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

[redacted]
Abe U.,[1]
Complainant,

v.

Dr. Heather A. Wilson,
Secretary,
Department of the Air Force,
Agency.

Appeal No. 0120172822

Hearing No. 480-2014-00795X

Agency No. 9H1C14002F17

DECISION

On August 21, 2017, 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 July 24, 2017, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a police officer, 0083, GS-06, at the Agency's 99th Security Forces Squadron facility in Nellis Air Force Base, Nevada.

On January 13, 2014, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment on the bases of race (white), national origin (Hispanic), age, and reprisal for prior protected EEO activity when he was subjected to ongoing harassment and his employment was terminated during his one year probationary period, effective December 1, 2013. Among other things, he alleged that, on November 23, 2013,

[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.

he heard two co-workers saying that he was suspended for crashing a government vehicle while another person who also crashed a government vehicle was promoted to lieutenant.

With respect to his harassment/hostile work environment claim, Complainant alleged several instances where supervisors and co-workers did not treat him with courtesy or respect or made him feel different. He noted instances including people not knowing who he was on his first day, barking orders at him, mispronouncing or misspelling his name, inquiring as to how long he had been in this country, and imitating his accent. He also alleged that, on or about July 12, 2013, management admonished him for failing to be at his post, but did not admonish others who engaged in the same behavior and, on or about November 21, 2013, management assigned him to a patrol unit by himself.

In response to Complainant's complaint, the Agency issued an undated Notice of Partial Dismissal and Acceptance of Claims Forwarded for Investigation. The Notice dismissed Complainant's termination claim because he appealed his termination to the Merit Systems Protection Board (MSPB). Therefore, pursuant to 29 C.F.R. § 1614.107(a)(4), the Agency contended that this claim must be dismissed.[2]

The Agency accepted the hostile work environment/harassment complaint and conducted an investigation which produced the following pertinent evidence.

Complainant was employed as a police officer at the Agency for six months, from June 3, 2013 to December 1, 2013. He generally alleges that he felt like his supervisors and co-workers treated him like a stranger from his first day. Visitor center employees did not know who he was and referred to him as "another gate guard." He said that supervisors were friendly and attentive to non-Hispanics, but were rude and indifferent to him. Supervisors 1 and 2 called him "Aztec" instead of "Azta" as he requested. Complainant felt singled out when Supervisor 1 and Co-worker 1 asked how long he had been in the country. He said Supervisor 1 made fun of his accent but never made fun of any other accent.

Complainant alleged that a supervisor reprimanded him for not standing outside the guard shack on a 100-degree day, while others routinely waited inside the guard shack until a vehicle approached the gate. In November 2013, another supervisor assigned him to patrol a unit by himself because he did not want to ride with him. That same month, Complainant crashed a government vehicle and his supervisors directed him to sign a statement indicating he found the vehicle dented.

[2] Complainant's MSPB appeal was dismissed for lack of jurisdiction. Complainant failed to take any action to revive his claim of disparate treatment regarding the government vehicle accident until his representative's submission of a Request for an Additional Issue to be Considered, on September 16, 2014. The Administrative Judge denied this request, noting Complainant's failure to properly pursue the dismissed claim through the EEO process after the MSPB dismissal.

Supervisor 1 attested that Complainant gave different names as to what he wanted to be called, including "Aztec" and "Mr. C." Management denied asking Complainant how long he had been in this country and making fun of his accent. Other than being charged leave without pay for failing to show up for work, Complainant had not been admonished to his knowledge. Complainant had an accident in a government vehicle and lied about the damage he caused to it. Complainant avoided assignments and agued with supervisors about his duties, procedures, and training.

Supervisor 2 attested that he called Complainant, "Azta," and denied referring to him as "Aztec." He wrote Complainant up because he was in the gate guard shack rather than being outside ready to check all entering vehicles' identification. Complainant was treated no differently from any other employee doing the same. In November 2013, Complainant was not assigned to patrol but was assigned to cover gates and/or posts as relief.

Supervisor 3 attested that he and the Commander investigated Complainant's complaints. They found that neither Supervisor 1 nor 2 intended to mispronounce Complainant's name, Complainant's arrival at the visitor's center was not mishandled, and there was no intent to discriminate or harass with respect to any allegations of asking Complainant how long he had been in this country. Complainant had not been admonished although he had been written up, which was not disciplinary. Supervisor 3 issued a memorandum for the record (MFR) dated December 9, 2013. Complainant was not assigned a patrol by himself but he was assigned a government vehicle. Complainant wrecked the vehicle, but made a false statement that the damage was on the vehicle when it was assigned to him. Complainant was a probationary employee deemed unqualified for the position for which he was being evaluated. The December 9, 2013 MFR is of record and supports management's position.

The Commander indicated he and several others investigated Complainant's allegations and determined they were unsubstantiated. As a probationary officer making a false report, Complainant was terminated during his probationary period.

Co-worker 1 attested that Complainant had an apparent lack of understanding of uniforms, responding to alarms, obeying warnings, and responding to calls. He asked Complainant how long he had been in this country for safety reasons, not harassment.

Co-worker 2, who is also Hispanic, supported Complainant's allegations, attesting that Supervisor 1 "talked down" to Complainant and used an inappropriate tone, making him feel unwelcome. Supervisor 1 listed Complainant on the duty roster several different ways, including, "Mr. C." and "Aztec." He also felt he had to "walk on eggshells" around Supervisor 1. He witnessed Supervisor 1 make fun of Complainant's accent and imitate it.

Complainant's employee records include supervisors' notes indicating that, on July 20, 2013, Complainant was advised to be outside of the gate, ready to check ID's and that he was advised as to proper dress code. Notes in August 2013 indicate Complainant lacked the basic police officer skills and Complainant failed to show up for work and did not call in sick.

An email string between employees indicates Complainant reported receiving a government vehicle that was damaged. Complainant provided a written statement as to the same. Complainant subsequently admitted to driving and, upon being questioned by investigators, admitted to damaging the vehicle.

A memorandum dated November 27, 2013 indicates Complainant was terminated during his trial/probationary period as a police officer, effective December 1, 2013. The decision to terminate Complainant was based on (1) his conduct in which he displayed behavior that is incompatible with being an Agency employee, specifically providing a false official statement regarding the destruction of government property, described as a patrol vehicle; and (2) on August 13, 20112, he received one day of AWOL (absent without leave) for not showing up to work or calling out and failing to follow proper leave procedures.

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. Over Complainant's objections, the AJ assigned to the case granted the Agency's/Complainant's December 23, 2014 motion for a decision without a hearing and issued a decision by summary judgment in favor of the Agency on June 6, 2017. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant asserts that he has presented sufficient evidence that he was subjected to a hostile work environment based on his race and national origin. He reiterates his allegations of harassment by his supervisors and co-workers. Complainant asserts that the harassment effected a term or condition of his employment and unreasonably interfered with his work, lowering his morale, making him feel uncomfortable, stressed, offended, stereotyped, and profiled. He felt like an outcast and not part of the team.

Complainant also asserts that the evidence establishes the Agency's conduct was sufficiently severe or pervasive as to form the basis of a hostile work environment claim. The short span of time over which the events occurred supports finding a discriminatory nexus. Being called, "Aztec," is a derogatory slur referencing Complainant's Hispanic descent and/or Mexican heritage and ethnicity. Additionally, Complainant alleges there are key material issues, including whether Complainant's supervisor mocked his accent.

In response, the Agency asserts that Complainant's termination during the probationary period for filing false official statements and being AWOL was not discriminatory but was based on Complainant's poor performance. It argues that it is undisputed that Complainant was involved

in an accident, damaging a government vehicle, and that he initially lied about it, although he eventually admitted he caused the damage. The Agency asserts that his AWOL is sufficiently documented as well. The Agency concludes that with respect to Complainant's allegations, even if true, Complainant cannot establish such slight annoyances or petty instances would constitute a hostile work environment.

ANALYSIS AND FINDINGS

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

Upon review of the record we find that the AJ properly found that the instant complaint was suitable for summary judgment. The record is adequately developed and there are no disputes of material fact. Complainant was given ample notice of the Agency's motion for a decision without a hearing, a comprehensive statement of the allegedly undisputed material facts, the opportunity to respond to such a statement, and the chance to engage in discovery. We find that, even assuming all facts in favor of Complainant, a reasonable fact-finder could not find in his favor, as explained below. Therefore, we find that the AJ's issuance of a decision without a hearing was appropriate.

Complainant has alleged the Agency subjected him to 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 the complainant's employment and create a hostile or abusive working environment." See also Oncale v. Sundowner Offshore Services. Inc., 23 U.S. 75 (1998). 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. Thus, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment.

We find that Complainant has failed to establish a prima facie case of harassment. Even if his allegations relating to being spoken to harshly, having his name mispronounced or misspelled, people asking him how long he has been in the country, etc., were true, we find they are insufficiently severe or pervasive to have altered the conditions of his employment. See Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996) (the allegation that a supervisor had "verbally attacked" the complainant on one occasion, attempted to charge him with AWOL, and disagreed with the time the complainant entered into a sign in log, were found to be insufficient to state a harassment claim). The allegations, assuming they are true, were isolated incidents that are insufficient to support a prima facie case of harassment. See Rennie v. Dalton, 3 F.3d 1100 (7th Cir. 1993).

We note that Complainant asserts on appeal that use of the term, "Aztec" is a slur, sufficient to constitute harassment. Although we have found that under certain circumstances a single or limited number of epithets or slurs may constitute harassment under Title VII, we do not find use of the word, "Aztec," sufficiently inflammatory to rise to that level. See Brooks v. Department of the Navy, EEOC Request No. 05950484 (June 25, 1996) (in some circumstances, the single use of a racial epithet or slur that "dredge[s] up the entire history of racial discrimination in this country" may be enough to constitute a hostile work environment); Yakubi v. Department of the Army, EEOC Request No. 05920778 (January 4, 1993) (single incident of verbal abuse and negative comments regarding the Japanese people sufficient to constitute race and national origin discrimination).

Additionally, we find Complainant's other allegations, including those relating to being admonished or to assignments, generally relate to routine managerial decisions. Without evidence of an unlawful animus, we have found that similar disputes do not amount to unlawful harassment. See Complainant v. Dep't of Def., EEOC Appeal No. 0120122676 (Dec. 18, 2014) (The record established that the issues between the complainant and the supervisor were because of personality conflicts and fundamental disagreements over how work should be done and how employees should be supervised, and there is no indication that the supervisor was motivated by discriminatory animus towards the complainant's race, sex. or age); Lassiter v. Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between a supervisor and a complainant do not rise to the level of harassment). Although Complainant asserts that the Agency acted discriminately, there is insufficient evidence to support the assertion that Complainant's race, national origin, age, or prior protected EEO activity played a role in the incidents at issue. Thus, Complainant's allegations, even if true, are insufficient to support this claim.

Finally, with respect to Complainant's disparate treatment claim relating to government vehicle accidents, the AJ's denial of Complainant's Request for an Additional Issue to be Considered is sufficiently supported. Complainant failed to properly revive this complaint in accordance with 29 C.F.R. § 1614.302.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order.

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 8, 2019
Date