor was not asked about the specific instances, and the records do not contain more than blanket statements, such as the Supervisor having “no knowledge” of Complainant’s allegation that the Supervisor created constant distractions. ROI 2 at 77.

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, 7-1; 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 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995).

⁵ It is well established that requesting a reasonable accommodation is protected EEO activity. See EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.A.2.e (Aug 25, 2016).

In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials, coworkers, and Complainant, herself. Therefore, judgment as a matter of law for the Agency should not have been granted for Complainant's two EEO complaints.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, and evidence not specifically discussed in this decision, the Commission REVERSES the Agency's final orders and REMANDS the matters to the Agency in accordance with this decision and the Order below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is directed to resubmit a hearing request on Complainant's behalf to the appropriate EEOC Hearings Unit, as well as a copy of this appellate decision and uploading the complaint files. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint files have been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a joint hearing for Complaints 1 and 2,⁶ and subsequently issue a decision on the complaints 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.

⁶ The claims in Complaint 1 are outlined in the November 22, 2019 Case Management Order.

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).

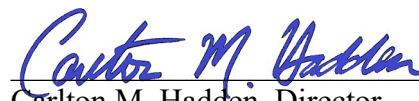
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

August 7, 2023
Date