



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

[REDACTED]
German D,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2019000687

Hearing No. 420-2014-00139X

Agency No. ARREDSTON13AUG03808

DECISION

On October 23, 2018, 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 September 14, 2018 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the Equal Employment Opportunity Commission Administrative Judge (AJ) properly issued a decision without a hearing finding that Complainant failed to establish that he was subjected to a hostile work environment based on national origin (Hispanic)² and reprisal (prior EEO activity) when:

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 The Commission classifies Hispanic under the protected basis of national origin not race.

- A. on or about July 18, 2012, Agency Management downgraded his FY (Fiscal Year) 2012 performance evaluation from a rating of “1” to a rating of “2”;³
- B. on or about August 13, 2013, he received a rating of “2” on his FY 2013 performance evaluation;
- C. he was required to provide a signed SF-182 authorization to attend a “Surveillance Detection for Law Enforcement and Security” training course at the Huntsville Police Academy Training Center July 10-12, 2013;
- D. on or about August 14, 2013, he was given a Memorandum of Counseling for Failure to Follow Instructions;
- E. on October 17, 2013, he was given a Letter of Reprimand for Failure to Follow Instructions; and,
- F. on or around July 28, 2014, he received a “2” rating on his FY 2014 annual performance evaluation.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Security Specialist, GS-0080-13 at the Agency’s Army Material Command in Redstone Arsenal, Alabama. On August 14, 2013, Complainant initiated EEO Counselor contact. Informal efforts to resolve his concerns were unsuccessful. On October 25, 2013, Complainant filed a formal complaint alleging that the Agency subjected him to a hostile work environment and discriminated against him as articulated in claims C-E in the statement of “Issues Presented” above.

Complainant filed a motion to amend on August 4, 2014 seeking to include claims A-B and F as articulated in the statement of “Issues Presented” above.⁴ The Agency filed a motion for summary judgment on September 6, 2014. By order dated September 23, 2014, the AJ denied Complainant’s motion to amend. On September 24, 2014, the AJ issued an order: (1) vacating his previous order denying Complainant’s motion to amend; (2) denying the Agency’s motion for summary judgement; and (3) granting Complainant’s motion to amend. The final version of the claim at issue in the instant matter was framed as stated above.⁵

³ The Commission acknowledges that the AJ dismissed claim A pursuant to 29 C.F.R. 1614.105(a)(1) for untimely EEO counselor contact. Complainant does not challenge this ruling on appeal.

⁴ The record is devoid of any evidence that Complainant sought to formally amend his Complaint to include the allegation from EEOC Case No. 420-2016-00073X concerning management’s failure to select him to conduct the OPSEC portion of the protection assessments. Complainant’s motion to amend dated August 4, 2014, is silent with respect to this allegation. We find the arguments raised by Complainant on appeal related to this claim inappropriate at this time.

⁵ The record reflects that by order dated September 24, 2014, the AJ consolidated two of Complainant’s cases, Hearing Nos. 420-2014-00139X and 420-2016-00073X, for the purposes of disposition.

The AJ issued a decision without a hearing dated September 10, 2018, finding no discrimination. Specifically, the AJ concluded that: (1) Complainant was unable to establish that any of the incidents described were motivated by Complainant's national origin or his prior EEO activity; (2) that any of the conduct was severe or pervasive enough to alter the terms and conditions of his employment; (3) that any of the disciplinary actions or performance ratings were motivated to deter Complainant from engaging in protected activity; or (4) that any of the asserted legitimate non-discriminatory reasons was a pretext for discrimination.

The Agency's final action implemented the AJ's decision. The instant appeal followed.

STANDARD OF REVIEW

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*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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 AND FINDINGS

We determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant contends that a previously filed motion for summary judgment is outstanding, and that a genuine issue of material fact is in dispute requiring a hearing because the AJ failed to make a decision on an allegation from the underlying complaint. Ultimately, the AJ correctly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

After a review of the record, we find that there are no genuine issues of material fact or any credibility issues which required a hearing and therefore the AJ's issuance of a decision without a hearing was appropriate. The record has been adequately developed, Complainant was given notice of the Agency's motion to issue a decision without a hearing, he was given a comprehensive statement of undisputed facts, he was given an opportunity to respond to the motion and statement of undisputed facts, and he had the opportunity to engage in discovery.⁶ Under these circumstances, we find that the AJ's decision without a hearing was appropriate.

Disparate Treatment & Reprisal

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII cases alleging discrimination is a three-step process. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); see Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (applying McDonnell Douglas to retaliation cases). First, Complainant must 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. McDonnell Douglas, 411 U.S. at 802. Next, the Agency must articulate a legitimate, nondiscriminatory reason(s) for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, then Complainant must prove, by a preponderance of the evidence, that the legitimate reason(s) proffered by the agency was a pretext for discrimination. Id. at 256.

Allegations C-E: Signed SF-182

Assuming, *arguendo*, that Complainant established a prima facie case of discrimination based on national origin and reprisal, we find that the Agency articulated legitimate, non-discriminatory reasons for the actions taken by Agency management with respect to allegations C, D and E.

⁶ To the extent that Complainant is arguing on appeal that the AJ's discovery rulings were in error, those arguments lack merit.

The record reflects that Complainant was aware that an SF-182 signed by his second-level supervisor and submitted to his first-level supervisor was required before he would be permitted to attend the “Surveillance Detection for Law Enforcement and Security” training class. Complainant demonstrated his awareness of this requirement by requesting that his second-level supervisor sign the SF-182. In contrast, Complainant demonstrated his disregard for the second step by adamantly refusing to submit the signed SF-182 to his first-level supervisor, even after he requested it on multiple occasions. Complainant’s refusal to submit the signed SF-182 to his first-level supervisor resulted in issuance of both the Memorandum of Counseling and the Letter of Reprimand.

Allegations B and F: FY 2013 and FY 2014 Performance Evaluations

Allegations B and F address Complainant’s contentions that he was entitled to a rating of “1” (Outstanding) on his FY 2013 and 2014 performance evaluations. Complainant contends that beginning in FY 2012 and continuing, management downgraded his performance evaluation ratings from ratings of “1” to ratings of “2” (Fully Successful), after he and other colleagues made allegations of hostile work environment. The record is devoid of any specific evidence to indicate that Complainant should have received a rating of “1” for FY 2013 or FY 2014. Record evidence supports the Agency’s position that performance ratings directly correlated with the measure of employee’s independent performance. Nothing in the record aside from Complainant’s bare assertions that employees outside of his asserted protected bases received higher ratings than him, and the fact that his rating reductions occurred in the same FY that he filed the instant complaint, establishes that the rating reductions were based on any discriminatory animus.

In sum, our review of the record confirms the Agency’s assertion that its decisions were based on its determination of how best to effectively manage the workplace and its assessment of Complainant’s performance and conduct in the workplace. Nothing in the record, or submitted on appeal by Complainant, demonstrates that the Agency’s actions were in any way motivated by discriminatory animus. The Commission has long held that 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. Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 259; Vanek v. Dep’t of the Treasury, EEOC Request No. 05940906 (January 16, 1997). We find no evidence of unlawful motivation on the instant facts.

Harassment/Hostile Work Environment

With respect to any contention by Complainant that he was subjected to a hostile work environment with respect to any of the actions by Agency management, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) that Complainant’s claim of hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).

A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. United States Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000). We concur with the AJ's findings that the allegations complained of in the instant matter were not severe and pervasive enough to rise to the level of actionable harassment.

CONCLUSION

Based on a thorough review of the record, we find that the AJ properly issued a decision without a hearing finding that Complainant failed to demonstrate he was subject to discrimination as articulated above in the statement of Issues Presented. The Agency's final order adopting the AJ's decision therefore is **AFFIRMED**.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

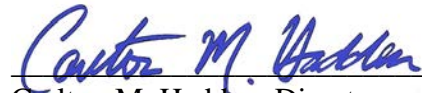
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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 his or her 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

August 19, 2020
Date