



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

[REDACTED]  
Foster B.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 0120172997

Hearing No. 532-2014-00069X

Agency No. PHI120608SSA

**DECISION**

On September 11, 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 20, 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a secretary, 0318, GS-5 at the Agency's Mid-Atlantic Program Service Center in Philadelphia, Pennsylvania.

On September 7, 2012, Complainant filed an EEO complaint form generally alleging that the Agency discriminated against him. On November 2, 2012, he submitted another EEO complaint, alleging harassment and discrimination based on race (African-American) and color (Black) and in retaliation for prior EEO activity, noting events occurring in August and September 2012, relating to the assignment of duties, work conditions, use of leave, overtime, and working at work stations. He requested to amend his complaints on November 27, 2012, January 9, 2013, and January 28, 2013.

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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.

A letter from the Agency to Complainant, dated January 29, 2013, indicates the Agency was consolidating Complainant's claims, pursuant to 29 C.F.R. § 1614.606. The Agency found the Complainant's claims were as follows.

Complainant alleged disparate treatment based on retaliation when, on June 2, 2012, he received credit hours rather than overtime pay for hours worked and, on June 5, 2012, he was not allowed to detail to the Debt Management Section in order to work unlimited overtime.

He alleged harassment based on retaliation when, since May 2011: (a) he was suspended from work without pay 3 times, had 4 proposed suspensions, and received several disciplinary memos; (b) he was continuously verbally harassed and embarrassed by his manager in front of co-workers; (c) the manager denied him breaks; (d) he was referred to by his co-workers as "memo boy;" and (e) his emails referencing harassment were tampered with or deleted. On July 11, 2012, he was subjected to a Weingarten meeting as a result of his managers' false claims to which he was not given adequate time to respond; on July 13, 2012, management denied him the ability to work credit and overtime hours without providing him a written explanation; and, on July 17, 2012, management responded to Complainant's emails with phone calls and stating "We got some issues. I'm going to send you and email," and "Who the hell care about frappy hair people."

He alleged discrimination and harassment based on race, color, and in retaliation for prior EEO activity when: (a) on May 9, 2012, he was issued a Management Directive regarding overtime procedures; (b) on August 26, 2012, he was instructed to work overtime outside the normal work area, whereas a white female co-worker was not similarly instructed; (c) on August 24, 2012, he was assigned duties that were not his regular duties; (d) on September 9, 2012, he was told to work overtime in Module 7; (e) on September 14, 2012, he was denied leave and the ability to work overtime; (f) on October 23, 2012, he was issued a Management Directive regarding Rep Payee Accounting Workload; (g) on November 5, 2012, he was charged Absent Without Leave (AWOL); (h) on November 9, 2012, Complainant was issued a Proposal to Suspend for 21 Days; (i) on November 20, 2012, he was issued a Management Directive regarding Reissuance; (j) on November 29, 2012, his manager came to his cubicle, spoke to him in a disrespectful tone, and, when he attempted to leave, blocked the exit and flinched, as if to hit him and when he went to speak to upper management, his manager became very loud and rude; and (k) on December 6, 2012, he was issued a Management Directive regarding failure to complete work assignments.

He also alleged disparate treatment based on race, color, and in reprisal for prior EEO activity when, on August 26, 2012, he was instructed to work overtime outside the normal work area, whereas a white female co-worker was not similarly instructed.

The letter indicates the Agency dismissed the Complainant's allegations that since May 2011, he had been suspended without pay 3 times, proposed for suspension 4 times, and received several disciplinary memos, pursuant to 29 C.F.R. § 1614.107(a), as stating previously raised in an earlier complaint; thus, the Agency dismissed all such claims prior to April 22, 2012.

The Agency dismissed the claim relating to being instructed to work overtime outside the normal work area on August 26, 2012, pursuant to 29 C.F.R. § 1614.107(a)(5), as there is no reasonable expectation that this will recur and Complainant has acknowledged receiving a remedy which eradicated the effects of the alleged discrimination.

The Agency conducted an investigation of the claims as described above, which produced the following pertinent evidence.

Complainant attested that he worked at least 3 extra hours on June 2, 2012 and requested he be compensated with overtime, rather than credit hours. Management refused his request and compensated him with credit hours, but compensated other employees with overtime.

Management indicated that the availability of credit and/or overtime depends on the workload and components must be approved for overtime. Employees sign up for credit or overtime hours, if available, which is subject to approval by a member of management.

In June 2012, Complainant applied for a temporary developmental opportunity in the Debt Management Section, which would have allowed him to work unlimited overtime. The position was not filled but was reposted at a higher grade-level requirement. Complainant alleges that at least 2 employees were detailed in Debt Management without the job being posted for everyone to compete.

Management indicated that two employees were selected for the detail, both of whom were assessed more favorably than Complainant.

Complainant attested as to the occurrence of the alleged harassing events, including describing events that, from his perspective, involved management's speaking to him harshly, intimidatingly, rudely, and disrespectfully, as well as bullying him; he also indicated management did nothing when they heard co-workers calling him, "memo boy." The record contains emails generally documenting conflicts with management, particularly relating to communication and breaks. It contains electronic messages indicating missing email files. Complainant attested as to a Weingarten meeting on July 11, 2012 and indicated all of management's allegations were false; he indicated he was not given adequate time to prepare for the meeting.

Complainant's manager denied hearing co-workers call him "memo boy." She did not receive any emails relating to Complainant's deleted emails, as Complainant indicated another section was looking into it. Complainant requested 4 hours to work on his statement to management regarding his alleged inappropriate behavior and one hour was approved. Complainant later indicated he received additional time.

The record includes the management directives as discussed above. Generally, the directives either instruct Complainant as to assignments or document Complainant's failure to adhere to the Agency's procedures and instructing him as to following the procedures at issue. Complainant

disputes that these are, in fact, the Agency's procedures. Complainant attested to being assigned duties above his pay grade, which interfered with his ability to perform his regular duties. Emails between Complainant and management discuss the denial of his requests for leave and overtime.

Management indicated that they told Complainant that he was not following the management directives and gave him notice that if he continued to mismanage his work, he would not be given the opportunity to work overtime and credit hours.

Documentation shows management charged Complainant with AWOL as alleged; it indicates Complainant failed to follow the Agency's procedures requiring employees to have leave approved prior to leaving the worksite. Complainant indicated adherence to such procedures has not been required in the past.

Management issued a Notice of Proposed Suspension for 21 days, dated November 9, 2012, as indicated above.<sup>2</sup> It was issued for conduct unbecoming a federal employee, specifically, failing to follow a management directive and discourteous and disrespectful conduct to a management official. Following the proposal, the Agency issued an additional management directive as indicated above, generally indicating Complainant was not following Agency procedures and directing him to do so.

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. When the Complainant did not object, the AJ assigned to the case granted the Agency's March 3, 2017 motion for a decision without a hearing and issued a decision by summary judgment in favor of the Agency on June 8, 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 the Agency did not make witnesses available who would have knowledge of his claims, would not make available conference room space for him to conduct depositions of Agency employees, and that the Union did not afford him representation and he, therefore, lacked representation.

In response, the Agency asserts that Complainant cannot show that the alleged incidents of harassment and reprisal were based on his protected class status and the alleged incidents are not objectively severe and persuasive and, therefore, cannot amount to a hostile work environment.

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<sup>2</sup> Suspensions in excess of 14 days are subject to Merit System Protection Board jurisdiction and are not within that of EEOC.

Complainant's issues with regard to his reprisal claims are not adverse actions and, with his harassment and reprisal claims, he cannot show a causal connection to his prior EEO activity. Finally, the Agency asserts that Complainant has not successfully rebutted the Agency's legitimate, non-discriminatory reasons for its actions.

### 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.

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 must further establish that such facts are material under applicable law. While Complainant has, in a very general sense, asserted that facts are in dispute, he has failed to point with any specificity to particular evidence in the investigative file or other evidence of record that indicates such a dispute.

For the reasons discussed below, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in his favor. Therefore, we find that the AJ properly issued a decision here by summary judgment.

Complainant has alleged that the Agency treated him disparately in several instances. A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Tex. Dep't of Cmty. Affairs v. Burdine. 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate

responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Even if we assume that Complainant established a prima facie case of discrimination, his claims ultimately fail, as we find that the Agency articulated legitimate, non-discriminatory reasons for its actions. With respect to Complainant having been offered credit hours as opposed to overtime, the Agency explained that overtime and/or credit hours are made available based on the component's workload; employees sign up for overtime or credit hours as they are available and management approval is required. With respect to not being allowed to detail to the Debt Management Section, the Agency explained that it chose two other candidates who ranked higher in evaluation than Complainant.

Complainant alleged that he was subjected to several instances of disparate treatment relating to management directives, assignments, overtime, leave, and discipline. The Agency explained that the management directives were due to his mismanagement of his daily assignments, conduct unbecoming a federal employee, and failure to follow Agency procedures and directives. Complainant's job description including performing other duties as assigned. Complainant was denied leave when it appeared he was starting a pattern of arriving late and then requesting to work overtime at the end of his tour. Complainant also did not follow proper leave procedures, which required prior approval.

Complainant also alleged the Agency subjected him to numerous instances of 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. Complainant's allegations relating to harassment can generally be described as relating to being spoken to harshly or rudely and disagreements with managerial decisions. With respect to his allegations relating to being spoken to harshly, in a manner that embarrassed him, being spoken to loudly or rudely, and being called "memo boy," 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 find Complainant's other allegations, including those relating to overtime and credit hours, leave approval, assignments, break scheduling, sufficient time to prepare for meetings, the issuance of management directives and their contents, and discipline, to be disagreements about 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 and/or in reprisal, there is insufficient evidence to support the assertion that Complainant's race, color, 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.

We also find that Complainant's allegations relating to suspensions without pay, proposed suspensions and other disciplinary memos, which are pending in another complaint, was appropriately dismissed, pursuant to 29 C.F.R. § 1614.107(a)(1), and his allegations relating to being instructed to work overtime outside the normal work area on August 26, 2012, was properly dismissed, pursuant to 29 C.F.R. § 1614.107(a)(5).

### 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

February 14, 2019

Date