



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

[REDACTED]
Erick K.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security,
Agency.

Appeal No. 2023005074

Hearing No. 520-2022-00451X

Agency No. HS-HQ-00514-2022

DECISION

On September 11, 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 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

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.

ISSUES PRESENTED

- 1) Whether the EEOC 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.
- 2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination as alleged.

BACKGROUND

Complainant worked as a Senior Special Agent, GS-1811-13, Criminal Investigator, with the Federal Protective Service (FPS). Complainant was assigned to work in FPS Region 2 out of the Newark, New Jersey office.

Complainant was in a work-related vehicle accident on November 13, 2018, and was subsequently out of work as a result of the injuries sustained. On November 19, 2018, Complainant applied for Workers' Compensation. Complainant never returned to work at FPS after November 19, 2018. On May 26, 2020, Complainant applied for disability retirement.

Nonselection

From April 9, 2021, through April 15, 2021, the Agency posted Vacancy Announcement IMP-11046546-21-PH for Deputy Regional Director (DRD), GS-1801-14, or Supervisory Criminal Investigator, GS-1811-14 positions. Five openings were announced in different locations, including one vacancy in New York, New York. Complainant applied for the position of DRD. At the time he applied, his disability retirement application was pending. Complainant and fifteen others were selected for interviews. Three applicants withdrew from consideration and one applicant recused himself. Complainant and the other eleven were interviewed telephonically. On June 1, 2021, Complainant was notified via email that he was not selected.

Retired Badges and Credentials

In July 2021, Complainant's disability retirement application was approved. On July 3, 2021, Complainant emailed Regional Director for Region Two (RD), Deputy Regional Director (DRD), and Supervisory Special Agent (Person A), informing them that he had been approved for disability retirement and would be processed out of the Agency that day.

Complainant attached the FPS Badge & Credential Request (Retirement) Form for issuance of his retired credentials. Complainant asked for his 50th anniversary badge, certificates and pins for recognition of service to the government (for five, 10, 15, and 20 years of service), and for any other items to which he was entitled.

By email on July 7, 2021, RD requested that the Agency provide Complainant with his length of service pins and certificates. Also on July 7, 2021, RD submitted an FPS Badge and Credential Form.

Person A emailed Complainant on July 7, 2021, stating they had his 50th anniversary badge and she offered to mail it to him at any address he wanted. Regarding the other requests (for retired badge, credentials, pins, and certificates), Person A stated the Region does not control the outcome. Person A noted the form Complainant used was an older form and that they had to move the information onto the new form currently in use. However, she stated they had done so and already sent the form to the appropriate Headquarters (HQ) team for further action. Additionally, Person A noted they had already sent another request to a different HQ team for his employee entitlements, pins, and certificates. Person A noted this would require coordination outside of FPS, so it may take some time.

On July 12, 2021, Complainant provided a mailing address for his 50th anniversary badge. In a September 7, 2021 email, Complainant acknowledged receiving his 50th anniversary commemorative badge. At this time, Complainant renewed his request for his retired badge and credentials.

On September 13, 2021, Person B at HQ requested clarification on whether Complainant wanted only a retired rocker as shown on one of the forms, or whether he wanted a badge in Lucite and retirement rocker. RD replied the same day noting on his original form Complainant did not check the Lucite option but suggested they order both.

On September 22, 2021, DRD emailed Complainant noting that due to Complainant's extended absence from work prior to his retirement, they were unable to go through the usual out-processing procedures. DRD noted they were unaware of the date of Complainant's retirement until Complainant informed them on the date his retirement was effective, which added some complications and delays. With regard to his request for his retired badge, DRD noted the form Complainant sent was out of date and that in an attempt to get the request done quickly, they transferred the information onto the new form.

DRD attached a copy of the newly complete form for Complainant to view. DRD also noted RD requested a badge in Lucite and a retirement rocker for Complainant at no extra cost. DRD stated those items were currently at Blackington for production and would be sent to Complainant once completed.

Regarding his length of service pins, the record shows that HQ informed Person D on September 21, 2021, they had exhausted their supplies of these items and that they would have to get the request approved so they could order new certificates. In a September 23, 2021 email, Person D stated he could get approval on his end. In his affidavit, Person D stated in an effort to expedite the process for the length of service pins, rather than waiting for HQ to approve the purchase of more items, he approved the local purchase of these supplies for HQ.

Complainant's 15 and 20-year service pins and certificates were mailed on October 12, 2021, via UPS Priority Overnight. A second package containing Complainant's retired badge and credentials was sent via UPS Priority Overnight on November 16, 2021. According to the tracking information, both packages were delivered on October 13, 2021, and November 17, 2021, respectively.

In an email dated February 18, 2022, Complainant acknowledged he had received his retired badge and credentials. However, Complainant stated he had not received his inauguration badge for the Biden inauguration, his retired pins and certificate, a "good guy" letter, or a retirement letter from the Department of Homeland Security (DHS) Secretary.

On March 8, 2022, Person A stated the Lucite Badge was sent via UPS on March 7, 2022. She noted the 15 and 20-year pins were sent out on October 12, 2021. Person A stated the DHS Secretary letter (and Presidential recognition) no longer exist. She noted unlike other federal agencies, FPS does not issue "good guy" letters. Regarding the inauguration badge, she noted those were available for purchase by LEOs (law enforcement officers) during the inauguration. She clarified that only LEOs who worked the inauguration were issued those badges free of charge. Finally, Person A stated regarding Complainant's portfolio and Director's letter, the process takes time. Person A noted there have been a lot of retirements recently and the Agency was processing them as expeditiously as possible.

In his affidavit Complainant acknowledged receiving the 15 and 20-year Recognition of Service certificates and the retired badge and credentials. He stated he received them in November 2021 from Person A.

Lump Sum Payment

Following his retirement, Complainant was paid an Annual Leave Lump Sum. The payment was received by Complainant in December 2021 via direct deposit. Complainant contends the lump sum was improperly calculated.

Supervisory Human Resources Specialist (Branch Chief), Retirement and Benefits Unit, HQ, oversaw the calculations. The Payroll and Processing Unit within the Agency's Human Resources Management Division was responsible for processing annual leave lump sum payments. The lump sum payment was processed by Person C in the payroll department. Branch Chief stated the payment was released the end of December 2021.

Credit Reporting Incident

Complainant stated following his retirement he discovered a negative reporting on his credit report. Specifically, he stated the USDA National Finance Center (NFC) reported that he had a debt of \$74.00 on July 1, 2021. Complainant argued this decreased his credit score. Complainant stated on December 5, 2021, he emailed the Branch Chief regarding a negative reporting on his credit report. Complainant said he continued communication with the Agency about this issue throughout the month of December. He stated in January or February 2022, he checked his credit report and found the charge was removed.

Branch Chief stated she became aware of this matter when Complainant brought it to her attention. Branch Chief stated that debts and bills are generally coordinated through their Payroll and Processing Unit as well as through the NFC. She noted the NFC was their serving payroll office. Branch Chief noted the Payroll and Processing Unit sent an inquiry at her request to NFC to determine the source of the bill. She noted research was ongoing concerning the debt to identify the source and accuracy of the debt.

EEO Complaint

On December 17, 2021, Complainant filed an EEO complaint, which was subsequently amended, alleging that the Agency discriminated against him on the bases of race (African-American), national origin (American), sex (male), color (brown), disability ("physical"), age (Y.O.B. 1978), and in reprisal for prior protected EEO activity when:

1. On August 17, 2021, Complainant learned he was not selected for the position of Deputy Regional Director (Vacancy Announcement Number: IMP-11046546-21-PH).
2. From July 2021 to present, the Agency delayed issuing Complainant a Recognition of Service certificate and pins, retired badge, and credentials.
3. On July 3, 2021, to present, the Agency failed to process Complainant's Annual Leave Lump Sum.
4. On December 5, 2021, Complainant became aware the Agency caused a Cause for Action of a Negative Reporting on his credit report.

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 requested a hearing. The parties participated in a Pre-Hearing Conference (Conference) on March 9, 2023. A March 9, 2023, Order Following Telephonic Pre-Hearing Conference, noted the Agency's Motion for Summary Judgment was due on April 24, 2023, and that Complainant's Response was due on May 9, 2023. The Order noted parties were required to provide Word versions of their briefs along with PDF versions. The Agency filed its Motion for Summary Judgment on April 24, 2023. Complainant did not file a response. On July 12, 2023, the AJ issued a decision without a hearing granting summary judgment in favor of the Agency. The AJ found claim 1 was untimely raised with an EEO Counselor. Additionally, the AJ found Complainant failed to show he was subjected to discrimination as alleged. When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). Thereafter, Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that when the Agency filed its Motion for Summary Judgment, it initially only filed the document in PDF format which was contrary to the AJ's order. Complainant states that two days after the deadline for the Agency to submit their Motion for Summary Judgment, on April 26, 2023, the AJ told the Agency to provide the Word version of the motion. Complainant states he did not respond to the Agency's Motion for Summary Judgment because he was awaiting a response from the AJ on the Agency's failure to comply with the AJ's Order.

In response to Complainant's appeal, the Agency notes Complainant has not challenged any of the AJ's factual or legal conclusions. The Agency notes Complainant has also not challenged the Agency's statement of undisputed facts. Rather, the Agency notes Complainant is only challenging the fact that when the Agency initially filed its motion for summary judgment on April 24, 2023, it filed the motion in PDF format and did not include a Word version. The Agency noted that by email on April 26, 2023, the AJ informed the Agency of the oversight, and it cured the oversight the same day by providing both the motion for summary judgment and the statement of undisputed facts in Word format. The Agency argues the AJ's decision granting summary judgment was proper.

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.

At the outset, we address Complainant’s contention that Agency’s Motion for Summary Judgment was improperly filed. Upon review, we find the AJ did not abuse his discretion in accepting the Agency’s Motion for Summary Judgment. Furthermore, there is no harm to Complainant because if we consider his arguments on appeal as if they would have constituted his opposition to summary judgment before the AJ, we still find the AJ’s decision to be proper. We find the issuance of summary judgment in favor of the Agency was proper.

Regarding the AJ’s dismissal of claim 1 for untimely EEO Counselor contact, we note Complainant does not challenge the dismissal of this claim on appeal. The Commission has the discretion to review only those issues specifically raised in an appeal. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at Chap. 9, § IV.A (Aug. 5, 2015). Accordingly, we will not address claim 1 in this decision.

For a complainant to prevail on a claim of disparate treatment, they must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A complainant must initially establish a prima facie case by demonstrating that they were 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 804 n. 14.

To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

To establish a prima facie case of disability discrimination under a disparate treatment theory, a complainant must demonstrate that: (1) they are an "individual with a disability" (2) they are "qualified" for the position held or desired; (3) they were subjected to an adverse personnel action under circumstances giving rise to an inference of disability discrimination and/or denied a reasonable accommodation. See Josiah M. v. U.S. Postal Serv., EEOC Appeal No. 2019003865 (Feb. 14, 2020).

To establish a prima facie case of disparate treatment on the basis of reprisal, a complainant must show that: (1) they engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132503 (Aug. 28, 2014), citing Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

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).

A complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, 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.

We find Complainant met the first element of his disparate treatment claim based on his race, color, national origin, sex, and age. Further, we note the Agency does not dispute that Complainant was disabled and thus, we find he has also met the first element of his disability claim. Additionally, we find Complainant met the first and second elements of his prima facie case based on reprisal since he engaged in prior protected activity and Person A and the DRD were aware of his prior filing.

However, regarding claim 2, the record shows the Agency sent Complainant his 15 and 20-year service pins and certificates and his retired badge and credentials. UPS tracking shows both packages were delivered. Further, Complainant acknowledged receiving his 15 and 20-year service pins and certificates and his retired badge and credentials. Complainant has not shown that as a result of the delay in issuance of his recognition of service certificate and pins, retired badge, and credentials, he suffered an actual harm or loss with regard to a term, condition, or privilege of employment. Thus, we find Complainant failed to establish a prima facie case of discrimination. Further, we note Complainant failed to produce any evidence that the delay in receiving his retired badge was due to discrimination on any of his protected classes. Complainant has also failed to provide any evidence of similarly situated employees outside of his protected classes who were treated more favorably.

Regarding claim 3, by alleging his annual lump sum leave amount was incorrect, we find Complainant has shown that he was subjected to an adverse action. However, Complainant has not presented any evidence linking the action with his membership in the protected class. Also, he failed to identify a similarly situated retired FPS LEO outside of his protected classes who was treated better than he was. Furthermore, we note the Branch Chief, who oversaw the calculations of Complainant's Annual Leave Lump Sum, stated she was unaware of Complainant's protected bases or prior EEO activity. Similarly, Person C, who processed the payment, was also unaware of Complainant's protected bases or prior EEO activity. Thus, we find Complainant failed to establish a prima facie case of discrimination or reprisal. Moreover, we find Complainant failed to present evidence that the Agency's treatment of his lump sum was motivated by discriminatory or retaliatory animus.

Regarding claim 4, we find Complainant failed to show he was subjected to an adverse action. While Complainant claims the USDA NFC's report of a debt that damaged his credit report, he failed to provide evidence of this claim. He also stated that in January or February 2022, he saw the charge was removed from his credit report. Thus, he has not shown he suffered a present, adverse harm with regard to the terms, conditions, or privileges of employment. Thus, we find he failed to establish a prima facie case. Further, we find Complainant failed to present evidence that the Agency's actions were based on his membership in any of the alleged protected classes or his prior EEO activity. Further, he failed to provide evidence that similarly situated employees were treated differently.

CONCLUSION

Accordingly, the Agency's final action dismissing claim 1 and finding no discrimination on the remaining claims is AFFIRMED.

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

December 16, 2024
Date