



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

[REDACTED]
Norbert K.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023001988

Hearing No. 550-2021-00273X

Agency No. 200P-0662-2020105478

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 January 17, 2023 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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.

Whether the Agency's final order properly found that Complainant was not subjected to discrimination and a hostile work environment based on race (African American).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Support Assistant, GS-6, at the Agency's Outpatient Clinic, Eureka Veterans Affairs Medical Center facility in Eureka, California.

On September 7, 2020, Complainant filed an EEO complaint alleging the Agency subjected him to a hostile work environment and discrimination based on race (African American) when:

1. On July 15, 2020, a Registered Nurse stood in Complainant's personal space while he was performing his duties at the facility's check-in entrance point for COVID-19 screening;
2. On July 15, 2020, Complainant was removed from his place of duty at the COVID-19 screening point by a VA Police Officer upon the request of the named Nurse, to have Complainant arrested;
3. On July 20, 2020, Complainant was stopped at the facility's front door entrance and his lunch bag was searched by a VA Police Officer while the Administrative Officer was standing duty; and
4. On August 10, 2020, Complainant resigned from federal service.²

Complainant is an African American. His immediate supervisor was the Administrative Officer (Caucasian).

Prior to events in the instant matter, Nurse 1 had posted a sign on the door of another Nurse (Nurse 2) (Caucasian). The sign said, "Living on Tulsa Time." ROI at 112, 133, and 137. Nurse 1 had posted the sign approximately nine months prior to Complainant being hired. Nurse 1 stated that the sign was a reference to a 1978 country song by Don Williams. Complainant entered duty with the Agency in July 2019.

² Claim (4) was processed as a mixed-case complaint and, in its final decision, the Agency provided Complainant with appeal rights to the Merit Systems Protection Board for this claim. As a result, we find that Claim (4) is not properly before us at this time.

Complainant subsequently told the other nurse (Nurse 2) that the sign offended him as he perceived the sign to be related to Donald Trump and the Juneteenth massacre in Tulsa, Oklahoma. ROI at 133. Nurse 2 removed the sign after speaking to Complainant. ROI at 112.

On July 15, 2020, Complainant was conducting patient screening at an assigned checkpoint, when Nurse 1 approached him and said, "Hello, we need to talk about the Tulsa sign." Report of Investigation (ROI) at 53, 72. Complainant responded, "get away from me" and called Nurse 1 a "fucking racist." *Id.* Complainant jumped out of his chair and said, "We're going to talk about it in the parking lot after work." The two men stood face-to-face puffy chested, and Complainant had his fists clenched. The Police Lieutenant witnessed this exchange, moved in between both parties, and ordered both to back off. The Lieutenant told Nurse 1 several times to "take a walk," which he ignored. Nurse 1 shouted "He threatened me. I want him arrested." The Lieutenant then turned to Complainant and said, "I need you two to separate, go in the clinic." Complainant acknowledged that he yelled out, "Everyone up in here is racist." The Lieutenant ordered Nurse 1 to "take a walk now." Nurse 1 eventually complied. Neither man was arrested.

After the incident, the Lieutenant conducted an investigation and interviewed several Agency employees. ROI at 76. He learned that Complainant owned and carried firearms in his vehicle. He also averred that several employees expressed fear of Complainant after the July 15, 2020, incident.

On July 20, 2020, Complainant returned to work and was stopped at a checkpoint. The Lieutenant told Complainant that they received information that Complainant may have a gun and that the Lieutenant needed to search Complainant's bag. Complainant consented to the search. No weapon was found.

Complainant believed that he was racially profiled when he was stopped and asked if his lunch bag could be searched. He speculated that he was the only person searched that day. Complainant did not return to work after July 20, 2020. On August 10, 2020, Complainant resigned, stating he was resigning due to his "uncomfortable" work environment. ROI at 55.

At the conclusion of the investigation of the non-mixed claims, 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 issued a summary judgment decision in favor of the Agency.

In the decision, the AJ determined that the undisputed evidence showed that Nurse 1 placed the Tulsa sign on Nurse 2's door well before Complainant began working at the Agency and that the sign was unrelated to Donald Trump or the Juneteenth Massacre. Despite this, Nurse 2 immediately removed the sign when Complainant voiced his objection to it. Further, the undisputed evidence demonstrated that Complainant and Nurse 1 had a heated exchange about the sign on July 15, 2020. There was no evidence in the record showing that Nurse 1 was motivated by discriminatory animus when he approached Complainant. Rather, the two employees appeared to have had a very contentious and acrimonious relationship, but this does not evidence any discrimination based on race. Moreover, the undisputed evidence showed that the Lieutenant separated both employees when their discussion became heated. The AJ found that there was no evidence in the record to show that the Lieutenant discriminated against Complainant based on his race or treated Nurse 1 better or differently than Complainant.

Finally, the AJ determined that the undisputed evidence showed that the Lieutenant discovered that Complainant possessed firearms in his vehicle and that other employees were afraid of Complainant due to his possession of the firearms and the July 15, 2020 incident. The Lieutenant explained that they checked Complainant's lunch bag on July 20, 2020 for these reasons and because Complainant was carrying a lunch bag that was large enough to conceal a weapon. The AJ found that there was no evidence in the record to establish even an inference that the Lieutenant's stated reason for searching Complainant's lunch bag was pretext for discrimination. As a result, the AJ concluded that Complainant was not subjected to discrimination or a hostile work environment as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ failed to consider the evidence in the light most favorable to Complainant. He asserts, without any specification, that the AJ “took it upon himself to determine disputed facts without proper scrutiny.” Further, Complainant contends that he has presented sufficient evidence showing that the Agency’s articulated reasons for its actions were clearly pretext for unlawful discrimination. Accordingly, Complainant requests that the Commission reverse the final order.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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”).

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*).

ANALYSIS

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. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

Hostile Work Environment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on the protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove his hostile work environment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, his race. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Even assuming that the acts that make up the alleged harassment in the light most favorable to Complainant and finding such conduct to be sufficiently severe and/or pervasive, we nevertheless find insufficient

evidence of discriminatory animus on the part of any Agency official. It is undisputed that Nurse 1 placed the sign on Nurse 2's door before Complainant began working with the Agency. Complainant and Nurse 1 had a contentious work relationship; however, there is no evidence demonstrating that Nurse 1 acted with discriminatory animus toward Complainant. Likewise, the Lieutenant stepped in to separate the employees when it became apparent the situation was escalating. The Lieutenant asked that both employees go to different locations to diffuse the situation. Finally, the Lieutenant asked to search Complainant's lunch bag upon his return to work after learning that Complainant possessed firearms in his car, other employees were fearful of Complainant, and after observing that Complainant's lunch bag was large enough to conceal a weapon. Accordingly, we find that Complainant has not established that he was subjected to a discriminatory hostile work environment as alleged.

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). Complainant must initially 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. Corp. 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 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) he is a member of a protected group; (2) he suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

Here, looking at the evidence in the light most favorable to Complainant, he failed to establish a prima facie case of race discrimination. He did not show that similarly situated employees outside of his protected group were treated more favorably. Complainant has not provided any evidence otherwise raising an inference of discrimination.

Notwithstanding, the Commission finds that the Agency articulated legitimate, nondiscriminatory reasons for its actions as discussed above. It was necessary to deescalate a volatile confrontation and Complainant's bag was checked because of reports that employees were in fear and that he possessed a firearm in his car. The Lieutenant further observed that Complainant's lunch bag was large enough to conceal a weapon.

Complainant bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 256.

The Commission finds no persuasive evidence that Complainant's race was a factor in any actions at issue. Aside from his conclusory allegations and speculations, Complainant has not provided probative evidence to rebut the Agency's reasons. 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 acted based on discriminatory animus. Complainant failed to carry this burden. As a result, the Commission finds that Complainant was not subjected to discrimination as alleged.

CONCLUSION

Based on a thorough review of the record, we AFFIRM the Agency's final order.

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

November 20, 2024
Date