



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

████████████████████
Ahmed S.,¹
Complainant,

v.

Jeremy Pelter,
Acting Secretary,
Department of Commerce
(Patent and Trademark Office),
Agency.

Appeal No. 2023001418

Hearing No. 570-2021-01198X

Agency No. 20-56-99

DECISION

On October 25, 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 October 5, 2022, final order 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 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 GS-1224-13 Patent Examiner in the Agency's Technology Center 3600, Art Unit 3691 in Alexandria, Virginia.

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 December 29, 2020, Complainant filed an EEO complaint, which he subsequently amended, alleging that the Agency discriminated against him on the bases of race (Asian), national origin (India), sex (male), religion (Hindu), color (Brown), age (born in 1959), and reprisal for prior protected EEO activity (contacting EEO counselor in 2007) when:

1. On October 12, 2020, Complainant failed the Agency's Partial Signatory Authority (PSA) program;
2. On January 27, 2022, Complainant's supervisor (Supervisor-1; Caucasian, Ukrainian, male, Ukrainian Orthodox, White, born in 1958) allegedly forced Complainant to accept the October 12, 2020, PSA exam results; and
3. On January 31, 2022, Supervisor-1 allegedly emailed Complainant and attempted to force Complainant to either withdraw his EEO complaint or accept the October 12, 2020, PSA exam results.

Complainant participated in the Temporary PSA Program from February 2, 2020, to August 1, 2020, which gave him temporary partial signatory authority. To be granted permanent partial signatory authority, the cases Complainant reviewed, decided, and posted during this time needed to have an error rate below 6.49 percent. Complainant had the opportunity to select seven of the 17 cases that would be reviewed for quality.

On August 18, 2020, the Technology Center Director (Director-1; White, American, male, Christian, White, born in 1966) issued Complainant a Letter of Concern. According to the Letter of Concern, Complainant had signed 28 cases during the PSA Program and, of the 17 cases reviewed, eight were found to have errors. On August 25, 2020, Complainant rebutted the errors, defended the merits of his decisions, argued that decisions signed off by previous examiners should not be charged as an error to Complainant, and explained difficulties Complainant experienced with a faulty docking station and cable.

On August 28, 2020, Director-1 issued Complainant a memo denying him permanent partial signature authority. Complainant had been credited with 30 cases, and his rebuttals were not persuasive as to six of the errors, resulting in an error rate of 20 percent. Complainant requested additional time to rebut the errors, and Director-1 agreed. A virtual meeting was held on October 7, 2020. On October 12, 2020, Director-1 emailed Complainant, stating he had decided to maintain the errors.

Complainant alleged that, in September 2020, he was discussing a case with a Primary Examiner (Examiner-1; African American, Nigerian, male, Christian, Black, born in 1973) when the conversation became heated and Examiner-1 made a comment about Complainant's English. Complainant reported the conversation to Supervisor-1, who directed Complainant to post all of his cases to Supervisor-1 rather than Examiner-1. The Agency's anti-harassment program conducted an investigation into Complainant's allegations of harassment during the PSA program review process and during the conversation with Examiner-1. The Agency concluded that the evidence did not support a finding of harassment.

On January 27, 2022, Complainant and Supervisor-1 were instant messaging via Microsoft Teams chat when Supervisor-1 asked Complainant if he was available for a phone call. After their phone call, Complainant sent Supervisor-1 the following message:

Thanks for your [o]ffer about PSA and FSA, but since PSA matter is still under review at EEOC, I would like to wait to see its outcome. Also, instead of re-doing PSA when I know I passed it clearly in the last round in 2020 for which I am not getting proper credit for no fault of mine when I followed all guidance given to me, I would like to wait for EEOC outcome.

Amended Complaint at 3. Supervisor-1 responded, "That's fine [Complainant]. Thank you." Id. On January 31, 2022, Supervisor-1 sent Complainant an email, which stated, in relevant part:

Thank you for your response to the offer for PSA and FSA assistance I presented you during our conversation last Thursday, 1/27. I want to make sure you understand the offer that if you wish, assistance can be provided to prepare you for both the Partial Signatory Authority program and the Full Signatory Authority program. The assistance would take the form of some of your actions to a combination of a SPE in the Finance Workgroup and/or to the TQAS shop for review and any comments. I understand your position that at the present time you decline any assistance with the Partial Signatory Authority program. If at any time you change your mind, please inform me and we will proceed with the assistance for Program purposes as discussed.

Amended Complaint at 4.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case granted the Agency's motion for summary judgment and issued a decision without a hearing in favor of the Agency.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.²

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

² As a general rule, no new evidence will be considered on appeal absent an affirmative showing that the evidence was not reasonably available prior to or during the investigation or during the hearing process. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.A.3 (Aug. 5, 2015). Accordingly, we decline to consider the evidence presented by Complainant for the first time on appeal.

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 established a prima facie case of discrimination with respect to the Agency denying him PSA. Complainant has not identified any similarly situated employees who were treated more favorably than he was or evidence that reasonably gives rise to an inference of discrimination. The Agency's legitimate, nondiscriminatory reason for denying Complainant PSA was that his error rate was above 6.49 percent. Even after two additional cases were attributed to Complainant and the number of errors was reduced from eight to six, Complainant's error rate was 20 percent.

As evidence of pretext, Complainant argues that he should have been credited with 33 cases during the PSA program. However, even assuming that to be true, six errors from 33 cases would yield an error rate of 18 percent. Complainant strongly disputes the assessment of six errors, but he has not identified any evidentiary connection between this assessment his race, national origin, sex, religion, color, age, and/or prior protected activity. Complainant argues for the first time that, because Director-1's October 12, 2020, email specifically discussed one error, Director-1 had determined that Complainant only had one error. However, the record reflects that Director-1 responded to an October 7, 2020, email from Complainant raising additional arguments about one specific error after their virtual meeting, and a reasonable finder of fact could not find in Complainant's favor on this issue. Complainant alleged that Examiner-1's comment about his English was based on his national origin, but there is no evidence in the record that Examiner-1 had any involvement in reviewing Complainant's PSA program cases. We agree with the AJ that Complainant's conclusory, unsupported assertions that he was subjected to discrimination are insufficient to establish pretext for discrimination.

Regarding Complainant's harassment claim, Complainant's allegations are based on the January 27, 2022, Teams chat messages and the January 31, 2022, email from Supervisor-1. On January 27, 2022, Complainant thanked Supervisor-1 for a PSA and FSA offer Supervisor-1 made during a phone call but stated that, because his EEO complaint regarding the 2020 PSA program was pending, he would prefer to wait for the outcome of his EEO complaint. Supervisor-1 responded, "That's fine" and thanked Complainant. Amended Complaint at 3. In the January 31, 2022, email, Supervisor-1 thanked Complainant for responding to the January 27, 2022, offer.

Supervisor-1 stated that he wanted to make sure Complainant understood that, if Complainant was interested, he could receive assistance to prepare for the PSA program and FSA program. Supervisor-1 expressed that he understood Complainant was not interested, adding that, if Complainant changed his mind, he could inform Supervisor-1. We find that the evidence in the record does not show that Complainant was subjected to conduct with a retaliatory motivation or a potential chilling effect on EEO activity. Complainant was the one who raised his EEO activity, and there is no evidence that Supervisor-1 attempted to force Complainant to accept the offer of FSA assistance or to withdraw his EEO complaint. Moreover, there is no evident connection between the alleged harassment and Complainant's race, national origin, sex, religion, color, and/or age, and the alleged harassment is insufficiently severe or pervasive to constitute a hostile work environment.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, including those not specifically addressed herein, 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.

Accordingly, we AFFIRM the Agency's final action 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

March 6, 2025

Date