



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

[REDACTED]
Bryan Y.,¹
Complainant,

v.

Andrew M. Saul,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2019000531

Hearing No. 410-2016-00479X

Agency No. ATL-16-0248-SSA

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 14, 2018 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Customer Service Representative Trainee, GS-7, at the Agency's District Office in Montgomery, Alabama.

On February 26, 2016, Complainant filed a formal EEO complaint alleging the Agency discriminated against him on the bases of his race (African-American), color (black), disability, and/or sex (male) when:

1. from April 19, 2015 to January 8, 2016, Complainant was subjected to non-sexual harassment/hostile work environment that included being provided insufficient

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.

training and inconsistent guidance, as well as being bullied, threatened with termination, and ultimately terminated from his position; and

2. on January 8, 2016, the Agency terminated Complainant's probationary employment.

After an investigation of the accepted claims, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an Equal Employment Opportunity Commission AJ. Complainant timely requested a hearing. However, on August 15, 2018, the AJ issued a decision, by summary judgment, in favor of the Agency. On September 14, 2018, the Agency issued a final order adopting the AJ's finding of no discrimination.

The instant appeal followed. On appeal, Complainant argues, through counsel, that he has established a prima facie case for discrimination and the Agency's reasons for its actions are pretext for discrimination. Complainant further argues that there are material issues in dispute.

ANALYSIS AND FINDINGS

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.

Disparate Treatment – Claim 2

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For a complainant to prevail, he or she must first 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. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, non-discriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (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).

Complainant stated that he was diagnosed with Post Traumatic Stress Disorder ("PTSD") in 2006 as a result of his military service. Complainant explained that his PTSD causes memory lapses and impairs concentration. As a result, Complainant stated that he takes medication for his medical condition. We presume for purposes of analysis only, and without so finding, that Complainant is an individual with a disability.

The AJ's analysis was confined exclusively to a determination that Complainant did not establish a prima facie case of disparate treatment on any of his raised bases. Our review of the record indicates that the Agency also provided legitimate non-discriminatory reasons for terminating Complainant's employment, even though the AJ did not address this analysis. Therefore, even if we assume that Complainant established a prima facie case of discrimination based on his race, color, disability, or sex, his claim ultimately fails, as we find that the Agency articulated, non-discriminatory reasons for terminating Complainant's employment.

The District Manager, Complainant's second level supervisor ("S2") (mixed race, male) stated that he terminated Complainant's probationary employment to "protect the integrity of clients' PII [Personally Identifiable Information]." Specifically, S2 stated that Complainant failed to follow procedures for safeguarding PII on four occasions during the three-week period from November 11, 2015 through December 1, 2015. S2 explained that the incidents involved (1) faxing a PII,² (2) releasing an appointment list to a client containing the names and social security numbers of other persons, and (3-4) sending forms containing PII to the wrong parties. As a result, S2 explained that he initially recommended that Complainant receive a reprimand. However, S2 explained that the Area Director and Labor Management Review ("LMR") suggested that he consider a termination given the severity of the deficiencies. S2 stated that he decided to terminate Complainant's employment because of the "frequency of PII violations in a short time period and because Complainant was still in probationary status."

² S2 acknowledged that faxing documents with PII was a past practice which management no longer permitted.

S2 further explained that based on his personal observations as well as reports from Complainant's first level supervisor ("S1") and Complainant's Mentor ("Mentor"), S2 determined that Complainant had "significant productivity problems."

S2 clarified that his initial draft for Complainant's proposed termination included the PII incidents as well as Complainant's training deficiencies. S2 explained that LMR recommended that he remove the training deficiencies from the draft because the training issues were not "germane" because he was terminating Complainant's position for integrity issues. S2 stated that he accepted the LMR recommendations and rewrote the termination notice.

Complainant's first level supervisor ("S1") (Hispanic male) testified that Complainant was terminated because of the severity of his PII violations. Regarding the appointment list, S1 explained that he conducted a search to find the missing list and discovered that it was in a client's possession, and the client informed him that he received the list from Complainant. S1 stated that Complainant eventually admitted that he had the list in his possession but copied his co-worker's list to cover up what he did which S1 determined to be an "integrity issue." S1 also explained that employees were instructed not to fax any documents on their first day of employment. Finally, S1 explained that Complainant sent forms with PII to the wrong individuals which posed a "possible public relations nightmare for the Agency."

The Mentor (African American female) testified that she was responsible for guiding trainees, such as Complainant, on their daily work functions. In this role, the Mentor stated that she reported to S1 on Complainant's progress, but S1, who was also her supervisor, evaluated Complainant. Regarding the faxing incident, the Mentor explained that Complainant violated Agency policy because he faxed a document that contained PII. The Mentor clarified that employees could fax a document if the document did not contain PII.

The record includes a copy of a January 4, 2016 notice entitled, "Termination During Probationary Period." The letter makes reference to the four incidents where Complainant failed to follow procedures for safeguarding PII from November 11, 2015 through December 1, 2015. The letter indicates that Complainant received verbal counseling and a counseling interview. Complainant's conduct, however, failed to improve. Therefore, the letter states that Complainant's employment was terminated, effective January 8, 2016.

To successfully oppose a decision by summary judgment, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant argues that there are specific material issues in dispute primarily related to whether the Agency treated Complainant differently from other employees who violated the Agency's policies on protecting PII. As an initial matter, however, it is undisputed that the other Customer Service Representative, who was training during this same period and was also on probation, did not have any instances of failing to protect PII. Complainant has made a very general statement that several other employees (all African American) were treated more favorably but has failed to identify specific incidents or conduct where these individuals failed to safeguard PII.

Moreover, there is no evidence or even allegation that these employees were in their probationary period and had four incidents of improper handling of PII in a three-week period like Complainant.

Neither during the investigation, nor on appeal, has Complainant proven, by a preponderance of the evidence, that management's proffered reasons for his termination were a pretext for unlawful discrimination based on Complainant's race, color, disability, or sex.

Harassment/Hostile Work Environment – Claim 1

To establish a claim of discriminatory environment harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

In other words, 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 race, color, disability, or sex. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The AJ properly determined that remaining claim 2 fails to support a finding that the Agency subjected Complainant to discriminatory harassment.

Complainant testified that his Mentor caused a hostile work environment when she treated him differently from another probationary co-worker (African American female, also disabled), provided another coworker additional training, spoke to him in an aggressive tone, refused to answer his questions, and changed the manner in which she assigned his work. Complainant further testified that he believed that S2 contributed to him being subjected to a hostile work environment when S2 proctored a test Complainant had to take.

Complainant's Mentor denied speaking to Complainant in a disrespectful tone. The Mentor explained that Complainant would ask her "the same questions over and over again" instead of referring to a folder she prepared for him and all trainees that served as a referral guide. The Mentor further denied correcting Complainant in the presence of customers because she "did not want customers to lose confidence in the Agency's work." The Mentor also denied correcting Complainant in the presence of Complainant's co-workers because "it was none of their business."

With respect to providing training on the phones, the Mentor acknowledged that another co-worker was assigned to answer the phones more often than Complainant and this co-worker received more training than Complainant. However, the Mentor clarified that she did not control the scheduling for phone assignments. The Mentor explained that she assigned Complainant and the other co-worker the “same work at the same time for completing, in the same time frame,” but the other co-worker often finished her work before Complainant. As a result, the Mentor stated that she moved this co-worker forward to another topic, but she did not move Complainant forward to another topic until he could demonstrate competency with his initial assignment.

Complainant’s Mentor testified that on one occasion she notified S2 instead of S1 of a PII breach because S1 and the other supervisors were in a training meeting. The Mentor explained that a customer came to the office and provided an application that Complainant had mailed him which belonged to another customer. The Mentor stated that the application had another customer’s name and social security number. Because Agency policy requires employees to report a breach within 30 minutes, the Mentor explained that she informed S2 instead of S1 of the incident because S2 was the only supervisor available at that time.

The Mentor also acknowledged that if she overheard a trainee providing incorrect information during a phone call, she would ask the trainee to place the call on hold to ensure that the correct information was relayed. However, the Mentor explained that Complainant would “not allow [her] to intervene to help him” during these situations and he would not accept her help. The Mentor stated that she asked Complainant, during a fall 2015 meeting, whether he wanted her to stop mentoring him because “he seemed to be resisting” her help. However, the Mentor explained that Complainant informed her that he had “no problem with [her]” and he did not want another mentor.

S1 testified that he observed that the Mentor treated Complainant equally and Complainant did not complain to him about her. S1 explained that Complainant had the opportunity to request another mentor, but never did.

S2 testified that he personally observed the training the Mentor provided and never saw the Mentor act in a disparaging manner toward Complainant or offer Complainant less training than the other trainee. S2 explained that the Mentor demanded that Complainant complete his work. However, Complainant did not complete his work in a timely fashion. S2 also explained that he preferred that the tests were proctored to ensure that trainees could ask questions about the test and to ensure the legitimacy of the test process. S2 stated that he proctored one of Complainant’s tests because the Mentor was not available that day.

We find that considering these allegations, even if true, Complainant has not shown evidence that considerations of his race, color, disability, or sex motivated the disputed actions toward Complainant. The record indicates that several of Complainant’s co-workers felt that he was treated more harshly but stated that they did not believe the Mentor’s actions toward Complainant were influenced by his race, color, disability or sex.

The record further indicates that the Mentor attempted to correct Complainant, but Complainant was not receptive to the Mentor's help. The Mentor testified that she assigned the same work and the same deadlines for trainees to complete their work, but Complainant completed his assignments later. The Mentor further clarified that she was not responsible for the phone schedule, and she instructed Complainant to refer to his training materials because Complainant repeatedly asked her the same questions. The Mentor also testified that she notified S2 instead of S1 of an PII breach incident because S2 was the only supervisor available at the time. Additionally, S2 explained that he wanted all tests proctored and he proctored one of Complainant's tests because the Mentor was not available that day. A case of harassment is precluded based on our finding 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).

Moreover, the incidents Complainant alleges are not sufficiently severe or pervasive as to constitute hostile work environment/harassment under Commission regulation. The incidents involved are of a type that typically arise out of workplace conflicts or communications. However, EEO laws are not a civility code. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale, 523 U.S. 75, 81 (1998). After careful review of the record, including Complainant's contentions on appeal, we find that Complainant failed to demonstrate that the Agency discriminated against him as alleged.

CONCLUSION

The AJ's issuance of a decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred. Accordingly, the Agency's final order implementing the AJ's finding of no discrimination 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

October 1, 2019

Date