



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

████████████████████
Milan S.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2023001972

Agency No. DeCA-00126-2022

DECISION

On February 16, 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 February 15, 2023, final decision 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 reasons set forth below, we AFFIRM the Agency's final decision finding no discrimination.

ISSUES PRESENTED

The issue is whether the Complainant established that the Agency subjected him to discrimination or harassment based on his race, sex, religion,² color, age, or in reprisal for protected EEO activity.

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 In Complainant's investigative affidavit, he stated, "the form of discrimination and harassment was not based on my religion." See ROI at 374, 376, and 382. There are no additional facts or details provided by Complainant or contained in the record to suggest discrimination or harassment on the basis of religion. As such, we decline to address religion as a basis at length in this decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Meatcutter Supervisor at the Agency's Fort Gordon Commissary in Augusta, Georgia.

On August 8, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (White), sex (male), religion (Catholic), color (White), age (48), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 when:

1. On May 19, 2022, Complainant received "fully successful" on his annual performance appraisal for the rating period of April 1, 2021 to March 31, 2022; and
2. On or about August 8, 2022, Complainant's supervisor issued him a Letter of Reprimand dated July 18, 2022.

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). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed. In opposition to Complainant's appeal, the Agency argues that Complainant did not establish a prima facie case for discrimination or harassment for either claim. The Agency also argues that Complainant cannot and did not show how the Agency's proffered reasons for its actions were pretextual. Complainant did not file a statement with his appeal.

ANALYSIS AND FINDINGS

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").

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, he must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In order to establish a prima facie case of age discrimination, a complainant must show proof of the Title VII criteria set forth in McDonnell Douglas. In accordance with the burdens set forth in McDonnell Douglas, and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

After establishing a prima facie case, the burden then shifts to the agency to articulate a legitimate, non-discriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency's articulated reasons are pretextual and that the agency instead acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Melissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons, and that the Agency instead was motivated by a prohibited reason.

This established order of analysis in disparate treatment cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases.

Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination or retaliation.³

With respect to claim 1 concerning the fully successful performance rating, Complainant's rater and reviewer stated that the rating at issue was based solely on the Complainant's performance. ROI at 390 and 399. Specifically, Complainant's reviewer stated that Complainant lacked leadership ability, failed to keep his subordinates informed of departmental issues, and failed to maintain supply ordering processes on a daily basis. ROI at 391. The reviewer also stated that he and Complainant's rater had many conversations about the Complainant's subpar performance during the rating period. ROI at 390.

To prove pretext, Complainant initially alleges that his rating should have been higher because his sales numbers were high, he was working past his scheduled time, and assisting the department to ensure there were enough products on the shelves. ROI at 373. In response, Complainant's supervisor and rater stated that she held a midterm performance rating with Complainant over the phone when they discussed the Complainant's inability to listen to upper management regarding how to run his department, and leadership issues with his subordinate employees. ROI at 398. The rater stated that Complainant has been accused of discrimination by multiple employees and had been counseled about this behavior in the past even though he continued to struggle with supervision despite advice and help from management. Id.

Despite the arguments included in Complainant's formal complaint and investigative affidavit, in his rebuttal statement, Complainant stated that he is not contesting the overall rating itself, but a specific comment in the narrative block that he describes as his rater calling him a "racist." Complainant stated that he has never had any substantiated EEO cases against him, any formal counseling, nor any corrective training for discriminatory behavior, so his rater's comments in the narrative section of his performance appraisal are inappropriate. ROI at 446. In Complainant's performance appraisal, his rater stated that Complainant had been accused of discriminatory behaviors, but she did not use the term "racist" when completing his performance appraisal. ROI at 14, 402-403. To support her narrative, Complainant's rater stated that she was called in a meeting by Complainant's co-workers who were "getting tired" of Complainant's treatment of her and two other black employees where they accused Complainant of discriminatory treatment. ROI at 402-403. She stated that she later had a meeting with Complainant to discuss the accusations which he denied. ROI at 403-404. The record reveals that Complainant received a written letter of warning from his supervisor discussing his treatment of his subordinates. See ROI at 109-111. We find that the record does not support Complainant's claim as alleged.

With respect to claim 2, Complainant's supervisor stated that the reprimand was given because running out of supplies cost the government unnecessary funds as they had to pay the

³ U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

Complainant overtime to pick up the wrapping film that he ran out of, which was ultimately determined to be the wrong type and required even more time to order the correct film under expedited processing. ROI at 401. Complainant argues that the reprimand was not justified because the store was experiencing supply chain issues during the COVID-19 pandemic, and all departments were having supply issues, not just his. ROI at 375. Complainant also asserts that he was not negligent in his duties because he was engaged with suppliers during the performance period. *Id.* Complainant himself admits that he had been previously counseled and given memoranda about similar issues in the past. *Id.* In response, Complainant's supervisor further stated that the letter of reprimand was appropriate based on the Complainant being counseled on the subject many times over the years by her and past supervisors. *Id.* Complainant's supervisor submitted a pre-action worksheet requesting the LOR to Human Resources. ROI at 153-156, 401. A Human Resources Subject Matter Expert testified that in contrast to what Complainant alluded in his testimony, the Agency no longer utilizes a table of penalties and that to the best of his knowledge, the Letter of Reprimand was issued in accordance with applicable regulations. ROI at 424.

The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, such as discipline, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997).

Complainant believes that his race, color, and age were a factor in the Agency's actions because two employees were not criticized in terms of performance appraisals or discipline to the extent he was, allegedly because they were both older, black women. A comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. All relevant aspects of the comparative employee's work situation must be identical or nearly identical to that of Complainant, including, but not limited to reporting to the same supervisor, performing the same job function, and working the same schedule. See Cantu v. Dep't of Homeland Sec., EEOC Appeal No. 01A60528 (Jul. 14, 2006); Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001) reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002). Comparator employee 1 (C1) testified as being a Grocery Manager GS-10. Comparator employee 2 (C2) testified as being a Produce Manager GS-8. Complainant testified that he was a Meatcutter Supervisor, GS-6. It is clear from the position titles that Complainant and the two comparator employees do not share the same job function. As such, C1 and C2 cannot appropriately serve as comparator employees for either of Complainant's claims or offer any convincing evidence that Complainant was treated differently than other similarly situated employees.

In regard to Complainant's allegations of reprisal, he simply stated that management was harassing him. He did not, however, explain why he thought this treatment was linked to his prior protected EEO activity. The Commission has found that bare assertions, such as Complainant's, are insufficient to prove pretext. See Erby v. U.S. Postal Serv., EEOC Appeal No. 0120064377 (Feb. 12, 2008).

Besides these bare assertions and the unsuccessful comparator argument, Complainant does not offer any other arguments or evidence to establish pretext and did not submit any additional material on appeal. As such, we find that Complainant is unable to establish pretext in these claims. Therefore, we further find that Complainant has not established that he was subjected to discrimination on the basis of any of his protected categories.

Harassment

As discussed above, we found that Complainant did not establish a case of discrimination on any of his alleged bases. Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that any of the actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant did not show that the Agency subjected him to harassment based on race, sex, religion, color, age, or reprisal for prior protected EEO activity.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we **AFFIRM** the Agency's final decision finding no discrimination, harassment, or retaliation.

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 29, 2024

Date