



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Homer S.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Great Lakes Area),
Agency.

Appeal No. 0120181759
Hearing No. 440-2016-00107X
Agency No. 1J603003915

DECISION

On April 30, 2018, 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 April 5, 2018, 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., the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 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 order.

ISSUES PRESENTED

In the instant appeal, we examine whether the EEOC Administrative Judge properly issued a decision without a hearing finding that Complainant did not establish that he was discriminated against based on race (African-American), sex (male), color (Brown), disability, age (69), and reprisal for prior protected EEO activity when:

1. On April 24, 2015, he was instructed to report for a Fitness for Duty evaluation before he was permitted to work, and subsequently after he passed management requested more testing and additional documentation;

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 April 23, 2015, he was placed on Emergency Placement; and
3. He received a Letter of Intent, dated May 26, 2015, which was subsequently removed from his record.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Tractor Trailer Operator at the Agency's Carol Stream Processing and Distribution Center facility in Carol Stream, Illinois. The AJ's decision thoroughly discussed the facts in the record, and the instant decision incorporates them as stated. On July 29, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him as articulated in the statement of Issues Presented above. 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 Administrative Judge (AJ). Complainant timely requested a hearing. After both parties submitted motions for a decision without a hearing, the AJ assigned to the case issued a decision without a hearing on March 19, 2018. The record reflects that both Complainant's response to the Agency's motion, and his own motion for summary judgment, were void of a statement of alternative undisputed facts, or reference to any evidence to establish that the facts as presented by the Agency were in dispute. 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.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates many of the arguments he made in his initial complaint. He is requesting that the Commission reinstate his claim, and that the Agency be ordered to pay him backpay for the period of time he was subjected to discrimination. The Agency did not respond to the appeal.

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”).

ANALYSIS AND FINDINGS

We must determine whether the AJ appropriately issued the decision without a hearing. 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 for 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.

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). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, aside from presenting a completely new statement of facts, Complainant does not present any specific arguments contesting the AJ’s issuance of a decision without a hearing. After a review of the record, we find that there are no genuine issues of material fact or any credibility issues which required a hearing and therefore the AJ’s issuance of a decision without a hearing was appropriate. The record has been adequately developed, Complainant was given notice of the Agency’s motion to issue a decision without a hearing, he was given a comprehensive statement of undisputed facts, he was given an opportunity to respond (and did) to the motion and statement of undisputed facts, and he had the opportunity to engage in discovery. As noted above, Complainant filed his own motion for summary judgment. Under these circumstances, we find that the AJ’s decision without a hearing was appropriate.

Disparate Treatment & Reprisal

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII, ADEA and Rehabilitation Act cases alleging discrimination is a three-step process. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); see

Hochstadt v. Worcestor 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). First, Complainant must establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination; i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802. Next, the Agency must articulate a legitimate, nondiscriminatory reason(s) for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, then Complainant must prove, by a preponderance of the evidence, that the legitimate reason(s) proffered by the Agency was a pretext for discrimination. Id. at 256.

Assuming, *arguendo*, that Complainant established a prima facie case of discrimination based on race, color, age, disability and reprisal, we find that the Agency articulated a legitimate, non-discriminatory reason for each of the actions taken by Agency management. The record reflects that on January 25, 2013, March 12, 2013, April 20, 2013 and April 19, 2015, Complainant was involved in work-related motor vehicle accidents. It was determined that Complainant was at fault in two of the accidents. Before the last two accidents, Complainant was diagnosed with heart disease and underwent heart surgery on December 12, 2014. He was off work beginning on November 1, 2014 and was cleared to return with medical restrictions on February 24, 2015. On February 27, 2015, Complainant was required to undergo a medical examination before returning to work which is customary when a driver is absent from work due to a serious medical condition and is planning to perform safety sensitive duties upon return.

The record reflects that Complainant failed to report the accident April 19, 2015 accident immediately, and that it wasn't until the vehicle was subject to a pre-trip inspection that damage to the vehicle's front bumper and headlight were discovered and the accident officially reported. In response, the record reflects that Complainant was placed on Emergency Placement in off-duty status and was issued a 14-day suspension for unsafe driving practices, failure to report a motor vehicle accident, and for attempting to conceal the accident. The number of accidents Complainant had within a short period of time were taken into consideration when the decision was made.

On April 24, 2015, Complainant was asked to report for a second physical after management was informed that a medical condition may have contributed to the April 19, 2015 accident. Complainant failed to report and was subsequently placed on Leave Without Pay. A Letter of Intent (LOI) was issued during the time that Complainant was out of work to inform him that medical documentation was needed to support his absences. On May 26, 2015, Complainant's doctor submitted a statement indicating that he was unable to work due to work-related stress. Additionally, Complainant was already off-duty because he needed to pass the physical exam. No further action was taken and the LOI was removed from Complainant's record. Complainant did not submit any additional documentation until he returned to work on June 22, 2015 with a note indicated that he was incapacitated due to work-related stress from April 23, 2015 to June 22, 2015.

Regarding claim 1, whether or not Complainant is an individual with a disability is irrelevant to the issue of whether the Agency properly requested he submit medical examinations because the

Rehabilitation Act's limitations regarding disability-related inquiries and medical examinations apply to all employees. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (Enforcement Guidance on Disability-Related Inquiries), No. 915.002 (July 27, 2000). The inquiry may be made, or the examination ordered only if it is job-related and consistent with business necessity. See 29 C.F.R. §§ 1630.13(b), 1630.14(c). This means that the employer must have a reasonable belief based on objective evidence that an employee will be unable to perform the essential functions of his or her job or pose a direct threat because of a medical condition. Enforcement Guidance on Disability-Related Inquiries, at Q.5. Objective evidence is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with his ability to perform essential job functions or will result in direct threat. *Id.* It is the burden of the employer to show that its disability-related inquiries and requests for medical examination are job-related and consistent with business necessity. See Solomon B. v. Dep't of Homeland Sec., EEOC Appeal No. 0120162325 (Jan. 25, 2018) (citing Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120060363 (Oct. 9, 2007)).

Based on the record, we find that the Agency directed Complainant to report for medical examinations and made other medical inquiries that were for reasons that were job related and consistent with business necessity. The record indicates that Complainant was diagnosed with heart disease and underwent heart surgery on December 12, 2014. He was off work beginning on November 1, 2014 and was cleared to return with medical restrictions on February 24, 2015. On February 27, 2015, Complainant was required to undergo a medical examination before returning to work which is customary when a driver is absent from work due to a serious medical condition and is planning to perform safety sensitive duties upon return. Likewise, on April 24, 2015, Complainant was asked to report for a second physical after management was informed that a medical condition may have contributed to his April 19, 2015 accident.

We also find that Complainant failed to demonstrate that the Agency's decisions to: (1) direct him to report for a Fitness for Duty evaluation before he was permitted to work; (2) place him on Emergency Placement; and (3) issue him a LOI (which was subsequently removed from his record) were pretext for discrimination. Complainant offers nothing more than bare, unsupported statements that the Agency's actions were motivated by discrimination. Additionally, Complainant's comparator analysis fails. He identified several employees whom he says are proper comparators and contends that these employees were treated more favorably after engaging in similar conduct. We concur with the AJ's decision to exclude the comparators due to a difference in job duties, or the nature of work-related incident warranting Agency action.

In sum, our review of the record confirms the Agency's assertion that its decisions were based on its determination of how best to effectively manage the workplace and its assessment of Complainant's performance and conduct in the workplace. Nothing in the record, or submitted on appeal by Complainant, demonstrate that management's actions were in any way motivated by discriminatory animus, or taken because of any prior EEO activity by Complainant. In fact, the Commission notes that the record is void of any prior EEO activity. The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions and

should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259; Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (January 16, 1997). We find no evidence of unlawful motivation on the instant facts.

CONCLUSION

Based on a thorough review of the record, we find that the AJ properly issued a decision without a hearing finding that Complainant failed to demonstrate he was subject to discrimination when on April 24, 2015, he was instructed to report for a Fitness for Duty evaluation before he was permitted to work, and subsequently after he passed the physical, management requested more testing and additional documentation; on April 23, 2015, he was placed on Emergency Placement; and he received a Letter of Intent dated May 26, 2015 which was subsequently removed from his record. The Agency's final order adopting the AJ's decision therefore is **AFFIRMED**.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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).

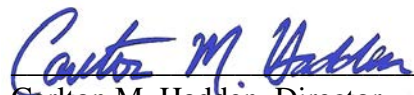
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

August 16, 2019

Date