



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

[REDACTED]  
Alden G.,<sup>1</sup>  
Complainant,

v.

Nancy A. Berryhill,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 0120170849

Hearing No. 471-2015-00130X

Agency No. CHI-15-0111-SSA

**DECISION**

On December 19, 2016, 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 December 2, 2016, final decision 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 decision.

**ISSUES PRESENTED**

The issues presented are (1) whether the Equal Employment Opportunity Commission Administrative Judge (AJ) properly dismissed Complainant's request for a hearing, and (2) whether the Agency subjected Complainant to harassment based on race and reprisal for prior protected EEO activity.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Claims Representative (Bilingual), GS-11, at the Agency's Pontiac District Office in Pontiac, Michigan.

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<sup>1</sup> 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 December 15, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of race (Mexican American)<sup>2</sup> and in reprisal for prior protected EEO activity. In its acceptance letter, the Agency defined the accepted issues as “[w]hether the Agency subjected Complainant to non-sexual harassment and/or hostile work environment” on the bases of race and reprisal when:

1. on or about October 31, 2014, Complainant overheard a conference call wherein management was attempting to solicit statements from the staff in order to label him a bully;
2. on unspecified dates Complainant's co-workers have destroyed his work in order to sabotage him;
3. on November 17, 2014, Complainant was notified that his request to be paid administrative leave for the dates of November 3-5, 2014, had been denied; and
4. beginning in November 2014 and continuing, Complainant has been assigned walk-ins and phone duty, and other employees are assigning appointments in his name when he is not on the schedule for those particular assignments.

In a December 17, 2014, email to the Agency's Area Director (AD), Complainant noted that he had met with AD on December 12, 2014, and that AD had asked him to explain why he believed that management had subjected him to a hostile work environment. Complainant asserted that he had heard AD instruct managers to have employees write that Complainant was bullying them. He also asserted that managers subjected him to unwelcome conduct and intimidation, used coworkers to harass him, and failed to investigate his harassment complaints.

In his affidavit, Complainant stated that he participated in EEO activity as a union representative when he helped other employees with their EEO complaints. He alleged that management allowed other employees to treat him differently because of his union and EEO activities and that other employees have made negative comments about him. He asserted that the different treatment started two or three weeks after he began his union and EEO activities.

Complainant stated that he heard his name mentioned when he walked past an office on October 31, 2014, while his Operations Supervisor (S1), another Operations Supervisor (S2), the Assistant District Manager (ADM), and the District Manager (DM) were on a conference call with the Area Director (AD). He alleged that AD “was providing managers orders to solicit derogatory statements from employees based on a report from” a September 2014 visit by representatives of the Agency's Office of Civil Rights and Equal Opportunity Office (OCREO). According to Complainant, AD told managers that this would enable management to take action.

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<sup>2</sup> Although Complainant identified his race as “Mexican American,” the Commission recognizes this term as an indication of national origin rather than race.

Complainant also stated that, on August 5, 2014, a coworker (CW1) put Complainant's name on an appointment that was not his, complained that Complainant had left work, and, upon learning that Complainant had not left, yelled at him. He asserted that, on August 15, 2014, another coworker (CW2) "put up a slip for one of [his] claimants" and quoted the claimant as saying that Complainant did not do his job. According to Complainant, he spoke with the claimant, she denied saying that, and she submitted a written statement.

In addition, Complainant asserted that ADM verbally approved his request for administrative leave for EEO purposes but later denied the leave. Complainant also asserted that managers and other employees would assign appointments to him without his knowledge, that he would have to check the monitor every 20 minutes, that this interfered with his adjudication time, and that he was the only employee treated like this.

AD stated in his affidavit that two EEO investigators from the Agency's Chicago Office conducted training at the Pontiac facility in 2014 and that they submitted a report about the facility. According to AD, 11 employees complained to the investigators that Complainant harassed other employees, stole their lunches, was disrespectful to management and visitors, and rarely worked. AD stated that the investigators asked him to have managers inform employees that they should report inappropriate behavior to management and management would look into the matter. He denied Complainant's request to see the OCREO report because Complainant "had no need to know." He stated that he had a conference call with managers regarding the report, that he told them to hold a staff meeting to address the complaints against Complainant and to let employees know that they should come forward if they felt harassed, that managers held the meeting, and that Complainant's name was not mentioned during the meeting. He denied telling managers to "solicit" statements about Complainant. AD stated that Complainant sent him emails complaining about the alleged harassment and that he directed the District Manager to investigate Complainant's allegations. He was aware of Complainant's EEO activity because he received monthly reports from OCREO and saw Complainant's name on a few complaints.

DM similarly stated that he was aware of Complainant's EEO activity. He estimated that Complainant had three pending EEO cases of his own and was the representative for seven other EEO cases. DM stated that he investigated Complainant's harassment allegations and sent Complainant a January 22, 2015, email stating that he had found no evidence to support the allegations. He also stated that the October 31, 2014, conference call addressed the "numerous complaints" contained in the OCREO report and that "[t]here was no request or order to obtain statements from the staff to label anyone as a bully." After Complainant alleged that an employee had typed incorrect information on a screen, DM spoke with the employee and determined that she was trying to provide information to help the next person who would interview the claimant. DM stated that managers rarely approve administrative leave, that "EEO time is duty time," and that no other employees had received administrative leave for EEO purposes. He could not recall any instances when Complainant had unnecessary appointments assigned to him.

ADM stated that managers discussed the OCREO report and how to handle matters raised in the report during the October 31, 2014, meeting. Like DM, ADM stated that EEO time “is considered regular duty time” and that no employees had received leave for EEO purposes. She denied that Complainant verbally requested administrative leave for EEO purposes. According to ADM, Complainant submitted a leave slip “for a leave period when he called into work” and should have requested sick or annual leave. She was aware that Complainant had filed prior EEO complaints and had served as a representative for other employees who filed complaints.

S1, who knew that Complainant had represented other employees in EEO matters, stated that Complainant did not complain to him about alleged harassment. With respect to the October 2014 meeting, it was his understanding that, “if anyone felt threaten[ed] or bullied by [Complainant], then we would like them to document it.” According to S1, he overheard the conversation between Complainant and CW1 about putting Complainant’s name on an appointment and told CW1 not to make assignments to other people.

S2 stated that, during the October 2014 meeting, managers “were advised that some serious accusations had been made and in order to take action, we would need statements from the employees making the accusations.” She did not recall that anyone had used the term “bully.” She asserted that it was common for employees who performed “walk-in duty” to have appointments assigned to them. She was aware of Complainant’s EEO activity.

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.

During the hearing process, Complainant and the Agency entered a Stipulation and Protective Order that stated, “Information provided by [the Agency] to Complainant and his representative that is covered by this Stipulation and Protective Order, shall not be used by Complainant or his counsel for any purpose except as necessary for the prosecution of the instant litigation.” Complainant violated the Order when he used one of the Agency-produced documents as an exhibit during an arbitration hearing on his termination from the Agency. In response to the Agency’s Motion for Sanctions, Complainant acknowledged that he violated the Order but argued that he needed to use the document for the arbitration. The AJ noted, however, that Complainant had deliberately blacked out the text “CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER” from the document when he submitted it at the arbitration hearing. She also noted that he had not requested a modification of the Protective Order to enable him to use the document. Accordingly, the AJ granted the Agency’s Motion for Sanctions, dismissed Complainant’s hearing request, and remanded the case to the Agency for the issuance of a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, the Agency found that Complainant did not show that the Agency subjected him to unlawful discrimination. The Agency concluded that Complainant belonged to protected classes and was subjected to unwelcome conduct. The Agency also concluded that Complainant did not show that the conduct was related to his race. In addition, the Agency stated that

Complainant's actions as a union representative for other employees' EEO complaints did not constitute protected EEO activity. The Agency concluded, however, that "the record shows that Complainant was involved in numerous EEO complaints of his own," that "Complainant's previous complaint was resolved two to five months prior to the adverse actions in the instant complaint," and that his "prior EEO activity was recent enough to create a nexus between the alleged conduct and his protected activity." With respect to the October 31, 2014, meeting, the Agency stated that "management merely holding a meeting does not affect Complainant's employment" and was not severe or pervasive. Similarly, the Agency concluded that, even if CW2 entered erroneous information into the VIP system, such conduct was not severe or pervasive. In addition, the Agency stated that, absent evidence of discriminatory intent, neither the denial of leave nor the routine assignment of duties constitutes harassment. The Agency also stated that CW1's actions were not severe or pervasive. The Agency concluded that the incidents at issue, even when considered as a whole and assumed to be true, did not rise to the level of a hostile work environment.

Further, the Agency found that "management explained that the alleged harassment either did not occur or was not severe or pervasive." With respect to Complainant's claim that management solicited complaints against him, the Agency stated that the Chicago OCREO had received complaints about Complainant and that managers asked employees to speak to them directly. In addition, the Agency noted that DM stated that he investigated Complainant's claim that CW2 tried to sabotage his work and that CW2 was only trying to input information that would help the person who interviewed the claimant. The Agency also stated that administrative leave was not intended for EEO work, that managers redistributed work when an employee was out, that S1 spoke with CW1 after Complainant told him that CW1 had assigned him work and yelled at him, and that Complainant has not pointed to subsequent problems with CW1.

#### CONTENTIONS ON APPEAL

On appeal, Complainant states that the Agency terminated his employment illegally and that he violated the Stipulation and Protective Order "for the health and safety of [his] family." He submits a copy of an arbitrator's decision overturning the termination.

In response, the Agency argues that the AJ properly dismissed Complainant's hearing request as a sanction for violating the Protective Order. The Agency also argues that Complainant did not establish that the Agency subjected him to a hostile work environment based on race or reprisal.

#### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (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

#### *1. Dismissal of Hearing Request*

The Commission’s regulations afford broad authority to Administrative Judges for the conduct of hearings, including the authority to issue protective orders not to disclose information and to sanction a party for failure without good cause shown to comply fully with an order. See 29 C.F.R. § 1614.109; EEO-MD-110, Chap. 7, § III.D.; Complainant v. Dep’t of Transp., EEOC Appeal No. 0120123005 (June 13, 2014) (citing Brannon-Winters v. Dep’t of the Navy, EEOC Appeal No. 01A51549 (Mar. 28, 2006)). Where a party fails to comply with an order of an AJ, the AJ may, as appropriate, take action against the non-complying party pursuant to 29 C.F.R. § 1614.109(f)(3). An AJ may: (1) draw an adverse inference that the requested information would have reflected unfavorably on the non-complying party; (2) consider the requested information to be established in favor of the opposing party; (3) exclude other evidence offered by the non-complying party; (4) issue a decision fully or partially in favor of the opposing party; or (5) take other action deemed appropriate. Id.; EEO-MD-110, Chap. 7, § III.D.10.

Upon review, we find that it was not an abuse of discretion to dismiss Complainant’s hearing request. Complainant was aware of the Agency’s Motion for Sanctions and had an opportunity to respond to the Motion. He acknowledges that he violated the Stipulation and Protective Order. As the AJ noted, Complainant did not request a modification of the Order. Instead, he intentionally violated the Order. We find that the AJ properly dismissed Complainant’s hearing request.

#### *Harassment*

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create a hostile or abusive working environment.” The Court explained that an “objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive” and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Id. at 23.

To establish a claim of harassment, Complainant must show that: (1) he is a member of a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct

involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment 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 to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994) (Enforcement Guidance on Harris). The evaluation "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

Having considered the evidence of record, we find that Complainant has not shown that the Agency subjected him to harassment based on race/national origin or reprisal.

Complainant has established that he is a member of protected classes and that he was subjected to unwelcome conduct. He participated in protected EEO activity when he assisted other employees with their EEO complaints and when he filed his own EEO complaints. EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, at II.A.3. (Aug. 25, 2016) (anti-retaliation protections cover individuals "who participate in the EEO process in any way, including as a complainant, representative, or witness for any side"); Milhado v. Dep't of the Army, EEOC Request No. 05870174 (July 2, 1987) (individual whose union activities included the representation of employees in EEO cases stated a claim of reprisal). The Agency, in its final decision, acknowledged that there was a close temporal proximity between Complainant's prior EEO complaint and the actions at issue here.

We find that Complainant has not established that the actions at issue here occurred because of his race/national origin or prior EEO activity. AD stated that employees complained to EEO investigators that Complainant had harassed them and that the investigators asked AD to have managers tell employees to report inappropriate behavior. Other Agency managers also stated that October 31, 2014, meeting addressed the OCREO report, that the report contained "numerous complaints" and "serious accusations," and that managers were advised to have employees make statements documenting accusations. S1 stated that he overheard the conversation between Complainant and CW1 and told CW1 not to make assignments to other people. DM stated that CW2 was trying to provide information to help the next person who would interview a claimant, and S2 stated that it was common for employees who performed walk-in duties to have appointments assigned to them. DM and ADM stated that time spent on EEO matters is regular duty time and that employees do not receive administrative leave for such purposes.

Complainant has not shown that the managers' explanations are unworthy of credence or that considerations of race/national origin or reprisal more likely motivated the Agency's actions. Although the temporal proximity between Complainant's protected EEO activity and the incidents at issue raises an inference of reprisal, the evidence is insufficient to support a determination that the incidents occurred because Complainant engaged in EEO activity.

Similarly, the evidence does not establish that the incidents occurred because of his race/national origin. Complainant's bare allegations, in the absence of supporting evidence, do not establish the existence of race/national origin discrimination or reprisal.

Furthermore, we find that a finding of discriminatory harassment is precluded based on our determination that Complainant did not show that the Agency's actions were motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant has not demonstrated that the Agency subjected him to harassment based on race/national origin or protected EEO activity.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we **AFIRM** the Agency's final decision and its finding of no discrimination.

### 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).

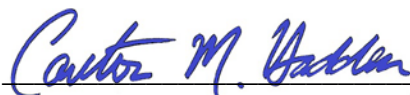
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

February 15, 2019

Date