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

[redacted]
Lee R.,[1]
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2023003409

Hearing No. 410-2020-00374X

Agency No. ARUSAR19OCT04380

DECISION

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 May 1, 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, we AFFIRM the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Heavy Mobile Equipment Repairer (HMER) at the Agency's 81st Readiness Division Equipment Concentration Site (ECS) in Fort Benning, Georgia.

[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 April 2, 2020, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment and discriminated against him on the bases of race (Caucasian), color (brown), disability (physical),[2] and in reprisal for prior protected EEO activity[3] when:

1. In 2018, Complainant was required to purchase work boots after Maintenance Supervisor refused to purchase work boots for him;
2. Beginning in 2018, Team Leader failed to accurately input Complainant production time into the Agency's production database;
3. In 2018, Complainant's first line Supervisor (Supervisor 1) disclosed Complainant's use of Disabled Veterans Leave (DVL) in a staff meeting;
4. Since 2018, Complainant has not received training on the use of the Automated Time and Attendance Production System (ATAAPS) resulting in incorrect leave accrual and usage,
5. On September 11, 2019, Supervisor 1 issued Complainant a counseling statement for failure to follow leave procedures;
6. In November of 2019, Complainant's third line supervisor (Supervisor 3), interviewed Complainant's co-workers when Complainant filed an internal harassment complaint against Supervisor 1;
7. On December 12, 2019, Maintenance Supervisor counseled Complainant on being absent without leave (AWOL); and
8. On April 1, 2020, Shop Foreman counseled Complainant again for being AWOL.

Claim 1

In October 2017, when Complainant was hired, the Agency provided Complainant with a set of steel toed boots. Report of Investigation (ROI) at 222. Sometime later, Complainant informed Supervisor 1 that he needed new boots. ROI at 375. Supervisor 1 stated that he asked Maintenance Supervisor to purchase boots for Complainant, but Maintenance Supervisor refused to do so. Id. Maintenance Supervisor, however, explained that he was unaware of Complainant's request for new boots, and asserted that he believed that Supervisor 1 had asked him to purchase boot inserts for Complainant, which the Agency was not obligated to provide. According to Maintenance Supervisor, had he known about Complainant's need for boots, he would have made sure to purchase the boots. ROI at 419-420. In 2019, Complainant purchased new boots with his own money under the assumption that he would be reimbursed. ROI at 376-377. However, he never received reimbursement because the Agency did not have a process in place for reimbursing employee purchases. In November 2019, Complainant received new Agency issued boots. ROI at 201 and 208.

[2] According to Complainant, his disability is physical in nature and known to management due to his use of Disabled Veterans Leave (DVL).

[3] Complainant alleged reprisal as a basis only in claims 6 through 8.

Claim 2

Beginning in 2018, Complainant realized that Team Leader, who was responsible for inputting Complainant's production time on projects, was failing to do so. ROI at 384-386. Team Leader stated that each work leader inputted time differently, some daily, and others weekly. Team Leader noted that the database updated on a monthly basis, giving work leaders flexibility in inputting time. Team Leader acknowledged that he was not always consistent at when he inputted time (whether weekly or daily) but that he never missed inputting any of Complainant's time. ROI at 473-474.

Claim 3

During a staff meeting, Supervisor 1 allegedly disclosed the use of Disabled Veterans Leave (DVL) by Complainant and several coworkers. ROI at 389. Complainant recalled that Supervisor 1 appeared frustrated by the DVL process and asked an employee if she could share how the process worked. ROI at 390. Team Leader stated that the staff meeting was a general meeting discussing DVL because people were having a hard time understanding the process for it. ROI at 475-476. While Complainant asserted that he felt uncomfortable with the meeting, he did not allege that details about his disability or medical information were released. ROI at 389-391.

Claim 4

Complainant claimed that since 2018, he has not received any formal training on the use of the Automated Time and Attendance and Production System (ATAAPS), thereby causing him to enter incorrect time and attendance entries. Complainant noted that he filled out paperwork to attend a benefits training course called ARSET, which allegedly provided the formal training that he needed to complete his time and attendance entries. However, for a variety of reasons he could not attend, including his schedule not aligning with when the course was offered. Maintenance Supervisor, however, responded that management typically gave new employees, hands-on training, which the Agency deemed sufficient in understanding how to use the Agency's ATAAPS. ROI at 427.

Claim 5

On September 11, 2019, Supervisor 1 issued Complainant a Developmental Counseling Form for an incident in which he requested sick leave despite not having any sick leave accrued. The counseling form noted that if Complainant did not have sick leave, he could request Leave Without Pay. ROI at 236. Complainant acknowledged that he made the error but that it was a mistake and that he was still learning. ROI at 237; 395.

Claim 6

In November of 2019, Complainant initiated an internal harassment complaint against Supervisor 1, Maintenance Supervisor, and Team Leader. On December 27, 2019, the Agency released its findings on the internal inquiry, determining that Complainant had not been subjected to harassment. Supervisor 3, who conducted the internal inquiry, noted that while no corrective actions would be taken, management and Complainant agreed to meet to discuss a way forward. ROI at 197-200.

Claim 7

On December 12, 2019, Complainant did not go to work as scheduled due to being ill. Complainant asserted that he left a voicemail explaining his absence. ROI at 404. Maintenance Supervisor, however, denied receiving any voicemail and ultimately counseled Complainant for being AWOL. ROI at 432.

Claim 8

On March 31, 2020, Complainant asserted that he sent an email to his supervisors stating that he would not be able to come to work on April 1, 2020. ROI at 524. Shop Foreman acknowledged that he received the email, however the appropriate way to request leave, per the Collective Bargaining Agreement (CBA) was for an employee to contact the supervisor via telephone. ROI at 532. Since Complainant did not telephone his request, Shop Foreman issued Complainant a Developmental Counseling Form noting the appropriate procedure. Shop Foreman noted that the CBA explained that texts and emails are not appropriate for requesting leave. ROI at 299. Complainant contested the situation and asserted that at the very least, he made a good faith effort to call out. ROI at 300.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for summary judgment, urging the AJ to rule in its favor. Over Complainant's objections, the AJ adopted the facts laid out in the Agency's motion and concluded that Complainant failed to prove his allegations of discrimination.

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. Complainant filed the instant appeal but not provide any arguments in support of his appeal.

ANALYSIS AND FINDINGS

Standard of Review

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

Disparate Treatment – Claims 1-2, and 4-8

To prevail in a disparate treatment claim such as these, 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 Construction 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 804 n. 14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Assuming arguendo that Complainant established a prima facie case of discrimination, we find that the Agency has provided legitimate, nondiscriminatory reasons for its actions as discussed above.

We ultimately find no evidence that Complainant's protected classes were a factor in any of the Agency's actions. 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 on the basis of discriminatory animus. Complainant failed to carry this burden. Aside from conclusory statements, Complainant has not proffered any persuasive evidence from which a reasonable fact finder could conclude that the Agency's explanation for its actions was pretext for discrimination. As a result, we find that Complainant was not subjected to disparate treatment as alleged.

Medical Disclosure - Claim 3

Under the Rehabilitation Act, information "regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c)(1); 42 U.S.C. § 12112(d). This requirement applies to all medical information, including information that an individual voluntarily discloses. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000).

Employers may share confidential medical information only in limited circumstances: supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; first aid and safety personnel may be told if the disability might require emergency treatment; and government officials investigating compliance with the ADA and Rehabilitation Act must be given relevant information on request. 29 C.F.R. § 1630.14(c)(1).

Improper disclosure of such medical information by the Agency constitutes a per se violation of the Rehabilitation Act. Valle v. U.S. Postal Serv., EEOC No. 05960585 (September 5, 1997). The disclosure of a specific condition, diagnosis, or symptoms is a violation. Fisher v. Army, EEOC No. 01A32251 (January 14, 2005), req. for recons. den., EEOC Request No. 05A50210 (January 14, 2005). However, there is no violation where the Agency's disclosure does not disclose a particular condition, diagnosis, or symptoms. Cathy M. v. U.S. Dep't of Agric., EEOC No. 0120140008 (November 16, 2016); Myrah v. U.S. Dep't of Agric., EEOC No. 01A52157 (April 26, 2006).

Here, Complainant has failed to even allege, let alone establish, the Agency disclosed a particular condition, diagnoses, or symptom. As we find that Supervisor 1's general discussion on how to properly utilize the DVL process neither concerned Complainant's diagnosis nor constituted medical information within the purview of the Rehabilitation Act, we find no violation here.

Hostile Work Environment

Regarding Complainant's allegation of a hostile work environment, as to the claims addressed above, a finding of a hostile work environment is precluded by our determination that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

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 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

January 23, 2024
Date