



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

████████████████████
Leonard H.,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 0120150843

Agency No. PE-FY14-030

DECISION

On December 18, 2014, Complainant filed an appeal with the Equal Employment Opportunity Commission (the EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 7, 2014, final decision concerning his 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 the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et seq.* Our review is *de novo*. For the following reasons, the Commission **AFFIRMS** in part and **REVERSES** in part the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Substitute Teacher at the Agency's Bechtel Elementary School in Okinawa, Japan.

On April 1, 2014, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the bases of his race (Caucasian), sex (male), color (white), age (48), and in reprisal for his wife's prior protected EEO activity when from November 8, 2013 to January 29, 2014, the Principal at the Bechtel Elementary School prohibited him from working there.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency determined that Complainant failed to prove that it subjected him to discrimination as alleged. The record reveals that Complainant began working as a substitute teacher at the Bechtel Elementary School in early 2012 after serving 26 years in the United States military. The Agency stated that for the past ten years, Complainant's Japanese wife also taught at the school under the provisions of the Host Nation program funded by the Japanese government. The Agency noted that Complainant claimed that on November 8, 2013, Complainant's wife contacted an Agency EEO Counselor. The Agency stated that Complainant's wife was allegedly informed that she was precluded from filing an EEO complaint because she is not an American citizen. The Agency noted that Complainant claims that the Principal began discriminating against him on November 8, 2013, the same day that his wife contacted the EEO Office. Complainant claimed that although he had a busy schedule teaching in the early segment of the school year, he was no longer called to substitute teach following his wife's EEO contact.

The Agency stated that on November 14, 2013, Complainant's wife and another Host Nation teacher at the school met with the Principal, the Assistant Principal, and the Okinawa District Superintendent. Complainant asserted that the meeting involved his wife's EEO complaint. The Agency stated that its officials who attended the meeting described it as dealing with Host Nation program issues as well as the job performance of the two teachers present. The Agency noted that a few weeks later the Principal met with the school's front office staff responsible for scheduling substitute teachers and instructed them to place Complainant's name at the bottom of the list of available substitutes.

Complainant initiated contact with an EEO Counselor on January 6, 2014, concerning not being assigned work as a substitute teacher since his wife engaged in the EEO process. The Agency noted that independent of its procedure for processing EEO complaints, it conducted a separate investigation into Complainant's claim. According to the Agency, on January 23, 2014, the Agency-Pacific Chief of Staff issued a memorandum finding that there was evidence to support Complainant's allegation that the Principal directed her staff not to call Complainant for work in retaliation for the November 2013 meeting between his wife and the Agency administrators. The Agency stated that promptly after the issuance of the Chief of Staff's memorandum, Complainant began working nearly every day for the remainder of the school year at Kubasaki High School, on the other side of Okinawa from Complainant's residence, which was close to the Bechtel Elementary School.

The Agency determined that Complainant failed to set forth a prima facie case of reprisal. The Agency stated that Complainant did not provide evidence to support his assertion that his wife contacted an EEO Counselor. Moreover, the Agency noted that the Principal denied that any of Complainant's wife's actions involved a complaint of discrimination or protected EEO activity,

and there is no evidence that the Principal was aware of any EEO activity on the part of Complainant's wife.

With regard to the remaining bases alleged by Complainant, the Agency determined that it articulated legitimate, nondiscriminatory reasons for its actions. The Agency stated during the government shutdown in October 2013, Complainant refused four or five offers to teach at the Bechtel Elementary School because school officials could not provide him with a written guarantee that he would be paid. The Agency explained that as tension increased between the Principal and Complainant's wife, Complainant became angry and confrontational with staff. The Principal maintained that Complainant was defensive and had an aggressive attitude and she was concerned that Complainant might act in an aggressive manner that could compromise the safety and security of the school's staff and students. The Agency stated that the Assistant Principal also observed a change in Complainant's demeanor as he projected a negative attitude toward staff and no longer acknowledged the Assistant Principal's presence when the two were in the school cafeteria or hallways. According to the Agency, Complainant acknowledged that he worked much like a drill sergeant and could unnerve people at times. The Agency noted that Complainant admitted that he refused to speak with a front office substitute teacher coordinator because at the time she was a volunteer rather than an Agency employee and he believed he needed to be careful to whom he gave personal information due to his high-level security clearance.

The Agency explained that early in the school year, the Bechtel Elementary School had a limited number of substitute teachers. The Agency stated that changed in early November 2013 when the hiring freeze was lifted and the school gained approximately twenty additional substitute teachers. The Agency noted that the Principal and front office staff received oral complaints from teachers about the quality of Complainant's performance. The Agency acknowledged that these complaints were not memorialized in writing and the Principal counseled Complainant on his performance only once, in September 2013, after a parent complained about Complainant.

According to the Agency, after Complainant substituted at Bechtel on November 8, 2013, the teacher of the class filed a report wherein she stated that Complainant did not adequately follow her lesson plan. In response to a December 30, 2013, request from the School Secretary at the Kadena Middle School for an available substitute teacher, the Bechtel School Secretary stated that Complainant was available and willing to travel. The Agency noted that the Kadena Secretary responded that the Assistant Principal had requested that they not use Complainant due to past experiences with him. The Agency stated that the Bechtel Secretary replied that Complainant had been a reliable substitute but there had been some recent issues with his wife and the Principal had requested that Complainant only be used as a last resort. The Agency stated that the Pacific Chief of Staff's determination that Complainant had been denied work in retaliation for his wife's meeting with administrators relied heavily on the Bechtel Secretary's statement to the Kadena Secretary.

The Agency stated that it disagreed with the Pacific Chief of Staff's conclusion. The Agency noted that in November 2013, there were no established guidelines for whom to contact first

when a substitute teacher was needed. At that time, substitute teaching opportunities were offered based on dependability, availability, certification, and if the substitute had previously worked with that teacher or class. A formal guidance was subsequently issued and Bechtel implemented it in January 2014. The Agency noted that the Bechtel Secretary explained that her December 2013 e-mail mentioning issues between Complainant's wife and the Principal referred to tension between the Administration and the Host Nation program and nothing else.

With regard to Complainant's arguments to establish pretext, the Agency asserted that Complainant essentially argues that he is a Caucasian, white, over-40 year old male so he can only assume that he has been discriminated against. The Agency stated that this argument is unsupported by evidence and is insufficient to meet Complainant's burden of proof. The Agency determined that Complainant did not demonstrate that he was entitled to protection from reprisal because he failed to provide credible evidence showing that his wife engaged in protected EEO activity. The Agency asserted that Complainant was not treated unfavorably due to any of the alleged bases but rather the record reveals that he was not called to substitute at Bechtel beginning in mid-November due to teacher complaints, his increasingly unpleasant demeanor, and a vastly expanded substitute teacher roster offering Bechtel a wider range of qualified substitute teachers.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that there are systemic and chronic problems at the Bechtel Elementary School that not only affected him and his wife, but also the entire staff and parents. Complainant submits documentation that he claims establishes that his wife engaged in EEO activity in November 2013. Complainant submits documentation that appears to be the EEO complaint that Complainant's wife attempted to file. Preceding this documentation is an e-mail from Complainant's wife to the EEO Counselor, sent on November 8, 2013.

ANALYSIS AND FINDINGS

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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 802 n. 13. To establish a prima facie case of reprisal, Complainant must show that: (1) he engaged in protected EEO activity; (2) the Agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the Agency; and (4) a nexus exists between his protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is

pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

We shall assume arguendo that Complainant has set forth a prima facie case of race, color, sex, and age with regard to not receiving substitute teacher assignments at the Bechtel Elementary School during the relevant period of November 8, 2013 – January 29, 2014. The Agency determined that Complainant failed to establish a prima facie case of reprisal. The Agency based this determination on its conclusion that Complainant did not provide evidence to support his assertion that his wife contacted an EEO Counselor. The Agency asserted that the Principal denied that any of Complainant's wife's actions involved a complaint of discrimination or protected EEO activity, and that there is no evidence that the Principal was aware of any EEO activity on the part of Complainant's wife. On appeal, Complainant submits documentation that appears to be the EEO complaint that Complainant's wife attempted to file. Preceding this documentation is an e-mail from Complainant's wife to the EEO Counselor, sent on November 8, 2013. It is clear that Complainant's wife attempted to initiate the EEO process in November 2013. Title VII provides a cause of action to an employee who suffers an adverse action in retaliation for another individual's protected EEO activity. Thompson v. North American Stainless, L.P., 131 S.Ct. 863 (2011).

We are not persuaded that the Principal was unaware of Complainant's wife's pursuit of the EEO process. Additionally, we note that Complainant's wife's claims were that she had been subjected to "harassment, and discrimination of host nation teachers." The Agency stated that on November 14, 2013, Complainant's wife and another Host Nation teacher at the school met with the Principal, the Assistant Principal, and the Okinawa District Superintendent. The Agency admitted that its officials who attended the meeting described it as dealing with Host Nation program issues as well as the job performance of the two teachers present. As Complainant's wife was claiming that she had been discriminated against as a host nation teacher, and her EEO complaint references this, we find that the Principal knew as of the meeting on November 14, 2013, that she had engaged in protected EEO activity. Shortly thereafter, Complainant was no longer given substitute teacher assignments, and suffered an adverse action. Therefore, we find that Complainant set forth a prima facie case of reprisal.

The Agency provided several legitimate, nondiscriminatory reasons for its decision not to issue Complainant substitute teacher assignments. The Agency stated that during the government shutdown in October 2013, Complainant refused four or five offers to teach at the Bechtel Elementary School because school officials could not provide him with a written guarantee that he would be paid. The Agency maintained that Complainant became angry and confrontational with staff. According to the Principal, Complainant was defensive and had an aggressive attitude and she was concerned that Complainant might act in an aggressive manner that could compromise the safety and security of the school's staff and students. Additionally, the Agency stated that early in the school year, the Bechtel Elementary School had a limited number of substitute teachers. The Agency stated that changed in early November 2013 when the hiring freeze was lifted and the school gained approximately twenty additional substitute teachers. Further, the Agency asserted that the Principal and front office staff received oral complaints

from teachers about the quality of Complainant's performance. The Agency stated that a written complainant was filed after Complainant substituted at Bechtel on November 8, 2013. According to the Agency, the teacher of the class filed a report wherein she stated that Complainant did not adequately follow her lesson plan. We find that the Agency articulated legitimate, nondiscriminatory reasons for its decision not to issue Complainant substitute teacher assignments during the relevant period.

Complainant argues that the Agency's various explanations are pretext intended to hide its discriminatory motivation. Upon review of the record, we take note of the fact that the Agency-Pacific Chief of Staff issued a memorandum finding that there was evidence to support Complainant's allegation that the Principal directed her staff not to call Complainant for work in retaliation for the November meeting between his wife and the Agency administrators. That finding was based in part on the Bechtel School's Secretary's statement to the Kadena Middle School Secretary that there had been some recent issues with Complainant's wife and the Principal had requested that Complainant only be used as a last resort. In light of this evidence, we find that the Agency engaged in discrimination, as reprisal was a factor in Complainant not receiving substitute assignments.

Although we find that reprisal occurred, we recognize that the Agency presented legitimate reasons for its decision not to issue Complainant substitute teaching assignments. Cases in which the employer acts on the basis of both lawful and unlawful reasons are known as "mixed motive" cases. A mixed motive analysis applies to cases in which there is a finding that discrimination was one of multiple motivating factors for an employment action, *i.e.*, in which the Agency acted on the bases of both lawful and unlawful reasons. See EEOC Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Notice No. 915.002 III.B.2 (July 14, 1992), as modified, EEOC Notice No. 915.002 (January 16, 2009). Under Title VII, a violation is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Once a complainant demonstrates that discrimination was a motivating factor in the agency's action, it is the agency's burden to demonstrate that it would have taken the same action even if it had not considered the discriminatory factor. Genny L. v. Department of Defense (Defense Contract Audit Agency), EEOC Appeal No. 0120122795 (February 23, 2016). If the agency makes this demonstration, the complainant is not entitled to personal relief such as damages, reinstatement, hiring, promotion, and back pay but may be entitled to declaratory relief, injunctive relief, attorney's fees, and costs. See DeArmas v. Dep't of the Treasury, EEOC Appeal No. 0720060085 (July 26, 2007); Walker v. Soc. Sec. Admin., EEOC Request No. 05980504 (Apr. 8, 1999).

Upon consideration of the reasons presented by the Agency for not issuing Complainant substitute teaching assignments, we find that the same decisions to award teaching assignments to other substitute teachers rather than Complainant would have been made even absent discrimination. The addition of a sizable number of other qualified substitute teachers afforded the Bechtel Elementary School more, and potentially better, options to serve in the substitute positions when they arose. In November 2013, Complainant was reported for failing to follow a

teacher's lesson plan. In September 2013, Complainant received a verbal counseling from the Principal when a parent complained about him. Understandably, the Principal was not pleased when Complainant rejected several opportunities to serve as a substitute during the government shutdown in October 2013 without a written guarantee that he would be paid. Additionally, Complainant's less than pleasant demeanor toward certain school personnel during the relevant time period did not help his cause. We find that Complainant was placed at the bottom of the substitute referral list and did not receive assignments in part due to his wife's EEO activity. However, this also occurred due to certain deficiencies in Complainant's teaching style and attitude.

With regard to Complainant's claims of discrimination based on race, color, age, and sex, as previously indicated, we find that the Agency has presented legitimate, nondiscriminatory reasons for not issuing Complainant substitute teacher assignments. Complainant attempts to establish pretext by arguing that individuals who were of other races, women, and younger than him received substitute teacher assignments during the relevant period. This evidence by itself is not sufficient to refute the Agency's explanation for not utilizing Complainant. We find that Complainant has not established that the Agency's reasons were pretext intended to hide discriminatory motivation attributable to his race, color, sex, or age.

CONCLUSION

The Agency's determination that no discrimination occurred is **AFFIRMED** in part and **REVERSED** in part. We find that Complainant was discriminated against on the basis of reprisal. We further find that Complainant was not discriminated against on the bases of his race, color, sex, or age.

ORDER

1. The Agency shall take corrective, curative, or preventative action to ensure that similar violations of the law will not recur. See 29 C.F.R. § 1614.501(a)(2);
2. The Agency shall provide eight (8) hours of in-person or interactive EEO training to the responsible management official, the Principal, who was employed at the Bechtel Elementary School during the relevant period that Complainant was not assigned substitute teacher positions.
3. The Agency shall provide eight (8) hours of EEO training to all non-management staff at the Bechtel Elementary School who were involved in the assignment of substitute teacher positions during the relevant period.
4. The Agency shall post a notice that the Agency has been found to have discriminated against an employee at the Bechtel Elementary School on Okinawa.

5. The Agency shall consider taking appropriate disciplinary action against the responsible management official, the Principal. The Commission does not consider training to be disciplinary action. Within 30 days of the date this decision becomes final, the Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management official has left the Agency's employment, then the Agency shall furnish documentation of her departure date.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G1016)

The Agency is ordered to post at its Bechtel Elementary School, Okinawa copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- **within thirty (30) calendar days** of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail

within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (T0610)

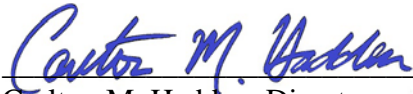
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

January 19, 2018
Date