



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

[REDACTED]
Mitchell H.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Request No. 2020001624

Appeal No. 0120182662

Agency No. 1G321000118

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120182662 (December 5, 2019). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

After reconsidering the previous decision and the entire record, the Commission finds that the request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request.

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.

ISSUES PRESENTED

The issues presented are: (1) whether the Agency's request meets the criteria for reconsideration; and (2) whether Complainant established that the Agency discriminated against him based on his race, national origin, color, or age.

BACKGROUND

At the time of events giving rise to the underlying complaint, Complainant was employed by the Agency as a Supervisor, Maintenance Operations, EAS-17, at the Agency's Processing and Distribution Center in Pensacola, Florida. In his complaint, Complainant alleged that the Agency discriminated against him based on race, color, national origin, and age when his leave request was denied; his training and detail requests were denied; and his application for a Tour 2 position was not accepted.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing (Notice) before an EEOC Administrative Judge (AJ). The Notice explained that a request for a hearing should be made by completing an enclosed form and mailing it to the Hearings Unit of the Birmingham District Office within 30 days of receipt, with a copy sent to the Agency at an address provided.

Complainant timely requested a hearing with the Commission's Birmingham District Office. The Agency asserted that Complainant, however, did not submit a copy of the hearing request to the Agency in accordance with 29 C.F.R. § 1614.108(g). On July 23, 2018, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency was subsequently notified of Complainant's hearing request and filed a motion to dismiss the hearing request, asserting that Complainant did not properly provide the Agency with a copy of the hearing request. On April 11, 2019, the assigned AJ dismissed Complainant's hearing request for failure to serve the hearing request on the Agency.

In our previous decision, we disagreed with the AJ's dismissal of Complainant's hearing request under the circumstances presented. The decision noted that Complainant's May 2018 request for a hearing at the Commission's Birmingham District Office effectively transferred jurisdiction of the complaint to the Commission, such that the Agency had no jurisdiction to issue a final agency decision. We further found that the Agency failed to identify any substantive prejudice that it would suffer in defending the matter if the hearing request were honored. Moreover, we determined that there was no regulatory purpose served by the AJ denying Complainant's hearing request. We concluded that in the interest of fairness and under the circumstances, Complainant should be afforded a hearing before an AJ. As such, the previous decision vacated the Agency's final decision and ordered the Agency to remand the matter for a hearing with the Commission's Birmingham Hearings Unit.

ARGUMENTS ON RECONSIDERATION

In its request for reconsideration, the Agency maintains that Complainant failed to comply with the mandatory service requirements of 29 C.F.R. § 1614.108(h) and it had neither actual nor constructive notice of Complainant's hearing request until eight months after it issued the final decision. The Agency argues that the instant facts are analogous to the facts in Blanca B. v. U.S. Postal Service, EEOC Appeal No. 0120171595 (November 2, 2018); request for reconsideration denied, EEOC Request No. 2019002387 (June 11, 2019), rather than Chas T. v. U.S. Postal Service, EEOC Appeal No. 2019001983 (October 8, 2019), the case cited in the appellate decision. The Agency further contends that it will suffer substantive prejudice in that it would have to reargue the underlying facts of an action that failed on the merits. The Agency adds that it can demonstrate additional prejudice in the form of monetary expenses and time delay.

Complainant did not submit a statement or brief in opposition to the Agency's request.

ANALYSIS

Request for Reconsideration

Pursuant to 29 C.F.R. §1614.108(h), complainants are required to submit written requests for hearings directly to the EEOC office indicated in an Agency's Notice letter along with sending a copy of the request to the Agency's EEO Office. In Gallo v. Department of Labor, the Commission held that failure to provide an agency with notice of a hearing request may render the request legally deficient and, therefore, ineffective in transferring jurisdiction of the complaint to the EEOC for the purpose of conducting a hearing. Gallo, EEOC Request No. 05A01085 (Oct. 9, 2002). Here, it is undisputed that Complainant submitted a request for a hearing to the Commission's Birmingham Field Office but failed to submit a copy of the request to the Agency.

In its request for reconsideration, the Agency asserts that Complainant's appeal should be analyzed through the legal framework set forth in Blanca B., supra. In Blanca B., the complainant sent a request for a hearing directly to the Hearings Unit of the EEOC's St. Louis District Office. The hearing request form that the complainant signed and submitted stated that if the complainant failed to provide the Agency with a copy of her request for a hearing, the Agency would issue a final decision, resulting in the loss of the complainant's right to request a hearing. The Agency did not learn of the complainant's hearing request until an AJ issued an Acknowledgement Order. The Agency moved to dismiss the hearing request, arguing that the AJ lacked jurisdiction to issue a decision because it had issued a FAD, which Complainant had already appealed. The AJ granted the motion and dismissed the complainant's hearing request. On appeal, the Commission affirmed the AJ's dismissal of Complainant's hearing request.

The Agency asserts that the Commission's interpretation of 29 C.F.R. § 1614.108(h), as explained in Chas T., *supra*, was inappropriate. In Chas T., the Commission disagreed with the assigned AJ that, under the circumstances presented, it was appropriate to dismiss the complainant's hearing request. There, the complainant timely filed his hearing request with the EEOC but failed to provide the agency with a copy of his request. However, the agency conceded that it was informed of the hearing request by the EEOC Hearings Unit a few weeks later. Notably, the agency had not issued a FAD by the time it learned of Complainant's request for a hearing. Accordingly, the Commission determined that delay was not at issue and there was no real harm to the Agency or the process.

We find persuasive the Agency's argument that Blanca B. is more factually consistent with the instant matter. Specifically, in Blanca B., the agency issued the FAD without knowing that the complainant had requested a hearing and the complainant did not provide documentation that she sent a copy of her hearing request to the agency. Chas T. differs in that the District Office and the AJ communicated concerning the hearing request, which placed the agency on notice that the complainant had filed a hearing request. We find that, in the present matter, Complainant failed to properly serve the Agency with a copy of his hearing request, rendering the request legally deficient and the Agency without notice of Complainant's request for a hearing before it issued its FAD. Based on the foregoing and specific circumstance of this case, we find that our previous decision improperly remanded this matter for a hearing.

Because our previous decision considered only Complainant's request for a hearing, we will now consider the merits of the underlying claims, as well as the arguments the parties originally submitted on appeal below.

Review of Final Agency Decision

On January 10, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), national origin (African), color (black), and age (55) when:

1. On September 21, 2017, he was informed that his request for Wounded Warrior leave was denied;
2. On or about September 21, 2017, his training and detail requests were denied; and
3. On or about November 16, 2017, his application for a Tour 2 position was not accepted.

In its July 2018, final agency decision, the Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant appealed the Agency's final decision without specific comment regarding the Agency's determination regarding his claim of discrimination.

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”).

Disparate Treatment

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 she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency’s explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that, even if we assume arguendo that Complainant established a prima facie case of discrimination on all bases, the Agency articulated legitimate, nondiscriminatory reasons for its actions.

Regarding claim 1, management officials affirmed that Complainant’s request was denied because he failed to provide the correct documentation. Report of Investigation (ROI), Volume 2, at 101.² Specifically, Complainant’s first-line supervisor (S1) stated that Wounded Warrior leave is for medical appointments or treatment of an injury. Id. at 101, 139-140. Here, Complainant was granted sick leave for the time in question when he did not provide the requisite documentation. Id. The record reflects that, following the denial of his Wounded Warrior leave, Complainant inquired about the use of Wounded Warrior leave and a Labor Specialist confirmed that Complainant needed to request this type of leave in advance. Id. at 143. The Labor Specialist informed Complainant that “unforeseeable leave” could be requested as long as the

² Page numbers refer to the Bates page numbers appearing at the bottom of each page of the ROI.

Wounded Warrior leave request related to a service-connected disability and the leave was used for treatment, examination, evaluation, or courses of action proposed by a physician. Id. She noted that a qualifying employee would need to substantiate their absence within 15 calendar days of their return to duty. Id. The Labor Specialist clarified that Wounded Warrior leave is inappropriate for instances in which the qualifying employee's service-connected disability is "acting up" and they cannot report to duty. Id.

With respect to claim 2, S1 stated that Complainant scheduled himself for two training courses despite prior instruction to obtain pre-approval for training courses. ROI at 104. S1 stressed that he approved one of Complainant's courses and cancelled the additional course. Id. As for supervising opportunities, management officials stated that there was no one with appropriate experience to replace Complainant on his tour. Id. The Maintenance Manager (S2) testified that Complainant would have been afforded the opportunity if he had been able to provide a backup for his position. Id. at 125. He stressed that Complainant performed the same basic work on his shift and it would have created a strain on the department if they vacated Complainant's position for an extended period. Id. S2 added that Complainant was able to work a mixed shift when the Agency lost two supervisors to training and leave simultaneously. Id.

As for claim 3, Complainant alleged that two coworkers were treated more favorably because one coworker (CW1; Caucasian, female, white, White, unknown age) received a lateral transfer without applying competitively and the other coworker (CW2; male, Caucasian, white, White, over 40) received training and an offer for the position at issue. Importantly, the record shows that neither individual applied for the position at issue. Id. at 271-273.

Management officials stated that when CW1 requested a lateral transfer into a Tour 2 position, she was instructed to apply and compete for the position. Id. at 121. She applied for and was awarded her position through the competitive process. Id. The record indicates that CW2 applied for his position competitively and was awarded his position through the competitive process; he was not merely offered a Tour 2 position without going through the competitive process. Id. at 111, 121.

As for the actual applicants for the position at issue, the record shows that the top three candidates received scores³ of 26, 24, and 19. Id. at 272. Complainant received a score of 5. Id. The record does not reveal any evidence that the scoring process was affected by discrimination. Accordingly, Agency officials explained that the selection panel did not recommend Complainant's application for the interview portion of the application process. ROI at 112. A member of the Review Committee averred that the top three candidates were the individuals with the highest combined scores following an independent review by selection panel members. Id. at 132. Although Complainant contended that comparators were not required to compete for

³ Applicants were given 10 different numerical scores for 10 different job-related criteria. Id. at 272-273. The 10 scores were added together for an overall applicant score. Those with the highest applicant scores were recommended to the selecting official. Id. at 132.

their positions, management officials affirmed that the alleged comparators applied competitively and were awarded their positions based on their applications and interviews. Id. at 121. Management officials maintained that the other craft employees that Complainant alleged were treated more favorably would have also been required to compete for their positions. Id. at 116, 126.

We find that Complainant has not shown that the proffered reasons were pretext for discrimination, and he has not proven by a preponderance of the evidence that the Agency discriminated against him based on his race, color, national origin, or age. As a result, the Commission finds that Complainant has not established that he was subjected to discrimination as alleged.

CONCLUSION

After reconsidering the previous decision and the entire record, the Commission finds that the agency's request meets the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to GRANT the request. The decision of the Commission in Appeal No. 0120182662 is VACATED. We AFFIRM the Agency's final decision finding no discrimination. Because this is the first time the merits of the matter have been addressed, we are affording the parties the right to request reconsideration of our merits determination.

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 B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

August 11, 2020
Date