U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted] Donte L.,[1]
Complainant,

v.

Charlotte A.
Burrows,[2] Chair,
Equal Employment Opportunity
Commission, Agency.

Appeal No. 2020002367

Agency No. 2016-0037

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 30, 2019, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

[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.

[2] As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints. The Chair has abstained from participation in this decision.

ISSUE PRESENTED

The issue is whether Complainant established that the Agency subjected him to harassment in reprisal for opposing an allegedly discriminatory practice when it issued him a Letter of Warning.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Sign Language Interpreter, GS-12, at the Agency's Office of Chief Human Capital Officer (OCHCO) in Washington, D.C. Complainant stated that in July or August 2015, his first-line supervisor (S1) accused him and another Sign Language Interpreter (SLI) of spending too much money on procuring the services of sign language interpreters. Complainant stated that in October or November 2015, he told S1 that the Agency should not "use the budget" as a reason to limit or reduce reasonable accommodations for deaf and hard of hearing employees. Complainant also stated that in November 2015, S1 placed him and SLI under the day-to-day supervision of the then-Disability Program Manager (DPM). Report of Investigation (ROI) at 12.

On December 14, 2015, a new employee (NE) emailed S1 a complaint about Complainant and SLI. NE stated that, during an orientation session on October 15, 2015, for newly-hired deaf and hard of hearing Information Intake Representatives (NE's position) regarding video telephone call technology, Complainant stated, "[NE] is not paying attention, I cannot continue to sign since I see his big black forehead." NE stated that, during a break, Complainant stated to him, "Let me make this clear to you…you are not taking this seriously. Me and [another employee] worked five to six years for this and you better not screw this up." NE noted an additional incident that occurred on December 8, 2015, when Complainant stared at him "like a hawk" during the filming of a video for the deaf and hard-of-hearing community, and NE "kept messing up" as a result. NE stated that he later learned that "something happened to the video"; that he was not in the video and that he believed he was discriminated against because he is Black and uses signed English rather than American Sign Language. S1 requested an investigation into NE's allegations. ROI at 389-90.

A Human Resources Specialist (HRS) conducted an investigation and issued a Report of Investigation on March 2, 2016. Regarding the first incident, a Training Specialist (TS) stated that Complainant "upset the training" when he stated that he would not interpret unless NE looked at him, and that NE

"better use" American Sign Language (ASL) or Complainant would not interpret. TS stated that she heard Complainant state that he "can't sign when looking at [NE's] forehead," but she did not recall Complainant using the phrase "black forehead." TS also reported that Complainant stated that signing with elbows was not acceptable and unless NE uses ASL, Complainant would not interpret, and that NE "better take his job seriously and do it right as he should be grateful to have been given the position in the first place." TS stated that, in her opinion, Complainant's behavior was unprofessional. ROI at 396-8.

Regarding the second incident, NE was filming a video for the Agency's external website, and Complainant was scheduled to provide the voiceover for NE's portion of the video. Witnesses stated that Complainant said that NE's signing skills were "not good"; that Complainant could not provide the voiceover because NE "did not know sign language"; and that Complainant "had a reputation" within the sign language interpreter community and NE's signing would make Complainant "look bad." One witness stated that Complainant's attitude was "somewhat pompous," and that he was more concerned with his reputation than with assisting in this Agency project. Based on Complainant's statements, NE was not used in the video. Based on its investigation, HRS recommended that Complainant be issued either a Letter of Warning (LOW) or a Letter of Reprimand. ROI at 399-401.

On April 6, 2016, S1 issued Complainant a LOW for discourteous conduct based on the two incidents. S1 stated that Complainant's conduct was unprofessional, inappropriate, and discourteous in the performance of his duties. S1 also instructed Complainant to attend an Interpersonal Communication Skills training. ROI at 401-2.

On July 24, 2016, Complainant filed an EEO complaint alleging that the Agency subjected him to harassment in reprisal for opposing an allegedly discriminatory practice (complaining to an Agency manager that the Agency should not use the budget as a basis to limit or reduce reasonable accommodations for deaf and hard of hearing employees) when on April 6, 2016, he was issued a LOW.

On July 10, 2018, the Agency accepted the LOW claim for investigation.[3] However, the Agency dismissed the following allegations of retaliation as untimely:

1. in early November 2015, S1 changed Complainant's reporting chain of command and directed him to report to DPM;

2. S1 consistently overruled DPM's decisions, which caused further problems with the delivery of services to deaf and hard of hearing employees. For example, S1 overruled DPM's decision to have Complainant and SLI involved in the development of the Standard of Work (SOW) for the national contract for "CART" services, and as a result, Complainant and SLI were excluded from the SOW process;

3. in November 2015, Complainant received his lowest performance rating (Fully Successful) in 15 years at the Agency, which Complainant claimed was an example of a "blatant misuse of power to punish and harass" him; and

4. on February 6, 2016, Complainant was contacted by HRS, who was investigating a complaint filed against Complainant and SLI by NE. The complaint was based on incidents which occurred on October 15, 2015, and December 8, 2015.

The Agency also dismissed a basis of disability because Complainant did not claim that he was disabled or that he was subjected to discriminatory treatment for requesting a reasonable accommodation. The Agency noted that while Complainant alleged retaliation for his association with individuals with a disability, it was his opposition to alleged discrimination against individuals with a disability, and not association, that was at issue in this case. ROI at 188-9.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

[3] The Agency initially dismissed Complainant's complaint. Complainant appealed the dismissal. The Agency thereafter reversed its dismissal and issued a revised Acceptance/Partial Dismissal letter to Complainant. The Commission subsequently closed the appeal in EEOC Appeal No. 0120182016.

The Agency found that there was no evidence to support Complainant's assertion that S1 issued the LOW in retaliation for his opposition to an allegedly discriminatory practice, but there was ample evidence showing that the LOW was issued in response to the investigation into complaints brought against Complainant. The Agency also found that the single incident of issuing the LOW was not sufficiently severe or pervasive to rise to the level of unlawful harassment, and that Complainant did not allege that he suffered any adverse consequences because of the LOW, which was temporary and removed after six months. The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant's Contentions

On appeal, Complainant argues that the investigation was biased against him and that the EEO investigator failed to interview his key witnesses, specifically, DPM and a contract interpreter (CI). Complainant also argues that false statements were not examined to determine credibility or veracity, for example, that Complainant was "frustrated" by NE's lack of ASL proficiency. Complainant also asserts bias from S1 and HRS because the LOW contained "numerous mischaracterizations," which reflected S1's bias, and HRS's investigation was not impartial and was incomplete. Complainant states that HRS relied heavily upon TS's statement about the training incident, but that CI was the "only witness" to the conversation, and had HRS interviewed CI, he would have discovered that none of TS's statements were correct.

Regarding the December 8, 2015 incident, Complainant states that he was not working in his capacity as an interpreter, but as a member of the Information Intake Representative committee, and that he provided professional feedback on the quality of the video. Complainant also states that witness statements were not accurate or were taken out of context and that HRS took the statements at face-value and did not determine their veracity. Complainant argues that S1 "misused her authority and position" when she issued the LOW to target him for not agreeing to reduce reasonable accommodations for deaf employees.

In addition, Complainant states that his 2015 performance rating was retaliatory and an attempt to coerce him into reducing reasonable accommodation services. Complainant also asserts that S1 created a hostile work environment, such as when she threatened to take away his alternative

work schedule (AWS); cut off Complainant during staff meetings; insisted that Complainant not participate in the development of the SOW; and made Complainant sign in every morning for two to three months.

Agency's Contentions

The Agency denies that the investigation was biased. Regarding Complainant's witnesses, the Agency asserts that DPM was not present at either incident; and that even if CI was present at the October training session, she was not the sole witness and that the Agency obtained statements from other witnesses. The Agency argues that the absence of any statement from DPM or CI does not warrant a reversal of its final decision, because there was adequate evidence upon which the Agency based its findings.

The Agency argues that its decision regarding issuance of the LOW is well supported by the evidence and law and that no reasonable person could conclude that the single, isolated instance of receiving a LOW created an abusive working environment or was severe, pervasive, physically threatening, or humiliating. Further, the Agency asserts that the record contains no evidence that the alleged harassment was based on Complainant's alleged prior protected activity. Notably, HRS, who conducted the investigation and recommended the LOW or a reprimand, had no knowledge of Complainant's alleged prior protected activity. The Agency requests that the Commission affirm its final decision finding that Complainant failed to show he was subjected to harassment in reprisal for protected EEO activity.

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 Chap. 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

Additional claims

As an initial matter, we note that Complainant describes his dissatisfaction with the way the Agency processed his EEO complaint. Complainant is attempting to raise "spin off" complaints, which must be raised with the Agency official responsible for complaint processing and/or processed as part of the original complaint, rather than on appeal. See Samuel C. v. Dep't of Justice, EEOC Appeal No. 0120182823 (Nov. 15, 2018); Denis M. v. U.S. Postal Serv., EEOC Appeal No. 0120181126 (May 2, 2018). As such, this decision will not address Complainant's dissatisfaction with the EEO investigation.

On appeal, Complainant raised his 2015 performance rating and S1's alleged insistence that Complainant not participate in the development of the SOW. EEOC regulations require that complaints of discrimination be brought to the attention of the EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1). The record shows that Complainant initiated EEO counseling on April 18, 2016. ROI at 34. Complainant stated that he was issued his rating in November 2015, and while Complainant did not specify the date, even assuming that his rating was issued on November 30, 2015, his initial EEO contact was 140 days later, which was well past his 45-day deadline. ROI at 29. Regarding the SOW claim, Complainant stated that he began to work on the SOW in "early January 2016." ROI at 458. Again, while Complainant did not provide an exact date, even assuming that S1 denied his ability to work on the SOW through early January 2016, Complainant did not initiate EEO contact within 45 days. As such, we affirm the Agency's determination that the claims related to Complainant's 2015 performance rating and the SOW were untimely.

Complainant also raised new allegations of retaliation and harassment for the first time on appeal, including threatening to take away his AWS, cutting him off during meetings, and requiring him to sign in. New claims may not be raised for the first time on appeal. See Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004).[4]

[4] If Complainant wishes to pursue these claims, he may contact an EEO counselor within 15 days of the date this decision is issued. For timeliness

Retaliatory Harassment

Complainant alleged that he engaged in protected EEO activity and was subjected to harassment after he spoke up to "defend the rights" of the Agency's deaf and hard of hearing employees when he complained to S1 that the Agency should not use budgetary limitations to reduce or limit reasonable accommodations. ROI at 12.

To prevail in his claim of retaliatory harassment, Complainant must show that he was subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Damon Q. v. EEOC, EEOC Appeal No. 2022000576 (April 25, 2024); Janeen S. v. Dep't of Com., EEOC Appeal No. 0120160024 (Dec. 20, 2017). Importantly, "[t]he threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment." Irvin C. v. Dep't of Homeland Sec., EEOC Appeal No. 0720180024 (July 25, 2023), at *8 (quoting EEOC Enforcement Guidance on Retaliation & Related Issues, No. 915.004, § II.B, Ex. 17. (Aug 25, 2016). "If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation & Related Issues, No. 915.004, § II.B, Ex. 17. (Aug 25, 2016).

We find that Complainant has not established a retaliatory motive for the issuance of the LOW. The record shows S1 issued the LOW based on the recommendation following HRS's investigation into E1's allegations. ROI at 302-3. There is no evidence that HRS was aware of Complainant's protected EEO activity in support of the Agency's deaf and hard of hearing employees. HRS stated that he was not aware of Complainant's activity regarding any allegedly discriminatory practices, which Complainant did not dispute. ROI 373-4. Because we find no retaliatory motive, we need not address whether issuance of the LOW would have dissuaded reasonable employees from

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purposes, the date of initial contact will be deemed to be the date this appeal was filed.

making or supporting a complaint of discrimination. Accordingly, we find that the Agency did not subject Complainant to retaliatory harassment.

While Complainant alleged harassment when he was issued the LOW, the Commission has found that a discrete action states a claim outside the framework of a harassment analysis and can also be reviewed as disparate treatment. See Moylett v. U.S. Postal Serv., EEOC Appeal No. 0120091735 (Jul. 17, 2012); Sedlacek v. Dep't of Army, EEOC Appeal No. 0120083361 (May 11, 2010). Because Complainant's allegations could alternatively be interpreted as a claim for disparate treatment, we will evaluate the claim under that framework as well.

Disparate Treatment

Generally, claims of disparate treatment based on indirect evidence are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

For 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. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, can be streamlined in some circumstances. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a

preponderance of the evidence that the agency's actions were motivated by discrimination. See Aikens, 460 U.S. at 713-14 (1983); Complainant v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990).

Here, the Commission finds that the Agency proffered legitimate, nondiscriminatory reasons for issuing the LOW. The record shows that NE emailed S1 to complain of Complainant's conduct, and that HRS investigated NE's allegations. ROI at 291-4. S1 stated that she issued the LOW because she agreed with the recommendation based on the findings of HRS's investigation. ROI at 281. HRS stated that he was not aware of Complainant's activity regarding any allegedly discriminatory practices, and that the LOW was issued for Complainant's misconduct toward a hearing-impaired coworker. ROI 373-4.

We find that Complainant has not shown that the proffered reasons were pretext for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008). On appeal, Complainant asserted that S1 and HRS were biased, but he did not provide any evidence to support his assertions.

Complainant also asserted that the record was incomplete because DPM and CI were not interviewed. However, we find that there is no evidence that DPM witnessed the events on October15, 2015 or December 8, 2015. While CI was a witness to the October 15, 2015 incident, we note that HRS interviewed eight witnesses, in addition to Complainant and NE. ROI at 400. Complainant argued that CI was the "only witness" to the conversation, and had HRS interviewed CI, he would have discovered that none of TS's statements were correct. However, the record shows that another employee was in that training session, and she provided a witness statement. ROI at 422-3.

In addition, while Complainant argued that "false statements" were not verified, the record does not support a finding that witnesses made any false statements. For example, Complainant alleged that a statement that he was "frustrated" by NE's lack of ASL proficiency was false. However, two witnesses noted that Complainant "upset the training," and that Complainant was

"frustrated" due to NE's proficiency in ASL. One witness added that Complainant seemed "outraged" that NE was looking at his phone during the training. ROI at 416, 422. In addition, for the December 8, 2015 incident, two witnesses indicated that Complainant stated that NE's "signing skills were not understandable and not good," and that Complainant did not want his voice used in the video because people would recognize him; and Complainant expressed concerns about NE's "language production." ROI at 407, 434.

While Complainant asserts that the Agency issued the LOW in retaliation for his opposition to a reduction in services for deaf and hard of hearing employees, there is no evidence to support that assertion. Rather, the record supports the Agency's contention that the LOW was issued because of Complainant's conduct that was the subject of NE's complaint. We find that the record contains no evidence to connect the LOW, issued on April 6, 2016, to Complainant's opposition to reducing reasonable accommodations for deaf and hard of hearing employees. Further, the Commission has long held that "[p]articipation in the EEO process does not shield employees from uniformly applied standards of conduct and performance; nor are the statutory anti-retaliatory provisions a license for employees to engage in misconduct." Berkner v. Dep't of Commerce, EEOC Petition No. 0320110022 (June 23, 2011). As such, we find that Complainant did not show pretext for discrimination and that he did not establish that the Agency retaliated against him when it issued him a LOW.

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 decision finding that Complainant did not establish that he was subjected to harassment in reprisal for opposing an allegedly discriminatory practice when it issued him a Letter of Warning.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

https://publicportal.eeoc.gov/Portal/Login.aspx

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

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

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

/s/Raymond Windmiller
Raymond Windmiller
Executive Officer
Executive Secretariat

January 8, 2025
Date