



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

[REDACTED]
Kristopher M.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2023005162

Hearing No. 510-2021-00298X

Agency No. DOT-2020-28758-FAA-03

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from an EEOC's Administrative Judge's (AJ) decision dated July 5, 2023, which effectively became the Agency's final decision, pursuant to 29 C.F.R. § 1614.109(i), 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. For the following reasons, we AFFIRM the Agency's final decision finding no discrimination.

ISSUES PRESENTED

1. Whether the 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.

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.

2. Whether the Agency's final decision properly found that Complainant was not subjected to discrimination based on national origin.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a FV-2101-G, Airway Transportation System Specialist (ATSS) at the Agency's Miami Environmental Service Support Center in Miami, Florida.

On April 3, 2020, Complainant filed his complaint alleging discrimination based on national origin (Dominican) when on February 13, 2020, he was terminated from his ATSS position.

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. 29 C.F.R. § 1614.108(f). 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.

Complainant was hired as an ATSS at the Agency on August 5, 2019, subject to a one-year probationary period. Report of Investigation (ROI) at 169.

Complainant's first level supervisor (S1), Front Line Manager, J Band, indicated that he made a recommendation to terminate Complainant from his probationary employment based on his work ethic, observation, and team fit. Specifically, S1 stated that throughout August and September 2019, Complainant was verbally counseled on numerous occasions concerning his teamwork, his going to breakfast during work hours, taking extended lunch, his failure to follow S1's instructions (going to the airfield where airplanes and equipment were constantly in motion without proper credentials), and his failure to follow safety instructions by repeatedly touching live voltage after being instructed not to do so. ROI at 171, 172.

The record indicates that on December 13, 2019, S1 issued Complainant a Record of Conference for failure to perform duties while sleeping (nodding off) or exhibiting a sleep-like state. ROI at 187. On December 13, 2019, Complainant was issued another Record of Conference for his tardiness (unauthorized early departures, delay in reporting to work, returning late from lunch/breaks, and returning to his work site after leaving the workstation on official business). ROI at 188. Complainant signed both Records of Conference on December 13, 2019. Id.

S1 stated that he counseled Complainant for failure to comply with the Agency's sick leave policy on December 27, 2019. Specifically, S1 indicated that he was on vacation from December 23, 2019, to January 6, 2020, and he placed an Employee in Charge (EIC) in his place while he was away. Instead of contacting the EIC, Complainant sent a text message to his coworker (C1) for his sick leave on December 27, 2019.

Complainant acknowledged that he did not contact the EIC and instead contacted C1 in the morning of December 27 for his sick leave. Complainant did not claim that he was unaware that he should contact the EIC, instead of S1, regarding his sick leave.

C1 acknowledged that Complainant sent him a text message on December 27, 2019, stating that he was not feeling well and asked him to relay the message to the EIC, who was at work on that day and was available. ROI at 304. C1 stated that he did not know why Complainant contacted him because Complainant knew he had no authority to grant sick leave. *Id.*

S1 indicated that on January 14, 2020, he counseled Complainant for departing work early. ROI at 173. Complainant acknowledged that it was his mistake for leaving his work one hour early after his training on January 14, 2020. ROI at 83. Complainant indicated that he, as approved by S1, made up that one hour the next following day. *Id.*

Complainant's second level supervisor (S2), District Front Line Manager, K Band, stated that based on S1's recommendation, Complainant's performance and conduct report, he decided to terminate Complainant during his probationary period. The record indicates that on February 13, 2020, S2 issued Complainant a memorandum of termination during probation, citing the incidents, set forth above, concerning his failure to follow safety instructions, his work ethic, his tardiness, his sleeping or being sleepy at work, and his failure to follow the Agency's sick leave policy. ROI at 209-211.

Based on the foregoing, the AJ found that the Agency terminated Complainant during his probationary period for legitimate, nondiscriminatory reasons and Complainant failed to show the reasons were pretextual. The AJ also found that Complainant failed to establish that he was treated differently than others not in his protected class under similar circumstances. The AJ concluded that Complainant failed to establish that he was discriminated against based on national origin when he was terminated during his probationary period.

The Agency did not issue a final order after the AJ's decision which effectively became the Agency's final decision. 29 C.F.R. § 1614.109(i). Complainant appeals from the Agency's final decision.

CONTENTIONS ON APPEAL

Complainant contends that the AJ erred in issuing a decision without a hearing. Specifically, Complainant, reiterating arguments he previously made, indicates, in part, that he was harshly treated by the Agency concerning his sleeping or being sleepy, his taking extended lunchbreaks, his texting his coworker for his sick leave, and not getting back to work after his training session was over.

The Agency indicates that Complainant on appeal reiterates the arguments he previously made and which were fully considered by the AJ. The Agency contends that Complainant offers nothing to disturb the AJ's finding of no discrimination when he was removed during his probationary period. Specifically, the Agency contends that Complainant failed to identify any similarly situated employees who were treated differently, and he was removed due to his misconduct as set forth in detail by S1 and S2.

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 fact-finder 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.

In order to establish a prima facie case of discrimination based on national origin, Complainant must show that: (1) Complainant is a member of a protected class; (2) Complainant was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) Complainant was treated differently than similarly situated employees outside Complainant's protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. McCreary v. Dep't of Defense, EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Navy, EEOC Request No. 05950927 (Jan. 9, 1998); Trejo v. Soc. Sec. Admin., EEOC Appeal No. 0120093260 (Oct. 22, 2009).

In the instant case, we find that Complainant failed to establish a prima facie case of discrimination based on national origin. Specifically, we find that Complainant failed to identify any similarly situated employee outside of his protected class who was treated differently than he was or that there was any evidentiary link between his protected class and the Agency's action. Complainant fails to identify any ATSS employee at the Miami Environmental Service Support Center who was not terminated during their probationary period for misconduct similar to that of Complainant.

Further, we find that the Agency articulated legitimate, nondiscriminatory reasons for Complainant's termination during his probationary period. Specifically, the Agency stated that Complainant was terminated because he engaged in misconduct, i.e., being sleepy or exhibiting a sleep-like state, his tardiness, and not following the Agency's leave policy. Upon review, we agree with the AJ that Complainant failed to show that the Agency's reasons were pretextual.

Based on a thorough review of the record, considering all statements submitted on appeal, 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 decision 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 11, 2024
Date