



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

[REDACTED]
Chadwick S.,¹
Complainant,

v.

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

Appeal No. 2023001034

Hearing No. 451-2022-00016X

Agency No. HS-CBP-01551-2020

DECISION

On December 5, 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 November 10, 2022 final decision concerning his equal employment opportunity (EEO) complaint claiming 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.

ISSUES PRESENTED

1. Whether the Agency properly determined that Complainant was not subjected to discrimination based on his national origin (Hispanic) or in reprisal for prior EEO activity when, on May 15, 2020, he learned that he was not selected for the position of Supervisory Border Patrol Agent at the Agency's facility in Clint, Texas.
2. Whether Complainant was subjected to a discriminatory hostile work environment when an Agency official smirked and said, "that's interesting" when Complainant confirmed that he knew that Complainant's former trainee had been selected for the supervisory position.

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

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

On November 10, 2022, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of national origin (Hispanic) as and in reprisal for his prior protected EEO activity when:

1. Complainant was not selected for the position of Supervisory Border Patrol Agent at the Agency's facility in Clint, Texas.
2. Complainant was subjected to a hostile work environment when an Agency official smirked and said, "that's interesting" when Complainant confirmed that he knew that Complainant's former trainee had been selected for the supervisory position.

After the 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 EEO Administrative Judge (AJ). Complainant requested a hearing, The assigned AJ, however, dismissed the hearing request due to Complainant's failure to cooperate with the EEO investigator and provide his affidavit, file a Preliminary Case Information report, and respond to a Show Cause Order. In an Order dated October 11, 2022, the AJ remanded the formal complaint to the Agency for issuance of a final decision.² Thereafter, the Agency issued a final decision, pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination or unlawful retaliation was established as alleged.

This appeal followed. Complainant filed no arguments in support of his appeal.

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, 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").

² On appeal, Complainant has not challenged the AJ's sanction. Therefore, we will not address this issue.

ANALYSIS AND FINDINGS

Disparate Treatment: Claim 1

A claim of disparate treatment based on indirect evidence 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 or she 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. 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). Once the Agency has met its burden, 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. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

After a review of the record, and assuming without finding that Complainant has established a prima facie case of discrimination, we find that the Agency's selecting officials have articulated legitimate, non-discriminatory reasons for Complainant's non-selection. The record evidence developed during the investigation reflects that on April 7, 2020, Complainant applied for a position as a Supervisory Border Patrol Agent pursuant to Job Opportunity Number: USB-IMP-107511125-JAK. There were no interviews for the position. Instead, a panel of Agency officials reviewed the applications and resumes submitted for consideration. The candidates were scored using a pre-determined matrix of qualifications for the position. Out of 25 candidates, Complainant ranked 20th, while the selectees for the position ranked 1st and 2nd according to the matrix. The selecting officials determined that Complainant's resume lacked substance and details regarding his work experience and reflected that Complainant did not have any supervisory experience which was deemed critical for the subject position. Complainant has not provided any arguments on appeal reflecting that the Agency's reasons for his non-selection were pretext masking discriminatory or retaliatory motivations.

Harassment: Claim 2

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 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).

Regarding claim 2, Complainant alleges that, on the same day he learned of his non-selection, he was subjected to harassment when the Watch Commander at the El Paso station smirked and said, “that’s interesting” after Complainant confirmed that he knew that Complainant's former trainee had been selected for the supervisory position. Based on this single, isolated incident, we concur with the Agency’s conclusion that the claim, without more, not sufficiently severe or pervasive to violate Title VII. Moreover, to the extent that any such comment was made, we discern noting in the record reflecting that the Watch Commander was motivated by discriminatory or retaliatory animus toward Complainant.

CONCLUSION

We AFFIRM the Agency's final decision 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).

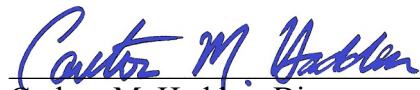
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 31, 2024
Date