



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

[REDACTED]
Wilbur R.,¹
Complainant,

v.

Gina M. Raimondo,
Secretary,
Department of Commerce
(National Oceanic & Atmospheric Administration),
Agency.

Appeal No. 2021002250

Hearing No. 480-2017-00250X

Agency No. 54-2016-00119

DECISION

On March 1, 2021, 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 January 28, 2021 final order 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., 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

At the time of events giving rise to this complaint, Complainant worked as a Meteorological Technician, GS-5, at the Agency's Weather Station in American Samoa.

On March 15, 2016, Complainant filed a formal EEO complaint that the Agency discriminated against him on the bases of race (Native Hawaiian/Pacific Islander), disability (30% disabled

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.

veteran), age (born 1959) and reprisal when Complainant was terminated from his position effective February 10, 2016.

The Agency accepted the complaint and conducted an investigation which produced the following pertinent facts.

Complainant began work with the Agency as a GS-5 Meteorological Technician on February 23, 2015. His appointment was subject to a one-year probationary period. In October 2015, Complainant received an annual evaluation, where he was rated as "Meets or Exceeds" expectations in all critical elements. Complainant's first line supervisor (S1) and second line supervisor (S2) signed the evaluation on October 18, 2015.

Complainant was terminated from his position on February 10, 2016, just two weeks before his probationary period ended. The Notice of Termination (Notice) was issued by S2, and it stated that Complainant's "performance does not meet the standards and expectations required" of him. Specifically, the Notice stated Complainant: 1) failed the Upper Air test (also known as the weather observation test), and (2) failed to complete the Flash Flood Hydrology and Warning Operations course prior to the mandatory deadline of September 30, 2015.

S1 testified that Complainant was "a very capable and excellent probationary employee and should not have been terminated." S1 stated that based on his daily observations, Complainant "was successfully performing his job duties." S1 stated that S2 made the decision to terminate Complainant from the Agency "due to discrimination," and the reasons that S2 listed for Complainant's termination were inaccurate. S1 stated the Upper Air test was not a mandatory requirement for technicians in Complainant's position. S1 pointed out that the test was not mentioned in Complainant's position description. S1 testified that S2's claim that Complainant complete failed to complete the Flash Flood Hydrology and Warning Operations training prior to the mandatory deadline was "false." S1 stated that Complainant completed the training with his mentor, and the training was not recorded due to "some sort of computer glitch."

S2 testified that he made the decision to terminate Complainant from the Agency because Complainant failed the Upper Air test and failed to timely complete required training. S2 stated that his office never received any information or documentation to confirm that there was a computer glitch in connection with the Flash Flood Hydrology and Warning Operations training or that Complainant had completed the training prior to the mandatory deadline. With regard to the Upper Air test, S2 testified that all Meteorological Technicians at the GS-5 level are required to pass the test because they are responsible for the preparation and launching of upper air weather balloons. S2 testified that this key job function is listed in Complainant's position description and performance plan.

The record contains a copy of position description for a GS-5 Meteorological Technician and it states that the duties and responsibilities include:

Performs complex but repetitive tasks such as verifying observation listings, extracting data from telecommunications messages and sorting surface observations, editing surface observations, preparing climatological tabulations, maintaining climatological records, computing/compiling/editing data, etc. Inputs data into automated system, retrieves data.

The record also includes a copy of Complainant's performance plan, critical element 1 states that Complainant is required to:

Work rotating shifts and participate in a full range of WSO Pago Pago programs and functions to acquire on-the-job experience necessary for advancement. Participate in the observation program, including surface observation and upper air programs. Operate communication systems to interpret and integrate observation models and other data set. Prepare various hydro-meteorological observations and assist with preparation of forecasts and warning products for distribution to customers and other users. Operate NOAA Radio and other dissemination systems. Participate in the watch/warning program and assist in issuing severe weather and flood related products. Provide public service and other briefings as required.

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 Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing.

The Agency submitted a motion for a decision without a hearing. The AJ granted the Agency's motion and issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed. Complainant submitted a brief arguing that there are inconsistencies with S1 and S2's testimony. Complainant argued that if balloon observations were not part of the major responsibilities for a GS-5 Meteorological Technician, the requirement would have been explicitly stated in the position description, like it was explicitly stated in the position description for a GS-6 Meteorological Technician. The Agency submitted a reply brief arguing that balloon observation requirement was included in critical element 1 of Complainant's performance plan.

ANALYSIS AND FINDINGS

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, Complainant has established such a dispute. Complainant has identified significant inconsistencies with S1 and S2’s testimony concerning the reasons for Complainant’s termination. S1 and S2 gave conflicting testimony on the Upper Air test. S1 stated the Upper Air test was not a mandatory requirement for technicians in Complainant’s position, whereas S2 testified that the test was a mandatory requirement. Although the record contains copies of Complainant’s job description and performance plan, the wording in these documents is too vague for us to conclude that the Upper Air test was a mandatory requirement. Testimony is required on this issue. S1 and S2 also gave conflicting testimony on the Flash Flood Hydrology and Warning Operations training. S1 testified that he informed S2 that Complainant completed the mandatory training timely, and S2 testified that he never received any information or documentation to confirm that Complainant completed the training timely or there was a computer glitch in connection training. Also, S2 testified that Complainant was not terminated based on a protected basis, which is a stark difference to S1’s testimony. S1 testified that S2 made the decision to terminate Complainant from the Agency “due to discrimination,” and that Complainant was “a very capable and excellent probationary employee” who “should not have been terminated.” Moreover, the record contains Complainant’s October 18, 2015 annual evaluation, signed by both S1 and S2, where his work performance was rated as satisfactory. However, less than four months later, S2 terminated Complainant, at least in part, for failure to complete training within that same rating period. Given the foregoing, we find that the AJ erred when he concluded that there was no genuine issue of material fact in this case that required a hearing.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e).

“Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims.” Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials and Complainant, himself. Therefore, judgment without a hearing for the Agency should not have been granted.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission reverses the Agency's final action and remands the matter to the Agency in accordance with this decision and the Order below.

ORDER

Within 30 calendar days from the date this decision is issued, the Agency is directed to resubmit a request for a hearing to the Hearings Unit of the EEOC's Los Angeles District Office, along with the complete complaint file and a copy of this appellate decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

June 16, 2022

Date