



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Alejandro B.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy
Agency.

Appeal No. 2024001748

Hearing No. 410-2023-00126X

Agency No. 22-67100-00251

DECISION

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 January 2, 2024 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.² For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

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 This initially premature appeal has since been cured by the Agency's issuance of its final order.

Whether the Agency's final order properly found that Complainant was not subjected to discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Machine Tool Operator, WG-3401-8, at the Agency's Marine Depot Maintenance Command, Marine Corp Logistics Base Production Plant in Albany, Georgia.

On February 24, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on race (African American) when:

1. From July 15, 2021 to September 10, 2021 Complainant was told his performance was good and he was doing well. During Complainant's midterm evaluation it stated "He's not going to be able to do it (the work) and is not qualified for a WG-10 by his supervisor (S1);" and
2. On September 10, 2021, Complainant received a Termination During Probationary Period notice, effective September 12, 2021, signed by the Plant Manager.

On September 16, 2019, Complainant was appointed to an Excepted Appointment as a Student Trainee (Machinist Helper) under the Pathways Program Internship Program (Pathways Program). Report of Investigation (ROI) at 53, 87. Complainant was the only Pathways student in the shop at the time of the incidents at issue. He averred his monthly appraisals were at or above satisfactory until he contacted the local union. ROI at 69-70.

The Full Performance Level for the position was the WG-10 level. ROI at 87. Complainant received a promotion from Level 5 to Level 8. He received a "Fully Successful" rating for Fiscal Year 2021. ROI at 63. Complainant alleged that he was denied the opportunities to train on certain machines needed to obtain the knowledge to advance as a machinist. Complainant further claimed he witnessed white coworkers train on these machines, while he was directed by his supervisor to work on less challenging job assignments.

In a June 24, 2021 email, with the subject line of "Pathways Program-Monthly - May 2021", the Supervisor stated that Complainant "elected to not sign this evaluation on the basis that he feels that he should be promoted to WG-10 and not retained at WG-08 at this time." ROI at 40.

In July 2021, Complainant met with management officials, two representatives of the Labor Employment Relations unit, and the Union. During this meeting, Complainant stated that he was being treated unfairly in the machine shop because he is a Black man. He stated that he informed all who were present that he had not received the necessary training to fully advance on the Computer Numerical Control machines.

After the July meeting, Complainant claimed that his supervisor (S1) began leaving negative remarks in his evaluations. On July 29, 2021, S1 wrote "He is currently working as a WG-8. I do not think [Complainant] is ready to perform at the entire level of a WG-10 independently with little or no supervision. More time is needed to build a good understanding and foundation." ROI at 71. S1 stated that he believed that Complainant needed to perform the duties "with little or no supervision" in order to obtain the promotion to the WG-10 position.³

On August 27, 2021, Complainant's second level supervisor (S2) met with Complainant and the Union Steward to discuss his concerns with Complainant submitting leave and leaving without confirming leave was approved and about Complainant's concerns with his Pathway evaluations. ROI at 30. As of August 2021, Complainant stopped signing his monthly evaluations. S2 also stated that he had observed Complainant on one occasion sitting in a chair and not doing anything. ROI at 31.

On September 8, 2021, Complainant claimed that S1 told him how great of a job he had done on the work assignment that day. Two days later, the Plant Manager issued him a decision, "Termination During Probationary Period." Complainant alleged that he was called to the Plant Manager's office, where the Plant Manager read him a letter of termination. The Plant Manager stated he was issuing the termination for performance issues while completing the Pathways program. The letter stated that the removal promoted the efficiency of the service as Complainant "failed to demonstrate fitness for continued federal employment." ROI at 81.

³ The Pathways Program Agreement stated that the employee "must have supervised work experience that demonstrates the ability to satisfactorily perform the work of a machinist at the WG-3414-10 level. If not recommended by Supervisor and Branch head for advancement to the WG-3414-10 level within 12 months from the date the employee was converted to WG-3401-08, employee will remain at the WG-08 level which will then become the employee's full performance level." ROI at 54.

The Plant Manager stated that the Agency was undergoing financial difficulties and released him during the probationary period, rather than continuing him as a permanent employee.

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 timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

In the AJ decision, the AJ determined that the Agency proffered legitimate, nondiscriminatory reasons for the actions in question. The AJ reasoned that the actions were based on S1's observation of Complainant's work performance during July and August 2021. Management determined that Complainant's work performance was not adequate for the Agency to continue employing him. The AJ found the record was devoid of evidence established that the Agency's reasons were pretext for unlawful discrimination. As a result, the AJ found that Complainant was not subjected to discrimination as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision.

CONTENTIONS ON APPEAL

On appeal, Complainant reasserts his belief that the Agency willfully terminated him based on his race and that the record presents genuine disputes of material fact that warrant a hearing. Complainant disputes the Agency's contention that it was required to remove him in accordance with the Pathways contract. Accordingly, Complainant requests that the Commission reverse the final order.

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.

Disparate Treatment

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 he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. 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. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) he is a member of a protected group; (2) he suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

Here, looking at the evidence in the light most favorable to Complainant, he failed to establish a prima facie case of race discrimination. He did not show that others who were similarly situated and outside of his protected group were treated more favorably. The undisputed record shows that he was the only probationary employee and was at Level 8. The undisputed record showed that his supervisor had promoted him from the Level 5 to Level 8. His comparators were Grade 10 employees. Complainant has not provided any evidence otherwise raising an inference of discrimination.

Notwithstanding, the Commission finds that the Agency articulated legitimate, nondiscriminatory reasons for its actions. The record was clear that the S1 did not believe that Complainant was performing at the level necessary for promotion to Grade 10. S1 did not recommend that his employment be continued. It is a permissible practice to release employees who fail to show they can perform at the Grade 10 performance level. The Plant Manager stated Complainant was terminated because of the evaluations from the supervisors. ROI at 158. Further, the Plant Manager stated that the Agency was undergoing a reduction in labor hours due to financial difficulties and released him during the probationary period, rather than extending him as a permanent employee. ROI at 160.

Complainant bears the burden of establishing that the Agency's stated reason is merely a pretext for discrimination. Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 256.

Complainant states that the Agency offered two conflicting reasons for his termination; and he questions the Plant Manager's reliance on the negative comments from his second level supervisor. Complainant disputes that the second level supervisor had an adequate basis to judge his actual performance.

The Commission finds no persuasive evidence that Complainant's race was a factor in the adverse personnel decisions at issue. While we acknowledge that Complainant believes he was treated unfairly by the Agency, Complainant has not shown that S1's evaluation of his work performance was unwarranted or tainted by discriminatory animus. Aside from his conclusory allegations and speculations, Complainant has not provided probative evidence to rebut the Agency's reasons. Complainant failed to offer any evidence to prove pretext of S1's evaluation or show that the removal was due to unlawful race discrimination. Finally, it is not our role to second-guess management's business prerogatives to determine whether employees should remain employed if they are failing to meet the Agency's legitimate expectations.

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted based on discriminatory animus. Complainant failed to carry this burden. As a result, the Commission finds that Complainant was not subjected to discrimination as alleged.

CONCLUSION

Based on a thorough review of the record, we AFFIRM the Agency's final order.

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

November 19, 2024
Date