



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

[REDACTED]
Cristobal F.,¹
Complainant,

v.

Kristi L. Noem,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2023000133

Hearing No. 551-2021-00080X

Agency No. HS-TSA-00125-2021

DECISION

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 September 29, 2022, 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. For the following reasons, the Commission AFFIRMS the Agency's final order finding no discrimination.

At the time of events giving rise to this complaint, Complainant worked as a Transportation Security Officer (TSO) at the Agency's Portland International Airport (PDX) facility in Portland Oregon. TSOs are required to meet the Aviation and Transportation Security Act (ATSA) mandated medical guidelines.

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 January 1, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (alcohol disorder) when:

1. In or around September 14, 2020, management requested Complainant complete a fitness for duty evaluation;
2. In or around October 5, 2020, and again on December 11, 2020, management removed Complainant from his job duties and determined that he was not fit for duty;
3. In or around October 2020, management denied Complainant a reasonable accommodation;
4. In or around October 2020, Complainant became aware that his Personal Identification Verification (PIV) card was not working; and
5. In or around December 2020 and January 2021, Complainant became aware that management processed the wrong type of leave in his Office of Personnel Management (OPM) 71 form.

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). Complainant requested a hearing. Over Complainant's objections, the AJ granted the Agency's June 9, 2022, motion for a decision without a hearing and issued a decision without a hearing on August 24, 2022. The AJ found Complainant failed to present or identify any material facts that place the Agency's articulated nondiscriminatory reasons for its actions in dispute or demonstrate pretext.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant filed the instant appeal.

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 13, 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. (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).

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 animus. Here, however, Complainant has failed to establish such a dispute.

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 discriminated against by the Agency as alleged.

We find that Agency officials articulated legitimate, nondiscriminatory reasons for its actions, which Complainant failed to dispute.

Regarding Claim 1, the record indicates that on or about September 7, 2020, Complainant disclosed to a supervisor that he was prescribed a medication and was concerned it might cause him to fail a drug test. ROI at 45; 137. Management consulted Human Resources and the Office of Chief Medical Officer (OCMO) and requested that Complainant undergo a fitness for duty (FFD) exam. Report of Investigation (ROI) at 75. On September 20, 2020, Complainant was issued an FFD letter than explained that because Complainant had disclosed that he had been prescribed but was not taking Naltrexone and because Naltrexone is used to treat substance abuse, there was concern about his health and the “safety security, and the efficiency of operations.” ROI at 137. The FFD letter provided Complainant with additional instructions on completing the FFD process and gave him a deadline of October 14, 2020.

Regarding Claim 2, on October 1, 2020, Complainant submitted the FFD Questionnaire that was completed by his health care provider. The Questionnaire confirmed that Complainant was being treated for alcohol abuse, that he was prescribed medication for alcohol abuse that he was not taking, and that he was still drinking. ROI at 266-68. On October 2, 2020, the Office of Chief Medical Officer (OCMO) issued a determination that Complainant did not meet the medical and psychological guidelines for TSOs because he does not meet the DSM-5 criteria for full remission because he does not have documented abstinence of three months and does not have documentation demonstrating completion of a substance use disorder treatment program. ROI at 142. The determination advised Complainant that this was a temporary disqualification which would be revisited and that he might be eligible for light duty, a reasonable accommodation, or reassignment. ROI at 143.

Complainant requested reconsideration of the finding that he was unfit for duty. On December 11, 2020, OCMO determined that Complainant remained temporarily disqualified from performing the TSO duties because although he had enrolled in a substance abuse disorder treatment program, he lacked the three months of abstinence and had not yet completed the program. ROI at 149-51.

Regarding Claim 3, the record indicates that on November 16, 2020, Complainant submitted a request for a reasonable accommodation. ROI at 114. Beginning on November 20, 2020, the Reasonable Accommodation Program Officer (RAPO) discussed the requested accommodation with Complainant and Agency operations. Through the interactive process it was determined that Complainant wanted light duty or to do a different function such as working in the uniform room. ROI at 115. However, RAPO determined there was no light duty work available and the request for a temporary relocation to perform a different function was denied. ROI at 116.

In a February 3, 2021, letter RAPO, advised Complainant that although he has a diagnosis of alcohol disorder, he indicated that he had no limitations and had not refrained from the use of alcohol for the required period to have reconsideration of his fitness for return to duty. RAPO further advised Complainant that although his requested accommodation was not available, the Agency provided him with an accommodation of leave so that he could attend the substance abuse program. ROI at 163-66. On March 9, 2021, OCMO requested updated medical information from Complainant to determine whether he satisfied the medical guidelines for his position.

On March 15, 2021, OCMO issued a determination that Complainant had met the requirements to return to full duty and he was cleared to return. ROI at 276-79.

Regarding Claim 4, Complainant asserts that he had only been gone for a few weeks when he realized his PIV card was not working. He asserts that policy states that an employee must be gone for 30 days before a PIV card is inactive but he was only gone a few weeks when they deactivated his. ROI at 50. The record indicates that on October 8, 2020, Human Resources informed the Personnel Security Division that Complainant was expected to be on leave for more than thirty days. Agency policy requires Human Resources to notify the Security office when an employee will be on extended leave. ROI at 128. Personnel Security Division indicated it would deactivate his PIV card until he returned to duty. On October 23, 2020, Human Resources requested that Complainant's PIV card be reactivated so that he could access the Employee Personnel Page. On November 5, 2020, Personnel Security Division reactivated Complainant's PIV.

Regarding Claim 5, Complainant asserts he completed a form indicating what type of leave he wanted to use during his absence but management still applied the incorrect leave codes. ROI at 51. The record indicates that on December 19, 2020, Complainant requested clarification on how his leave would be coded during his extended absence. His leave was initially coded as sick leave, but his request to change it to annual leave was honored. ROI at 108, 192.

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Complainant has not identified any persuasive evidence that suggests that any Agency action raised in this complaint was motivated by discrimination.

Accordingly, we AFFIRM the Agency's final order implementing the AJ's decision finding no discrimination.

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

February 26, 2025
Date