



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

[REDACTED]  
Anton S.,<sup>1</sup>  
Petitioner,

v.

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

Petition No. 2024004537

MSPB No. DE-0752-19-0419-I-1

DECISION

Petitioner filed a petition with the Equal Employment Opportunity Commission (EEOC or Commission) seeking review of a Final Order issued by the Merit Systems Protection Board (MSPB or Board) concerning his claim of 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 CONCURS with the MSPB's finding of no discrimination.

ISSUE PRESENTED

Whether the MSPB was correct in finding that Petitioner did not establish that the Agency discriminated against him on the bases of race, national origin, color, or in reprisal for prior protected equal employment opportunity (EEO) activity when it removed him from federal service.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Petitioner'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 petition, Petitioner worked as a Supervisory Border Patrol Agent, GS-1896-13, at the Agency's Border Patrol Station in Ajo, Arizona.

Petitioner was removed from federal service in May 2018. His removal stemmed from incidents that occurred in March and August 2017, and from statements he made during subsequent investigations of those incidents in June and October 2017. On March 8, 2017, Petitioner was absent without leave (AWOL) for a portion of the day and could not be located. Management searched for him and ultimately performed a "welfare check" at Petitioner's home the next day, where he was found when he was supposed to be working. Petitioner later submitted a timesheet for March 8 that reflected he worked from 12:00 PM to 10:00 PM, which was different than the time he had actually worked that day, and a timesheet for March 9 that reflected he had worked from 6:00 AM to 4:00 PM, when in fact he had failed to report to work that day.

These incidents were investigated by the Agency's Tucson Sector Investigation Team (SIT) in June 2017.<sup>2</sup> During his SIT interview, Petitioner claimed that he had informed two other Supervisor Border Patrol Agents (SBPA1 and SBPA2) that he was modifying his duty shift on March 8, 2017 (and so therefore was not in fact AWOL), but both SBPA1 and SBPA2 denied that Petitioner sought to modify his duty hours or requested them to cover his supervisory duties. Modifying a shift required the approval of the Watch Commander, which Petitioner had not requested or obtained on March 8 or 9, 2017. The need for Watch Commander approval to modify shifts had been discussed with all supervisors, including Petitioner.

On August 21, 2017, at around 4:00 AM, Petitioner was the Supervisory Border Patrol Agent at an inspection checkpoint. Petitioner was apparently asleep in a vehicle that was parked outside of the primary inspection area. During this time, another Supervisory Border Patrol Agent (SBPA3) arrived at the checkpoint and saw a Border Patrol Agent (BPA) directing a car (a Crown Victoria) for a secondary inspection without back-up, which was required by Agency policy.

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<sup>2</sup> On March 8, Petitioner was also suspected of speeding in a government vehicle and almost causing a collision with the vehicle of another Border Patrol Agent, so this too was part of the SIT investigation, though these allegations ended up not being part of the decision to remove Petitioner.

After realizing this, SBPA3 got out of his vehicle and began yelling about the lack of secondary back-up. He aggressively questioned BPA about the location of the responsible supervisor until BPA reluctantly pointed out Petitioner's vehicle. SBPA3 approached the vehicle and could see someone reclined inside with a pillow behind their neck. SBPA3 knocked on the window three times, but Petitioner did not answer. SBPA3 then opened the door and began yelling at Petitioner (who appeared startled and to be just waking up) for being asleep while his agents needed secondary back-up.

This incident was investigated by SIT in October 2017. During his SIT interview, Petitioner denied being asleep and claimed to have seen the Crown Victoria going into the secondary inspection area being directly followed by SBPA3's van. However, Petitioner also denied that he saw SBPA3 approach his vehicle because it was dark outside.

After these investigations, on February 27, 2018, a member of the Agency's Discipline Review Board proposed Petitioner's removal. The proposed removal contained nine charges of misconduct. On May 22, 2018, the deciding official (DO), Chief Patrol Agent of the Tucson Sector, upheld the removal, sustaining seven of the nine charges and all but one of the underlying specifications of those seven charges.

In his decision letter, DO sustained the following charges: neglect of supervisory duties, which involved the incident on August 21, 2017, alleging that Petitioner lacked situational awareness and left BPA alone to conduct the secondary inspection, thus raising a safety concern; lack of candor, which involved answers Petitioner gave during his SIT interviews in June and October 2017; sleeping while on duty, which again involved the incident on August 21, 2017, alleging that SBPA3 found Petitioner sleeping while on duty with a neck pillow in the front passenger seat of a vehicle; failure to follow standard operating procedures, which involved Petitioner's admission during his SIT interview that he changed his assigned duty shift without Watch Commander's approval; unauthorized departure from the worksite, which involved the incident on March 8, 2017, where, during his shift, Petitioner departed the base without prior approval from management, resulting in a search for him that ended when he was found at home the next day; absence without leave, which involved Petitioner's failure to report for duty on March 9, 2017, without prior approval; and inaccurate submission of time and attendance, which involved the timesheets Petitioner submitted for March 8 and 9, 2017, which failed to reflect the time worked.

On July 30, 2018, Petitioner filed an EEO complaint alleging that the Agency discriminated against him based on race (African American), national origin (Kenyan), color (black), and in reprisal for prior protected EEO activity under Title VII when he was terminated from federal service, effective May 30, 2018.

Although the complaint was determined to be a mixed case complaint,<sup>3</sup> upon completion of the investigation the Agency incorrectly provided Petitioner notice of his right to request a hearing before an EEOC Administrative Judge (AJ) or a final Agency decision.<sup>4</sup> Petitioner requested a final decision, and on May 28, 2019, the Agency issued a decision finding that Petitioner was not discriminated against as alleged. The final decision contained inaccurate appeal rights to the EEOC; not the MSPB as is required for mixed case complaints. Per the erroneous appeal rights, Petitioner filed an appeal of the Agency's final decision with the Commission on or about June 21, 2019. The Agency subsequently issued an "Errata" on July 12, 2019, which corrected its final decision by replacing the EEOC appeal rights with appeal rights to the MSPB. Thereafter, Petitioner filed his appeal of the final Agency decision with the MSPB on August 19, 2019.

While Petitioner's MSPB appeal was pending, the Commission issued a decision on Petitioner's earlier EEOC appeal. In Chris A. v. Department of Homeland Security, EEOC Appeal No. 2019004938 (Feb. 12, 2020), the Commission found that the Agency's original final decision contained inaccurate appeal rights and was appealable only to the MSPB. As a result, the Commission vacated the May 28, 2019 final decision and remanded the matter to the Agency for issuance of a new final decision with appeal rights to the MSPB, not the EEOC.<sup>5</sup> Presumably in light of its Errata and Petitioner's then-pending appeal before the MSPB on the same matter, the Agency never issued a new final decision as ordered in Chris A.

An MSPB AJ then held a two-day hearing and issued an Initial Decision affirming the Agency's removal action.

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<sup>3</sup> A mixed case complaint is a complaint of employment discrimination filed with a federal agency related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1).

<sup>4</sup> Pursuant to 29 C.F.R. § 1614.302(d)(2), upon completion of the investigation into a mixed case complaint, an agency shall notify a complainant that it will issue a final decision within 45 days without a hearing before an EEOC AJ.

<sup>5</sup> Chris A. did not mention the Errata the Agency had issued.

The MSPB AJ found that the Agency's witnesses were credible, while finding that Petitioner was less credible, as his version of events was often contradictory, and that Petitioner seemed evasive during portions of his testimony. The MSPB AJ concluded that the Agency proved the sustained charges of misconduct and that Petitioner failed to establish his affirmative defenses of discrimination and retaliation.

The MSPB AJ noted that, aside from Petitioner's "conclusory statements that one or more individuals were biased," Petitioner failed to provide any credible evidence indicating discrimination or retaliation. Initial Decision at 24. The MSPB AJ noted, for example, that at the hearing Petitioner was asked why he believed certain events were discriminatory, but Petitioner's responses did not suggest discrimination or seem pertinent to the issue.<sup>6</sup> The MSPB AJ also determined that the overwhelming evidence in the record contradicted Petitioner's assertion that he had done nothing wrong and supported the charged misconduct.

Petitioner sought review of the MSPB AJ's Initial Decision by the full Board. On July 11, 2024, the MSPB issued a Final Order summarily affirming the Initial Decision. The instant petition followed.

#### CONTENTIONS IN PETITION

In his brief supporting the petition, Petitioner argues that he has met the burden of proof that the Agency's removal decision was pretext for discrimination and retaliation. Petitioner also notes that the Agency gave him "wrong and false information about his . . . appeal rights" and only corrected it after Petitioner appealed to the EEOC. Petitioner requests that we both review the MSPB's Final Order and also order "full implementation" of the Commission's decision in Chris A. Petitioner then argues that we should vacate the MSPB's Final Order because it conflicts with Chris A., which vacated the final Agency decision in this matter.

The Agency did not submit a statement regarding this petition.

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<sup>6</sup> For instance, when asked why he thought SBPA3 had discriminated against him, Petitioner stated only that SBPA3 "had his 'mind fixed' that agents might be sleeping." Initial Decision at 25.

### STANDARD OF REVIEW

EEOC Regulations provide that the Commission has jurisdiction over mixed case complaints on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

### ANALYSIS

As an initial matter, we find that Petitioner's reliance on the Commission's decision in Chris A. is misplaced. The decision in Chris A. did not make any findings or conclusions about the merits of Petitioner's discrimination claim. In fact, the Commission had no jurisdiction over Petitioner's appeal in Chris A. and, as such, simply ordered the Agency to provide Petitioner with the correct appeal rights to the MSPB.

Petitioner then filed his appeal of the final Agency decision on his mixed case complaint with the correct forum, the MSPB, which in turn issued a decision on the merits of his removal, including his affirmative defenses of discrimination/retaliation. We therefore find that the Agency's initial error of providing Petitioner with incorrect appeal rights to the EEOC has not prejudiced Petitioner and is no longer relevant. The instant petition for review of the MSPB's Final Order is the proper avenue for Petitioner to appeal the merits of his claim of discrimination, and the Commission's decision in Chris A. has no further bearing on this matter.

To prevail in a disparate treatment claim, Petitioner must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Petitioner must initially establish a prima facie case of discrimination 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) (citing McDonnell Douglas); see Homer B. v. Dep't of Interior, EEOC Appeal No. 2019005980 (Dec. 21, 2020).

To establish a prima facie case of disparate treatment based on race, national origin, or color, Petitioner 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).

For a reprisal claim, Petitioner may establish a prima facie case by showing that: (1) he engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, he 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); see Carr v. U.S. Postal Serv., EEOC Appeal No. 0120065298 (June 26, 2007); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

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; Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998). 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, Petitioner 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). Petitioner 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 finding no discrimination and retaliation, the MSPB AJ relied upon the MSPB's decision in Savage v. Department of the Army, 122 M.S.P.R. 612 (2015).

In Savage, the MSPB determined that the analytical framework set forth in McDonnell Douglas was not applicable to its proceedings. Savage, 122 M.S.P.R. at 637. In rejecting the McDonnell Douglas framework, the MSPB maintained that the MSPB's authority to adjudicate and remedy alleged violations of 42 U.S.C. § 2000e-16 is a matter of civil service law. Id.

We find that the MSPB AJ erred by not applying the analysis of McDonnell Douglas when deciding Petitioner's claim of discrimination based on race, national origin, color, and reprisal. We will analyze this case according to the McDonnell Douglas paradigm. See Raphael C. v. Dep't of Veterans Affs., EEOC Petition No. 0320160016 (May 10, 2016); McDonnell Douglas, 411 U.S. 792. We find, however, as set forth herein, that the MSPB AJ correctly determined that Petitioner did not establish that the Agency discriminated against him as alleged.

We find that Petitioner failed to establish a prima facie case of discrimination based on race, national origin, or color because he has not shown an evidentiary link between these bases and his removal. Petitioner also has not specified similarly situated individuals outside of his protected bases who were treated more favorably. Other than his own bare assertions and speculation, Petitioner has not shown any connection between the actions of management (or the proposing and deciding officials) and Petitioner's race, national origin, or color.

We find that Petitioner can establish a prima facie case of reprisal. He filed several EEO complaints (and a civil action) alleging discrimination, it appears that at least some of management was aware of his prior complaints, he was subsequently removed from his position, and some of his protected EEO activity occurred soon before his proposed removal. We therefore find that, at least for purposes of a prima facie case of reprisal, Petitioner has met his burden.

Next, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions as stated in the notice of proposed removal and the decision upholding that removal. In these documents, the Agency claimed that Petitioner was AWOL on March 8 and 9, 2017, as he failed to appear for work and never got approval to change his shift from Wing Commander, submitted inaccurate timesheets in relation to those absences, and then said during his SIT interview that he had requested a modification of his shift from SBPA1 and SBPA2 when he had not done so.

The Agency also claimed that several months later, Petitioner was asleep while on duty at a checkpoint, which prevented him from having the situational awareness to see BPA about to conduct a secondary inspection without backup (which was against policy and created a safety risk). The Agency further claimed that Petitioner then lied about the incident during another SIT interview.

We find that Petitioner failed to prove by preponderant evidence that the Agency's explanation is pretext for discrimination based on race, national origin, color, or reprisal. Other than Petitioner's bare assertions and speculation, there is no evidence in the record to indicate that any of the Agency's actions were based on discrimination or that the Agency treated other employees outside his protected bases more favorably in similar circumstances. We also note that, before the MSPB AJ, Petitioner admitted some of the alleged conduct, such as filling out the two timesheets with hours he was not working and failing to notify the Watch Commander of his shift change/absence.

In his brief, Petitioner has not specified any record evidence tending to show that management or any of the officials involved in his removal—or in the underlying incidents—were motivated by discriminatory or retaliatory animus. Most of the relevant individuals testified at the hearing (including SBPA1, SBPA2, SBPA3, BPA, and DO), and the MSPB AJ found them more credible than Petitioner. We give deference to such credibility findings made by an MSPB AJ. Petitioner v. Dep't of the Air Force, EEOC Petition No. 0320090063 (June 20, 2009). Petitioner may dispute that much of the conduct occurred as alleged or that his behavior warranted removal, but he has failed to persuasively establish that the Agency's reasons are unworthy of belief or that his protected bases motivated the Agency's actions.

### CONCLUSION

Based upon a thorough review of the record, it is the decision of the Commission to CONCUR with the final decision of the MSPB finding no discrimination. The Commission finds that the MSPB's decision constitutes a correct interpretation of the laws, rules, regulations, and policies governing this matter and is supported by the evidence in the record as a whole.


PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of 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.

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 8, 2025  
Date