



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

[REDACTED]
Rodrigo C.,¹
Petitioner,

v.

Frank Kendall,
Secretary,
Department of the Air Force,
Agency.

Petition No. 2024005227

MSPB No. DA-0752-21-0314-I-1

DECISION

On September 9, 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. For the following reasons, the Commission CONCURS with the MSPB.

ISSUE PRESENTED

The issue presented is whether the MSPB properly found that Petitioner did not establish his affirmative defenses of race discrimination or retaliation for his removal.

BACKGROUND

At the time of events giving rise to this complaint, Petitioner worked as an Instrument Mechanic at the Agency's 550th Commodities Maintenance

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.

Squad Oxygen Shop in Tinker Air Force Base, Oklahoma. The Oxygen Shop staff overhaul; troubleshoot; and test oxygen components for aircrafts using approved Technical Orders (TOs) containing step-by-step instructions to guide their work. The TOs can be changed at any time, and use of outdated data can cause injury to a pilot or damage to an aircraft. The publication date of each TO is listed on the cover page, and employees are required to review the dates before beginning their work. They place a maintenance stamp, which is a unique identifier for each mechanic, to indicate their reviews. Regulation allows for use of a printed TO for seven (7) days before it is reviewed again, but staff are not to place a current date stamp on an outdated TO. Hearing Transcript at 11-17, 32.

On March 11, 2021, a Proposing Official issued Petitioner a Notice of Proposed Removal for two specifications of Failure to Follow [Agency] Instructions. The Proposing Official explained that Petitioner's first-line supervisor ("Supervisor") found an outdated TO on Petitioner's work bench on July 10, 2020. While this TO was published on February 1, 2020, it was superseded on April 15, 2020. The following morning, Petitioner asked the Proposing Official about the missing TO, and he responded that the Supervisor took it. The Proposing Official asked if Petitioner had any other outdated TOs, and they found four more with Petitioner's maintenance stamp beyond the rescinded dates of each TO. By applying his maintenance stamp, Petitioner was verifying them for use under the current date.

The Proposing Official noted that Petitioner had been briefed multiple times, yet he chose to disregard the Agency's instructions, directives, and protocols on proper usage of TOs. The two specifications of the failure to follow instructions charge were (1) maintaining outdated TOs with Petitioner's maintenance stamp beyond their rescinded dates; and (2) use or attempted use of an outdated TO.

The Proposing Official stated that he considered the relevant Douglas Factors,² such as Petitioner's prior disciplinary record of a 14-day suspension for failure to follow a directive and lack of candor; a 7-day suspension for failure to stay gainfully employed; and a 3-day suspension for failure to follow instructions and careless workmanship.

² The Douglas Factors are the list of factors that may be relevant to a determination of discipline. Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305-6 (1981).

The attached analyses into the relevant factors showed that the selected penalty was within the guidelines of the table of penalties, and the Proposing Official did not believe that Petitioner had potential for rehabilitation based on his previous discipline.

Petitioner submitted an oral and written response to the Deciding Official. Petitioner accused the Proposing Official of bias because he had been named in Petitioner's prior EEO complaint. Petitioner also submitted a text message he received from a former supervisor ("Former Supervisor") on June 22, 2018, as evidence of race discrimination. The Former Supervisor stated, in relevant part, "[y]ou have a couple of friends at work that needs to cover their butts...I can't say who but they are black lol & some folks that are white lol are out for them."

Petitioner denied, generally and specifically, all allegations in the proposed removal. He asserted that the evidence did not show that he used his maintenance stamp to date any TO after the rescinded dates. Petitioner also claimed favored treatment by similarly situated White employees. For example, one coworker ("Coworker") was caught using an outdated TO but was never subjected to a proposed removal or suspension.

On June 4, 2021, the Deciding Official issued a Notice of Decision to Remove. He reviewed Petitioner's oral and written responses to the proposed removal and the penalty assessment factor analysis. The Deciding Official found that the reasons in the proposal were fully supported and warranted discipline. As such, Petitioner was removed effective June 4, 2021.

Petitioner appealed his removal before the MSPB and alleged that the Agency discriminated against him based on race (African American), and in reprisal for prior protected EEO activity,³ for his removal on June 4, 2021.

A hearing was held on September 9, 2021, and thereafter an MSPB Administrative Judge (AJ) issued an Initial Decision, affirming the Agency's removal action and finding that Petitioner did not establish his affirmative defenses of race discrimination or retaliation for prior protected EEO activity.

³ An EEOC Administrative Judge held hearings for Petitioner's prior EEO complaints, including his prior suspension claims, and found no discrimination or retaliation in EEOC Hearing Numbers 560-2020-00045X and 560-2020-00354X. Petitioner did not appeal these decisions.

The AJ found that the Agency established that Petitioner failed to follow instructions. The Proposing Official testified that the Supervisor reported finding a TO on Petitioner's work bench that was issued on February 1, 2020, but replaced on April 20, 2020, with Petitioner's maintenance stamp of July 9, 2020. The Proposing Official subsequently found additional outdated TOs with Petitioner's maintenance stamp.

Petitioner testified that he stamped four TOs on July 11, 2020, but he planned to shred them but did not get around to it. He also contended that his toolbox was "messed with" because he placed clear tape on it and saw that the seal was broken on July 11, 2020. However, the AJ noted that Petitioner failed to mention the "messaging with" his toolbox in his written response to the proposed removal. Further, Petitioner testified during the hearing that he verified and stamped the outdated TOs on July 11, 2020, but he stated in his written response that he did not use his maintenance stamp on TOs beyond the dates of rescission. The AJ observed Petitioner's demeanor and expressions throughout the hearing and did not find his testimony persuasive. Specifically, the AJ did not find credible Petitioner's testimony that his toolbox was "messed with," and that he had verified each outdated TO before stamping them. The AJ highlighted Petitioner's inconsistent testimony regarding whether he verified each outdated TO before stamping them. In addition, it was unclear why Petitioner would stamp outdated TOs if he intended to shred them the same day.

The AJ found that the record was devoid of non-speculative evidence that Petitioner used the outdated TOs, and the Agency did not prove the second specification. However, proof of one or more specification is sufficient to sustain a charge, and since the Agency established that Petitioner maintained outdated TOs, the AJ sustained the charge of failure to follow instructions.

The AJ then found that Petitioner did not prove his affirmative defenses of race discrimination or reprisal. The Proposing Official testified that he was not there when the Former Supervisor sent the text message to Petitioner. The AJ found the Proposing Official's testimony credible that no one told him to treat African American employees more harshly and his decision to propose Petitioner's removal did not factor his race or prior EEO complaints.

The Deciding Official testified that he did not know Petitioner, even by name, prior to being named the deciding official for his removal action, and he was unaware of Petitioner's race or prior EEO activity until disclosed in his written response.

The AJ also found credible the Deciding Official's testimony that Petitioner's race and prior EEO activity were not considered in his decision to sustain the removal action. The AJ observed that Petitioner did not identify any negative statements by Agency officials pertaining to his race or EEO activity, and the record contained no persuasive direct or circumstantial evidence supporting his claims of race discrimination or reprisal.

The AJ concluded by finding that the Agency established a nexus between the charge and the efficiency of service, and that the penalty was reasonable and promoted the efficiency of service.

Petitioner filed a petition for review before the full Board. On August 8, 2024, the MSPB issued a Final Order affirming the Initial Decision. The MSPB noted that Petitioner challenged the AJ's credibility findings; asserted a failure to consider all evidence; and disputed the AJ's determination that the Agency proved its charge. However, the MSPB found that Petitioner failed to establish any basis for granting his petition. In addition, Petitioner argued that the AJ took 18 months to issue the Initial Decision, and that the delay was unreasonable, but the MSPB determined that an administrative judge's delay in issuing a ruling does not, without more, constitute a reversible error. The MSPB concluded that the Initial Decision was thorough and well-reasoned and affirmed it.

The instant petition followed.

CONTENTIONS ON PETITION

Through his attorney, Petitioner argues that he was terminated, despite the Agency's admission that no harm was done and there was a failure to have a system in place to make sure that the most up to date TOs were used. Petitioner also asserts that a Quality Assurance Specialist testified that he informed the Proposing Official that there was no regulation broken by Petitioner for any of the actions for which he was charged. Petitioner further contends that a Caucasian comparator (the Coworker) committed the same kinds of infractions but did not face removal or even a proposed removal. The Coworker testified to his discipline; notably a 3 to 5-day suspension, followed by a week-long suspension. Petitioner requests that the Commission reverse the MSPB's decision.

The Agency opposes the petition and states that Petitioner failed to establish discrimination as a motivating factor in his removal.

Petitioner identified the Coworker as someone who was outside of his protected race category and purportedly treated more favorably, but the Coworker fails as a comparator because he had less active discipline at the time that he was disciplined and had different mitigators, such as taking accountability for his actions. Further, the Deciding Official testified that he did not know Petitioner prior to the removal action, and that the AJ credited his testimony that Petitioner's race or prior EEO activity did not factor in the removal action. The Agency requests that the Commission concur with the MSPB's decision.

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

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976). For Petitioner to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Petitioner has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs 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.

At all times, Petitioner retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

Petitioner may establish a prima facie case of race discrimination by providing evidence that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) either that similarly situated individuals outside his protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted). It is undisputed that Petitioner is African American and that he suffered an adverse action when he was removed from the Agency.

Petitioner contends that the Coworker was outside of his protected class and treated more favorably because he was not removed. Among other things, to be considered "similarly situated," the comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. See Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001), reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002). In his brief, Petitioner includes the legal standards to demonstrate that a comparator is similarly situated, but he fails to explain how the Coworker was similarly situated.

We find that the evidence does not establish that the Coworker was a similarly situated comparator. The Proposing Official testified that the Coworker was not issued a proposed removal because he had fewer incidents (one or two) to consider as progressive discipline, and not his third or fourth offense. Hearing Transcript at 130, 137. The Coworker confirmed that the first reprimand stayed in a file for one year and a second reprimand for two years, and that the level of punishment depends on what is active at the time of the new action. Hearing Transcript at 274. Petitioner's proposed removal referenced three prior suspensions, and the instant failure to follow instructions charge was his fourth offense. The difference between their active disciplinary histories shows that it would not be expected that the Coworker and Petitioner be treated in the same manner. As such, we find that Petitioner did not establish a prima facie case of race discrimination.

Petitioner may establish a prima facie case of reprisal 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 (Sept. 25, 2000). Petitioner could not recall how many EEO complaints he had previously filed, but the Agency's attorney noted that it was six. Hearing Transcript at 256.

The Proposing Official admitted that he was aware of Petitioner's prior EEO complaints, but he did not remember when he learned. Hearing Transcript at 21. The Deciding Official testified that he did not previously know Petitioner, and he only learned of his protected EEO activity from his written response to the proposal. Hearing Transcript at 145-6. A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001). For the sake of argument, we will credit a temporal nexus between the Deciding Official's awareness of Petitioner's EEO complaints on or about March 30, 2021, and the decision to remove Petitioner on June 4, 2021, to find a prima facie case of reprisal.

We now turn to the Agency's articulated legitimate, nondiscriminatory reasons for the removal. The Deciding Official testified that use of TOs was mandatory and extremely important because failure to follow technical data correctly could lead to a catastrophe of a component and endanger the lives of pilots. He reviewed the package for Petitioner's proposed removal and the oral and written responses to sustain the removal. Petitioner's disciplinary record showed progressive discipline, and the Deciding Official chose the next step of removal. He observed a pattern of issues, and that the severity was getting worse, which supported the decision to remove and was in line with the penalties table. The Deciding Official did not believe that Petitioner's rehabilitation was possible because he had numerous chances to change his behavior from the past progressive discipline. The Deciding Official added that he did not see Petitioner accept any responsibility for the charges against him. The Deciding Official weighed mitigating factors and considered alternate sanctions, and he concluded that removal was appropriate and reasonable. Hearing Transcript at 144, 146-55, 158.

We find that Petitioner has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

Petitioner challenges his removal action by arguing that the Agency did not have a system in place to make sure that the most up to date TOs were used, and that the Agency admitted that no harm resulted from his actions. However, the Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency's action.

Further, Petitioner testified that he was aware of the requirement that TOs that were no longer valid needed to be shredded; burned; torn up; placed into a recycling bin; or marked "FOR REFERENCE ONLY," which suggests that there was a system in place to ensure that outdated TOs were not used, and that Petitioner was aware of the options for their proper handling. The Deciding Official stated that it was an employee's responsibility to make sure that a TO is up to date. Hearing Transcript at 242-4, 188. In addition, the Deciding Official testified that management typically does not wait until there is actual harm to take disciplinary action, and that they want to correct action as soon as they see it and not "just wait around for something else to happen later on." Hearing Transcript at 190. Petitioner confirmed that a lack of oxygen to a pilot could be "catastrophic," and that he had been trained to only use current and verified TOs. Hearing Transcript at 236.

Petitioner also argues that the Quality Assurance Specialist testified that he did not inform the Proposing Official that Petitioner broke a regulation for the actions for which he was charged. However, Petitioner misconstrues the Quality Assurance Specialist's testimony.

Specifically, the Quality Assurance Specialist testified that he did not know what they had accused Petitioner of, but he was asked about a TO being left out, which was not a violation of the regulations. Hearing Transcript at 303-4. Petitioner was not charged with leaving out a TO, but rather, with maintaining/stamping superseded TOs.

The AJ evaluated the credibility of the witnesses and did not find Petitioner credible regarding his actions surrounding the stamping of his TOs. The AJ noted Petitioner's inconsistent testimony that he verified each TO prior to stamping but then stated that he did not verify them and intended to shred them. The AJ found the Proposing Official and Deciding Official to be credible about Petitioner's claims of race discrimination and reprisal. Regarding this evidence, the Commission gives deference to an MSPB AJ's credibility determinations regarding their testimony. See Keturah F. v. Dep't of Veterans Affairs, EEOC Petition No. 2022005061 (Feb. 14, 2023); Glover v Dep't of the Air Force, EEOC Petition No. 0320090063 (Jun. 30, 2009). Petitioner did not challenge the AJ's credibility determinations in his petition.

Petitioner did not show that the Agency's proffered reasons are not worthy of belief and his bare assertions that management officials discriminated against his are insufficient to prove pretext, or that their actions were discriminatory. Accordingly, we find that the MSPB properly concluded that Petitioner did not establish his affirmative defenses of race discrimination or retaliation for the Agency's removal action.

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 or retaliation.

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

November 19, 2024
Date