



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

[REDACTED]  
Barry G.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Appeal No. 2023005092

Hearing No. 510-2022-00248X

Agency No. HS-CBP-00805-2021

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 15, 2023, finding no discrimination regarding his 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 finding no discrimination.

ISSUES PRESENTED

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

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<sup>1</sup> 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. Whether the Agency's final order properly found that Complainant was not subjected to discrimination based on disability and in reprisal for prior EEO activity when he was terminated.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GL-9, Marine Interdiction Agent, at the Agency's Mayaguez Marine Unit, Caribbean Air and Marine Operations in Mayaguez, Puerto Rico.

On May 12, 2021, Complainant filed a formal complaint alleging discrimination based on disability (Crohn's disease) and in reprisal (for asking sick leave) when on February 24, 2021, he was terminated during his probationary period.

The Agency investigated the complaint. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC AJ. Complainant requested a hearing. The Agency filed a motion for summary judgment. Complainant responded. The AJ issued a decision without holding a hearing, finding no discrimination.

The record indicates that on June 7, 2020, Complainant was appointed to a career-conditional position at the Agency in his Marine Interdiction Agent position subject to one year probationary period. Complainant's duties included investigating and interdicting/intercepting dangerous people, vehicles, and materials to keep them from entering the United States to enforce immigration and trade laws and to support counter-terrorism efforts.

Complainant indicated that he had Crohn's disease. Complainant also indicated that he was able to perform his position tasks (i.e., typing reports, filling out paperwork, operating motor vehicles (boats and cars), using communication equipment, and maintaining gear and equipment). Report of Investigation (ROI) at 140. Complainant did not request a reasonable accommodation to perform his position duties due to his disability. ROI at 66.

Complainant's first level supervisor (S1, retired in December 2021), GS-13, Supervisory Marine Interdiction Agent, indicated that he was not notified of Complainant's medical condition until the day Complainant was terminated. S1 stated that on July 27, 2020, Complainant did not report to work at 7:00 am as scheduled. ROI, Exhibit (Ex.) 5.

When another agent called to check on Complainant, Complainant stated that his alarm did not go off. Complainant did not report to work until 9:00 am.

On July 28, 2020, stated S1, Complainant again failed to report to work at 7:00 am as scheduled. Id. S1 tried calling Complainant twice to no avail. Complainant came to work at 10:00 am without any explanation. S1 stated that when S1 called Complainant to S1's office and had a conversation about his tardiness, he had an attitude as if he did not care and said he decided to stay home and sleep because he did not have much work to do since he had not yet attended the law enforcement academy. An hour after the conversation, Complainant came to S1 and told S1 that he was sorry.

On August 7, 2020, S1, after consulting with Human Resources office, issued Complainant an Official Letter of Reprimand due to his tardiness on July 27 and 28, 2020, including his unprofessional response. ROI, Ex. 3.

The record indicates that Complainant's third level supervisor (S3), Director of Marine Operations, issued Complainant a letter, dated February 18, 2021, to notify him of S3's decision to terminate him from his position at the Agency during his probationary period. ROI, Exs. 4 and 5. Therein, S3, citing the foregoing incidents, stated that despite the August 7, 2020 Letter of Reprimand, Complainant's behavior did not improve. Specifically, S3 stated that on January 13, 2021 (three days after his law enforcement training academy), Complainant again did not report to work as scheduled. S1 called and emailed Complainant for two hours to no avail. Thus, two coworkers were sent to Complainant's residence to check on him. They discovered Complainant asleep in his home. Complainant told S1 that he was not feeling well; his phone was damaged which prevented him from calling S1 to request leave; and he would be at work in a few minutes. After a while, Complainant called S1 to request sick leave for the remainder of the day.

The AJ found that Complainant failed to establish a prima facie case of reprisal because he did not engage in any protected activity prior to his termination. The AJ noted that Complainant's sick leave request on January 13, 2021, did not constitute protected activity. The AJ also noted that Complainant first sought EEO counseling on February 25, 2021, i.e., after his termination. The AJ stated that the Agency articulated legitimate, nondiscriminatory reasons for its action.

Specifically, the AJ stated that the Agency terminated Complainant during his probationary period due to his failure to report to duty at his scheduled time; on August 7, 2020, he received an Official Letter of Reprimand; and subsequently, on January 13, 2021, he failed to report to work on time. Based on the foregoing, the AJ found that Complainant failed to establish that he was discriminated against based on disability and reprisal when he was terminated.

The Agency's final order implemented the AJ's decision. Complainant appeals from the Agency's final order.

### CONTENTIONS ON APPEAL

Complainant does not raise any new contentions on appeal. The Agency, reiterating the AJ's analysis, contends that the AJ correctly decided that Complainant failed to prove that he was discriminated against based on disability or reprisal.

### 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 (EEO MD-110), Chap. 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 EEO MD-110, 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 retaliatory 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.

To prevail in a disparate treatment claim such as this, 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 Complainant 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 Community 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's explanation was pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

To establish a prima facie case of disparate treatment discrimination based on disability, Complainant generally must prove the following elements: (1) Complainant is an individual with a disability as defined in 29 C.F.R. §§1614.203(a) and 1630.2(g); (2) Complainant is "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the Agency took an adverse action against Complainant; and (4) there was a causal relationship between Complainant's disability and the Agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

In order to establish a prima facie case of reprisal, Complainant must show that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant 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). Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996).

In the instant case, we find that Complainant failed to establish a prima case of disability or reprisal. There is no evidence of a causal relationship between Complainant's disability and his termination. Further, there is no evidence Complainant engaged in any protected activity prior to the termination.

Furthermore, the Agency stated that Complainant was terminated during his probationary period due to his attendance issues. The Agency issued Complainant a Letter of Reprimand for his attendance issues on August 7, 2020 (two months after he was appointed to his position). However, on January 13, 2021, Complainant again failed to arrive for duty at his scheduled time. As a result, Complainant was terminated on February 24, 2021, during his probationary period. Complainant has not shown that similarly situated persons outside of his protected groups were treated differently.

Based on a thorough review of the record, we find that Complainant failed to show that the Agency's action was motivated by discrimination as he alleged.

#### CONCLUSION

Accordingly, the Agency's final order finding no discrimination 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 9, 2024

Date