



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

John S. Morter, a/k/a
Ward B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Intelligence Agency),
Agency.

Appeal No. 2020005490

Hearing No. 510-2020-00021X

Agency No. DIA201400052

DECISION

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 August 5, 2020, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

At the time of events giving rise to this complaint, Complainant worked as an Intelligence Analyst at the Agency's U.S. Special Operations Command (USSOCOM), Joint Intelligence Center in Tampa, Florida. In 2006, the successful completion of a Polygraph Credibility Assessment (PCA) became a requirement for Complainant's position. Report of Investigation (ROI) at 196. On March 23, 2011, March 25, 2011, January 31, 2012, June 26, 2012, and August 5, 2014, Complainant took a PCA, and the results were inconclusive each time. ROI at 198-99.

On May 21, 2014, the Insider Threat Program Coordinator (ITPC) informed Complainant of his reassignment due to his inability to complete a polygraph examination.

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.

ITPC noted that an inability to pass an examination, on its own, did not suggest that Complainant was a security risk, but it presented a vulnerability that must be mitigated. As such, Complainant was reassigned to Agency Headquarters to mitigate the vulnerability. ROI at 145.

On July 23, 2014, Complainant filed a complaint alleging that the Agency discriminated against him based on disability (anxiety disorder) when:

1. on October 8, 2013, Complainant was informed that his Top-Secret security clearance and access to classified networks was revoked due to his inability to successfully complete several PCAs;
2. on May 12, 2014, Complainant was informed that his services would not be retained at USSOCOM due to his inability to successfully complete PCA examinations; and
3. on May 27, 2014, Complainant received notice of a reassignment to the Agency's Headquarters in Washington, D.C.

On November 10, 2014, the Agency informed Complainant that it was accepting claims 2 and 3 for investigation but dismissing claim 1 for untimely contact with an EEO counselor and failure to state a claim. Specifically, Complainant contacted the EEO office 248 calendar days after he learned that his security clearance and access to classified networks were revoked, which is beyond the 45-days required by 29 C.F.R. §§ 1614.105(a)(2) and 1614.604(c). Further, the Agency found that claim 1 involved a security clearance decision, which must be dismissed under 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a decision without a hearing on August 23, 2017.

The AJ found that Complainant was an individual with a disability, but further found that Complainant was not able to perform the essential functions of his position with or without an accommodation, because the position required that Complainant successfully complete PCAs to maintain a security clearance. The AJ nonetheless found that Complainant was a qualified individual with a disability because he could perform the essential functions of his position without successfully completing a PCA, but not where a security clearance was required. The AJ noted that Complainant was entitled to a reasonable accommodation, but not necessarily one of his choice, and there was no evidence that there was a vacant, funded position to which Complainant could be reassigned at USSOCOM. Accordingly, the AJ found that the Agency met its burden of providing a reasonable accommodation by reassigning Complainant to a position at its headquarters. The Agency subsequently issued a final order implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to disability discrimination. Complainant appealed the Agency's final order.

In EEOC Appeal No. 0120180397 (Sept. 30, 2019), we determined that the record was inadequately developed. Specifically, the record did not clearly show why Complainant was no longer permitted to work at USSOCOM, after years of working at that location without having passed a PCA. As such, the Agency's final order was vacated, and the Commission ordered the AJ to further develop the record to obtain answers to the following questions:

1. Did Complainant lose his Top-Secret security clearance?
 - a. If so, when?
 - b. What work was Complainant allowed to perform after he lost his Top-Secret security clearance?
2. If Complainant lost his Top-Secret security clearance, did he regain it?
 - a. If so, when?
 - b. Did Complainant resume his original duties after he regained his Top-Secret security clearance?
3. Is passing a PCA a requirement to obtain/maintain a Top-Secret security clearance?
4. Is passing a PCA a requirement to work at USSOCOM?
 - a. If so, why is passing a PCA a requirement to work at USSOCOM for employees who have obtained a Top-Secret security clearance without a PCA?
5. Why was Complainant allowed to work at USSOCOM for years without passing a PCA?

While the appellate decision found that claim 1 was properly dismissed, it noted that additional background information would be helpful to give context to the accepted claims in the instant complaint. In addition, we noted that the AJ analyzed this complaint as a claim of a failure to provide a reasonable accommodation; however, the claims should also be considered as allegations of disparate treatment based on disability. As such, the complaint was remanded for further action. Ward B. v. Dep't of Def., EEOC Appeal No. 0120180397 (Sept. 30, 2019).

On June 26, 2020, the AJ issued a decision without a hearing in the Agency's favor, following motions for summary judgment from both parties. The AJ noted that Complainant was unable to successfully complete four PCAs in 2011 and 2012 due to "issues of mishandling classified information and unauthorized foreign contacts," and that Agency policy mandated that passing periodic PCAs was a condition of employment.

The AJ stated that USSOCOM was a host to some Agency employees and USSOCOM along with the Agency were involved in addressing security matters. The AJ determined that it was possible to temporarily remain at USSOCOM while attempting to complete unresolved PCAs, but there was nothing to support that the process was intended to continue ad infinitum.

Further, the AJ found that, at the time of Complainant's four PCAs, there was no evidence that Complainant had a disability; the Agency was aware of any disability; or that medical documentation was presented to the Agency to support a disability-related claim associated with the PCAs. The AJ noted that the earliest medical documentation was dated nine days after Complainant's Top-Secret clearance was at least restricted, if not revoked.

In addition, the AJ highlighted that the record showed that Complainant met with an Agency Psychologist (AP) on or about November 6, 2013. During this meeting, Complainant "inadvertently revealed" that he had conducted extensive research on polygraph examinations and considered himself an expert. AP stated that when he asked Complainant if he looked into countermeasures, Complainant provided contradictory responses. AP also stated that Complainant averred that he did not disclose his extensive research into polygraph testing to the polygraph examiners because "no one asked," but when AP informed Complainant that such inquiry was standard protocol, Complainant admitted to telling at least two polygraph examiners and claimed a conspiracy that someone was "out to get" him. AP concluded that, based on Complainant's verbalized intent and demonstrated efforts to subvert a polygraph examination, he was unlikely a suitable candidate for further polygraph testing.

The AJ found that, while on February 6, 2014, Complainant was informed that the Agency reached a favorable decision on his case due to his decision to seek mental health care and comply with treatment recommendations, the question of Complainant's ability to maintain a security clearance remained open. However, on May 12, 2014, the USSOCOM Deputy Commander determined that he had lost confidence in Complainant's ability to protect sensitive and classified information, and that his services were no longer required. As such, ITPC and the Director of Security reassigned Complainant to Headquarters.

The AJ found that there were no positions available at USSOCOM, where Complainant was in essence a guest, and the Agency reassigned Complainant to Headquarters, which qualified as a reasonable accommodation. Regarding disparate treatment, the AJ determined that there was no evidence that any similarly situated employees were treated more favorably, and, therefore, Complainant failed to establish a prima facie case of disability discrimination. The AJ concluded that Complainant did not prove that he was subjected to disability discrimination.

The Agency issued its final order implementing the AJ's finding that Complainant failed to prove discrimination as alleged. The instant appeal followed.

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. (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*).

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 he 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, however, Complainant has failed to establish such a dispute. On appeal, Complainant argues that summary judgment is inappropriate because there are genuine issues of material facts still in dispute and he proffered 18 facts.² However, we find that Complainant did not show a genuine dispute of material facts or his purported facts are not material.

For example, Complainant asserts there is a dispute "whether the Agency and USSOCOM correctly followed the approved and relevant policies regarding the use of the polygraph." In support of his contention, Complainant avers that the process is to initiate a counter-intelligence (CI) investigation if the second examination fails to resolve all relevant questions, and in his case, CI investigations were conducted in July 2012 and January 2014, and were subsequently terminated due to an absence of any wrongdoing. However, Complainant provided no supporting evidence, and mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Sec., EEOC Appeal No 0520110581 (Jan. 12, 2012), citing Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), req. for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

Complainant also avers that he did not admit to attempting to subvert a PCA and that AP "fabricated this idea" and Complainant challenges AP's credibility. However, we find that the evidence does not support a need for a determination into AP's credibility. A review of AP's psychological evaluation report shows that Complainant informed AP that he began researching polygraph examinations in January 2011, and Complainant at first denied looking into countermeasures, but later conceded that he "glanced through" some articles. Complainant also suggested that AP hypnotize him so that he could pass a polygraph. In a June 27, 2012 statement, Complainant corroborated that he "extensively" researched polygraph examinations and read articles on how to "beat the polygraph."

² Complainant provides arguments related to the suspension of his security clearance on October 8, 2013; however, we remind Complainant that claim 1 was previously dismissed and, as such, we will not address this claim.

While Complainant informed AP that he was not interested in beating the polygraph, we find that he did not present any evidence to counter AP's conclusions, which were based on Complainant's contradictory responses throughout his evaluation. Agency's Motion for Summary Judgment, Exhibit N.

Complainant also disputes that there were no similarly situated comparators. For example, Complainant notes that ITPC identified twelve comparators, none reporting a disability. However, ITPC explained that these individuals were also realigned to a Headquarters position as a result of their inability to successfully complete a PCA. ROI at 337. As such, we find that these comparators were not treated more favorably. In addition, Complainant argues that there were similarly situated employees who were exempted, deferred, or otherwise excused from polygraph examinations, but we find that this is not material because Complainant's claims do not include an allegation related to an exemption, deferral, or excuse from a polygraph examination.

Complainant questions the awareness of his disability by four management officials. However, we will credit that the relevant management officials were aware of Complainant's disability and assume, *arguendo*, that Complainant established a *prima facie* case of disability discrimination.

We find that the record contains legitimate, nondiscriminatory reasons for the Agency's actions. Multiple Agency officials averred that the USSOCOM Deputy Commander was the ultimate deciding official for claim 2 and he determined that Complainant could not remain at USSOCOM because he lost confidence in Complainant. ROI at 287, 349, 357. Complainant disputes that the USSOCOM Deputy Commander lost faith in him because, if that were the case, he would have moved more swiftly to remove Complainant from USSOCOM. However, Complainant only speculates what the USSOCOM Deputy Commander would have done, without any evidence.

The EEO Investigator noted that an affidavit from the USSOCOM Deputy Commander was not obtained because he was no longer with the Agency and there was no forwarding address. ROI at 7. However, the record contains consistent evidence to support the fact that the USSOCOM Deputy Commander lost confidence in Complainant. For example, the record shows that on February 10, 2014, ITPC initiated a virtual Insider Threat Mitigation Panel to address Complainant's situation. In response to a management official's recommendation to not transfer Complainant,³ AP replied that the Agency was not in a position to transfer any risk to USSOCOM, especially since USSOCOM leadership already expressed a loss of confidence in Complainant and made it clear that they wanted Complainant removed from the facility. Agency Motion for Summary Judgment, Exhibit I. Complainant also makes unsubstantiated claims that Agency officials "improperly influenced" the USSOCOM Deputy Commander.

³ The Agency redacted the name of this management official.

For claim 3, ITPC and the Director of Security averred that they made the decision to reassign Complainant to Headquarters to mitigate security vulnerabilities due to Complainant's inability to pass a polygraph examination. ROI at 338-9, 364-5. On June 4, 2014, Complainant appealed the decision to reassign him to Headquarters. ROI at 148-50. The Director of Security explained that he responded to Complainant's appeal and sustained the original decision, following Complainant's failure to complete another polygraph examination in August 2014. ROI at 365.

Complainant asserts that ITPC exhibited a discriminatory animus when he stated, "if a claim of disability was presented, it would not have altered the outcome as the issue is the [Agency] employee being unsuccessful in completing the [polygraph] examination and presenting a threat, risk, or vulnerability to national security information and operations." However, we find a declaration that an employee's disability "would not have altered" a decision communicates a lack of a discriminatory animus.

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency's final order implementing the AJ's decision.

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 (S0610)

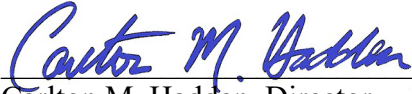
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department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

May 9, 2022
Date