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

[redacted]
Darell C.,[1]
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2022004381

Hearing No. 451-2019-0042X

Agency No. HS-CBP-01458-2017

DECISION

On August 12, 2022, 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 9, 2022, final order concerning an 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.

ISSUE PRESENTED

Whether the EEOC Administrative Judge (AJ) abused his discretion by issuing a decision without a hearing finding that Complainant failed to establish that he was subjected to disparate treatment or discriminatory harassment based on national origin (Hispanic) and/or in reprisal for prior protected EEO activity?

BACKGROUND

During the relevant time, Complainant worked for the Agency as a Border Patrol Agent, GS-12, in El Paso, Texas.

[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.

On July 25, 2017, Complainant filed a formal EEO complaint alleging the Agency discriminated against him on the bases of national origin (Hispanic) and reprisal for prior protected EEO activity when:

1. Complainant was subjected to harassment as evidenced by the following:

    a. In 2014, Complainant was removed from the Border Enforcement Taskforce;
    b. In 2015, Complainant was not selected for the Drug Enforcement Administration Border Security Initiative Taskforce;
    c. In 2016, a Supervisory Border Patrol Agent issued Complainant a memorandum notifying him not to let unauthorized personnel into the Fleet office; and
    d. In 2016, the Agency's Special Operations Supervisor notified Complainant that he could not work on holidays while on a detail assignment.

2. In 2017, after being selected for a detail as a Field Intelligence Agent, management changed the shift assignment to duty hours Complainant which did not want to work, resulting in Complainant declining the detail.

3. In 2017, Complainant was not interviewed for a detail to the EL Paso Communications PRIDE/Detour Unit.

4. In 2017, while Complainant was explaining the shift bidding process to a colleague, his supervisor scolded Complainant for providing incorrect information.

5. In 2017, Complainant's request to serve as an acting supervisor was denied.

6. In October 2017, Complainant was not scheduled for the Financial Literacy Seminar.

7. In December 2017, Complainant's detail to the El Paso Sector was cut short, and he was required to return to his station.

8. On December 10, 2017, Complainant was removed from Confined Space Entry Training scheduled for December 11, 2017.

9. On December 18, 2017, Complainant learned that he did not receive a cash award for fiscal year 2017.

10. On April 21, 2017, Complainant was not interviewed for the position of Supervisory Border Patrol Agent at the Agency's Santa Teresa Station.

11. In April 2017, Complainant was not interviewed for a second Supervisory Border Patrol Agent position at the Agency's Santa Teresa Station.

12. On April 2, 2017, Complainant was not interviewed for a Supervisory Border Patrol Agent position at the Agency's Clint Station.

13. On December 15, 2017, Complainant learned that he was not selected for a second Supervisory Border Patrol Agent position at the Agency's Clint Station.

Following the Agency's investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

However, on July 5, 2022, the AJ issued Complainant an Order to Show Cause to explain why Complainant failed to submit a status report as ordered. Complainant failed to respond to the AJ's Order to Show Cause, resulting in the issuance of sanctions. The AJ determined that because Complainant had twice disregarded orders, sanctions are warranted. As a sanction for Complainant's failure to respond, the AJ issued a decision without a hearing based solely on the evidence in the Report of Investigation and not with any additional evidence or argument provided by Complainant. The AJ noted that although it was in his discretion not to do so, he would nevertheless construe the evidence in the light most favorable to Complainant, meaning that any genuine issue of material fact would be decided in Complainant's favor.

On July 12, 2022, the AJ issued a decision on the merits of the complaint. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination or unlawful retaliation as alleged.

This appeal followed.

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

Sanction – Decision Without a Hearing

The Commission has held that sanctions, while corrective, also act to prevent similar misconduct in the future and must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). The Commission has emphasized that the purpose of the sanction is to deter the underlying conduct of the non-complying party. See Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005).

The factors pertinent to "tailoring" a sanction, or determining whether a sanction is, in fact, warranted include: 1) the extent and nature of the of non-compliance, including justification presented by the non-moving party; 2) the prejudicial effect of the non-compliance on the opposing party; 3) the consequences resulting from the delay in justice, if any, and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007); Voysest v. Soc. Sec. Admin., EEOC Appeal No. 01A35340 (Jan 18, 2005).

Here, Complainant failed to comply with the AJ's order to submit a status report. The AJ issued an order to show cause, providing Complainant with an opportunity to explain his failure to submit the report as ordered. However, Complainant also failed to respond to the order to show cause. Complainant has also not filed any argument in support of the instant appeal. In light of these specific circumstances, we find no reason to overturn to sanction imposed by the AJ in this matter, which was to issue a decision on the merits of the complaint based on the evidence developed in the Report of Investigation.

Disparate Treatment

To the extent that the subject claims are viewed in the context of a disparate treatment analysis, we will address the claims as follows. A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983): Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Services, EEOC Request No. 05900467 (June 8. 1990): Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

A careful review of the record shows that Complainant's claims concern alleged Agency conduct occurring between 2014 and 2017. Complainant mainly challenges several non-selections and the handling of his detail assignments. For each of Complainant's non-selection allegations as well as his claims regarding other personnel decisions including detail assignments. the AJ properly found that the Agency offered legitimate, non-discriminatory explanations for its conduct. The AJ also determined that there was no evidence in the Report of Investigation establishing that the Agency's explanations were pretext to mask discrimination.

The investigation disclosed that Complainant objected to the Agency's handling of several of his detail assignments. Complainant alleges that the Agency removed him early from one detail, failed to interview him for another detail assignment, and changed the shift hours to a detail he had applied and been selected for but ultimately declined. The AJ found that Agency officials provided legitimate explanations regarding these incidents. Complainant alleges that the Agency purposely changed the duty hours of the detail he had been selected for in order to discriminate against him. However, record evidence reflects that the shift hours of Complainant's detail were determined by operational need and unit seniority. As a detailed employee, Complainant had the least amount of seniority in the unit. The record further reflects that Complainant was advised in the interview for the detail that the successful candidate would be required to work different shifts. The evidence also shows for another detail that operational need required management to remove Complainant early from his detail assignment.

Complainant also challenged the Agency's conduct with respect to training and cash awards. The AJ determined that in one instance, the evidence showed Complainant never actually requested to attend a Financial Review Seminar. The record indicates that once Complainant requested to attend the seminar, he was permitted to do so in February 2018. Regarding Complainant's claim regarding a cash award, according to an Agency official, Complainant had “pissed off a lot of supervisors,” a fact which Complainant did not rebut. There is no evidence, however, that the supervisors had a negative view of Complainant because of his national origin or his prior EEO activity.

Complainant acknowledged that he often challenged the knowledge and authority of his supervisors. The AJ found that there was no evidence that the Agency's failure to provide a cash award was based on Complainant's protected status rather than his unrelated clashes with supervisors.

The record indicates that Complainant applied for four different Supervisory Border Patrol Agent positions. Complainant twice applied for a supervisor position at both the Agency's Santa Teresa Station and its Clint Station. In each instance, the selecting officials determined that Complainant lacked the requisite supervisory experience and intelligence experience for the jobs. Complainant failed to demonstrate that his qualifications for the supervisory positions were plainly superior to the selectees' qualifications. See Wasser v. Department of Labor, EEOC Request No. 05940058 (November 2, 1995).

Harassment

To prove his harassment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case, his national origin or prior EEO-protected activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Here, the AJ found that Complainant failed to establish that several of the incidents in this matter occurred as alleged. Moreover, the AJ determined that, beyond Complainant's bare assertions, he failed to demonstrate a nexus between the allegedly discriminatory actions and his protected bases.[2] Instead, the incidents complained of here appear to have been the reasonable actions of Complainant's supervisor and other management officials taken in the course of discharging their supervisory responsibilities. An Agency has broad discretion to carry out personnel decisions, such as disciplinary decisions, and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Burdine, 450 U.S. at 259; Stiles v. Dep't of Transp., EEOC Request No. 05910577 (June 27, 1991).

The image which emerges from considering the totality of the record is that there were conflicts and tensions with Agency management that left Complainant feeling aggrieved. However, the statutes under the Commission's jurisdiction do not protect an employee against all adverse treatment, even that caused by a supervisor's personality quirks or autocratic attitude. See Bouche v. U.S. Postal Serv., EEOC Appeal No. 01990799 (Mar. 13, 2002).

[2] The AJ also noted that the formal complaint addressed "lingering" claims occurring between 2014 and 2016 which were not expressly addressed in the AJ's decision. The AJ notes that because Complainant failed to demonstrate that any of the more *recent* claims were discriminatorily motivated, the AJ is not obliged to consider the stale claims. We concur.

See also Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981) ("Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed. The essence of the action is, of course discrimination."). Discrimination statutes prohibit only harassing behavior that is directed at an employee because of his or her protected bases. Here, the preponderance of the evidence does not establish that any of the events at issue were motivated by discriminatory or retaliatory animus. Complainant's claim of harassment is precluded based on our findings that he failed to establish that any of the actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

We AFFIRM the Agency's final order implementing the AJ's decision without a hearing finding no discrimination or unlawful retaliation was established as alleged.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124.1)

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 their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx

Alternatively, Complainant can submit their 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 their 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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 29, 2024
Date