



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

[REDACTED]
Oliver M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2022000598

Hearing No. 410-2019-00434X

Agency No. ARSTEWART18JUL02976

DECISION

On November 15, 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 October 13, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. 1614.405.

BACKGROUND

In January 2018, Complainant, an Obstetrician/Gynecologist with decades of experience, was recruited by the Agency and entered a Relocation Incentive Services Agreement. This agreement provided him with a one-time incentive bonus in exchange for at least two years of service. In March 2018, Complainant began working at the Agency's Winn Army Community Hospital in Fort Steward, Georgia. His first-line supervisor, a Nurse Midwife, was the Officer in Charge (hereinafter "OIC-F"). The Chief of the OB/GYN Department was his second-level supervisor (hereinafter "Chief-M").

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.

Believing that he was subjected to a hostile work environment that culminated in his constructive discharge, on November 1, 2018, Complainant filed a formal complaint based on sex (male), age (62), religion (Catholic), and national origin. The events comprising the complaint were defined as follows:

1. On or about June 6, 2018 [Chief-M] informed him that effective immediately, he was removed from coverage from the Labor and Delivery (L&D) unit as an Obstetrician because of a previous Caesarian-section (C-section) birth, in which he was the attending physician.
2. On or about June 7, 2018, [OIC-F] and [the Medical Officer (hereinafter "Doctor R")] issued him a Letter of Counseling that contained various unsubstantiated and vague patient allegations.
3. On or about June 15, 2018, [OIC-F] and [Doctor R] presented him with a highly critical peer review drafted by [a colleague (hereinafter identified as "Doctor B")] which contained specific patient cases and failed to provide Complainant with the ability to rebut the review.
4. On or about June 15, 2018, [OIC-F] and [Doctor R] discussed various patient complaints with him and threatened that an investigation into the complaints would be conducted if he did not resign from his position.
5. On or about June 27, 2018, [OIC-F] and [Doctor R] advised him to resign and informed him that he was not to return to the L&D floor as an Obstetrician.
6. On or about July 9, 17, and 19, 2018, and August 24 and 27, 2018, he submitted his resignation and sought waivers of his signing and relocation bonuses. The Agency, however, declined his resignation and stated they were without the authority to waive repayment.
7. On or about September 12, 2018, the Agency informed him that only a pro-rated portion of his relocation bonus would be waived.

Complainant alleged that the harassment began "almost as soon as he reported for duty". Complainant asserted that he was singled out as the only male OB/GYN employee and an older male, by OIC-F (female, y.o.b. 1980, American) and Doctor-R (female, y.o.b. 1978, American). Complainant claimed that they repeatedly degraded, criticized, and spread rumors about him. Complainant was allegedly told he was "not a good fit," should "watch his back," and refrain from buying a home in the area.

Regarding claim (1), Complainant argued that the purported “sentinel event” was pretext as the incident was found not to meet the standards of a sentinel event and he was never given the opportunity to defend himself.² Further, he contended that the actions of the Nurse/Anesthesiologist (hereinafter “Nurse”) (female, age and national origin not identified) participating in the delivery were at fault, and she was not investigated. Complainant asserted further that a younger, female physician (hereinafter “Doctor-L”) (female, y.o.b. 1959, American) engaged in a sentinel event, that resulted in an infant skull fracture, and she was not removed from L&D or suspended from deliveries.

Regarding the letter of counseling (claim 2), Complainant believed the discipline was discriminatory because he was not provided with details as to which patient cases it was based upon. Complainant asserted that, instead, OIC-F relied on unnamed colleagues with vague “concerns.” Similarly, he argued that the peer review (claim 3), conducted by the youngest doctor on staff – Doctor-B (female, unknown, unknown), was further evidence of OIC-F and Doctor-R’s discriminatory efforts to get him to resign.

Complainant asserted that these efforts continued with threats of an investigation (claim 4), which would be included in his permanent record. Complainant stated that he was also threatened with placement on a Performance Improvement Plan (PIP) if he did not resign. He asserted that Doctor-R said she would be reviewing all his charts, implying that she would be looking for excuses to terminate him if he did not resign.

Even after submitting his resignation, Complainant believed the harassment continued when the Agency failed to resolve the matter of his relocation bonus (claims 6 and 7). When the Agency stated it needed time to consider his requested waiver of repayment, Complainant stated he took the balance of his leave to allow the new Commander to gather information and make a determination regarding the debt. Complainant claimed, however, that the waiver was not granted, and he was threatened with being charged Absent Without Leave (AWOL) if he did not report to duty on August 27, 2018. Even when the Agency later informed Complainant that the debt would be waived, he subsequently received a notice of the monies owed, which he paid in January 2019.

After an investigation into the complaint, 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. However, on August 6, 2021, the AJ assigned to the case issued a “Notice of Intent to Issue a Decision Without a Hearing.” After considering statements from both parties, the AJ issued a decision by summary judgment on August 25, 2021. The AJ reasoned that Complainant did not identify any genuine issue of material fact or prove that he was treated differently than other employees. The AJ found that the comparators cited by Complainant were not shown to be similarly situated. For example, he was a probationary employee while the other employees were not.

² A “sentinel event” is a medical term reflecting a patient safety event that results in death, permanent harm, or severe temporary harm.

The AJ concluded that Complainant identified “nothing more than unsupported allegations and speculation”.

Subsequently, on October 13, 2021, the Agency issued a final order adopting the AJ’s finding that Complainant failed to prove that the Agency subjected him to discrimination. Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

Standard of Review

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. (Aug. 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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ’s, and Agency’s, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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”).

Summary Judgment

The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge 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 “material” fact has the potential to affect the outcome of a case.

Moreover, an AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003).

On appeal, Complainant argues that there are several material facts in dispute and issues of credibility that require a hearing. Complainant contends that the facts surrounding the purported sentinel event³ are “undeniably in dispute”, noting that the testimony by Chief-M and Doctor-R themselves appear to conflict. According to Doctor-R, states Complainant, the Nurse only administered the medication after the umbilical cord was clamped and was blameless. Yet, Chief-M attested that the Nurse involved in the birth was removed from L&D and had her privileges suspended. Moreover, argues Complainant, the record is unclear regarding comparator Doctor-L and whether she was involved in a sentinel event and violated the standard of care. While the Agency points to Complainant’s status under a FPPE (Focused Professional Performance Evaluation)⁴ as a distinction, Complainant asserts that the record does not reflect when Doctor-L’s sentinel event occurred and whether she too was subject to a FPPE. He notes that the record does not contain testimony from anyone who witnessed the birth that led to his removal from L&D and the LOC.

Based on our review, we find that the record is not adequately developed. Here, Complainant contends that the sentinel event was pretextual and that a similarly situated, younger, female physician (Doctor-L) was treated more favorably in that she was not removed from L&D, issued a letter of counseling, or pressured to resign following a potentially sentinel event. Doctor-R, an OB/GYN colleague who described herself as “while not in an official capacity, I was also referred to as Deputy Chief by [Chief-M]”, attested that Complainant was removed from L&D due to concerns raised by nurses and physicians regarding the care delivered by him. Yet, apart from OIC-F and Chief-M, there is no testimony from these individuals. In fact, Doctor-R names six individuals, including two of the comparators identified by Complainant and the physician who issued the negative peer review, and yet the record does not contain testimony from *any* of them.

In discussing Doctor-L’s comparative case, where a vacuum extraction allegedly resulted in a skull fracture, OIC-F attested that the case was reviewed by the department “in a morbidity and mortality review” and the standard of care was not found to have been violated. However, it is unclear when this department review transpired, what Doctor-L’s status was pending the review, and whether such review was the equivalent of the Department of Safety assessment of Complainant’s case.

³ The incident was later found *not* to be meet the standards for a “sentinel event”.

⁴ During the first 90-days an initial FPPE is comprised of a review of least five charts per month. Thereafter, quarterly FPPEs are conducted.

As for Complainant's c-section case, Doctor-R acknowledged she was not present, but was informed that sequential application of vacuum and forceps had occurred prior to the c-section delivery. In response to Complainant's assertion that the infant had low APGARS and was transferred as a result of the Nurse's actions, Doctor-R again admitted she was not present, but theorized the respiratory depression in the infant was "more likely" due to deferred delivery and lack of urgency. In contrast, when questioned about another of Doctor-L's cases, where she had scheduled an induction and Complainant ordered a repeat sonogram which revealed the baby's size necessitated the cancellation of the induction, OIC-F declined to theorize on what may or may not have occurred if Doctor-L's plan of care had not been altered.

With respect to the letter of counseling, we find the record is also deficient. In an effort to establish an inference of discrimination, Complainant argued that Doctor-R relied entirely on unnamed colleagues and vague "concerns" in issuing the discipline. According to Chief-M, Doctor-R drafted the letter at OIC-F's request. Doctor-R's June 7, 2018 memorandum lists concerns by L&D nurses, to include the following: unnecessary roughness in cervical exam of laboring patient; failure to actively manage patients admitted for labor induction; and ineffective communication and triaging of patients. From his colleague physicians, identified concerns included: sequential application of vacuum and forceps during attempted vaginal delivery; and multiple diagnosis of 'nascient' chorioamnionitis, with subsequent administration of antibiotics, without meeting criteria for diagnosis.

However, when asked about the letter of counseling, OIC-F's testimony was short on details, often stating, "[a]t this time I do not have knowledge, as I do not have access to the LOC [letter of counseling] ... and do not remember the exact contents...". When asked for witnesses to Complainant's problematic conduct or performance, that led to the letter, OIC-F failed to identify any individuals, only attesting, "I do not remember the name of the RN who was in the [c-section at issue] ..."

Doctor-R attested that an inquiry was conducted that led to the letter of counseling, that a "review of cases cited by physician colleagues revealed deviation from current ACOG guidelines. . ." However, evidence of such an inquiry is not included in the instant record. In response to Complainant's denied application of forceps or vacuum pop-offs, Doctor-R testified that witnesses reported several pop-offs. However, only one of the four witnesses identified by Doctor-R, the pediatrician on-call, was interviewed and did not have information regarding Complainant's care during the delivery.

The negative peer review, conducted by Doctor-B, was also cited as a reason for management's actions. Complainant argues that Doctor-B was the youngest doctor on staff and had not yet even completed her boards. When asked why she was selected to conduct Complainant's review, OIC-F did not recall how she was selected. Doctor-R attested that she was simply selected because of her Active-Duty status, that "Active Duty Physicians are assigned the responsibility of performing initial FPPE" and after the initial three month period, quarterly FPPE reviews are rotated within the physician pool.

The Chief Medical Officer, attested that Doctor-B was chosen to do the review because “[s]he was a relatively new physician at Winn, had not worked frequently with Complainant and was felt to be impartial.” The management officials were also inconsistent in their answers regarding whether the opportunity for rebuttal was available for peer reviews.

As for patient complaints, the record contains a chart listing three complaints against Complainant from June 2018. The substance of the complaints is limited, only a sentence; one of the three complaints concerns “a horrible experience in the OB/GYN clinic,” not with Complainant in particular. The other two make reference to a lack of compassion exhibited by Complainant. In another document regarding patient complaints over a two-year period, nine doctors are listed as having been identified in patient complaints, including OIC-F and Doctor-R. However, the nature of the complaints is not provided. The inadequacy of the record regarding patient complaints is further illustrated by OIC-F’s testimony as she could not recall the nature of the complaints nor how many there were.

Additionally, we note that in finding no discrimination, the AJ reasoned that Complainant’s comparators were not similarly situated because he was in his probationary period, and they were not. However, we find that Complainant has persuasively argued on appeal that this is a distinction without a difference. Citing Idell M. v. United States Postal Svc., EEOC Appeal 0120132276 (Dec. 9, 2015), Complainant contends that where the probationary status of the individual was not relevant to the action taken against the employee, a comparator with a different status may still be considered similarly situated. In this case, the fact that Complainant was in the first 90 days of his employment with the Agency was not relied upon by the Agency for its actions. We acknowledge that the Agency points to Complainant’s FPPE as a distinguishing characteristic, it is unclear whether, for example, Doctor-L was under a FPPE at the time of her possibly sentinel event.

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 to examine and cross-examine witnesses.” See EEOC Management Directive (MD) 110, as revised, November 9, 1999, Chapter 7, page 7-1; 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.” Mi S. Bang v. United States Postal Service, EEOC Appeal No. 01961575 (March 26, 1998).

See also Peavley v. United States Postal Service, EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. United States Postal Service, EEOC Request No. 05940578 (April 23, 1995). In this case, there exist genuine issues of material fact and credibility determinations to be made. Therefore, judgment as a matter of law for the Agency should not have been granted.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, the Agency's final action is VACATED, and the case is REMANDED in accordance with this decision and the ORDER below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is directed to submit to the EEOC Hearings Unit of the Atlanta District Office a new request for a hearing on this complaint on Complainant's behalf, as well as a copy of the complaint file and 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 AJ shall process the hearing request and hold a hearing in accordance with 29 C.F.R. § 1614.109, unless the AJ determines that a decision without a hearing is appropriate. The Agency shall then 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

February 8, 2023

Date