



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

[REDACTED]
Jeromy C.,¹
Complainant,

v.

Kristi Noem,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2024000275

Hearing No. 510-2023-00237X

Agency No. HS-TSA-00523-2023

DECISION

On October 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 September 22, 2023, final decision 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. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination and harassment on the basis of reprisal.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Federal Air Marshal, SV-1901-J, at the Agency's Miami Field Office in Sunrise, Florida.

On February 12, 2023, Complainant filed a formal EEO complaint alleging that he was subjected to retaliation for prior protected EEO activity, including harassment, when:

1. On October 1, 2022, a management official changed Complainant's duties from operational support to handling scheduling and metrics; and
2. On December 2, 2022, management revoked Complainant's telework privileges.

Regarding claim 1, Complainant stated that prior to October 1, 2022, he was the Training Supervisor responsible for training other employees and running the training department with three Training Instructors reporting to him. Complainant stated that an Assistant to the Supervisory Air Marshal in Charge (Manager-1) verbally told Complainant in August or September 2022, that Complainant's duties were changing as Complainant was scheduled to take over the Aviation Operations Program (AVO). Complainant stated that he was told that he would have three basic responsibilities: (1) operational tasks and accomplishments of the Individual Aviation Operations Federal Air Marshal; (2) scheduling for AVO; and (3) metrics and capturing statistics as it relates to AVO. Complainant stated that he was told the reason for this change was normal rotation in job responsibilities. Complainant stated that most of the other employees were having their duties changed.

Complainant stated that to perform the operational component he was required to coordinate with an Assistant Federal Security Director – Law Enforcement (AFSD-LE). Complainant stated, however, that the AFSD-LE forwarded an email to Complainant where Complainant's first-line supervisor (Supervisor-1) and Manager-1 indicated that they did not want Complainant to meet with AFSD-LE.² Complainant stated that later Supervisor-1 began making scheduling decisions, which left Complainant with the single responsibility of handling metrics.

² The record does not contain a copy of this email. Supervisor-2 and Manager-1 did not address this email.

Complainant stated that he was not provided a way to deliver a finished product related to metrics. Complainant reported a belief that this meant he did not have any responsibilities. Complainant identified his prior EEO activity as an EEO complaint he filed on March 3, 2022.

Manager-1 stated that Complainant volunteered to supervise the AVO, which Manager-1 described as a new program being developed within the Agency. Complainant's second-line supervisor (Supervisor-2) stated that his email dated August 23, 2022, indicated the change in duties for seven Supervisory Federal Air Marshals, including Complainant. Supervisor-2 stated that employee duties and responsibilities are changed at the discretion of leadership as they relate to the needs of the Agency. Manager-1, Supervisor-1, and Supervisor-2 stated that leadership at Agency headquarters defined the duties involved with Complainant's new role of supervising AVO.

Regarding claim 2, Complainant stated that Supervisor-1 emailed Complainant on December 2, 2022, and told Complainant to report to one of three airports every day. Complainant stated that he was required to report to an airport even when he was planning on performing administrative tasks, which previously were allowed to be completed while teleworking. Complainant stated the change occurred on December 2, 2022, which was the day when an EEOC Administrative Judge held a hearing to define the discovery rules related to his prior EEO complaint. Complainant reported a belief that he was being singled out due to his prior complaint. Supervisor-1's email dated December 2, 2022, included the following: "We need to ensure there is supervision of the AVOs, and that they have management support readily available when needed. The necessity for you to be at one of the three airports is critical for the AVO pilot program to maintain its path to success, and teleworking in this capacity will not ensure that we achieve our goal." Report of Investigation (ROI) at 69, 141. In their affidavits, Supervisor-1 and Supervisor-2 state that Complainant's telework was not revoked.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant appellate brief addresses only the telework issue contained in claim 2. Complainant states that he was allowed to telework while supervising AVO from October 1 to December 2, 2022. Complainant contends, in effect, that the Agency decision did not address why the change occurred on December 2, 2022. Complainant also contends that, contrary to Supervisor-1 and Supervisor-2 statements in their affidavits, his telework was revoked.

The Agency requests affirmation of its final decision.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), 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”).

ANALYSIS

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 he or she 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.

To establish a prima facie case of disparate treatment on the basis of reprisal, Complainant must show that: (1) Complainant engaged in a 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. Nicki D. v. Equal Emp. Opportunity Comm'n, EEOC Appeal No. 0720180023 (Sept. 18, 2021). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. Douglas F. v. Equal Emp. Opportunity Comm'n, EEOC Appeal No. 0120122183 (Dec. 4, 2015).

Once Complainant has established a prima facie case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant must prove that the employer's reasons are not only pretext but are pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 and 516 (1993). A factual issue of pretext cannot be established merely on personal speculation that there was discriminatory intent. Complainant v. U.S. Postal Service, EEOC Appeal No. 01A11110 (May 22, 2002); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008). Pretext means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000).

The Agency did not dispute that Complainant established a prima facie case of discrimination on the basis of reprisal in its final decision. We find the Agency articulated legitimate, nondiscriminatory reasons for the employment actions. Regarding claim 1, Supervisor-1 and Supervisor-2 stated that Agency leadership at headquarters changed many employees' duties for operational needs. Regarding claim 2, Supervisor-1 advised Complainant that telework was not compatible with successful supervision of the AVO program.

After a review of the record, we find Complainant failed to show that the Agency's articulated reasons for the employment actions were a mere pretext for discrimination. Complainant relies on the belief that he was being singled out based on his filing of his prior complaint. An individual's belief, alone, is insufficient to establish retaliatory animus.

Furthermore, the change to Complainant's telework occurring on the same day the AJ held the initial conference associated with Complainant's prior EEO complaint appears to be a mere coincidence. The record does not establish that any member of Complainant's management was involved in that initial conference. In contrast, the record supports that AVO was a new program in development and that updated priorities related to AVO required the program's supervisor to be on hand to respond to issues as they arose, which addresses Complainant's first contention. We find Supervisor-1 and Supervisor-2's denial that Complainant's telework was revoked to be inconsequential to establishing retaliatory motive. Because we find the employment actions were not shown to be retaliatory, there can be no hostile work environment on such claims.

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

February 5, 2025
Date