

Exhibit 2

EXHIBIT C1

1301 Clay St
Oakland, CA 94612



U.S. Customs and
Border Protection

MAR 18 2009

Kenneth D. Humphrey
1750 N.E. 191st Street, D209
Miami, Florida 33179

Complaint of Kenneth D. Humphrey and Janet Napolitano,
Secretary, U.S. Department of Homeland Security
Case Number: HS-09-CBP-003066-090104

CERTIFIED AND REGULAR MAIL
RETURN RECEIPT REQUESTED

Dear Mr. Humphrey:

This letter refers to the above-referenced complaint of discrimination filed on February 23, 2009.

Based on our review of the formal complaint and the EEO Counseling Report, the complaint is accepted for processing under the provisions of the Equal Employment Opportunity Commission (EEOC) regulations, 29 CFR Part 1614. The issues to be investigated are:¹

Whether Customs and Border Protection discriminated against Complainant, CBP Officer, GS-1895-11, assigned to the Miami International Airport, Miami, FL, based on his race/national origin/color (African American/Black) and age (Date of Birth: April 26, 1945) when:

- (1) on or around November 12, 2008, he was removed from field duties with the Anti-Terrorism Contraband Enforcement Team (AT-CET), assigned desk duties and not permitted to work overtime in the field;
- (2) on or around January 21, 2009, he was notified that his bid rotation was denied; and

¹ By accepting the identified claims, the Agency does not waive its authority to dismiss the complaint, or issues of the complaint, if procedural grounds are identified that call for a dismissal. The EEOC has held on numerous occasions that agencies have acted properly when initially accepting complaints but dismissing them later for appropriate reasons. See *Rodriguez v. Department of Defense*, EEOC Appeal No. 01953421 (Apr. 25, 1996); *Cook v. Social Security Administration*, EEOC Appeal No. 01944962 (Oct. 12, 1995) (agency's procedural dismissal of the complaint held appropriate even though issued after issuance of administrative judge's findings and conclusions, but before agency's receipt of the administrative judge's findings and conclusions).

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(3) on February 16, 2009, he was assigned to Passenger Control.²

If you disagree with the issues, please notify me in writing within 15 days of the date of receipt of this letter. Please be clear and concise in your response. If no response is received, I will assume that you agree with the issues and will proceed with the investigation of the complaint.

An EEO Investigator will be assigned to thoroughly investigate all aspects of the issues accepted for processing. The investigator has the authority to administer oaths and to require employees to furnish affidavits under oath or affirmation without a promise of confidentiality or, alternatively, by written statements under penalty of perjury. The complainant has a responsibility to cooperate with the investigator in timely scheduling an appointment, meeting with the investigator and providing necessary written statements. Failure to do so may result in the dismissal of the complaint for failure to cooperate.

Any affidavit, written statement, or documentary evidence submitted to the investigator is subject to prohibitions against improper disclosures. All parties who provide statements or documentary evidence bear the responsibility to ensure that the submissions are properly sanitized, and should consult with bureau disclosure officials if there are any questions concerning what material would constitute disclosure.

Upon completion of the investigation, you will be furnished a copy of the Investigative File and an election form on which you may elect one of the following options: (1) a hearing and decision by an EEOC Administrative Judge; (2) a final decision by the Department of Homeland Security (DHS) without a hearing; or (3) withdrawal of the complaint.

You also may request a hearing from an Administrative Judge at any time after 180 days from the date of the original complaint. If you wish to amend the complaint after you have requested a hearing, you may file a motion with the Administrative Judge.

Should you request a hearing on your complaint, your request should be sent to:

District Director
Equal Employment Opportunity Commission
One Biscayne Tower
2 South Biscayne Blvd., Suite 2700
Miami, Florida 33131

² In the formal complaint, Complainant discussed a Workers' Compensation claim of June 12, 2008, and denial of TDY assignments, training assignments and bonuses. In a telephone discussion of March 9, 2009, with EEO Specialist Stacey Willardson, Complainant advised Ms. Willardson that his Workers' Compensation claim had been resolved and the other matters were included merely as background information.

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In accordance with 29 CFR §1614.108(g), you must send a copy of your request for a hearing to the Complaints Processing Center.

You will have the right to appeal to the EEOC, Office of Federal Operations, DHS' final decision or final order, or file a civil action in federal district court.

In addition, please note that 29 CFR §1614.603 directs the Agency to make reasonable efforts to voluntarily settle a complaint throughout administrative processing. A settlement may afford quick closure to a dispute, save time and expense for the parties, and resolve workplace uncertainties. In accordance with §1614.102(b)(2), a formal Mediation Program is made available to complainants after the filing of a complaint. Participation in the Mediation Program will have no effect on the rights and responsibilities otherwise possessed by the parties with regard to the complaint, or on the timeframes for processing the complaint otherwise provided for by the regulations. The terms of any settlement agreement will be reduced to writing, and you will be given a copy.

Mediation may be requested by completing and returning the attached "Request & Consent to Mediate Form" to the Complaints Processing Center.

If you have any further questions regarding the Mediation Program or the processing of your complaint, please contact EEO Specialist Stacey Willardson at (510) 637-2545.

Sincerely,



Lois Hofmann
Director
Complaints Processing Center
Office of Equal Opportunity

Enclosure: Request & Consent to Mediate Form
Why Mediation?

cc: EEO Manager, Miami Field Office
Customs and Border Protection
(w/copy of formal complaint)

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Exhibit 3

**UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
MIAMI DISTRICT OFFICE
HEARINGS UNIT**

DECISION WITHOUT A HEARING

In the matter of

KENNETH D. HUMPHREY,	X	
)	
)	
COMPLAINANT)	
)	
V.)	EEOC Case No.
)	510-2009-00241X
JANET NAPOLITANO,)	
SECRETARY,)	AGENCY Case No.
DEPARTMENT OF HOMELAND SECURITY)	HS-09-CBP-003066-
)	090104
AGENCY)	
	X	

Complainant's Representative *pro se*

Agency Representative Carolyn Sarnecki, Esq.

Nature of the Complaint Discrimination: Race/Color; Age; National Origin

Administrative Judge Ana M. Lehmann
1 Biscayne Tower
2 South Biscayne Blvd.
Suite 2700
Miami, Florida 33131

Date of decision: November 16, 2010

I. INTRODUCTION

This complaint is before the Equal Employment Opportunity Commission (the “EEOC” or “Commission”) as a result of a complaint dated February 23, 2009, filed by Mr. Kenneth D. Humphrey (“Complainant”) alleging that the Department of Homeland Security (“Agency”) discriminated against him based upon his race/color/national origin (Black/African-American) and/or age (63 at the time of the complaint).¹ ROI, *Formal Complaint, Letter of Acceptance of the Complaint* and AJ Exhibit 1.² The Agency filed a Motion for a Decision Without a Hearing (“Motion”) on October 16, 2009. The Complainant filed a response to the Agency’s Motion (“Response”) on November 6, 2009. Jurisdiction is predicated on Section 717 of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16 (“Title VII”) and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 633(a) (“ADEA”). The EEOC Regulations authorizing the proceedings appear at 29 C.F.R. §1614.109.

II. ISSUES

Was the Complainant discriminated against on the basis of race/color/national origin (Black/African-American), in violation of Title VII and/or age (63), in violation of the ADEA when:

- (1) on November 12, 2008, he was removed from field duties with the Anti-Terrorism Contraband Enforcement Team, assigned to desk duties, and not permitted to work overtime in the field;
- (2) on January 21, 2009, he was notified that his bid rotation was denied; and
- (3) on February 19, 2009, he was assigned to passenger control?

¹ The issues accepted for investigation as provided in the Letter of Acceptance of the Complaint dated March 18, 2009 are stated as “race/national origin/color and age”. ROI Exhibit C-1. However, the formal complaint as filed by the Complainant only alleges discrimination based on race and age. ROI Exhibit A-1, page 23. For the purposes of this decision, I have considered all of the possible purviews and have reached the same conclusion as to each possible ground of alleged discrimination.

² Reference/citations to the Report of Investigation (or case file) will be made as “ROI” followed by an exhibit number and/or name of document as appropriate. References to attachments to this decision will be made as “AJ” followed by an exhibit number.

III. STATEMENT OF THE FACTS

The following facts are undisputed or are found by a preponderance of the evidence. The Complainant was employed by the Agency in Miami, Florida as a U.S. Customs and Border Protection (“CBP”) Officer assigned to the Anti-Terrorism Contraband Enforcement Team (“A-TCET”). On November 2, 2008, Complainant was working at Miami International Airport (“MIA”) when a vehicle carrying two Continental Airlines employees approached the gate and swiped a valid ID which granted them access. After the vehicle continued through the gate, Complainant and another CBP Officer stopped the vehicle and confiscated the airline employees’ identification. Report of Investigation, (“ROI”), F2. A heated exchange followed, resulting in the Complainant making threats of arrest against both of the airline employees, who proceeded to file formal complaints regarding Complainant’s conduct. ROI, F12a.

Only ten days later, on November 12, 2008, the Complainant had another confrontational incident with an American Airlines employee and a Miami-Dade County employee as well as those employees’ supervisors, again confiscating everyone’s identification. ROI, F2; F13a. This incident ultimately resulted in several Miami-Dade police officers being called to the scene. ROI, F13c. The Complainant’s manager was called to the scene and resolved the incident, returning all identifications to their respective owners. Because of the above described incidents, later that same day, the Complainant was removed from the field and assigned to desk duties. The Complainant was told that he was under investigation for the above-stated incidents and that he would be removed from the field pending the outcome of the investigation.

These incidents were referred to the Joint Intake Center for investigation on November 13, 2008.³ ROI, F2. A second referral was made on January 13, 2009, and received by the Joint Intake Center on January 14, 2009. After the Complainant had been removed from the field pending an investigation, the Agency held its annual bid and rotation for the upcoming year. As the Complainant was under investigation, he was ineligible to participate in the bid process for that year. According to the “Bid, Rotation and Placement Policy,” employees who are under investigation are excluded or ineligible to bid for rotations. See ROI, F18a. Because the

³ Time-stamped emails provided by the Agency show that the Agency communicated with the Joint Intake Center on November 13, 2008 to report these incidents for investigation. AJ Exhibit 2. However, the Intake Center did not begin its investigation until after the referral was made for a second time on January 13, 2009. AJ Ex. 1, enclosure 1.

Complainant was ineligible to bid at the time, he was assigned to work in passenger processing effective February 1, 2009.

The Joint Intake Center issued a final disposition on March 11, 2009, recommending that no disciplinary action be taken against the Complainant. As a result, Complainant was kept in passenger processing after the investigation was closed. The Agency argues this is pursuant to Agency policy applied to all employees. AJ Ex. 1, Enclosure 5, pg. 2, Section B, Bullet #3. The Agency's policy states: "[i]f the employee is clear to resume normal duties in between the bid cycle, the employee will return to the port's core operations, e.g., primary or passenger processing, until the next opportunity to bid." AJ Ex. 1, p. 5. The Agency argues it followed established policy on all allegations brought by the Complainant in this case.

IV. ANALYSIS AND FINDINGS

A. *Summary Judgment Standard*

The regulations provide that "[i]f a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may...file a statement with the administrative judge prior to the hearing setting forth the...facts and referring to the parts of the record relied on to support the statement." 29 C.F.R. §1614.109(g)(1). The Complainant may then "file an opposition within 15 days of receipt of the" Motion. *Id.* at §1614.109(g)(2). The Administrative Judge may then issue a decision without a hearing. *Id.* The language of this section is patterned after Rule 56 of the Federal Rules of Civil Procedure. Therefore, in determining whether the Complainant's request for an administrative hearing should be granted, case law interpreting Rule 56 is followed. Rule 56(c) of the Federal Rules of Civil Procedure provides for entry of summary judgment if the pleadings, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Thus, under the standard, the mere existence of some alleged factual dispute will not, in and of itself, defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1976); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The requirement is that no genuine issue of material fact exist. *Id.*

With regard to materiality, "only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment...while the

materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* A material fact is "genuine ...if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Thus, summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

It is well-established law that mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1976); see also *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). Thus, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Liberty Lobby*; see also *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.) *cert denied* 513 U.S. 871 (1994); *Douglass v. United Services Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996)(en banc). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his case on which he bears the burden of proof at trial, summary judgment will be granted. *Id.* For the reasons that follow, I find that, in viewing the record in the light most favorable to the Claimant, there exists no genuine issue of material fact and the Agency is entitled to judgment as a matter of law.

B. Title VIII and the ADEA

In claims involving allegations of unlawful employment discrimination, the Complainant bears the burden of establishing a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978). This requires the Complainant to present a body of evidence from which, if not rebutted, the trier of fact could conclude that unlawful discrimination occurred. Since each complaint of discrimination is unique, the facts necessary to establish a *prima facie* case will vary. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. at fn 13.

If the Complainant establishes a *prima facie* case, then the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas Corp.*, 411 U.S. at 802; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In order to prevail, the Complainant must establish by a preponderance of the evidence, that the

legitimate, non-discriminatory reason articulated by the Agency is a pretext and/or that the Agency was motivated by some unlawful discriminatory animus. *McDonnell Douglas Corp.*, 411 U.S. at 804; *Burdine*, 450 U.S. at 253, 255; *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The ultimate burden of persuading the trier of fact that the Agency discriminated against the Complainant remains at all times with the Complainant. *Reeves*, 120 S.Ct. at 2106; *St. Mary's Honor Center*, 509 U.S. at 507.

The same elements and burdens of proof that exist in Title VII cases are applied to cases under the ADEA. *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979). Thus, the Complainant may establish a *prima facie* case of discrimination under Title VII and the ADEA if the Complainant establishes that he is in a protected group and that he was subjected to adverse terms, conditions and privileges of employment to which similarly situated individuals outside his protected group were not subjected under the same or similar circumstances. *Potter v. Goodwill Industries of Cleveland*, 518 F.2d 864, 865 (6th Cir. 1975).

The Complainant in this case fails to make a showing sufficient to establish a *prima facie* case. To establish a *prima facie* case of disparate treatment as it relates to his claim of race, national origin, color and/or age, the Complainant must establish that a similarly situated individual outside his protected group received better treatment than he under the same or similar circumstances through a showing of substantive evidence and not merely by a statement of his own opinion. *Chukwurah v. Stop & Shop*, 354 Fed.Appx. 492, WL 4072086; see also *Boone v. United States Postal Service*, EEOC Appeal No. 01971754 (March 22, 1999). Persons are said to be similarly situated when all of the relevant aspects of the employment situation are nearly identical with those of the Complainant. *Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir 1985); *Murray v. Thistledown Racing Club Inc.*, 770 F.2d 63, 68 (6th Cir. 1985); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d. 1181, 1185 (11th Cir 1984). The Courts have held that individuals are not similarly situated merely because their conduct might be analogized. Rather in order to be similarly situated, among other things, employees must have engaged in similar conduct as the Complainant without such differentiating or mitigating circumstances that would distinguish their conduct. *Mazzelli v. RCA Global Communications, Inc.*, 642 F. Supp. 1531, 1547 (S.D.N.Y. 1986) *Aff'd.*, 814 F.2d 653 (2nd Cir. 1987).

In that regard, the Commission has held that for parties to be "similarly situated" the

comparable persons must have the same supervisor in the same work section and in the same installation. *Dodd v. United States Postal Service*, EEOC Appeal No. 01841675 (April 4, 1986)(a reinstatement case where the Commission found that since the responsible official [the Director of Mail Processing], was not involved in the decision to reinstate six other persons, the Appellant was not similarly situated to the cited comparable persons); *Ranson v. United States Postal Service*, EEOC Appeal No. 0100481 (March 3, 1982)(where the Commission held that in order to be similarly situated, the same supervisor had to have taken the adverse action against the Appellant and the comparable employee); *Mueller v. United States Postal Service*, EEOC Appeal No. 01841962 (April 2, 1986)(the Commission found that the proposed comparison employees were not assigned to the same station as the Appellant, were not supervised by the same alleged responsible official and therefore, they were not similarly situated).

Here, the Complainant offers no evidence, other than his own assertions, that similarly situated individuals outside his protected group who have engaged in similar conduct received better treatment than he under the same or similar circumstances. In Complainant's response to the Agency's motion, Complainant lists several persons outside his protected group whom Complainant alleges received better treatment than Complainant. However, the Complainant makes no offer of proof, other than his own opinion, to substantiate his assertions. *Chukwurah v. Stop & Shop*, 354 Fed.Appx. 492, WL 4072086. Furthermore, even if these assertions were taken as true, none of the people or incidents described by the Complainant were similarly situated to the Complainant for the purposes of making a proper comparison under the applicable law. *Smith v. Monsanto Chemical Co.*, 770 F.2d 719, 723 (8th Cir 1985); *Murray v. Thistledown Racing Club Inc.*, 770 F.2d 63, 68 (6th Cir. 1985); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d. 1181, 1185 (11th Cir 1984); *Dodd v. United States Postal Service*, EEOC Appeal No. 01841675; *Mueller v. United States Postal Service*, EEOC Appeal No. 01841962. Complainant merely describes situations he believes are similar, but I find they are clearly distinguishable from the actions of Complainant in this case. Therefore, I find Complainant has failed to meet his burden in establishing a *prima facie* case.

Assuming *arguendo* that the Complainant had established a *prima facie* case, the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-17 (1983); *McRae v. USPS*, EEOC Appeal No. 0120064701 (March 28, 2008); *Holley v. Department of Veterans Affairs*, EEOC