



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

[REDACTED]
Brenton W.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs (VA),
Agency.

Appeal No. 2020000957

Hearing No. 480-2019-00038X

Agency No. 200P-0664-2018102599

DECISION

On October 28, 2019, 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 October 16, 2019 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment with the Agency.

In early 2018, Complainant was contacted to interview for a Certified Registered Nurse Anesthetist (CRNA) position at the San Diego VA Medical Center. Complainant stated that the Agency made a tentative offer of employment based on his education, experience, and references. On February 22, 2018, Complainant went to the Agency to meet the Chief CRNA ("S1") and the Chief of Anesthesia Services ("S2").

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.

During the meeting, Complainant disclosed that he has a history of sedative abuse, that occurred after he lost his wife and son, and said information could arise during the Agency's CRNA privileges process. As a result, Complainant stated the job offer was withdrawn.

On April 1, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (history of sedative abuse) and reprisal for prior protected EEO activity (statement that withdrawal of job offer was discriminatory – threat of legal action) when:

1. in February 2018, an Attending Anesthesiologist ("S3"), who interviewed Complainant, subjected Complainant to hostile work environment harassment by asking "[if he had] ever been to rehab," and
2. on February 22, 2018, S2, who was the selecting official, rescinded the CRNA job offer from Complainant.

The Agency accepted Complainant's claims for EEO investigation.

During the EEO investigation, Complainant stated S1 sent him a text message stating he was their "first choice," the Administrative Officer sent an email stating S2 wanted to offer Complainant the CRNA position, and, on February 15, 2018, S2 offered him the CRNA position via telephone. He stated, subsequently, the Administrative Officer contacted him for information to start the credentialing and Human Resources (HR) process, which supposedly could take about three months.

Complainant stated after the February 22 meeting, where he disclosed his drug history, S2 did not allow his credentialing/HR process to move forward. He stated, at the meeting, S2 asserted he no longer wanted to hire Complainant because he was dishonest by failing to discuss his past history and he threatened legal action by alleging discrimination. Complainant stated that S2 denied him the due process of the formal peer review process for credentialing CRNAs.

S3 stated that he did not ask Complainant about attending rehabilitation. S3 stated that he asked Complainant about a gap in employment on his resume and Complainant responded with information about the loss of his wife and son. S3 stated that he did not pursue the matter further. Regarding the job offer, S2 stated that he interviewed Complainant earlier in February and Complainant asked to meet again on February 22, 2018. S2 stated, during the February 22 meeting, Complainant stated, without prompting, that he had a past history of substance abuse - using the anesthetic medication propofol. S2 stated that Complainant also presented a laboratory report showing that there was no propofol in his system. S2 stated after initial interviews, Complainant was deemed "suitable" out of three candidates. He stated, however, Complainant was informed that management cannot extend a job offer and that only HR can make a job offer after a background check, review of reference letters, and approval by the VAMC's Professional Standards Board.

S2 stated that an offer was not officially made by HR so there was no offer to rescind, but Complainant was removed from further consideration. S2 stated that Complainant was informed his past substance abuse would not be considered.

S2 stated that management re-evaluated Complainant's candidacy and removed him from further consideration because: (1) he could only provide one of three required letters of recommendation and the one he provided was from a dentist rather than an Anesthesiology/CRNA professional, (2) he intentionally omitted employment from his resume so the Agency could not contact those specific prior employers, (3) he made an untrue allegation that management questioned his past drug abuse when it did not, (4) he made untrue statements to HR that S2 sanctioned him to go to HR and that he recorded S2 on tape, and (5) Complainant's demeanor and speech were aggressive and threatening (angry, flushed face with clenched fists and threatening legal action) during the February 22 meeting, which was different than how he presented himself at other meetings. Agency witnesses also stated that Complainant was hostile when it requested the two additional required references and suggested management solicit the references themselves.

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 EEOC Administrative Judge (AJ) or an immediate final agency decision. Complainant requested a hearing. The AJ assigned to the case determined that the complaint did not warrant a hearing and issued a decision by summary judgment on October 2, 2019.

The AJ found no discrimination was established in claim (1). The AJ did determine that disability discrimination played a role in the rescission of the job offer. However, the AJ, using a mixed motive analysis, found that the Agency would have still made the same decision absent discrimination. The AJ stated that the record also showed that the Agency would not have allowed Complainant to encumber the position based on his aggressive behavior at the February 22 meeting and his "lack of candor in his application for [the] sensitive position." The AJ stated that Complainant was given an opportunity to show, if he was given a hearing, he could produce evidence to show that he is entitled to placement in the position or compensatory damages, but failed to do so and the AJ did not award these remedies.² The AJ ordered management training, consideration of discipline for the responsible management official, and posting of a notice of the finding of discrimination.

The Agency adopted the AJ's decision in its entirety. The instant appeal from Complainant followed. On appeal, Complainant argued that there is no legitimate ground for mixed motive analysis as he was not aggressive in the February 22 meeting, but rather told S2 withdrawal of job offer was discriminatory. Complainant stated that the Agency is using that reason as a "smokescreen." Complainant asserted that he was improperly denied job placement and compensatory damages by the AJ.

² Complainant was not represented by legal counsel so attorney's fees were not at issue.

ANALYSIS AND FINDINGS

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”).

Mixed Motive

Cases such as this, where there is evidence that discrimination was one of multiple motivating factors for an employment action – where the agency acted on the bases of both lawful and unlawful reasons – are known as “mixed motive” cases. See EEOC Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, EEOC Notice No. 915.002 (July 14, 1992), as modified EEOC Notice No. 915.002 (January 16, 2009). Under Title VII, a violation is established “when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m).

Once a complainant demonstrates that discrimination was a motivating factor in the agency's action, it is the agency's burden to demonstrate by clear and convincing evidence that it would have taken the same action even if it had not considered the discriminatory factor. If the agency makes this demonstration, a complainant is not entitled to personal relief such as damages, reinstatement, hiring, promotion, and back pay but may be entitled to declaratory relief, injunctive relief, attorney’s fees, and costs. Walker v. Social Security Administration, EEOC Request No. 05980504 (April 8, 1999). Here, we apply this Title VII principle to the Rehabilitation Act. Henry S. v. Dep’t of Defense, EEOC Appeal No. 0720170020 (March 28, 2018).

We conclude that the evidence of record fully supports the AJ's finding that the Agency met its burden of demonstrating that it would have taken the same action absent Complainant’s history of sedative abuse or prior protected EEO activity. We concur with the AJ that Complainant is not entitled to personal relief because the Agency has proven, by clear and convincing evidence, that the responsible management officials would have ceased processing his CRNA application due to intentional omission of employment history so that the Agency could not contact prior employers, as well as his aggressive demeanor and speech at a meeting with management.

As such, the Agency has proven, by clear and convincing evidence, that it still would not have hired Complainant because of non-discriminatory factors. Due to this conclusion, Complainant is not entitled to an award of placement in the position in question or compensatory damages.

CONCLUSION

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 fully adopting the AJ's decision.

ORDER

To the extent it has not already done so, the Agency shall provide the following remedial relief **within sixty (60) calendar days, unless otherwise noted, of the date of this decision.**

- I. The Agency shall provide six (6) hours of mandatory in-person (or interactive virtual) training to the relevant Chief of Anesthesia Services (identified as S2). The training shall cover unlawful discrimination under federal EEO laws, with special emphasis on disability and reprisal-based discrimination in the application process, and how issues of substance-abuse relate to the Rehabilitation Act.
- II. The Agency shall consider disciplinary action against the selecting official (S2) if he is still employed by the Agency. The Commission does not consider training to be a disciplinary action. If the Agency decides to take disciplinary action, it shall identify the actions taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S2 has left the Agency's employ, the Agency shall furnish documentation of the departure date(s).
- III. The Agency shall post a Notice of the Finding of Discrimination consistent with the statement below entitled "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

POSTING ORDER (G0617)

The Agency is ordered to post at its San Diego, California VA Medical Center copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her 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 his or her 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(c).

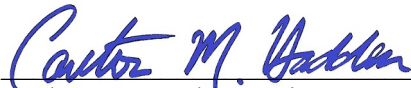
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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. **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 4, 2021

Date