



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

████████████████████
Chi E.,¹
Petitioner,

v.

Rohit Chopra,
Director,
Consumer Financial Protection Bureau,
Agency.

Petition No. 2024004851

MSPB No. NY-0752-21-0042-I-1

DECISION

On August 28, 2024, Petitioner filed a timely petition with the Equal Employment Opportunity Commission (EEOC or Commission) asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

ISSUE PRESENTED

Whether the MSPB's decision finding that Petitioner did not establish that the Agency discriminated against him based on reprisal for prior protected equal employment opportunity (EEO) activity when it removed him from federal employment 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).

¹ 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 complaint, Petitioner worked as an Examiner at the Agency's Northeast Region facility in New York, New York. Petitioner alleged that the Agency discriminated against him on the basis of reprisal for prior protected EEO activity when the Agency issued him a notice of removal. On October 27, 2020, Petitioner's first-line supervisor, the Field Manager, issued a Notice of Proposed Removal for numerous instances of disrespectful conduct and making an inflammatory statement. The Notice detailed the various email exchanges which the Field Manager deemed to be disrespectful and further noted that Petitioner had previously been suspended for duty on two separate occasions for disrespectful conduct and making an inflammatory statement and that Petitioner had also previously received a Letter of Reprimand for inappropriate conduct and failure to follow directives. On December 4, 2020, the Assistant Regional Director sustained the proposed removal, effective as of December 7, 2020.

Petitioner appealed his removal to the MSPB, arguing, inter alia, that the Agency's removal was due to reprisal based on whistleblower activity and on prior EEO activity because Petitioner had previously filed an EEO complaint in August 2019. A hearing was held and thereafter an MSPB Administrative Judge (AJ) issued an initial decision finding that the charges of disrespectful behavior and making an inflammatory statement were sustained and further that Petitioner did not establish that his removal was due to reprisal for his prior EEO activity. Petitioner filed a petition for review of the AJ's initial decision. The MSPB denied the petition for review, finding that Petitioner had not established his claim of reprisal.

Petitioner then filed the instant petition.

CONTENTIONS ON APPEAL

Petitioner did not file a brief on appeal.²

² We note that claims of whistleblower retaliation are not within the Commission's jurisdiction. See Palmer N. v. Dep't of the Treasury, EEOC Appeal No. 2024001831 (March 27, 2024). Therefore, this decision will only address Petitioner's claim that he was subjected to reprisal based on his prior EEO activity.

In response, the Agency argues that the Petition should be denied because the AJ properly concluded that Petitioner did not establish that his removal was based on reprisal.

STANDARD OF REVIEW

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals 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

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 reprisal 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 also Homer B. v. Dep't of Interior, EEOC Appeal No. 2019005980 (Dec. 21, 2020). Once Petitioner has established a prima facie case, 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). If the Agency is successful, the burden reverts back to Petitioner to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination.

For his claim of reprisal, Complainant must show that: (1) he engaged in a 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).

Upon review of the record, we do not find that Petitioner established a prima facie case of discrimination based on reprisal for protected EEO activity.

Although it is undisputed that Petitioner engaged in EEO activity by filing an EEO complaint in August 2019 and the Field Manager was aware of the EEO activity, there is no evidence in the record beyond Petitioner's unsupported assertions to establish a nexus between Petitioner's protected activity and his removal more than one year later. See Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120133200, (Dec. 18, 2014) (finding one year in between events "too remote to supply the necessary nexus").

We further find, however, that even assuming Petitioner could establish a prima facie case, the Agency articulated legitimate, nondiscriminatory reasons for his removal. The MSPB AJ found that the charges of 10 different instances of disrespectful conduct on Petitioner's part were sustained and that the charge of one instance of making an inflammatory statement was also sustained. The MSPB AJ also found that the Field Manager and the Assistant Regional Director testified credibly at the hearing that Petitioner was removed based on the many instances of his disrespectful conduct that had not improved in spite of his having previously been disciplined on at least three occasions for similar conduct. We give deference to the MSPB AJ's credibility determinations regarding the Agency officials' testimony. See Keturah F. v. Dep't of Veterans Affs., EEOC Appeal No. 2022005061 (Feb. 14, 2023). In addition, we find that the record supports the Agency's explanation and the MSPB AJ's finding that Petitioner had previously been warned regarding his disrespectful and inappropriate manner of communicating with his supervisor and failed to improve or alter his behavior.

We further find that the MSPB AJ's conclusion that Petitioner did not establish that the Agency's reasons for his removal were a pretext for reprisal discrimination is supported by the evidence in the record. Petitioner offered no evidence beyond his unsupported beliefs to support his assertions of retaliatory animus and the Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext. See Jed T. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2022000805 (May 18, 2023); Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019). Moreover, an agency has broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Burdine, 450 U.S. at 259; Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan 16, 1997). Accordingly, the Commission concurs with the MSPB's ultimate finding that Petitioner did not establish that his removal was based on reprisal for prior protected activity.

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 civilaction (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 14, 2025
Date