



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

[REDACTED]

Darell C.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Capital Metro Area),
Agency.

Appeal No. 0120181789

Hearing No. 531-2012-00355X

Agency No. 4K-200-0025-12, and 4k-200-0108-11

DECISION

On May 4, 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 4, 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

Whether the Equal Employment Opportunity Commission's Administrative Judge erred by not granting back-pay to Complainant based on his alleged failure to mitigate his damages.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier at the Agency's Rockville-Carrier Annex in Rockville, Maryland.

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.

On February 25, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of reprisal when:

1. he received a letter advising him to report to work, effective April 20, 2011, at the Derwood Branch, not his regular bid assignment at the Rockville Center Annex.
2. The Postmaster at Rockville Center took pictures of his mail case.
3. The Postmaster followed him to the loading dock area and took pictures of him loading his delivery vehicle.
4. On July 21, 2011, he was directed to submit to a Psychiatric Fitness for Duty Examination, scheduled for August 8, 2011.
5. On August 19, 2011, he was issued a Notice of Removal.

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 and the AJ held a hearing on August 22, 26, 27, 2014, and September 10, 2014. The AJ issued a decision on liability on December 20, 2016. In the decision on liability, the AJ found the Agency liable for unlawful retaliation in relation to issues 1, 4, and 5.

On June 6, 2017 and June 20, 2017, a hearing on relief and damages was held. On February 21, 2018, the AJ issued a decision on relief and attorney's fees (Decision on Relief) ordering that Complainant receive: (1) Reinstatement to a substantially equivalent position; (2) front pay from the date of the issuance of the Decision on Relief until the date of Complainant's reinstatement to a substantially similar position; (3) \$35,000 in non-pecuniary compensatory damages; (4) \$9,430 in pecuniary compensatory damages; (5) \$97,932.75 in attorney's fees, and; (6) \$1,104 in litigation costs. Complainant was not awarded back-pay because the AJ found that he failed to mitigate his damages.

The Agency subsequently issued a final order adopting the AJ's findings.

CONTENTIONS ON APPEAL

On appeal, Complainant contends, among other things, that the Agency erred in concurring with the AJ's finding that Complainant was not entitled to an award of back pay damages. Complainant maintains that he is entitled to an award of the period of unemployment that he suffered as a result of the Agency's retaliation. Complainant states that to fulfill this obligation to attempt to mitigate damages, under Title VII, he was only required to make "a reasonable, good faith effort to find other employment," and that he was not required succeed but only to make an honest, good faith effort. Furthermore, he maintains that in order to successfully receive a reduction of the back-pay damages to which a prevailing complainant would otherwise be entitled, the Agency must show (1) that he failed to use reasonable care and diligence in seeking a suitable position, and (2) that there were suitable positions available which he could have discovered and for which he or she was qualified.

Complainant contends that the AJ erred in finding that he “did not conduct a reasonably diligent job search.” Complainant maintains that he testified that after his termination, he sought work through a variety of avenues. He indicates that he registered with a local job search organization, he looked at ads in the local newspaper, he searched for jobs electronically using the computer at his local library, he spoke with friends and family, he physically went to car dealerships seeking employment, and applied at Costco, where he was offered a position but did not take it.

Complainant maintains that in discounting the evidence of his job search, the AJ noted with disapproval that he did not provide documentary evidence of his applications. The AJ also found that there was no evidence that Complainant had applied for “positions similar to his, like FedEx or UPS.” Complainant contends that the AJ misapplied the burden of proof. Complainant argues that the evidence does not support a finding that he made no effort to mitigate his damages though those efforts were unsuccessful in securing employment. At a minimum, Complainant contends that he should get back-pay for two of the six years that he looked for work.

In response, the Agency contends, among other things, that during the damages hearing, Complainant admitted that he had only looked for work for at most two years after he was terminated. During that two-year period, Complainant testified that he did not apply for jobs that he would have accepted, admitting that he had applied for and been offered a job at Costco soon after his termination, but declined the job offer because he did not actually want the position. Complainant also offered contradictory testimony regarding his income as at first he asserted that he had no income during the time of his unemployment, and then he admitted that he ran his own business selling commercial equipment during the period in question. Complainant refused to disclose his income and was confronted with his tax returns, which showed that he had not reported a business. Based on Complainant’s testimony regarding abandoning his job search, not applying to comparable jobs, and his concealment of income, the AJ held that Complainant failed to mitigate his damages, and that this was why Complainant was not awarded back pay. The Agency maintains that in his appeal, Complainant ignores his own testimony which formed the basis for the AJ’s determination to not award him back pay. According to the Agency, Complainant simply argues that he was automatically entitled to back pay.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015) (EEO MD-110).

EEO MD-110, at Chapter 9, § VI.C also provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ's decision to demonstrate that the AJ's factual determinations are not supported by substantial evidence. In this case, this means that Complainant has the burden of pointing out where and why the AJ's findings are not supported by substantial evidence. Cf. id. (pointing out that "[t]he appeals statements of the parties, both supporting and opposing the [AJ's] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ's] factual determinations are supported by substantial evidence"). Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that Complainant has not met that burden. Here, other than Complainant's conclusory statements he did not provide persuasive evidence in support of his appeal. Like the Agency, we find that Complainant's testimony at the hearing was, for the most part, the primary reason the AJ found that he did not mitigate his damages and therefore was not entitled to a backpay award. At the hearing, Complainant was not able to produce a single job application he submitted from the entire six-year period after he was terminated; he admitted that if he had undertaken a job search, it would only have been the two years after he was terminated; and he admitted that the jobs he would have applied for were not jobs he would have accepted. In addition, the AJ noted other inconsistencies in his testimony regarding his income during the period he was discriminatorily unemployed. Based on a totality of the record, we find that there is substantial evidence to support the AJ's finding that Complainant was not entitled to back-pay.

CONCLUSION

Accordingly, we AFFIRM the Agency final order which fully implemented the AJ's decision, which found that Complainant was not entitled to back-pay.

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)

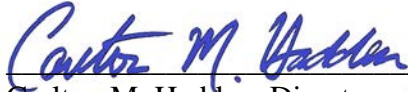
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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 20, 2019

Date