



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

████████████████████
Warner K.,¹
Complainant,

v.

Pete Hegseth,
Secretary,
Department of Defense
(Army & Air Force Exchange Service),
Agency.

Appeal No. 2023001285

Hearing No. 570-2021-00262X

Agency No. 20.001

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 21, 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.

At the time of events giving rise to this complaint, Complainant worked as a Food Service Foreman at the Agency's Burger King at U.S. Army Base in Vicenza, Italy.²

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.

² Complainant entered duty with the Agency on December 11, 2012, and was terminated on August 28, 2019. The termination is not at issue herein.

On October 3, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (mental and physical) and in reprisal for prior protected EEO activity when:

1. In or around the end of June 2019, the Human Resources Manager (HRM), sent the Acting Facility Manager a task to have Complainant unload a delivery truck;
2. In July 2019, the General Manager (GM) and HRM prepared and scored Complainant's performance evaluation, which negatively impacted Complainant's increase and promotion potential;
3. On August 21, 2019, GM provided information about Complainant's disability claim, harassment claim, and separation from the Agency to the Agency's Moral, Welfare and Recreation (MWR) Office, which resulted in them rescinding a job offer;
4. On August 21, 2019, management converted Complainant's current position to a local national position;
5. On August 28, 2019, GM and HRM requested for Command to bar Complainant from all Exchange facilities in Italy.

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 timely requested a hearing. The AJ assigned to the case granted the Agency's motion and issued a summary judgment decision.

In the decision, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions. For example, regarding claim (1), the AJ concluded that there was no evidence in the record to establish that Complainant was tasked to unload a delivery truck in June 2019; instead, the record evidence demonstrated that when the delivery trucks were received in June 2019, Complainant was on leave. As to claim (2), Complainant's first-level supervisor (S1) confirmed that he prepared Complainant's performance evaluation and that he rated Complainant as a "2" based on the performance Complainant demonstrated during the rating cycle. S1 stated that he had counseled Complainant during the performance year prior to issuing the rating and copies of the counseling communications were included in the record. With respect to claim (3), GM affirmed that she never provided any of the alleged information to MWR.

Rather, GM asserted that MWR contacted her for a reference check, and she was asked only whether Complainant was eligible for rehire. GM affirmed that she stated that Complainant was not eligible for rehire and that she was not asked any additional or follow-up questions, nor did she provide any additional or follow-up information.

Regarding claim (4), the AJ determined that there was no evidence that Complainant's position was converted to a local national position after he was terminated. Instead, the record demonstrated that a United States national, not an Italian national, filled the position after Complainant was terminated. Notwithstanding, even if the position was converted after Complainant was terminated, since he alleged this occurred after his termination, any such change would not have resulted in him suffering a present harm or loss related to a term, condition, or privilege of employment. Finally, as to claim (5), the record demonstrates that, when Complainant's employment ended, he lost access to the Vicenza base as an employee. However, as a military retiree U.S. citizen, he was permitted to request an exception to the policy to utilize facilities and services on the installation, which was granted, and he was able to resume accessing facilities and services on the installation in October 2019.

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 or reprisal as alleged.

The Agency subsequently issued a final order fully implementing 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. (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*).

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 fact-finder 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 or reprisal as alleged.

Accordingly, we AFFIRM the Agency's final order implementing 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

March 5, 2025
Date