



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Wilfredo B.,¹
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023001850

Hearing No. 550-2022-00304X

Agency No. 200P-648-2022-143036

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 17, 2023, 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 Physician at the Agency's Medical Center in Portland, Oregon.

On January 22, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (mental), and in reprisal for prior protected EEO activity, when:

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.

1. on November 17, 2021, Complainant was removed;
2. on November 17, 2021, Complainant was denied a reasonable accommodation; and
3. on December 17, 2021, Complainant was not reinstated to his prior position of General and Vascular Surgeon with privileges, when his termination was rescinded.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On November 25, 2022, the AJ issued a Notice of Intent to Issue Summary Judgment ("Notice of Intent"). The AJ observed that the Agency removed Complainant because the Oregon Medical Board placed restrictions on his medical license following an investigation of unprofessional conduct. The Agency subsequently reinstated Complainant to his former position after it determined that the Oregon Medical Board's ruling did not place restrictions on Complainant's license. The Agency also responded that it never received a reasonable accommodation request from Complainant. The AJ noted that the record lacked evidence to corroborate Complainant's allegations or that he was entitled to a reasonable accommodation. The AJ invited the parties to respond to the Notice of Intent.

Through his attorney, Complainant filed a motion to conduct discovery, or in the alternative, for the AJ to develop the record. For example, the record did not contain information about similarly situated employees. Complainant also submitted a response to the AJ's Notice of Intent. Over Complainant's objections, the AJ issued a decision without a hearing on January 11, 2023. The AJ stated that a review of Complainant's response did not provide a reason to disturb the prior findings, and that the evidentiary record was sufficiently developed. The AJ concluded by issuing a summary judgment decision in the Agency's favor.

The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. 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. (as revised, August 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*).

On appeal,² Complainant argues an abuse of discretion when the AJ issued a decision without a hearing and ignored his motion for discovery. An AJ has full responsibility for the adjudication of the complaint, including overseeing the development of the record, and has broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a), (e). Given the AJ’s broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep’t of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC). Here, we find that the AJ effectively denied Complainant’s motion to conduct discovery with the issuance of the decision without a hearing. In the decision, the AJ noted that Complainant’s response did not provide a reason to disturb the Notice of Intent. The AJ determined that the evidentiary record was sufficiently developed, and Complainant’s disagreement does not establish an abuse of the AJ’s discretion. Upon review, we find the record in the present case was fully developed.

² Complainant filed his appeal on February 7, 2023, and he submitted a reply to the Agency’s opposition brief with additional documents on June 9, 2023. The Commission’s regulations provide that “[a]ny statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal.” 29 C.F.R. §1614.403(d). Further, the Commission does not generally allow parties to submit multiple briefs. See Joellyn L. v. Dep’t of Justice, EEOC Appeal No 0120170274 (Apr. 5, 2019), citing 29 C.F.R. § 1614.403(d). As such, we will only consider Complainant’s timely initial appeal brief.

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 he 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 argues that the AJ failed to provide a factual or legal analysis in the decision, and that a party is entitled to know the basis for an AJ's decision. However, the AJ provided the factual and legal bases in the Notice of Intent. While Complainant argues that there was no particular reason to believe that his briefing was considered, the AJ specified that a review of Complainant's response did not support any reason to disturb the prior findings in the Notice of Intent. While Complainant desires additional language in the AJ's decision, we are not persuaded that this warrants a reversal of the summary judgment decision.

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder 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 discriminated against by the Agency as alleged.

Complainant asserts that there is a facially discriminatory motive for his removal based on his need for healthcare and history of mental health treatment. However, even crediting an inference of disability discrimination, the Agency provided a legitimate, nondiscriminatory reason for the removal. The Director issued Complainant a notice of termination based on a restriction to his practice by the Oregon Medical Board. ROI at 74, 63. The record showed that on October 7, 2021, the Oregon Medical Board issued a Stipulated Order related to Complainant's unprofessional or dishonorable conduct, which included a reprimand and order for Complainant to maintain an ongoing therapeutic relationship with a healthcare provider. ROI at 127-34. The Chief of Surgery further explained that Complainant was involved in an incident with a patient in 2018 that included verbal threats and bullying of both the patient and others in the operating room. ROI at 57. The Director stated that the Office of General Counsel subsequently reviewed this case and determined that the limitations did not reach the level of a restriction, and Complainant's termination was rescinded. ROI at 64.

Complainant contends that the Agency admitted that the reason for his termination was false and unworthy of belief, and that he was targeted for discrimination and retaliation because the Agency did not want a perceived impaired provider working as a surgeon. However, a mistake, without more, does not establish discriminatory animus. See Calvin D. v. Dep't of the Army, EEOC Appeal No. 0120171662 (Sept. 25, 2018); Velda F. v. Dep't of the Interior, EEOC Appeal No. 0120122684 (Jul. 10, 2018). The Director attested that he was unaware of Complainant's protected EEO activity or disability. ROI at 63. Complainant only offers accusations of a discriminatory or retaliatory motive, but mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No. 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

For claim 2, the Director responded that he was unaware of any reasonable accommodation request. ROI at 64. Complainant did not dispute that he did not request an accommodation, but he asserted that the Agency "owed [him] a reasonable accommodation to the extent that they viewed [him] as disabled from working." ROI at 51. However, an individual who is "regarded as" disabled, but has no actual/record of a disability, will not be entitled to reasonable accommodation. See Haydee A. v. Dep't of Homeland Security, EEOC Appeal No. 0120132668 (Jan. 19, 2016); Boozer v. U.S. Postal Serv., EEOC Appeal No. 0120082990 (Apr. 14, 2009). Further, the Commission has long held that an agency's obligation to provide a reasonable accommodation is always prospective and it is not obligated to excuse misconduct, even if the past misconduct was based on the employee's disability. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002), at Ques. 36; see also Stan H. v. Dep't of Veterans Affairs, EEOC Appeal No. 2023003631 (Nov. 7, 2023); Marguerite W. v. U.S. Postal Serv., EEOC Appeal No. 20224249 (Jan. 31, 2023); Traylor v. Environmental Protection Agency, EEOC Appeal No. 01A14117 (Nov. 6, 2003).

The Director replied for claim 3 that Complainant was not a General Vascular Surgeon at the time of his removal, and he was returned to his prior position. ROI at 64. The Chief of Staff corroborated that Complainant was reinstated to the position he held prior to the removal action.

To the extent that Complainant complains that his clinical privileges were not also restored, the Chief of Staff noted that clinical privilege actions are separate from employment actions, and the reinstatement did not change the denial of Complainant's clinical privileges based on the prior incident of verbal abuse and bullying. ROI at 60. Complainant provided evidence that the Agency previously revoked his clinical privileges in 2019. The Disciplinary Appeals Board reviewed the decision and concluded that the sustained charge of Unacceptable Conduct represented substandard care, professional incompetence, or professional misconduct. Complainant Exhibits A and C. Complainant did not show that the proffered reasons are not worthy of belief, and his bare assertions that management officials discriminated against him are insufficient to prove pretext or that their actions were discriminatory or retaliatory.

Accordingly, we AFFIRM the Agency's final order fully implementing the AJ's decision finding no discrimination.

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).

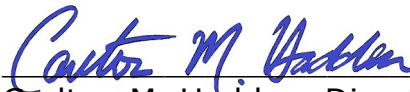
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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