



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Von E.,¹

Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023000342

Hearing No. 510-2021-00322X

Agency No. 2001-741C-2021101159

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 October 19, 2022, 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. For the following reasons, we AFFIRM the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant has shown by a preponderance of the evidence that the Agency subjected him to discrimination in reprisal for prior protected EEO activity when management charged him as Absent Without Leave (AWOL).

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Voucher Examiner, GS-540-06, Office of Community Care, Veterans Health Administration, Payment Operations and Management Team, Delivery Operations. Complainant held his position since 2015. His duty station was in Tampa, Florida, until the fall of 2020, when his duty station was moved to Largo, Florida. See Report of Investigation (ROI) at 64, 70, 172.

The Supervisory Program Manager served as Complainant's first-line supervisor from April 5, 2015 to February 2, 2020. ROI at 99. The Program Management Officer became Complainant's first-line supervisor on February 3, 2020. ROI at 87-88. The Area Manager for Payment Operations and Management (Area Manager) was Complainant's third-line supervisor. ROI at 203-204.

On January 4, 2021, Complainant filed an EEO complaint alleging the Agency discriminated against him in reprisal for prior protected EEO activity when:

1. On February 2, 2020, the Program Management Officer gave Complainant an unfavorable performance appraisal;
2. On April 20, 2020, the Supervisory Program Manager gave Complainant an unfavorable performance appraisal;
3. From on or about October 18, 2020 to December 2, 2020, the Program Management Officer delayed responding to or ignored Complainant's emails; and specifically, on November 24, 2020, ignored Complainant's email regarding a request to pick up Complainant's belongings and told Complainant that he had to schedule an appointment;
4. On November 30, 2020, the Program Management Officer gave Complainant an unfavorable performance appraisal, which resulted in lack of a bonus; and
5. On May 17, 2021, the Program Management Officer charged Complainant as Absent Without Leave (AWOL).

Although Complainant raised a total of five claims, on appeal, he only challenges the Agency's finding of no discrimination regarding claim 5. As such, we will limit our review to this claim. See EEOC Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 9, at § IV.A (Aug. 5, 2015) ("Although the Commission has the right to review all of the issues in a

complaint on appeal, it also has the discretion not to do so and may focus only on the issues specifically raised on appeal.”).

The investigation into the complaint revealed that Complainant previously engaged in EEO activity in November 2019, when he sought reasonable accommodations related to lighting and seating/desk arrangements at his workstation. Complainant ultimately withdrew his complaint. While the responsible management officials in his prior EEO complaint were not involved in the instant complaint, Complainant believed that the Program Management Officer was aware of his prior protected EEO activity. ROI at 57, 64, 70-71.

Claim 5

On May 17, 2021, the Program Management Officer charged Complainant as AWOL. Complainant’s assigned work hours were from 6:30 a.m. to 3:00 p.m. That same day at 6:41 a.m., Complainant sent a text message to the Program Management Officer, stating his PIV card did not work and he had a 1:30 walk-in appointment at the PIV office. Later at 8:46 a.m., Complainant requested eight hours of annual leave but claimed the Program Management Officer denied his leave request. ROI at 76. Complainant admitted that management informed him of his failure to enter leave as requested. However, he believed that reprisal was a factor in his treatment because he did not receive any positive actions or results from the management team, only punishment. Complainant also alleged that other employees were treated more favorably, but he did not identify them or the responsible management official. ROI at 77.

The Program Management Officer explained that she informed Complainant via text message of the option to either work at the Largo office or take leave until his PIV card appointment. Upon Complainant’s return to the office on May 18, 2021, he entered an eight-hour annual leave request. The following day, the Program Management Officer approved Complainant’s annual leave request. On May 20, 2021, the Program Management Officer received an email from Complainant requesting that the eight hours of annual leave be adjusted to include administrative absence for his PIV card appointment. Per Complainant’s request, the Program Management Officer reverted his annual leave back to pending and provided instruction on how to enter his portion of annual leave in the agency Time and Attendance system. Following that communication, Complainant did not enter his time, but instead emailed the Program Management Officer a response of “No” without further explanation. ROI at 92.

According to the Program Management Officer, on the morning of May 21, 2021, Complainant entered an annual leave request of 6:30 a.m. to 12:30 p.m. (to include 30 minutes for lunch) for his PIV card appointment on May 17, 2021. Following review of his timecard, the Program Management Officer advised Complainant that the correct ending time was 1:00 p.m., and that the timekeeper would reach out to assist him with the entry. In response, Complainant stated, "he [worked] on making the PIV appointment and it was up to the [Program Management Officer] to contact him to discuss his leave entry and not the timekeeper." Complainant ultimately never rectified the entry as instructed. ROI at 93.

The Program Management Officer maintained that due to Complainant's failure to follow directions and enter leave, an AWOL was posted to his timecard for May 17, 2021, from 12:30 p.m. to 1:00 p.m. The Program Management Officer denied reprisal and declared that no other employees were treated more favorably under similar circumstances. ROI 92-94.

According to the Area Manager, she was aware of Complainant's prior EEO activity as she was a part of the ADR and Complainant informed her of his formal complaint filing. She acknowledged that the Program Management Officer consulted with her prior to the AWOL issuance. The Area Manager maintained that the Program Management Officer's AWOL decision was strictly based on facts and supported by the time and attendance requirements imposed on all employees within the organization. The Area Manager insisted Complainant's prior EEO activity was not a factor in the AWOL charge. ROI at 203-206.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Complainant initially requested a hearing before an AJ. On April 13, 2022, the AJ required the parties to provide preliminary case information within 15 days of the date of the order. Complainant failed to comply. As a result of non-compliance, a show cause order was issued on May 2, 2022, to which Complainant did not respond. Based upon Complainant's non-compliance and non-responsiveness, on May 19, 2022, Complainant's request for a hearing was dismissed, and the matter was referred to the Agency for issuance of a final decision.

On October 19, 2022, the Agency issued a final decision, which concluded that Complainant failed to prove the Agency subjected him to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argues the Agency erred in its AWOL decision. Complainant contends that in response to management's request that he report to the Largo Office or take leave until his appointment, he mistakenly requested annual leave when he was already on duty. Complainant asserts that he was never AWOL.

The Agency opposes the appeal and succinctly responds that their decision is supported by law and evidence and should stand.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See MD-110, at Chapter 9, § VI.A. (Aug. 5, 2015) (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

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For a complainant to prevail, they 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. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

To establish a prima facie case of disparate treatment based on reprisal, Complainant must prove that: (1) they were engaged in prior protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to materially adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment.

Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A complainant can also establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253. 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. Hicks, 509 U.S. at 507.

At the outset, we find that Complainant failed to establish a prima facie case of reprisal. While it is undisputed that Complainant engaged in prior protected EEO activity when he requested a reasonable accommodation, the probative record shows that the Program Management Officer was not involved in Complainant's prior EEO activity. Moreover, we find no persuasive evidence of a nexus between Complainant's prior protected EEO activity and the alleged incident.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons. Here, the probative evidence demonstrates the Program Management Officer directed Complainant to correct his leave request to account for 30 minutes. The Program Management Officer made the timekeeper available to assist Complainant with corrections. Notwithstanding, Complainant rebuffed support from the timekeeper and placed the onus on management. Despite numerous requests from management, Complainant never rectified his entry.

Indicators of pretext include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

We ultimately find no evidence that Complainant's protected class was a factor in any of the Agency's actions.

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons, and that the Agency acted based on discriminatory animus. While we recognize that Complainant disagrees with the Program Management Officer's decision to mark him as AWOL, Complainant failed to demonstrate that the Program Management Officer's decision was based on retaliatory animus. Indeed, we note that the Program Management Officer denied any knowledge of Complainant's prior EEO activity. Aside from conclusory statements, Complainant has not proffered any persuasive evidence from which a reasonable fact finder could conclude that the Agency's explanation for its action was pretext for discrimination.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final 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

February 4, 2025
Date