



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Art B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Intelligence Agency),
Agency.

Appeal No. 2021001321

Hearing No. 510-2018-00407X

Agency No. DIA-2017-00037

DECISION

On December 16, 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 October 22, 2020 final order concerning an equal employment opportunity (EEO) complaint claiming 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the relevant time, Complainant worked for the Agency as the Chief of the Special Security Office (SSO), GG-15, in Tampa, Florida.

On April 13, 2017, Complainant filed formal EEO complaint alleging that the Agency discriminated against him on the bases of sex (male), disability (recurring kidney stones), age

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.

(59), and in reprisal for engaging in protected EEO activity (the instant complaint - Agency No. DIA-2017-00037)² when:

- a. In September 2015, he was belittled and threatened by his first line supervisor, [named individual WD], hereinafter RMO1.
- b. From 2015 to 2016, RMO1 ridiculed and mocked him.
- c. On several occasions from 2015 to 2017, RMO1 belittled him in front of an Agency official.
- d. In 2016, on several occasions, RMO1 mentioned it was time for Complainant to move on and suggested that Complainant hire young people for positions within the SSO.
- e. On January 12, 2017, RMO1 belittled Complainant in front of [named individual LS].
- f. On January 12, 2017, RMO1 embarrassed Complainant in front of LS by stating that Complainant's kidney ailments have affected his behavior and have made him an angry person; Complainant further alleged that WD stated in front of LS that Complainant was not performing to his full potential.
- g. On January 18, 2017, RMO1 sent Complainant an email accusing him of calling Complainant's Deputy and Branch Chiefs racists.
- h. On January 20, 2017, RMO1 humiliated Complainant by discussing Complainant's health information, the fact that Complainant discussed RMO1's proposal to remove him from his position as SSO with his second line supervisor, [named individual GR], hereinafter RMO2, and accused Complainant of underperforming in the presence of an Agency official.
- i. On April 11, 2017, RMO1 insisted that Complainant had called the Deputy and Branch Chief racists and stated that Complainant was unsuccessful in meeting the performance objectives in his midpoint assessment in front of [named individual MM].
- j. On April 27, 2017, RMO1 did not recommend Complainant for the Supervisory Security Specialist Joint Duty Assignment, USA-17-0031C in Afghanistan.

² According to Complainant's brief on appeal, the EEO counselor first notified management that Complainant had sought EEO counseling was on March 27, 2017.

- k. On August 30, 2017, [named individual AH] conducted a fact-finding interview to discuss allegations that Complainant had created a discriminatory hostile work environment based on race.
- l. In August 2017, Complainant became aware that in April and May of 2017, RMO1 was speaking with his co-workers to inquire about Complainant raising his voice and having disagreements with employees.
- m. On October 10, 2017, he was informed that he was not selected for the Security Officer/SSO – Bagran Afghanistan deployment opportunity.
- n. On December 13, 2017, RMO2 issued him a Letter of Counseling for unprofessional behavior in the presence of his new supervisor.

After an 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). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's January 30, 2020 motion for a decision without a hearing and issued a decision by summary judgment on October 13, 2020, finding no discrimination. The Agency subsequently issued a final order adopting the AJ's decision.

The instant appeal followed.

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

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. 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.

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 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 for Complainant.

Harassment/Hostile Work Environment

Complainant alleges that he was harassed and subjected to a hostile work environment by supervisory Agency officials that included these officials making threats, accusing him of not performing to his full potential, and questioning his leadership and management skills. Complainant further alleges that Agency officials harassed, belittled, and intimidated him concerning his medical condition and by accusing Complainant of calling high-ranking Agency officials racists.

To prove his hostile work environment harassment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case, his sex, disability, age, or prior protected activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

While Complainant alleges some harassing actions in 2015-2016, he solely concentrates on the events starting in 2017 in his brief submitted on appeal. The record indicates that in January 2017, several senior supervisors met with RMO1 and accused Complainant of fostering a hostile workplace. Senior supervisors reported that employees felt threatened by Complainant and that he yelled at SSO employees. In addition, Agency management indicates that when Complainant was questioned about his behavior, he accused those who complained about him of being racists. According to the record, RMO1 met with Complainant on January 12, 2017, about the allegations made against him. RMO1 reported that Complainant became angry and wanted to know the names of everyone who had made accusations.

The record further indicates that RMO1 memorialized his meeting with Complainant in a document dated January 18, 2017, entitled “Concerns Efficiency and Hostile Work Environment in SSO, CCJ2”. Therein, RMO1 described complaints he received from SSO employees about Complainant and noted Complainant's “slow and late SSO responses to work requirements which RMO1 attributed to Complainant's poor working relationship” with SSO employees. Finally, the AJ found, and the record supports, a determination that Complainant himself had disclosed his kidney condition to management as part of his claim that the condition itself, as well as attendant medications, made him angry and could explain why employees were concerned about him.

We determine that Complainant fails to establish a viable harassment claim. We concur with the AJ's finding that the actions complained of appear to be nothing more than routine work assignments, instructions and admonishments which by definition or neither severe nor pervasive enough to support a claim of harassment sufficient to violate the employment discrimination statutes.

In sum, we agree with the AJ's conclusions that the Agency management witnesses articulated legitimate, non-discriminatory reasons for the disputed actions and there is no evidence to suggest a discriminatory or retaliatory motivation. Complainant's claim of harassment is precluded based on our findings that Complainant failed to establish that any of the actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

Disparate Treatment: Claims j, m and n

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII case alleging discrimination is a three-step process. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); see Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), *aff'd* 545 F.2d 222 (1st Cir. 1976) (applying McDonnell Douglas to retaliation cases). 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 or unlawful retaliation. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas 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, 143 (2000); St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases.

Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Here, we recognize that the decisions not to recommend Complainant for a joint duty assignment or an assignment in Afghanistan, as well as the issuance of the Letter of Counseling occurred shortly after management was interviewed by the EEO counselor in late March-early April 2017. As such, Complainant has arguably established a prima facie inference of retaliation. However, in response to Complainant's allegations concerning these matters, the Agency's management witnesses averred that given Complainant's shortcomings and complaints about his supervisory performance, he was not recommended for these opportunities. Moreover, they asserted that the Letter of Counseling was issued a result of his "unprofessional behavior in the office" particularly engaging "in unproductive communications", and not due to his protected classes. Complainant failed to prove, by a preponderance of the evidence, that these proffered reasons were a pretext masking a true discriminatory or retaliatory motivation.

CONCLUSION

We AFFIRM the Agency's final order adopting the AJ's finding of no discrimination or unlawful retaliation.

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:



Carlton M. Hadden, Director
Office of Federal Operations

June 14, 2022

Date