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

[redacted]
Leon B,[1]
Complainant,

v.

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

Appeal No. 2023003471

Hearing No. 430-2022-00350X

Agency No. ARPOM22FEB01065

DECISION

On May 30, 2023, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 21, 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.

ISSUE PRESENTED

The issue is whether the Administrative Judge (AJ) properly determined that Complainant did not establish that the Agency subjected him to discrimination and/or harassment based on his sex, national origin or in reprisal for protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Assistant Professor at the Agency's Defense Language Institute, Language Training Detachments, Field Support Division, Spanish Department in Fort Bragg, North Carolina.

[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 27, 2022, Complainant filed a formal complaint contending that the Agency unlawfully discriminated against him. Specifically, 1) Complainant alleged that he was discriminated against and subjected to a hostile work environment based on sex (male) and national origin (Nicaraguan) by his first-level supervisor, the Language Training Detachment Director ("Director"), and his second-level supervisor, the Assistant Professor/Supervisor ("Asst. Supervisor") when:

a. From January 2020 to present, the Academic Specialist continuously assigned him students with little to no Spanish-speaking abilities for every student course cycle, which prevented him from performing other elements of his job duties;

b. From January 2020 to present, the Academic Specialist continuously and falsely reported him to his chain of command for allegedly not conforming to the teaching standards of an Assistant Professor;

c. In November 2020, the Academic Specialist instructed a contractor colleague to falsely report him for not speaking enough Spanish in class;

d. In September 2021, he was not given an opportunity to provide feedback on a class observation conducted by the Academic Specialist and end-of-course student surveys; and

e. On February 3, 2022, the Academic Specialist asked his colleague to submit harmful/negative comments about him.

2) Complainant alleged that he was discriminated against and subjected to a hostile work environment based on reprisal (current EEO activity) when on May 9, 2022, Director assigned him a new class to teach effective May 31, 2022, but did not assign a new class to a female Spanish Instructor, his comparator.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for a decision without a hearing, and Complainant responded. The AJ subsequently issued a decision with respect to claims 1(b), 1(c), 1(d), 1(e), 2 and the hostile work environment claim by summary judgment in favor of the Agency. However, the AJ determined that a material, factual dispute remained in claim 1(a), involving the alleged unfair course assignments. Consequently, the AJ denied the Agency's motion concerning this claim and a hearing was scheduled. Following the hearing, the AJ found no discrimination had occurred regarding claim 1(a). The Agency issued its final order adopting the AJ's findings that Complainant failed to prove discrimination as alleged. The instant appeal followed.

STANDARD OF REVIEW

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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").

ANALYSIS AND FINDINGS

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*).

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.

Disparate Treatment

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). 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). 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 acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination 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 the personnel action at issue, 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. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

The AJ decided the disparate treatment claims raised in claims 1(b), 1(c), 1(d), 1(e), and 2 by summary judgment. In so doing, the AJ found that management had legitimate, nondiscriminatory reasons for taking the alleged actions. The AJ explained that concerning claim 1(b), Complainant stated in his affidavit that the Academic Specialist reported him for not speaking enough Spanish in class and not assigning students enough homework. This information was relayed to him by Asst. Supervisor, Director and [two others]. However, even if these allegations are true, Complainant has suffered no harm or adverse employment action. His performance evaluation for 2021-2022 shows he was rated "Outstanding" in the "Classroom Instruction" element, despite any allegation that he was not proficient in his classroom instruction. Claims 1(c) and 1(d), which occurred in November 2020 and September 2021, are untimely. Complainant did not raise these allegations until well over 45 days later in February 2022. In claim 1(e), Complainant alleged a colleague made harmful/negative comments about him on February 3, 2022 at [the Academic Specialist's] request. However, the evidence shows the incident occurred not because of discrimination, but Complainant and this same colleague were involved in a verbal altercation on February 3. This colleague submitted a written complaint to the Academic Specialist, Asst. Supervisor, and Director about Complainant's "very disrespectful" and "unprofessional" conduct. Complainant proffered no explanation or evidence that would create a material factual dispute over what occurred on February 3. Asst. Supervisor investigated the incident, but the allegations were not substantiated, and no discipline followed.

Therefore, the AJ found that the Agency was entitled to summary judgment to the extent these claims allege a discrete act of discrimination.

In claim 2, Complainant alleged that he was being assigned to teach a new class scheduled to start on May 17. Complainant claimed [a female instructor, "comparator"] was more favorably treated in that she was not assigned a class around that time. According to Director, the class was scheduled to begin on May 18. Director stated she did not assign the comparator to a class when making the assignments on May 9 because she had been granted leave in advance for July 2022. Director stated she did not know Complainant planned to take leave in June 2022 until he approached her about the assignment on May 9. Instead, she offered to provide him a substitute teacher for the time he would be on leave. Notably, Complainant agreed he did not notify Director of his intent to take leave until their conversation on May 9 – after teaching assignments had already been made. This AJ noted that this fact is significant because it is not unreasonable that Director would have avoided scheduling the comparator for a class, given she would be absent for a two-week period of the class. On the other hand, there is no evidence that Director knew Complainant was planning to take leave at the time she made the assignments. The AJ concluded that the preponderance of the evidence does not support Complainant's disparate treatment claims of unlawful discrimination. Having reviewed the record, we agree.

Hostile Work Environment

To prove his harassment 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 sex, national origin or prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Furthermore, an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) the employer can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating that it exercised reasonable care to prevent and correct promptly any harassing behavior; and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

The AJ decided Complainant's harassment claim by summary judgment. The AJ determined that Complainant failed to show any discriminatory or retaliatory animus motivated the acts at issue.

The AJ concluded that management's actions comprising Complainant's harassment claims are not sufficiently severe or pervasive to create a hostile work environment. We agree. Beyond conjecture, Complainant has not shown that he was subjected to a hostile work environment based upon his claimed bases.

AJ (HEARING) DECISION

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

The AJ issued a hearing decision regarding claim 1(a). Concerning claim 1(a), involving the alleged unfair course assignments, the AJ noted that the key piece of evidence in this case was the "compilation" spreadsheet of class rosters for Complainant and his female comparator. The spreadsheet identified each Spanish student Complainant and his comparator taught during the three-year period, and his/her estimated proficiency level prior to the first day of instruction. Having confirmed through a hearing that the information in the class roster compilation was accurate, the AJ found that Complainant failed to establish unlawful discrimination had occurred. Specifically, the AJ concluded that Complainant and his female comparator were both assigned students of varying fluency levels. Over the course of three years, both were assigned mostly students assessed as Basic or Intermediate. The AJ's conclusion is supported by substantial evidence in the record.

After a review of the record in its entirety, including consideration of any statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the final Agency order because the Administrative Judge's ultimate finding, that unlawful employment discrimination was not proven by a preponderance of the evidence, is supported by the record.

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 24, 2024
Date