



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Alan N.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2020001528

Hearing No. 460-2018-0095X

Agency Nos. HS-CBP-25275-2016 & HS-CBP-00743-2017

DECISION

On December 11, 2019, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 14, 2019 final order concerning his equal employment opportunity (EEO) complaints 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the reasons discussed below, the Commission MODIFIES the Agency's final order.

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Border Patrol Agent (SBPA), GS-1896-13, at the Brian A. Terry Station, Tucson Sector in Bisbee, Arizona. On March 11, 2016, Complainant filed Agency No. HS-CBP-25275-2016, in which he alleged that the Agency discriminated against him on the bases of national origin (Hispanic) and in reprisal for prior protected EEO activity when:

1. On September 9, 2014, during a meeting about a work-related operation, his Watch Commander (WC) accused the supervisors involved in that operation, including presumably Complainant, of being "lazy;"

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. On September 10, 2014, another Supervisory Border Patrol Agent (SBPA-1) made a racially motivated comment about Complainant;
3. On November 24, 2015, WC questioned Complainant about his relationship with a female Border Patrol Agent;
4. On November 24, 2015, WC questioned Complainant about his use of sick leave in conjunction with his days off;
5. On November 24, 2015, WC questioned why Complainant did not inform him about an unscheduled shift change;
6. On December 5, 2015, while off duty, WC asked Complainant if his daughter could come over to WC's house to play with his daughter;
7. On December 8, 2015, while off duty, WC approached and made conversation with Complainant and his spouse;
8. On January 5, 2016, WC gave Complainant a written counseling letter regarding his use of sick leave in conjunction with his days off; and
9. On January 27, 2016, WC telephoned Complainant's spouse.

On March 2, 2017, Complainant filed Agency No. HS-CBP-00743-2017 in which he alleged that the Agency discriminated against him on the bases of disability (perceived – unspecified) and in reprisal for prior protected EEO activity when:

10. On January 17, 2017, Complainant learned that he was reported to the Office of Professional Responsibility for alleged abuse of prescription medication.
11. On April 26, 2017, another Supervisory Border Patrol Agent, SBPA-2, disclosed medical information about Complainant in an email addressed to 118 recipients.

After its investigations into the two complaints, the Agency provided Complainant with copies of the investigative reports (IR) and notice of his right to request hearings before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The matters were consolidated. The Agency submitted a motion for a summary judgment. The AJ subsequently issued a decision by summary judgment in favor of the Agency.

The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged. The instant appeal followed.

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of 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 fact is "material" if it has the potential to affect the outcome of the case. 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. (as revised, August 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*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated or retaliated against by the Agency as alleged. Accordingly, we AFFIRM the Agency's final order adopting the AJ's decision insofar as it pertains to incidents (1) through (10).

Unauthorized Disclosure of Complainant's Medical Information – Incident (11)

The AJ found no violation of the Rehabilitation Act in connection with SBPA-2's disclosure of Complainant's confidential medical information. We disagree. The Rehabilitation Act prohibits disclosure of confidential medical information except in certain limited situations, including when managers need to be informed regarding necessary accommodations. 29 C.F.R. § 1630.14(c). Consequently, where unauthorized disclosure of medical information is at issue, it is not necessary to prove the existence of a discriminatory motivation in order to establish a violation of the Rehabilitation Act; mere disclosure of such information without justification is enough. Alice S. v. Dep't of Defense, EEOC Appeal No. 2020000391 (Feb. 11, 2021) citing Velva B., et al. v. U.S. Postal Serv., EEOC Appeal Nos. 0720160006 & 0720160007 (Sept. 25, 2017); req. for recon. den'd EEOC Request Nos. 0520180094 & 0520180095 (Mar. 9, 2018).

In his affidavit, SBPA-2 acknowledged that on April 26, 2017, he sent an email entitled, "NCO IIR 17-NCOpHR-04-08-082/Employee Injury" to 118 recipients. The email indicated that on April 25, 2017, Complainant had been transported to a medical center after experiencing rapid heartbeat and tightness in his chest and left hand. Excerpts from SBPA-2's affidavit are set forth below:

- Q11: Who are the 118 employees on the list and what was their work relationship to Complainant? A: Management officials and intelligence units agents at the Terry Station. Also, agency form the Tucson Sector Intelligence Unit, Public Affairs Office, Joint Intelligence Operations Center, and Critical Incident Team. Wilcox and Douglas Station Command Staff are also on the list.

- Q12: Did all 118 Recipients have a need to know about Complainant's medical incident of April 25, 2017? A: No, not all 118 recipients had a need to know about the incident. Incidents concerning medical issues of employees are to be sent to the Limited Incident Report Distribution List. The individuals on that list are the only individuals that should be notified due to the sensitive nature of the medical information sent.
- Q13: Was it your intention to send this email to these 118 recipients? A: No, it was not my intention to send the report to the 118 recipients that received the mail. While performing In House Supervisor duties that day, I was multitasking and inadvertently selected the wrong email list. I followed correct procedure for completing the report but made a mistake in emailing the report.
- Q14: Were you instructed by any official to send this email to these 118 recipients? A: No.
- Q20: Did you receive any form of reprimand following your issuance of the April 26, 2017 email? A: Yes, I was verbally counseled by the Watch Commander. He counseled me to pay attention to detail and make sure to follow correct procedures for completing and emailing incident reports.
- Q21: What is your understanding of agency policy/guidance regarding disclosing the medical information of employees? A: Medical information should only be disclosed to those with a need to know due to the confidential nature of the information.

IR 119-121. These sworn statements by SBPA-2 establish that although he did so by accident, he nevertheless revealed Complainant's confidential medical information to unauthorized individuals. SBPA-2 acknowledged and took responsibility for his mistake; however, his actions constitute a violation of the Rehabilitation Act. Accordingly, we will enter an order to take appropriate corrective measures.

Based on a thorough review of the record and Complainant's contentions on appeal, we MODIFY the Agency's final order.

ORDER

The Agency shall take the following remedial actions:

1. Within 120 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of harm caused by divulging his medical information. The Agency shall afford Complainant an opportunity to establish a causal relationship between the disclosure and pecuniary and/or non-pecuniary losses. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages she is entitled to and shall provide relevant information requested by the Agency. The Agency shall issue a

new Agency decision awarding compensatory damages to Complainant within 60 calendar days after the date this decision is issued. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.

2. Within 60 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive EEO training to the management official identified as SBPA-2 if that individual is still employed by the Agency. The training shall focus on the laws, regulations, and policies governing confidentiality of medical information, and shall include a discussion of the circumstances under which such information shall and shall not be disclosed.

POSTING ORDER (G0617)

The Agency is ordered to post at the Brian A. Terry Station in Bisbee, Arizona 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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 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).

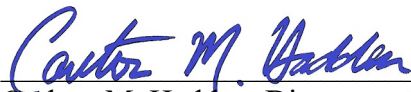
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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.

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

April 8, 2021
Date