U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted]
Judson G.,[1]
Complainant,

v.

Janet Dhillon,[2]
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 0120181479

Agency No. 2016-0038

DECISION

On March 22, 2018, 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 February 15, 2018, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

The issue presented on appeal is whether the Administrative Judge (AJ) erred in granting the Agency's motion of summary judgment finding that Complainant failed to establish that the Agency subjected him to discrimination on the bases of disability and age (65) when, on April 26,

[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] In this case, the Equal Employment Opportunity Commission is both the appellant agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with the in-house processing and resolution of discrimination complaints. For the purposes of this decision, we will use the term "Commission" to refer to the adjudicatory authority and the term "Agency" to refer to the appellant party in this request for reconsideration.

2016, he was notified that, effective April 29, 2016, he was being terminated from his position as a Social Scientist, GS-13, in the Agency's Office of Research, Information and Planning.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Social Scientist Analyst, GS-13 in the Agency's Office of Research Information and Planning (ORIP). Complainant was stationed at the Birmingham Alabama District Office, but he reported to the Director of ORIP in the Agency's Headquarters in Washington, DC. Complainant was hired on May 18, 2015, for a conditional appointment and was serving in a probationary period. Complainant's duties included, but were not limited to, providing guidance and direction to investigators and trial attorneys in the qualitative analysis of employment discrimination complaints. A critical function of the position involved utilizing Statistical Analysis Software (SAS) to determine whether there was potential discrimination and preparing preliminary reports on the findings. On April 26, 2016, Complainant was given notice that he was being removed from his probationary position, effective April 29, 2016.

On October 26, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability[3] and age (65) as articulated above. 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 Administrative Judge. Complainant timely requested a hearing. Over Complainant's objections, the AJ granted the Agency's October 26, 2017, motion for a decision without a hearing and issued a decision without a hearing on January 9, 2018. The Agency subsequently issued a final order adopting the AJ's finding that Complainant did not establish that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant through his representative, contends, among other things, that the AJ and the Agency failed to consider the full extent of the facts in the record, ignored disputed facts, did not resolve disputed facts in favor of Complainant, and reached an incorrect conclusion as a result. Complainant also argues that the case was inappropriate for summary disposition because there are numerous material facts in dispute. Finally, Complainant seems to argue that the AJ worked for the Agency and appeared to question his impartiality. Complainant stated that, "[a]s the EEOC was both the Agency and the Judge in the instant case, it calls into question the inherent bias present in this system when all disputed material facts are resolved in favor of the Agency, the moving party, in contradiction to federal law."

[3] Complainant described his Agent Orange related medical conditions as diabetic neuropathy, arteritis, kidney disease, anxiety disorder and Post Traumatic Stress Disorder. He indicated, at the outset of his employment, that he had "trouble getting around," because of the pain associated with his medical conditions.

In response, the Agency requests, in pertinent part, that we affirm its final order adopting the AJ's decision on the grounds that: (1) Complainant was not qualified for the Social Scientist position he occupied; and (2) Complainant failed to demonstrate that any of the Agency's proffered reasons for the termination were pretextual.

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 Chapter 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

At the outset, we must address Complainant's apparent contention that the AJ was biased because he was supposedly an Agency employee. Where the EEOC is the respondent Agency, in accordance with Commission policy, a case is assigned to an independent contract Administrative Judge *not* an employee of the Commission. See Logan-King v. Equal Emp't Opportunity Comm'n, EEOC Request No. 05A10082 (Jan. 3, 2002).

We must next 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 administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

After a review of the record, we find that there are no genuine issues of material fact or any credibility issues which required a hearing and therefore the AJ's issuance of a decision without a hearing was appropriate. The record has been adequately developed, Complainant was given notice of the Agency's motion to issue a decision without a hearing, he was given a comprehensive statement of undisputed facts, he was given an opportunity to respond to the motion and statement of undisputed facts, and he had the opportunity to engage in discovery. Under these circumstances, we find that the AJ's decision without a hearing was appropriate.

Disparate Treatment

To prevail in a disparate treatment claim absent direct evidence of discrimination, Complainant must satisfy the evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See also, Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999); Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001). Complainant carries the initial burden of establishing 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, 441 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to prove, by a preponderance of the evidence, that the reason proffered

by the Agency was a pretext for discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Assuming, arguendo, that Complainant established a prima facie case of discrimination on the bases of age and disability, we find that the Agency articulated legitimate, non-discriminatory reasons for its actions, and that Complainant did not demonstrate that any conduct on the part of the Agency was based on discriminatory animus. A review of the record supports the AJ's determination that very early in his employment, it became apparent that Complainant lacked the necessary skills to utilize the SAS. This inability conflicted with what Complainant marketed as his "expertise" during his interview and the application process.[4] The record indicates that SAS skills were necessary for Complainant to effectively complete most of his job tasks. As a result, he was advised to obtain training on how to better utilize the system on numerous occasions. The record reflects that an Individual Development Plan that included three SAS on-line training courses was drafted for Complainant, and that he failed to take advantage of any them despite numerous reminders from management. The record contains emails indicating that management began suggesting additional training to Complainant in June 2015, just a short time after he'd been hired on May 18, 2015.

The record reflects that, in addition to lacking the necessary skills with respect to using SAS, Complainant also missed several assignment deadlines. In some instances, Complainant missed a deadline that he previously confirmed to management that he was comfortable in meeting. In most instances, the record indicates the work Complainant was unable to complete had to be reassigned to another analyst, which impacted Agency resources. The record indicates that there were a series of instances where management had to check with Complainant on the status of an assignment, and that it was not until the "check-in" that Complainant would make them aware of a potential delay.

In his attempt to establish pretext, Complainant contends that the Agency's position that he had a deficit with respect to using SAS was without merit. Complainant contends that record evidence demonstrates his extensive history of using SAS, and similar programs. According to Complainant, he completed at least one assignment using SAS prior to his termination, and he

[4] The Chief Analyst, who provided training and mentorship to the field analysts and reviewed their work, stated in her affidavit that:

> At the beginning when [Complainant] was hired, his work performance was average. He lacked SAS skills and that's why training was needed. I believe [Complainant] overstated his SAS capabilities in his application materials and in the course of his interview process. Then he failed to meet deadlines on his cases. The deficiencies with [Complainant] were noticeable from the beginning of his employment and he never got better. His lack of SAS knowledge appeared to be the biggest issue. He did not appear to take advantage of the SAS training that we offered . . . .

maintained there was no evidence to show a deficit in this area. Complainant contends that missed deadlines were initially caused by his being over-ambitions in setting and accepting deadlines, and that later ones were related to his disability-related health issues.[5]

We find that these assertions by Complainant, without more, are insufficient to establish pretext. The record supports the Agency's contentions that Complainant's performance was unacceptable from the beginning of his employment with the Agency. There are multiple documented instances of Agency officials suggesting training courses to Complainant, as well as, addressing missed deadlines. The record clearly indicates that these were the reasons for his termination not discriminatory animus due to his age or disability. Where complainants are probationary employees, we have long held that they are subject to retention, advancement, or termination at the discretion of an agency so long as these decisions are not based on a protected category. Kaftanic v. U.S. Postal Serv., EEOC Appeal No. 01882895 (Dec. 27, 1988) (citing Arnett v. Kennedy, 416 U.S. 134, 152 (1974)). Accordingly, we find no persuasive evidence of an unlawful motivation in the instant matter.

Reasonable Accommodation

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See, e.g., Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016). An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

Again assuming, arguendo, that Complainant is an individual with a disability, we find that he has not established that he was denied a reasonable accommodation because he did not establish that he could perform the essential functions of his position as a Social Scientist with or without an accommodation, i.e., he has not established that he is a qualified individual with a disability. Moreover, even if he were deemed qualified, there is no evidence that Complainant ever advised the Office Director, or any other supervisor or employee, of his need for an accommodation to

[5] We note that, in addressing an Administrative Judge's issuance of a decision without a hearing, a complainant's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for a hearing. See Celotex, 477 U.S. at 324.

perform the essential functions of his position because of a disability. The record is clear: Complainant was advised that he needed training and was told how to obtain the necessary training. The record reflects that an Individual Development Plan that included three SAS on-line training courses was drafted for Complainant, and that he failed to take advantage of any of them despite numerous reminders from management. The record contains emails indicating that management began suggesting additional training to Complainant in June 2015, just a short time after he'd been hired on May 18, 2015.

The record indicates that Complainant was provided a telework schedule. Although Complainant subsequently argued that it was because of his disability, the AJ noted that in his affidavit, Complainant indicated that it was needed because of the distance to the Birmingham office, which was approximately 100 miles. The Office Director stated that, "[Complainant's] telework schedule was not an accommodation. Prior to his hire, I didn't know he lived far away from Birmingham which was his duty station. [Complainant] was placed on a flex schedule which is done for any analyst under my supervision and he did not indicate his telework was due to a disability."

CONCLUSION

Based on a thorough review of the record, and the contentions on appeal, including those not specifically addressed herein, we find that the AJ properly issued summary judgment upon determining that there were no material facts in dispute and that Complainant failed to demonstrate he was subject to discrimination based on his age and disability when he was terminated during his probationary period. The Agency's final order adopting the AJ's decision therefore is AFFIRMED.

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 (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:

/s/ Bernadette B. Wilson
_____
Bernadette B. Wilson
Executive Officer
Executive Secretariat

December 4, 2019
_____
Date