



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

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Virgilio M.,<sup>1</sup>  
Complainant,

v.

Pete Hegseth,  
Secretary,  
Department of Defense  
(Defense Contract Management Agency),  
Agency.

Appeal No. 2022000947

Hearing No. 520-2021-00205X

Agency No. P6-20-0023

DECISION

On December 3, 2021, Complainant filed an appeal, pursuant to 29 C.F.R. §1614.403(a), from the Agency's November 3, 2021 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 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 action.

At the time of events giving rise to this complaint, Complainant worked as a Management Program Analyst, GS-0343-12, at the Agency's facility in Tewksbury, Massachusetts.

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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 March 10, 2020, Complainant filed a formal EEO complaint alleging discrimination and harassment on the bases of race (African American), disability (bilateral hearing loss), and in reprisal for prior EEO activity when:

1. From October 29, 2019, to February 27, 2020, Agency employees harassed Complainant and treated Complainant differently than others. Complainant provided the following information in support of this claim:
  - a. On October 29, 2019, Criminal Investigator (Investigator-1) did not recuse himself from the inquiry that led to Complainant receiving a Proposed Letter of Reprimand, did not follow Agency policies during his inquiry and accused Complainant of lying about Complainant's loss of hearing;
  - b. On October 29, 2019, Complainant's second-line supervisor (Supervisor-2) ignored the Agency's Information Security instructions, Raytheon Integrated Defense Systems (IDS) instructions, and guidance issued from the Regional Legal Department when submitting her Proposed Letter of Reprimand;
  - c. On November 6, 2019, Program Manager – Personnel Security and Director of Security failed to inform Complainant of the documents they submitted to Department of Defense (DoD) Consolidated Adjudication Facility (CAF) that led to Complainant's security clearance being considered for revocation;
  - d. On November 26, 2019, Supervisor-2 did not provide Complainant an opportunity to respond to a Proposed Letter of Reprimand;
  - e. On November 15, 2019, Complainant's third-line supervisor (Supervisor-3) failed to address the complaint Complainant raised with him regarding senior officials colluding against Complainant;
  - f. On December 17, 2019, Supervisor-3 failed to address the statement sent to Complainant by Complainant's first-line supervisor (Supervisor-1), and Complainant's continuous reports of harassment;
  - g. On December 18, 2019, Supervisor-1 interfered with Complainant's hiring opportunities by sending a text message to Complainant's telephone and requested that Complainant do her a favor for a favorable hiring reference;
  - h. On December 18, 2019, Supervisor-1 failed to address the harassment, discrimination and targeting that Complainant was subjected to by Supervisor-2;

- i. On January 28, 2020, Deputy Regional Commander (Manager-1) failed to address the text messages Supervisor-1 sent Complainant;
  - j. On February 13, 2020, Manager-1 refused to recuse himself from the investigation against Complainant, and did not address the false instructions and testimony provided in the investigation against Complainant; and
  - k. On February 27, 2020, Manager-1 did not respond to Complainant's request for a copy of the Douglas Factor scorecard.
2. On November 6, 2019, Supervisor-3 failed to inform Complainant of the rule/regulation that Complainant violated when he removed Complainant's Continuity of Operation (COOP) duties, and access to other security and contract duties.<sup>2</sup>

The record shows that claims 1(a), 1(b), 1(d), 1(i), 1(j), and 1(k) all relate to a Proposed Letter of Reprimand (PLOR) which Supervisor-2 issued to Complainant on November 26, 2019. The claims in the present case relate to the processing of the PLOR itself rather than the ultimate decision on the proposed discipline. Complainant did not amend his complaint to address the ultimate decision that was issued on February 13, 2020, so we do not address it. Underlying the PLOR is a charge of conduct unbecoming a federal employee based on Complainant having recorded a conversation with Supervisor-1 on May 14, 2019, without her knowledge or consent, and having a recording device in his possession during a meeting with Supervisor-1 and a neutral observer on June 19, 2019. The record contains Complainant's admission that he made the former recording and possessed the recording device in the latter instance. Complainant identified his prior EEO activity as the filing of an EEO complaint in 2015 and 2018.

Regarding claim 1(a), Complainant reported a belief that Investigator-1 had shown bias against Complainant during three previous investigations into Complainant. Complainant reported that Investigator-1 was cohabitating with and engaged to be married to Supervisor-2.

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<sup>2</sup> Four additional claims were procedurally dismissed by the Agency. Complainant does not challenge the dismissal of these four claims on appeal. The Commission exercises its discretion to address only those issues specifically raised on appeal and declines to address these procedural dismissals. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) at Chap. 9, § IV.A (Aug. 5, 2015).

Complainant stated that Investigator-1 found Complainant to have violated an Agency policy related to restricted behavior in classified sites. Complainant stated that such a finding was not supported because the worksite does not have any classified areas. Complainant stated that Investigator-1 questioned the veracity of Complainant's hearing loss when Investigator-1 asked Complainant about hearing aids despite Complainant having provided Investigator-1 with a diagnosis letter from Complainant's medical provider.

Investigator-1 stated that he was assigned the investigation into allegations that Complainant illegally recorded some conversations at a worksite. Investigator-1 stated that on August 19, 2019, his first-line supervisor told him to transfer the investigation to a special agent (Investigator-2) because Complainant had complained about Investigator-1. Investigator-1 stated that he did not apply any Agency Policy because of this reassignment. The record shows that Investigator-2 took over the investigation and submitted the final report. Investigator-1 denied accusing Complainant of lying about hearing loss. Investigator-1 stated that he may have asked why Complainant was not wearing hearing aids at the time of the interview.

Regarding claim 1(b), Complainant stated that the relevant policy addresses the presence of cameras, cellphones, and electronic devices but that the worksite does not have any space that is considered classified or restricted to activate this policy. Supervisor-2 disagreed with Complainant's characterization. Supervisor-2 stated that the PLOR was based on a Report of Investigation that was completed by an investigator. Supervisor-2 stated that the PLOR was vetted by Agency Labor Employee Relations and Legal Counsel.

Regarding claim 1(c), Complainant admitted that there is no requirement that he be informed of documents being submitted to CAF.

Regarding claim 1(d), Complainant stated that Supervisor-2 did not provide Complainant the opportunity to respond to the PLOR despite Agency policy requiring such opportunity. Supervisor-2 stated that a response to any LOR does not go to the proposing official but is supposed to be addressed to the deciding official, which in this case was Manager-1. Complainant admitted that the PLOR instructed him to address his response to Manager-1 and that he submitted such a response.

Regarding claim 1(e), Complainant stated that he reported two instances of negative behavior. First, Supervisor-2 sent Complainant an email about Complainant's IG complaints. Second, Senior Leadership Team Members entered a room singing, "It's getting hot in here, so take off all your clothes," while staring at Complainant. Regarding the former, Complainant stated that only a few people had the right to know about the complaints. Regarding the latter, Complainant reported that he considered it a deliberate attack on Complainant because they were aware of the recording device issue. The record shows that Supervisor-3 investigated these two reported incidents and determined that Complainant had misinterpreted the benign events as harassment. Supervisor-3 stated that he responded to Complainant about the allegations and that he reported the allegations to upper management.

Regarding claim 1(f), Complainant stated that he provided Supervisor-3 with a copy of a cellular text which Supervisor-1 sent Complainant where Supervisor-1 indicated that Supervisor-2 was targeting and harassing Complainant. Complainant stated that Supervisor-3 did not respond or act on the information. Supervisor-3 stated that he issued Supervisor-1 a Letter of Warning and Instruction regarding the conduct and the record contains evidence of this disciplinary action.

Regarding claim 1(g), Complainant admitted that he was never offered any position to which he applied and that he had not reached the stage where a reference was required.

Regarding claim 1(h), Complainant stated that Supervisor-1 warned Complainant on several occasions that Supervisor-2 was targeting Complainant. Complainant stated that Supervisor-1 had a responsibility of reporting this information to upper management. Outside of the text message addressed in claim 1(f), the record does not contain any evidence or further context related to this claim.

Regarding claim 1(i), Complainant stated that the text messages in this claim are the same as the text addressed in claim 1(f). Complainant stated that Manager-1 responded that Complainant's time for submitting additional materials had expired. Complainant reported a belief that the collective bargaining agreement allowed a deciding official flexibility on the time for receiving additional materials. Complainant also reported a belief that Manager-1 had an obligation to address potential targeting or harassment. Manager-1 stated that his role was simply to review the allegation that

Complainant improperly recorded a conversation, the proposed reprimand, and Complainant's response.

Regarding claim 1(j), Complainant reported a belief that the fact that Complainant had written a statement in support of an EEO complaint filed by his former third-line supervisor against upper management created a reason for Manager-1 to recuse himself from being the deciding official regarding the PLOR. Manager-1 reported that he did not understand why he would have to recuse himself from the process. Manager-1 stated his role was to evaluate the PLOR and the associated information.

Regarding claim 1(k), Complainant stated that he made the request so he could see if he had been graded fairly under the Douglas Factors. Manager-1 reported not remembering exactly why he did not respond but guessed that it was most likely due to other pressing job duties.

Regarding claim 2, Complainant stated that Supervisor-3 removed the COOP Coordinator duties from Complainant's responsibilities as well as Complainant's access to anything related to security and contracting. Complainant reported asking Supervisor-3 to identify the rule or regulation that Complainant was alleged to have violated. Complainant stated that Supervisor-3 reported being unable to provide Complainant with an answer because Supervisor-3 did not know. Supervisor-3 stated that he made Complainant aware that the duties were temporarily suspended pending the outcome of CAF's investigation into Complainant's security clearance.

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 requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's July 19, 2021, motion for a decision without a hearing and issued a decision without a hearing finding no discrimination on September 17, 2021. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. §1614.109(g). 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. In rendering this appellate decision, we must scrutinize the AJ’s legal and factual conclusions, and the Agency’s final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a “decision on an appeal from an Agency’s final action shall be based on a *de novo* review...”); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge’s determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

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. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute.

The record clearly establishes the Agency’s legitimate, nondiscriminatory reasons for investigating Complainant’s behavior and subsequently issuing the PLOR. Specifically, there were credible allegations that Complainant had brought a recording device into the Agency facility on two occasions and had used it to record a conversation during one of those instances. Additionally, the investigation subsequently supported that Complainant had engaged in such behavior. We find Complainant failed to show that the articulated reasons for these actions were a mere pretext for discrimination or retaliation. Complainant’s disagreement with management’s conclusion that the presence and/or use of the recording device was against Agency policy, fails to establish discriminatory or retaliatory animus. Even if Complainant’s argument represented a correct interpretation of Agency policy, a mere mistake in application of Agency policy is not relevant in establishing either form of animus.

Similarly, Complainant fails to establish that any of the conduct that Complainant alleges was harassing was based on Complainant’s membership in a statutorily protected class or on his prior EEO activity. Furthermore, the record does not contain evidence sufficient to support that the conduct in certain claims occurred as alleged. For instance, the record shows that Supervisor-3 investigated the harassment Complainant had reported to him, contrary to the allegations in claims 1(e) and 1(f).

Finally, we find the conduct of which Complainant complains to be insufficiently severe or pervasive to alter the conditions of Complainant's employment or deter a reasonable person from engaging in protected activity.

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency's final order implementing the AJ's decision finding no discrimination.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0124.1)

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 their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their 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 their 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(f).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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 26, 2025  
Date