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

[redacted]
Charlie K.,[1]
Complainant,

v.

James R. McHenry III,
Acting Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 2023005355

Hearing No. 570-2023-00212X

Agency No. FBI-2022-00213

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 30, 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, the Commission AFFIRMS the Agency's final order.

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.

[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 order properly found that Complainant was not subjected to discrimination on the bases of race, national origin, religion, or disability when he was terminated from his position.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was a New Agent Trainee at the Agency's Training Division facility in Quantico, Virginia.

On April 14, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on race (Middle Eastern), national origin (Iraqi), religion (Muslim), and disability (unspecified "mental" condition) when, on March 10, 2022, he was dismissed from New Agent Training.[2]

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 EEOC Administrative Judge (AJ). Complainant requested a hearing. Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

Complainant began his training as a New Agent Trainee in December 2021, when he was assigned to a Basic Field Training Course (BFTC) class. The BFTC is the Agency's entry-level training for New Agent Trainees to ensure they attain the necessary proficiencies for their role at the Agency. All BFTC students, including Complainant, reviewed and signed a document outlining the requirements for graduation from the BFTC.

[2] Complainant also alleged parental status as a basis of discrimination, due to his baby being born prematurely and with a bacterial infection while Complainant was in training. The Agency stated in its final decision that Complainant's allegation of discrimination based on parental status was not appealable to the Commission but that, pursuant to its own policies, it would issue a separate decision on the parental status claim. We note that the Commission does not have jurisdiction over claims of parental status discrimination. See Ward B. v. Dep't of Homeland Sec., EEOC Appeal No. 2019004740 (Feb. 20, 2020),

This document listed six "suitability dimensions" expected of New Agent Trainees: conscientiousness, cooperativeness, emotional maturity, initiative, integrity, and judgment. ROI at 152-54. The document further stated that "[a]ny trainee who is deemed deficient in or unable to appropriately exhibit any one of the above-listed six dimensions during his/her training period may be recommended for dismissal from the BFTC." Id. at 154.

The document also included a copy of the Agency's "Honor Code" and indicated that "[a]ny trainee found to have violated the FBI Academy Honor Code will be recommended for Suitability Review." Id. at 157. As the document later explained when outlining the process regarding dismissal from the BFTC, a trainee may be dismissed (in relevant part) for "exhibit[ing] behavior inconsistent with the suitability dimensions," "fail[ing] to adhere to the Standards of Conduct," and "fail[ing] to adhere to the FBI Academy Honor Code." Id. at 172. In the circumstances of a suitability-based dismissal (as opposed to proficiency-based dismissals), the document explained that a trainee will first be put under a Suitability Review, which may result in the initiation of a Trainee Review Board (TRB). The TRB would then make a final determination about whether the trainee should continue in the program; if not, the trainee shall be immediately dismissed from the BFTC.

As part of the BFTC, Complainant and the other New Agent Trainees received training in interviewing and interrogation techniques. A Training Division instructor (Instructor) was the primary interview and interrogation instructor for Complainant's BFTC class. Part of the curriculum included practical exercises. These exercises consisted of an interview or interrogation of a "role player," during which the trainee would take interview notes. After the mock interview was completed, the trainee had the opportunity to review and revise their notes, which would then be used later to fill out a practice FD-302 form, which is a document used to summarize and record information from a witness interview. As part of the practical exercise, the trainees also viewed videotape of their interview in a video review room in order to complete a self-evaluation soon after the practice interview occurred with the role player. New Agent Trainees were informed several times that they were not permitted to bring in their notes or alter their notes during or after review of their interview tape; this was to prevent trainees from gaining an advantage in the written portion by adding information to their notes that they had missed during the actual interview.

On March 2, 2022, Complainant's BFTC class performed their third interview and interrogation practical exercise (scheduled to take place between 1:00 PM and 5:00 PM). Prior to the exercise, the class was told they could not bring their notes into the video review room or take any supplemental notes after watching the video of their interviews. Complainant and his classmates were directed that day to take notes during the role-playing interviews and informed that they could supplement their notes only before reviewing the video for the self-assessment.

After the role-playing interviews occurred, the New Agent Trainees watched their interviews in the video review room to complete the self-assessments. At about 4:00 PM, Supervisory Special Agent (SSA1), who worked as an instructor in the Training Division, checked the video review area to see if any New Agent Trainees were still working. SSA1 observed Complainant watching his video and writing in a notebook. Complainant admitted that SSA1 saw him writing notes after completing his self-evaluation. Complainant's instructors believed that Complainant was updating his original notes in order to draft a better FD-302 form. SSA1 told Complainant that Complainant had been instructed not to take notes into the video room or to take new notes after entering the video review room. In his affidavit, Complainant admitted that he brought his notes into the video room and that he had been instructed to only bring his self-evaluation form with him. Complainant also conceded that he had reviewed his interview and completed the self-evaluation by the time SSA1 observed him taking notes.

On March 7, 2022, Instructor and SSA1 interviewed Complainant about the incident. Complainant told them that he felt rushed during the practical exercise. SSA1 responded to Complainant that the exercise was scheduled until 5:00 PM, even though SSA1 observed Complainant taking notes at 4:00 PM, and therefore he could not have been rushed. Complainant admitted that he was taking notes from his interview tape so he could add information he had missed. According to Instructor, when they asked why Complainant was writing notes when it was not permitted, Complainant told them that he remembered a name the witness had mentioned during the interview and wanted to write it down. However, Instructor reviewed Complainant's interview tape and saw that Complainant had previously asked the witness about the same name and had appeared to write it down at the time. Instructor therefore believed Complainant was lying about recording the same name again.

The next day, Complainant was put under a Suitability Review for the incident. A TRB was then convened, with three voting members and a non-voting chairperson. The TRB members reviewed documents concerning Complainant's performance during the BFTC, as well as his Suitability Review notation. The TRB also interviewed witnesses about the incident, including Complainant, SSA1, Instructor, and Complainant's BFTC class supervisor (SSA2). SSA1 and Instructor told the TRB that Complainant's actions would have given him an unfair advantage in the exercise over other trainees who followed the directions not to take notes after their interviews. SSA1 told the TRB his belief that Complainant demonstrated an integrity issue, as Complainant could not adequately explain why he had taken his notebook into the video review room despite knowing the rules. SSA1 was concerned that this indicated Complainant may not follow procedure when under pressure in the field.

According to the TRB members, Complainant admitted to the TRB that he had brought his interview notes into the video room and made additions to his notes but claimed he was confused and did not understand the process, even though he had completed two prior practical exercises. The TRB members felt that Complainant minimized his actions and did not show remorse during his interview with them. The TRB members voted unanimously to recommend Complainant's dismissal from the BFTC. One panelist stated that his vote was due to Complainant's lack of candor; another stated that he felt Complainant cheated on the assignment; and the third voted to dismiss Complainant because he had been untruthful and minimized his actions. The TRB's recommendation and reasoning was given to Assistant Director (AD). AD concurred with the TRB's recommendation and dismissed Complainant from the BFTC on March 10, 2022.

The AJ first found that Complainant could not establish a prima facie case of discrimination. Regarding his claim of disability discrimination, the AJ found that Complainant had not introduced any evidence that he had a disability or that he was a qualified individual under the Rehabilitation Act. The AJ also found that Complainant had not introduced any evidence connecting his dismissal to his protected bases. Even assuming Complainant could establish a prima facie case, however, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions and that Complainant had not demonstrated they were pretextual.

The AJ found that Complainant could not establish pretext because in his prior statements he admitted to the majority of the Agency's reasons for his dismissal.

The AJ further found that Complainant had not shown that a similarly situated employee outside of his protected bases was treated more favorably. The AJ also rejected Complainant's argument that SSA1 and SSA2 discriminated against him by effectuating his dismissal. The AJ reasoned that, because the decisionmakers in this case (the TRB and AD) conducted an independent investigation and determined dismissal was appropriate, any supposed discriminatory animus on the part of SS1 or SSA2 could not result in liability. The AJ found that the TRB spoke with Complainant about the incident and independently concluded that he had lacked candor and failed to take responsibility for his actions.

CONTENTIONS ON APPEAL

Complainant argues on appeal that summary judgment was improper because there exist genuine disputes of material fact. Complainant argues that he can establish a prima facie case of disparate treatment. Regarding the alleged basis of disability, Complainant argues that he has a disability because he was in a car accident in 2014 and, since that time, his doctor recommended that he have check-ups every two years to determine if the accident caused any brain damage. Complainant argues that he can establish an evidentiary link between his protected bases and his termination from the Agency because, from the first day of training, he experienced "discrimination and harassment" from SSA2. He claims that SSA2 "frequently scrutinized Complainant; showing up to his trainings and leaving once Complainant had finished his portion" and threatening Complainant with discipline. He also contends that SSA2 looked "directly at Complainant" when she told the whole class they had to make sure any foreign family members had proper documentation before putting them on the graduation invitation list. Complainant also claims that SSA1 "ignored Complainant" and was dismissive, and that SSA1 "only started acting hostile towards Complainant after he heard Complainant speak [with an accent]."

Complainant argues that SSA1's record statements are inconsistent, which demonstrates discriminatory animus. Complainant also argues that the TRB members would have been aware of all his protected bases, even though some were unwilling to admit in their affidavits that they knew of Complainant's race or religion, and that such omissions "raise concerns" about the members' credibility. He further argues that, because there are no contemporaneous notes of the TRB interviews, the record is not fully developed in light of discrepancies between the three voting TRB members' affidavits about "the exact reason Complainant was terminated."

Complainant maintains that the TRB recommendation, and AD's subsequent decision, was "tainted by the discriminatory animus" of SSA1, SSA2, and Instructor.

Complainant also argues that he had no motivation to cheat because the incident involved a practical exercise and not an evaluation/test and that he never lied about his actions. He claims that "during the stress of the moment," he forgot the instructions about not taking his notes into the video review room or adding to his notes during the review. Complainant maintains that he admitted he "messed up" and that his actions were nothing more than a mistake because he felt rushed as the last trainee to finish the exercise. He therefore argues that his mere denial of intentionally cheating did not exhibit a lack of candor. Complainant argues that the Agency's legitimate, nondiscriminatory reasons for its actions are pretextual.

The Agency argues that Complainant's statements about SSA1 and SSA2 harboring discriminatory animus are self-serving and purely speculative. The Agency notes that SSA2's job was to monitor Complainant's class and that she was not directly involved in the process that led to Complainant's dismissal. The Agency argues that Complainant failed to establish a prima facie case of discrimination, as he did not allege that any similarly situated employees outside of his protected bases were treated more favorably and cannot otherwise show a link between these bases and his dismissal. The Agency maintains that Complainant was properly terminated because he failed to follow clear instructions provided to him regarding the practical exercise, which it maintains violated the Honor Code and BFTC graduation requirements. The Agency contends that, regardless of Complainant's "asserted intent," he violated the established protocols of the exercise, and that forgetfulness is not an excuse to such a violation.

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 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 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.

To prevail in a disparate treatment claim, 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 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 802 n.13.

To establish a prima facie case of disparate treatment based on race, national origin, or religion, Complainant must show that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) he was

treated differently than similarly situated employees outside his protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nannette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (Mar. 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008), request for recons. denied, EEOC Request No. 0520080545 (June 20, 2008).

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

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. 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 Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (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.

We find that Complainant cannot establish a prima facie case of disparate treatment under any of his alleged bases of discrimination. Regarding his claim of disability discrimination, we find Complainant has not shown the first element, as he makes no argument that he has an impairment that substantially limits one or more major life activities. Moreover, the evidence fails to establish an evidentiary link or causal relationship between any of Complainant's protected bases and his dismissal from the BFTC, as is required for a prima facie case under all of his alleged bases. Other than Complainant's own feeling that his instructors treated him less favorably than his classmates, Complainant has not presented any facts that reasonably give rise to an inference of discrimination.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions that Complainant fails to rebut as pretextual. Regarding Complainant's argument that SSA1 and SSA2 harbored discriminatory animus against him, we find this insufficient to create a genuine dispute of material fact requiring a hearing. We note that, in addressing an AJ's issuance of a decision without a hearing, a complainant's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for a hearing. See Celotex, 477 U.S. at 324. Here, Complainant's bare assertions that SSA2 looked directly at him when speaking about foreign family members and gave his work particular scrutiny, or that SSA1 ignored him, are purely speculative and insufficient to defeat summary judgment. Even if these incidents had occurred as alleged, there is no evidence that such treatment was motivated by discrimination.

We also find that the purported inconsistencies in SSA1's statements and between the TRB members' affidavits are insufficient to create a genuine dispute of material fact. It is undisputed that Complainant was instructed not to bring his notes into the video review room or to add to his notes after reviewing the video and that he did so anyway. A minor variance between SSA1's description of Complainant's additions to the notes therefore does not cast doubt on the Agency's reasons for its actions. The TRB members' affidavits also do not create a genuine dispute of material fact. That some members stated they were unaware of one or two of Complainant's alleged bases of discrimination is insufficient to create credibility problems. The members' answers as to why they recommended Complainant's dismissal are likewise insufficient to create a genuine dispute. Even though their answers varied slightly, all indicated to some extent that they felt Complainant minimized his actions and was not forthright about the incident.

We further note that there is no indication that SSA1, SSA2, or Instructor "tainted" the process. The record indicates that the TRB independently reviewed the relevant evidence and heard Complainant's version of events from Complainant; moreover, Complainant has not shown, beyond his own bare assertions, that any of the three instructors in fact were motivated by discrimination in their testimony before the TRB. SSA2 did not even witness the incident at issue firsthand. Therefore, we find the record sufficiently developed regarding the TRB process.

While Complainant's reasons for failing to follow instructions may have been, as Complainant asserts, entirely innocent, this does not create a genuine dispute of material fact. This was the third practical exercise involving interrogations/interviews; Complainant and his classmates had been repeatedly instructed about not bringing notes into the video review room or adding to the notes after reviewing the video. Complainant admitted at the time that he failed to follow these instructions. Whether Complainant in fact was stressed or rushed during the exercise and forgot the instructions is not material. The relevant management officials believed that Complainant's failure to follow the instructions would have given him an advantage in completing the written portion of the exercise and that Complainant's explanations and minimization of his actions reflected a violation of the BFTC graduation requirements. We therefore find no genuine dispute of material fact regarding the issue of pretext.

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision finding no discrimination.

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 22, 2025
Date