



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

████████████████████
Werner K.,¹
Complainant,

v.

Kristi L. Noem,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2023001669

Hearing No. 520-2020-00507X

Agency No. HS-CBP-00238-2020

DECISION

On January 17, 2023, 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 December 21, 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 for the Agency as a GS-1985-12 Customs and Border Protection (CBP) Officer, at John F. Kennedy International Airport (JFK) in Jamaica, New York. Complainant's duty station at JFK was the International Mail Facility (IMF).

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 February 4, 2020, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of national origin (Greek), religion (Greek Orthodox), age (born in 1969), and reprisal for prior protected EEO activity when, on October 9, 2019, Complainant was served with a two-day suspension letter for negligent performance of duties.

On March 31, 2019, Complainant volunteered for an overtime assignment, which was Passenger Processing at Terminal 8. Complainant admitted that, on March 31, 2019, he committed an error in processing a male passenger. The passenger was identified as a potential match to a lookout related to terrorism activities in TECS. TECS is the principal system used by CBP Officers at the border to assist with screening and determinations regarding the admissibility of arriving persons. After reviewing the passenger's documents and the details of the TECS records, Complainant did not refer the passenger to secondary for additional screening. According to TECS records, Complainant marked the referral boxes with "n" and attempted to modify the passenger's information. TECS records also reflect that Complainant viewed an alert stating that it was mandatory to escort the passenger to secondary examination even if the CBP Officer did not believe there was an exact match. Complainant admitted the passenger without performing a complete inspection and without referring him or escorting him to secondary.

On August 7, 2019, the Assistant Port Director issued Complainant a proposed 10-day suspension for negligent performance of duties with a single specification regarding Complainant's failure to refer the passenger who was a TECS lookout for terrorism activities to secondary processing on March 31, 2019. The Assistant Port Director stated that, because Complainant served a seven-day suspension for unprofessional behavior and failure to cooperate in an Agency investigation in June 2008, the current proposal was considered a second offense.

Complainant replied orally to the proposed suspension to the deciding official, the Port Director, and provided a written copy of his oral reply as well. Complainant stated that he took full responsibility for what he described as a clerical error but that he did not believe he engaged in misconduct. Complainant also noted that he made the error while performing an overtime assignment rather than while performing his daily duties at the IMF. Complainant averred that, at the time, he did not think he was violating the referral policy. According to Complainant, the passenger in question was not an exact match but a possible match to a lookout. Complainant stated that the passenger was subsequently determined to be a false match. Complainant alleged that he was denied fair representation by the union.

Complainant suggested that appropriate corrective action should be refresher training, an error recorded on his performance appraisal, and a suspension for 10-15 days from Passenger Processing overtime assignments.

On October 8, 2019, the Port Director issued Complainant a decision to suspend. The Port Director sustained the charge and specification against Complainant. The Port Director decided, based on the mitigating factors, to reduce the proposed 10-day suspension to a two-day suspension.² Complainant served the suspension November 19-20, 2019.

Complainant alleged that he was subjected to discrimination, noting that no one involved in the 2019 or 2008 suspensions was Greek or Greek Orthodox. According to Complainant, everyone involved in both disciplinary actions was Hispanic or Italian American and "probably Catholic."

Complainant stated that a CBP Officer (Officer-1; Hispanic, Catholic, born in 1975) committed the "exact same offense" but received proposed five-day suspension for negligent performance of duties related to failing to refer an individual to secondary processing. Officer-1, unlike Complainant, did not have any prior disciplinary actions. Through an Alternative Remediation Agreement, Officer-1 received a Letter of Reprimand. Complainant was not eligible for an Alternative Remediation Agreement because the collective bargaining agreement (CBA) stated that Agency employees were only eligible for Alternative Remediation Agreements for the first instance of proposed action for misconduct by the employee.

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. Over Complainant's objection, 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.

² The third page of the October 8, 2019, decision letter stated, "Please sign, date and return the accompanying copy of this letter along with the Letter of Reprimand to acknowledge your receipt of the original," and Complainant signed to indicate receipt on October 9, 2019. On June 1, 2020, the Agency issued a corrected version of the decision letter at Complainant's request to fix a typographical error on the third page by removing the reference to a Letter of Reprimand.

The AJ found that Complainant could not establish a prima facie case of discrimination because he did not show that similarly situated employees outside of his protected classes received more favorable treatment. The AJ determined that Officer-1 was not similarly situated to Complainant because she did not have a prior discipline, which affected the length of the proposed suspension and her eligibility for an Alternative Remediation Agreement. The AJ noted that another comparator (Officer-2; born in 1982, prior EEO activity) was treated less favorably than Complainant, as Officer-2 received a proposed 10-day suspension and a decision to suspend for seven days. According to the AJ, Complainant did not show that the responsible management officials were aware of his prior protected EEO activity, which predated the suspension by more than 10 years. The AJ concluded that Complainant failed to identify any evidence that discrimination motivated any Agency action.

The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.³

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*).

³ Complainant contends on appeal that, because the union does not treat all bargaining unit employees equally, he was denied due process under the U.S. Constitution. The Commission does not have jurisdiction over alleged violations of the U.S. Constitution or the CBA. See Michelle G. v. Dep't of Veterans Affs., EEOC Appeal No. 2022001792 n.3 (April 18, 2023) (the Commission does not have jurisdiction over the Constitution); Michale S. v. Dep't of Veterans Affs., EEOC Appeal No. 2021004448 n.2 (June 29, 2022) (the Commission does not have jurisdiction over violations of the collective bargaining agreement or the agency's policies).

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.

Complainant challenges the cases cited in the Agency's final order in support of its conclusion that the AJ properly issued a decision without a hearing, arguing that these cases are not relevant because they do not appear to involve individuals who are of Greek national origin or are Greek Orthodox. However, cases in question set forth relevant legal principles. The Agency's final order cited Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003) and Murphy v. Dep't of the Army, EEOC Appeal No. 01A04099 (July 11, 2003), which are Commission cases that discuss when it is appropriate for an AJ to issue a decision without a hearing. The EEOC's decision without a hearing regulation set forth at 29 C.F.R. § 1614.109(g) follows the summary judgment procedure from federal court. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

We agree with the AJ that Complainant has not established a prima facie case of discrimination based on national origin, religion, or age. While it is undisputed that Complainant is Greek, Greek Orthodox, and over the age of 40, Complainant has not shown that similarly situated employees outside of his protected classes received more favorable treatment. Officer-1 was not similarly situated because she did not have a disciplinary history and was therefore eligible for an Alternative Remediation Agreement. Officer-2 was younger than Complainant, but he was treated less favorably than Complainant because he was suspended for seven days, whereas Complainant was only suspended for two days. Complainant has not identified any other evidentiary connection between his national origin, religion, and/or age and his suspension. Regarding reprisal, Complainant has not shown that the Assistant Port Director, the Port Director, or any management officials involved in his 2019 suspension were aware of his prior protected EEO activity. Accordingly, Complainant cannot establish a prima facie case of reprisal.

Even if we were to assume a prima facie case of discrimination for the purposes of analysis, the Agency's legitimate, nondiscriminatory explanation for suspending Complainant was the sustained charge of negligent performance of duties based on his failure to refer the passenger to secondary on March 31, 2019.

Complainant argues that his action on March 31, 2019, did not have any adverse impact on the Agency. Complainant correctly notes that the Agency subsequently determined that the passenger in question was a false match. However, the fact that the passenger was subsequently found to be a false match is not material because Complainant was not suspended for failing to refer a passenger who was an exact match to a TECS lookout for terrorism activities. The specification of negligent performance of duties stated that Complainant failed to refer the passenger to secondary processing in accordance with policy. It is undisputed that Complainant did not follow the Agency's policy on March 31, 2019, when he did not refer the passenger, a possible match, to secondary processing. TECS records show that, on March 31, 2019, Complainant saw an alert stating that it was mandatory to escort the passenger to secondary, even if he did not believe that the passenger was an exact match. We find that Complainant cannot establish pretext for discriminatory and/or retaliatory animus.

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, 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 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 6, 2025
Date