



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

[REDACTED]
Allan L.,¹
Complainant,

v.

Michelle King,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2024005047

Agency No. KC-24-0342-SSA

DECISION

Complainant filed an appeal to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 11, 2024, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

Whether the Agency's final decision properly found that Complainant was not subjected to discrimination based on age (over 40) and in reprisal for prior protected EEO activity.

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, a former Agency employee, worked in the private sector. He maintained that he responded to an October 18, 2023 employment solicitation through the Agency's Handshake program by providing a resume, but he received no reply until his congressman made an inquiry. Afterward, Complainant stated he was notified that there was never a position available. The record indicated that the Handshake program is a social media platform used by various universities to alert graduates of career opportunities. The Agency was involved in posting a campaign on Handshake, which went out to about 4,000 people including Complainant.

According to Complainant, as a graduate of University of Missouri, he was entitled to receive job information from prospective employers through the Handshake program. He stated that he received a message addressed to him personally from A1, a GS13, Human Resource Specialist, who worked in the Agency's Center for Payroll, Placement, and Staffing. A1 was physically located in Atlanta, Georgia. Via the October 18, 2023 message, Complainant maintained that he was asked about his interest in a Human Resource position with the Agency and told that the Agency was hiring in multiple locations.

Complainant maintained that he replied to the message on October 21, 2023, asking for further information about locations and provided a copy of his resume. He noted that he did not receive a reply until he contacted his congressional representative who then contacted the Agency. On January 8, 2024, A1 responded stating that the October 2023, posting was for the purpose of resume collection for future hiring needs and was not about filling a current position. Complainant stated that he was never contacted about a specific position after A1's January 8, 2024 response.

Complainant indicated that he was previously removed from his position as a Claims Specialist by the Agency in 2017. He noted that he subsequently applied when the position was reposted in 2022 but was told that he could not be considered because he was not a recent graduate.²

² Complainant filed an EEO complaint regarding this prior non-selection. The Agency issued a decision finding no discrimination which was affirmed in Kevin W. v. SSA, EEOC Appeal No. 2023003278 (Nov. 2, 2023), request to reconsider denied, EEOC Request No. 2024000847 (Dec. 7, 2023).

Because A1 worked in the same department which made the decision to exclude him from consideration for his old position, Complainant believed that A1 had access to his records and was knowledgeable of his age and prior EEO activity, which he felt were factors in his lack of response from A1. Likewise, he stated that A1 had access to his resume and could determine his age from his graduation date. Complainant argued that the failure to communicate with him and the collection of his resume were examples of harassment. He maintained that A1 contacting him about a position that did not exist was a retaliatory act based on his prior EEO activity and age, because the message, particularly the request for his resume, implied that positions were currently available, which was not true.

On March 7, 2024, Complainant filed a formal complaint alleging that:

1. The Agency subjected him to disparate treatment based on age (over 40) and reprisal (prior EEO activity) when, on January 8, 2024, as an applicant, he was not selected or considered for a Human Resource (HR) Specialist position with [the Agency].
2. The Agency subjected him to nonsexual harassment based on age (over 40) and reprisal (prior EEO activity), from October 18, 2023, through January 8, 2024, in terms of no communication or response from [A1], collecting a resume for a position that did not exist at [the Agency], and alleging the Agency did not hire for the position that Complainant was contacted about in October 2023.

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. In accordance with Complainant's request, 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.

The Agency relied on A1's statement that he was not aware of Complainant's age or prior EEO activity at the time of the allegations at issue in this complaint. A1 stated that although he was involved in initiating the October 2023, campaign on Handshake, there was no job posting. At that time, he stated, the Agency had just begun using Handshake and they were not entirely familiar with the platform.

A1 acknowledged that initially the posting that was sent out began with, "We are hiring," but this was incorrect, as they were only collecting names and resumes for potential future needs. That language, he stated, should have been removed.

A1 stated that although they expected positions to be posted eventually, no actual positions were available when the initial message went out on Handshake; as such, there was no selection process involved nor any selection made. He emphasized that the instruction on Handshake was for people to post their resumes, and no jobs were actually listed. A1 stated that he did not receive Complainant's resume and does not know what was done with it. Because of the size of the campaign, HR Specialists did not reply individually. A1 stated that several hundred emails came in via Handshake and trying to reply to each one individually would have been impossible. Handshake, he maintained, was an advertising device and not a communications medium. Finally, A1 stated that he subsequently communicated with Complainant as soon as he was contacted regarding his complaint and denied there was any intentional harassment of Complainant. He stated that he had no information about Complainant's age or prior EEO activity.

CONTENTIONS ON APPEAL

On appeal, Complainant argues, in pertinent part, that:

I believe the agency's decision is incorrect because the [A]gency contacted me to apply for a job that did not actually exist but stated "Now Hiring" regarding a Human Resource (HR) Specialist position with the Social Security Administration. I believe the action was completely inappropriate and given prior complaints was against good conscious and immoral to do to someone given how this makes me, or anyone feel after applying for a job that I was contacted for but there was no hope of being hired as the job did not even exist. I believe that this is a continuation of unequal and unfair treatment. The [A]gency has made no efforts at any time to hire me for a position with the [A]gency since the most recent complaint.

In pertinent part, the Agency maintained that the Commission should uphold 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

Claim 1:

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. Co. v. Waters, 438 U.S. 567, 576 (1978).

To establish a prima facie case of disparate treatment based on age, 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); Saenz v. Dep’t of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

For a reprisal claim, Complainant may establish a prima facie case by showing 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 (Sep. 25, 2000); see also Carr v. U.S. Postal Serv., EEOC Appeal No. 0120065298 (Jun. 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 804 n.14. 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 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory (or retaliatory) 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.

At the outset, we do not find that Complainant established a prima facie case of discrimination based on age or reprisal with respect to claim 1. With respect to his age, Complainant, although over age 40, presented no evidence that he was either subjected to an adverse action or treated differently than someone younger than age 40. Likewise, with regard to the basis of reprisal, other than mere speculation, he has not shown that A1 was aware of his previous EEO activity, or that he even suffered an adverse action. There is simply no evidence that a selection was made as a result of the Agency's October 2023 promotion campaign via the Handshake platform or program. On appeal, Complainant acknowledges this fact when he discussed how he felt "[a]fter applying for a job that I was contacted for but there was no hope of being hired as the job did not even exist." Although Complainant may believe the Agency's actions were inappropriate, improper, or against good conscience, he presented no evidence that he was treated any differently than others from outside of his protected categories.

Claim 2: Harassment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).; Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove his hostile work environment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, his age, or because he engaged in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

As to retaliatory harassment, the Commission has held that reprisal claims are considered with a broad view of coverage and that the threshold for establishing retaliatory harassment is different than for discriminatory harassment. Retaliatory harassing conduct can be found even if it is not severe or pervasive enough to alter the terms and conditions of employment. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). To prevail on his claim of retaliatory harassment, Complainant must show that he was subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Janeen S. v. Dep't of Com., EEOC Appeal No. 0120160024 (Dec. 20, 2017) (citing

Burlington N., 548 U.S. at 57), request for recons. denied, EEOC Request No. 0520180224 (May 31, 2018); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000)).

We find that Complainant failed to establish his harassment claim for either of his alleged bases. Under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), Complainant's claim of hostile work environment must fail with regard to claim 2. See Harassment Enforcement Guidance. A finding of a hostile work environment is precluded by our determination above that Complainant failed to establish that the conduct at issue in this case was motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

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

February 4, 2025
Date