



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

[REDACTED]
Charlie K.,¹
Complainant,

v.

Charlotte A. Burrows,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal No. 2020002521

Agency No. 2018-0053

DECISION

On February 3, 2020, 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 December 15, 2019, final decision 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

- 1) Whether the Agency properly dismissed claims 1 and 2 on the grounds of timeliness; and
- 2) Whether Complainant proved that he had been subjected to discrimination when he was denied his Fourth Quarter FY2018 IDP training 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.

² In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent Agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party in this action. The Chair has abstained from participation in this decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Equal Opportunity Investigator, GS-1860-12/09 at the Agency's Denver Field Office (DENFO) in Denver, Colorado.

On October 17, 2018, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of race (Latino³), national origin (Hispanic/Mexican), sex (male), color (brown⁴), disability (physical), and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. On or about March 27, 2018, Complainant was informed that he would not be granted a Quality Step Increase (QSI) award;
2. Complainant was denied the Second and Third Quarter Fiscal Year (FY) 2018 Individual Development Plan (IDP) training request; and
3. Complainant was denied the Fourth Quarter FY2018 IDP training request.

The Agency's EEO Office issued Complainant a notice on April 8, 2019, accepting claim 3 for investigation. Claims 1 and 2 were dismissed due to untimely EEO counselor contact in accordance with 29 C.F.R. § 1614.105(a). Specifically, the Agency noted that Complainant did not initiate EEO contact until July 28, 2018, more than 45 days after the incidents occurring in claims 1 and 2.

Following the EEO investigation into claim 3, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In issuing the final decision, the Agency reaffirmed its dismissal of claims 1 and 2 pursuant to 29 C.F.R. § 1614.107(a)(2). With regard to claim 3, the Agency found that Complainant failed to show that he had been subjected to discrimination as alleged. Specifically, the Agency found that Complainant's second level supervisor, the DENFO Enforcement Manager (S2) did not have time to act on the request until the day after the deadline because Complainant's first-level supervisor forwarded the training request to her on May 23, 2018, while she was accompanying her husband to the hospital emergency room. The Agency argued that the tardy submission of Complainant's training request was merely an error and not discriminatory. This appeal followed.

³ The Commission considers the term "Latino" to denote a national origin rather than a race. The legal analysis for the bases of race and national origin are the same.

⁴ In his formal complaint, Complainant identified his color as "non-black and non-white." ROI at 000021. On appeal, Complainant now identifies his color as brown.

CONTENTIONS ON APPEAL

On appeal, Complainant initially requests that the Commission consolidate the instant appeal with EEOC Appeal No. 2020002546 (Agency No. 2017-0020) which involves the February 23, 2017 distribution of the electronic posting ordered in Appeal No. 0120142315 with Complainant's real name, rather than the pseudonym provided by the appellate decision.

With regard to the dismissal of claims 1 and 2, Complainant contends that the Agency, in dismissing these claims, "ignored an ongoing pattern of discrimination by incorrectly narrowing the scope of [the instant complaint] by asserting timeliness issues." He asserts that under the continuing violation doctrine, "even a single act within the statute of limitations can show a 'persistent, ongoing pattern' of discrimination by bringing actions outside the period." Thus, he contends that claims 1 and 2 should not have been dismissed.

As for claim 3, Complainant maintains that the Agency improperly denied his training request. He reasons that the denial was based on discriminatory motive because all of his training requests were denied after he filed an EEO complaint against the District Director.

The Agency opposes the appeal and requests that the Commission affirm the FAD in its entirety.

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").

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.606 provides that the Commission may, in its discretion consolidate two or more complaints of discrimination filed by the same complainant. We note that the matters raised in Complainant's appeals, 2020002546 and 2020002521, are not related and occurred over a year apart. Accordingly, we decline to consolidate the matters.

Dismissal of Claims 1 and 2

On appeal, Complainant maintains that the Agency should not have dismissed claims 1 and 2 on the grounds of timeliness because the continuing violation doctrine permits the inclusion of

otherwise time-barred claims. While the continuing violation doctrine does indeed allow an otherwise untimely claim to be accepted for processing if it is part of a series of related violations where at least one discriminatory event occurred within the relevant timeframe, we note that the U.S. Supreme Court in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002) rejected the use of the continuing violation doctrine in cases involving discrete acts of discrimination. Morgan, 536 U.S. at 113. We note that the Commission has previously applied Morgan's discrete act rule to denial of QSI award and training claims. See Davis v. Dep't of Health and Human Servs., EEOC Appeal No. 0120130989 (June 13, 2013) (finding denial of QSI award to be a discrete act); and Parker v. Dep't of State, EEOC Appeal No. 0120111931 (July 11, 2011) (finding denial of training opportunities to be a discrete act), req. for recons. den., EEOC Request No. 0520120034 (Jan. 6, 2012)

Applying Morgan here, we find that Complainant cannot rely on the continuing violation doctrine to make actionable an otherwise time-barred claim. For claims 1 and 2 to be considered timely, they would have had to have occurred on or after June 13, 2018, which is the 45th day prior to July 28, 2018, the date when Complainant first initiated contact with an EEO counselor. Having reviewed the record, we find that Complainant was well aware of his rights and the alleged discriminatory nature of the incidents; however, he failed to initiate EEO contact, until well after the 45-day regulatory timeframe. We therefore conclude that the Agency properly dismissed claims 1 and 2 as discrete acts pursuant to 29 C.F.R. § 1614.107(a)(2).

Claim 3

For Complainant to prevail on his claim of disparate treatment, he 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 he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

Assuming, arguendo, that Complainant established a prima facie case of discrimination, we find that the Agency articulated a legitimate, nondiscriminatory reason for its action. As discussed above, S2 acknowledged that she failed to timely submit Complainant's Fourth Quarter FY2018 IDP training request. However, she emphasized that she had been dealing with a family emergency at the time and was unable to submit Complainant's request until the day after the deadline. S2 added that she tried to get an exception to the deadline, but the District Resources Manager declined to grant an exception because the Agency had too many applications to process.

In arguing pretext, Complainant asserts on appeal that the denial of his training request was based on discriminatory motive because all of his training requests were denied after he filed an EEO complaint against the District Director.

While we recognize that S2 failed to timely submit Complainant's training request, we note that S2's failure was due to a family emergency. We have long held that a mistake made by an agency is not evidence of pretext unless there is evidence that the mistake was based on a complainant's protected classes. See Vickey S. v. Dep't of Def., EEOC Appeal No. 0120112893 (Nov. 17, 2015); Hsieh v. Dep't of Veterans Affairs, EEOC Appeal No. 0120120980 (June 4, 2012); Carroll v. Dep't of Justice, EEOC Appeal No. 01A20985 (Jan. 21, 2003). Having reviewed the record, including Complainant's contentions on appeal, we find that Complainant failed to make such showing.

To the extent Complainant asserts that the denial of his training request amounted to a hostile work environment, we find that a finding of harassment is precluded due to our determination that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01932923 (Sep. 21, 2000).

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 decision.

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 (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/ Shelley Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

October 13, 2021

Date