



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Aron J.,¹
Complainant,

v.

Janet Dhillon,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 2019004503

Agency No. 2017-0031

DECISION

This matter comes before the Commission on appeal from a contract Administrative Judge's³ (AJ's) April 3, 2019 decision and order, which entered a finding without a hearing, that Complainant did not establish that the Agency discriminated against him based on race and sex. In its May 16, 2019 final order, the Agency implemented the AJ's finding of no discrimination. The Commission accepts Complainant's appeal pursuant to 29 C.F.R. §1614.403(a). For the following reasons, we AFFIRM the Agency's final order implementing the AJ's decision.

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 As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints.

³ A case involving an Agency employee who requests a hearing is held before a contract AJ who is not employed by the Agency. See Logan-King v. Equal Emp't Opportunity Comm'n, EEOC Request No. 05A10082 (Jan. 3, 2002).

ISSUES PRESENTED

The issues presented are whether: (1) the Agency properly dismissed Complainant's claim that he was discriminated against when the Agency failed to timely issue two performance appraisals; (2) the AJ erred in denying Complainant's request to discard the investigative file; and (3) the AJ properly issued a decision without a hearing finding that Complainant did not establish that the Agency subjected him to a hostile work environment based on his race and sex.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Program Analyst (GS-15) in the Agency's Revolving Fund Division, Office of Field Programs in Washington, D.C. In April 2015, Complainant's first-line supervisor (S1) (Afro-Caribbean, male) transitioned into his position, overlapping with Complainant's former supervisor (FS) for a period of time. Report of Investigation (ROI) at 227. Complainant stated that FS completed Complainant's fiscal year 2015 (FY15) performance evaluation and provided it to Complainant's second-line supervisor (S2) (White, male), prior to leaving the Agency.⁴ Complainant stated that he asked S1 about receiving his performance evaluations in February and March 2017. ROI at 19.

Complainant stated that on April 3, 2017, he informed S2 about potential unethical financial practices, and that S2 then subjected him to intensified hostile treatment. Complainant also stated that S2 wanted Complainant's team to sign inaccurate performance plans, which his team refused to do because the plans did not reflect their duties and responsibilities. ROI at 18.

On or about April 26, 2017, Complainant learned that he was accepted for a Senior Executive Service position with another agency. Complainant left the Agency on May 12, 2017. ROI at 19. On May 12, 2017, S1 emailed Complainant his FY15 and fiscal year 2016 (FY16) performance evaluations. ROI at 260-83.

On June 12, 2017, Complainant filed a formal EEO complaint alleging that the Agency subjected him to non-sexual harassment on the bases of race (African-American) and sex (male), and in reprisal for "opposing unethical financial practices."

On April 6, 2018, the Agency informed Complainant that 180 days had passed, and that he had the right to request a hearing before an EEOC AJ. Complainant requested a hearing on April 9, 2018. ROI at 44-5, 240.

On April 17, 2018, the Agency accepted Complainant's complaint for investigation, and issued a revised acceptance letter on April 23, 2018. Therein, Agency informed Complainant that it was dismissing certain of his allegations that he was subjected to discrimination, to wit: (1) from 2013 through May 12, 2017, S2 treated Complainant in a hostile and disrespectful manner; (2) from 2015 through May 12, 2017, Complainant was not given two performance appraisals, which he

⁴ The Agency did not obtain an affidavit from Complainant, and his statements are taken from the Counselor's Report for his informal EEO complaint.

alleged prevented and/or delayed his ability to obtain outside employment; (3) Complainant did not receive his fiscal year 2017 (FY17) performance appraisal; and (4) on June 6, 2017, Complainant was again contacted by S1, at the behest of S2, to dissuade him from filing a formal EEO complaint. The Agency dismissed these claims for untimely contact with an EEO Counselor. The Agency also dismissed Complainant's retaliation claim based on opposing unethical financial practices because it was outside the scope of the Commission's jurisdiction. ROI at 39-42, 35-37.

The Agency issued Complainant a copy of the report of investigation on July 23, 2018. The AJ assigned to the case issued an Acknowledgment and Order on July 25, 2018, in which he notified the parties that they had 30 calendar days from receipt of the Order to identify any dismissed claims, and to comment on the appropriateness of the dismissal.

On August 3, 2018, Complainant submitted a request for reconsideration of the Agency's partial dismissal of his claims 1) that he was not given a FY17 performance appraisal and 2) that on June 6, 2017, S1 contacted him to dissuade him from filing an EEO complaint, which request the AJ denied on August 20, 2018. On August 14, 2018, Complainant filed a Motion to Discard Use of the Investigative File, arguing that the investigation was not timely or impartial. On August 20, 2018, the AJ denied Complainant's motion, finding that Complainant did not demonstrate any prejudice from the delay in completing the investigative record.⁵

Over Complainant's objections, the AJ assigned to the case granted the Agency's November 16, 2018 motion for a decision without a hearing, issuing a decision without a hearing on April 3, 2019. The AJ noted that Complainant's response to the Agency's motion did not contain any exhibits, specific references to the record, or otherwise dispute the material facts, and that Complainant reargued procedural issues that previously had been ruled upon. The AJ determined, based on the undisputed record, that Complainant did not suffer any adverse action, and that he could not establish that the Agency's conduct was so severe or pervasive as to alter the conditions of his employment. Further, the AJ found that Complainant did not show that the alleged discriminatory conduct was motivated by his race and/or sex.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant had not proven that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ erred when he determined that Complainant did not dispute any material facts because the "material facts" in the investigative file were not timely, legal, or impartial. Complainant notes that the Agency conducted an expedited investigation, which was not "impartial or appropriate."

⁵ On October 16, 2018, the AJ denied Complainant's request for reconsideration of the denial of Complainant's Motion to Discard the investigative file.

Complainant states that the Agency arbitrarily determined his comparators and that his position was not unique from any other Supervisory Program Analyst within the Management and Program Analysis series. Complainant argues that the AJ erred when he ruled that the investigative file should not be discarded.

Complainant asserts that the Agency erred when it did not accept his claim related to his performance evaluations. Complainant states that when the Agency issued a revised acceptance notice, it “removed” the FY15 and FY16 performance appraisals from being dismissed. Complainant argues that if a claim is not dismissed, it was intended to be accepted. Complainant also asserts that because he discussed these performance appraisals with S1 in February and March 2017, and did not receive his appraisals until May 11, 2017, this claim is timely. In addition, Complainant argues that the AJ “exasperated” the issue by not allowing this claim to be reinstated and allowed to move forward.

Complainant also argues that, despite the AJ’s decision to modify his Motion to Compel, the Agency failed to provide the information. For example, Complainant requested information regarding the performance ratings of employees who had S2 as the first or second-level rater, from 2010 to 2017; however, the Agency only provided a list with the employees’ race and sex, but no performance rating information. Complainant requests that the Commission find in his favor, or to order a hearing because there are material facts in dispute, and to discard the investigative file and conduct a new investigation.

The Agency argues that Complainant’s appeal should be dismissed because he failed to serve a copy on opposing counsel.⁶ The Agency also notes that Complainant did not directly address the AJ’s findings, and that three discrete preliminary rulings are the bases of his appeal. In response to the procedural dismissal of Complainant’s claim regarding his FY15 and FY16 performance appraisals, the Agency states that Complainant failed to comment on the dismissal before the AJ, and thus waived his opportunity to have those dismissed claims reviewed.

The Agency also argues that the AJ properly denied Complainant’s Motion to Discard the Investigative File because he did not identify any hardship suffered as a result of any delay in the issuance of his investigative file. In addition, the Agency asserts that Complainant has not shown that the AJ’s discovery rulings were clearly erroneous or an abuse of discretion. The Agency requests that the Commission affirm its final order adopting the AJ’s finding that Complainant had not proven that the Agency subjected him to discrimination as alleged.

⁶ The Agency asserts that Complainant failed to serve the Agency with a copy of his appeal and that it should be dismissed. However, the Agency had an opportunity to submit a response brief. Although the Agency’s brief was submitted out of time, given Complainant’s failure to serve a copy of his appeal on the Agency, we exercise our discretion to nonetheless consider the brief in rendering this decision. Thus, we find the Agency has not been harmed by Complainant’s procedural error. See Holderman v. Dep’t of Agriculture, EEOC Request No. 05930875 (June 2, 1994).

ANALYSIS AND FINDINGS

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 the 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 Chap. 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").

Decision without a hearing

We first 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 have carefully reviewed the record and find that it is adequately developed. On appeal, Complainant argues that the AJ erred when he denied Complainant's request to discard the investigative file. However, whether to include or exclude the investigative file was a matter within the AJ's broad discretion in the conduct of these proceedings. See 29 C.F.R. §§ 1614.109(a),(e). We find no basis to conclude that the AJ abused his discretion by allowing in the investigative file.

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 only makes a general claim that there are genuine issues of material fact, but he did not present any evidence to dispute any specific material facts. We note that mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. Lee v. Dep't of Homeland Security, EEOC Appeal No. 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for reconsideration denied, EEOC Request No. 05A10914 (Oct. 1, 2001). Regarding Complainant's assertion that the Agency's responses to his discovery requests were inadequate, we find that the information requested is not material and would not affect the outcome of his complaint. Accordingly, we find that the AJ properly issued a decision without a hearing.

Dismissed Claim

On appeal, Complainant argues that his claim regarding his FY15 and FY16 performance appraisals is timely and should not have been dismissed. The record shows that the AJ provided Complainant with an opportunity to challenge any dismissed claims, and that Complainant timely responded to challenge only the Agency's dismissal of his claims that he was not given a FY17 performance appraisal and that on June 6, 2017, S1 contacted him to dissuade him from filing an EEO complaint.⁷ On August 20, 2018, the AJ denied Complainant's request.

Complainant argues that the AJ "exasperated" the issue by not allowing FY15 and FY16 performance appraisal claim to be reinstated. However, we find that Complainant did not properly raise the dismissal of this claim before the AJ because he did not include it in his Request for Reconsideration of Agency's Partial Dismissal of Claims. As such, we find that Complainant waived his right to contest the dismissal of this claim and will not address it in the instant appeal. See Complainant v. Dep't of the Navy, EEOC Appeal No. 0120132166 (Sept. 22, 2015) (complainant waived his right to review the agency's procedural dismissal when he failed to respond to the AJ's Acknowledgement and Order); Ellison v. U.S. Postal Serv., EEOC Appeal Nos. 0120073973, 0120080638 (Nov. 17, 2009) (complainant failed to respond in timely manner to the AJ's Order pertaining to the agency's partial dismissal of issues of formal complaint; the AJ therefore properly deemed these issues waived); Show v. U.S. Postal Serv., EEOC Appeal No. 0120083277 (Sep. 24, 2008), req. for recon. den'd, EEOC Request No. 0520090116 (Jan. 9, 2009) (complainant waived her objection to the Agency's partial dismissal because she failed to oppose dismissed claim within 30-day comment period as ordered by AJ).

Harassment

Harassment is actionable if it is sufficiently severe or pervasive such that it results in an alteration of the conditions of the complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994).

⁷ The Commission has the discretion to review only those issues specifically raised in an appeal. See MD 110, at Chap. 9, § IV.A.3. Complainant did not contest the procedural dismissal of these claims on appeal; as such, we will not address them in the instant decision.

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) 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) there is a basis for imputing liability to the employer. See Humphrey v. United States Postal Service, EEOC Appeal No. 01965238 (Oct. 16, 1998).

We find that Complainant belongs to statutorily protected classes based on his race and sex, and that he was subjected to unwelcome verbal conduct. However, Complainant has not provided any evidence showing that the complained of conduct was based on his statutorily protected classes, and only offers bare assertions that he was harassed due to his race and sex. Accordingly, we find that Complainant did not establish that the Agency subjected him to a hostile work environment based on his race or sex.

CONCLUSION

We find that Complainant waived his right to contest the dismissal of his claim regarding his FY15 and FY16 performance appraisals. In addition, we find that the AJ did not err when he denied Complainant's request to discard the investigative file, and when he issued a decision without a hearing finding that Complainant did not establish that the Agency subjected him to a hostile work environment based on race and sex. Therefore, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order implementing the AJ's decision without a hearing.

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:

/S/ Bernadette Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

September 2, 2020
Date