



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

████████████████████
Patrick H.,¹
Complainant,

v.

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

Appeal No. 2022004672

Hearing No. 520-2022-00085X

Agency No. 200H-V102-2021102544

DECISION

Complainant filed a timely appeal, pursuant to 29 C.F.R. § 1614.403, from the Agency's August 9, 2022 final order concerning an 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, we AFFIRM the Agency's final order.

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Purchasing Agent, GS-1105-07, at the East Orange Veterans Affairs Medical Center in East Orange, New Jersey.

On March 25, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of disability (asthma) and age (53) when:

(1) in or around September 2020, prior to the application/approval of Complainant's accommodation request, the Assistant Chief of Prosthetics (Chief) informed Complainant that

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.

Complainant needed to apply for workers' compensation, not request a reasonable accommodation;

(2) on September 17, 2020, Chief ordered Complainant to come into the office on September 18, 2020, even though Chief had a doctor's report that stated Complainant could not go into that environment any longer;

(3) ongoing from September 2020 until at least April 2021, Chief has been argumentative, combative, and resentful because Complainant requested to telework; constantly uses all upper-case letters in his emails, indicating he is yelling at Complainant; and addresses Complainant as Mr. [____], instead of Complainant's first name;

(4) ongoing since in or about September 2020, Complainant has been assigned 80 percent of the purchasing work and required to perform clerk duties;

(5) although Complainant was provided an accommodation in or about September 2020, Complainant was not provided the use of an Agency laptop until December 2020;

(6) on December 14, 2020, Complainant's request for annual leave on December 18, 2020, was denied;

(7) in January 2021, Complainant was issued a written counseling and subsequent to the written counseling, Chief issued a notice that Complainant's reasonable accommodation was being terminated and to report to work;

(8) on February 8, 2021, Complainant's request for annual leave on February 12, 2021, was denied;

(9) on February 19, 2021, Complainant was issued a Proposed Admonishment, which was rescinded on March 29, 2021;

(10) on February 19, 2021, Chief requested that Complainant come into the office on February 24, 2021, to discuss a memorandum received and to bring union representation;

(11) on March 2, 2021, Complainant received notice that Complainant's reasonable accommodation was being terminated;

(12) on or about March 25, 2021, Complainant was informed that although Complainant's request for a reasonable accommodation was approved, the Agency was not providing the accommodation requested but rather offered an accommodation which they believed would be effective;

(13) on March 29, 2021, Complainant was issued a Written Counseling;

(14) on June 4, 2021, Complainant was rated "Needs improvement to be Fully Successful or better" on Complainant's mid-year Performance Appraisal; and

(15) on June 7, 2021, Complainant's duty station was changed from the East Orange campus to the Lyons campus of the New Jersey Health Care System.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

In the decision, the AJ determined that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, regarding claim (1), the AJ found that there was no evidence this incident occurred as alleged. Rather, the record showed that Complainant made multiple reasonable accommodation requests that were approved.

As to claim (2), Complainant's doctor advised that Complainant not work in the East Orange facility but did not state that he should never enter the workplace. Chief emailed Complainant asking him to come in and discuss supplies, and Complainant said he could not be present when Chief requested, and Chief suggested a different day to meet. The record did not show if Complainant ever went to East Orange for the meeting.

With regard to claim (3), the AJ determined that Complainant failed to support this claim with evidence. Specifically, there is no record of the phone calls Complainant alleged Chief made, and the available emails do not contain text in all capitals or extreme communication. As to claim (4), Complainant's second-level supervisor (S2) stated that she reviews monthly reports of employees' work activity and did not notice any imbalance between employees. In addition, the AJ found no evidence that Complainant was the only Purchasing Agent performing "clerk's duties", or that other Purchasing Agents at East Orange were working remotely. With respect to claim (5), emails established that arrangements were made for Complainant to acquire an Agency laptop, which was ready for Complainant to pick up from the Agency in August 2020. The AJ determined that there was no evidence of any delay in providing the equipment.

Regarding claims (6) and (8), Agency policy required that annual leave requests be made at least two weeks in advance. In each alleged instance, Complainant made an annual leave request four days in advance, which Chief denied due to staffing needs. As to claims (7), (9), and (13), Complainant alleged he was issued written counseling in January 2021, there is no such counseling in the record. Further, the March 29, 2021 counseling letter described errors made by Complainant in purchasing orders and a shipping address, as well as a resulting customer complaint. Complainant stated that any errors were corrected but did not dispute that they occurred. Moreover, Chief noted in the counseling letter how Complainant failed to follow instructions to follow up on an error.

With regard to claim (10), Complainant's doctor's advice not to work in the East Orange facility did not state that Complainant should never enter that office. The AJ noted that it was reasonable that a supervisor would want to discuss the written counseling they were issuing to an employee and inform the employee of their right to have representatives present. As with the proposed meeting in claim (2), the record does not show whether this meeting took place.

As to claim (14), Complainant's progress report indicated that he needed improvement to be fully successful. The reasoning for this assessment was based upon the events described in Complainant's written counseling, which included work errors and a failure to follow instructions.

Regarding claims (11), (12), and (15), the undisputed facts show that Complainant was given a temporary telework agreement on August 3, 2020, covering a period of 90 days. This agreement was extended multiple times through March 2021. At that time, while Complainant had requested telework as an accommodation, Chief and the Office of Human Resources suggested an alternative accommodation of reassignment to the Lyons facility to meet both the needs of Complainant and the Agency. The alternative accommodation recognized that Complainant could not work in the East Orange facility but could work in a facility where his asthma would not be triggered.

An increase in commute time from 25 to 40 minutes each way does not make the reassignment an ineffective accommodation. Complainant presented no evidence demonstrating that the alternative accommodation was ineffective.

The AJ concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. As a result, the AJ found that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). 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. 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. (as revised, August 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*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory or retaliatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was subjected to discrimination, reprisal, or a hostile work environment as alleged. Accordingly, we AFFIRM the Agency's final order adopting the AJ's decision.

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 25, 2024
Date