



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]

Lewis Z,<sup>1</sup>  
Complainant,

v.

Douglas A. Collins,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2022002984

Hearing No. 480-2021-00075X

Agency No. 200P-0600-2019105540

**DECISION**

On May 4, 2022, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 19, 2022 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 order.

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse during his probationary period at the VA Long Beach Healthcare Center.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On December 16, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to hostile workplace discrimination on the bases of race (Latino), national origin (Mexican-American), sex (male), disability (PTSD and bilateral tinnitus), and reprisal for prior protected EEO activity when:

- a) On or about October 15, 2018, the Preceptors assigned to Complainant informed him that they were too busy to train him;
- b) On or about November 27, 2018, Complainant's supervisor pressured Complainant to complete his competencies when he was not ready and not properly trained;
- c) During January 2019, an unnamed management official delayed the approval of the Complainant's request for Family Medical Leave Act (FMLA) for almost 30 days;
- d) On or about March 18, 2019, an unnamed staff nurse told Complainant, 'You've been on this unit for how long and still you don't have your time management down, that's sad;'
- e) During March 2019, an unnamed staff nurse questioned Complainant about his service-connected disability and the compensation he receives;
- f) On or about May 14, 2019, a co-worker, Registered Nurse on the Day-Shift, yelled at Complainant in front of his clinical nurse leader;
- g) On or about June 6, 2019, Complainant was informed by the Nurse Manager that his last day of orientation on day shift would be June 21, 2019, however he remained in orientation beyond that date;
- h) On or about August 13, 2019, Complainant [was] requested to sign a proficiency report regarding his orientation which contained false allegations;
- i) On or about August 13, 2019, the Assistant Nurse Manager denied Complainant's request to have a copy of his proficiency report after he refused to sign the report;

j) On or about August 27, 2019, Complainant was notified that he was being referred to the Nursing Standards Board regarding his professional conduct;

k) On or about August 27, 2019, Complainant became aware that his proficiency report with alleged professional misconduct was backdated by the Nurse Manager, four months to April 15, 2019;

l) On or about August 27, 2019, Complainant was denied a request for a copy of his proficiency report;

m) On or about September 19, 2019, Complainant discovered that the Assistant Nurse Manager asked other staff members to keep an eye on him and write him up;

n) On or about October 22, 2019, the Associate Director told Complainant, 'I don't help problem folks,' before his appearance before the Nursing Standards Board; and to include the following discrete events:

1. On or about November 27, 2018, Complainant's supervisor rated Complainant as unsatisfactory on his proficiency evaluation.

2. During December 2018, Complainant was transferred to a step-down unit where he received training in nursing assistant duties instead of registered nursing competencies.

3. On or about October 20, 2019, Complainant's request to have time off on October 21, 2019 to prepare for the Nursing Standards Board was denied.

4. On or about October 31, 2019, Complainant was transferred/[detailed] to the Out-Patient Clinic for 90 days.

5. On December 31, 2019, Complainant received a notification that he was terminated during his two-year probationary period with an effective date of January 15, 2020.

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 EEOC Administrative Judge (AJ).

Complainant requested a hearing. The Agency filed a Motion for Summary Judgment. Both Complainant and the Agency submitted replies. The assigned AJ determined that this matter did not warrant a hearing and over Complainant's objections issued a decision without a hearing on April 11, 2022.

The AJ concluded that the Agency had provided legitimate, nondiscriminatory reasons for its actions resulting in Complainant's termination. The Agency maintained that Complainant's continued, poor performance is what precipitated the various actions taken by management. It is undisputed that Complainant was transferred at times between different units, that management and co-workers criticized his work performance, and that ultimately, he was terminated. The AJ highlighted Complainant's detail (transfer) to the out-patient clinic in late 2019. Specifically, the Agency explained that the transfer was because Complainant could not be relied upon to accurately administer medications in an inpatient setting. Complainant does not dispute that he made medication errors, either by administering incorrect doses or by charting that medication was administered but then telling preceptors that it was not. Given the frequency of these errors, any prudent employer in the Agency's position would have taken action to mitigate the damage Complainant could do. On its face, a transfer to the lower-risk outpatient setting was a reasonable and effective solution to the undisputed problem of Complainant's medication and charting errors. Complainant does not have evidence to show that his management was not honestly concerned with patient safety. And he does not have evidence to show that any other nurse made similarly serious and frequent medication errors without similar consequence. No reasonable factfinder, even viewing the evidence in the light most favorable to Complainant could conclude the transfer to the outpatient clinic was tainted by consideration of Complainant's protected characteristics and activity. The AJ noted that all the other incidents that amounted to personnel actions, i.e. the November 2018 evaluation, the December 2018 transfer to the stepdown unit, the October 2019 time off request, and the December 2019 termination, lend themselves to an identical analysis. The Agency has given sensible business-related explanations for these events, and those explanations are consistent with how a prudent employer would act under the circumstances. Complainant in response fails to meaningfully undercut the offered reasons other than by voicing his subjective disagreement. The AJ further noted that none of Complainant's remaining allegations, designated as items a) through n), would by itself constitute a personnel action that would state an independently actionable claim. Nor would any individual event have dissuaded a reasonable employee from engaging in protected activity.

Accordingly, these events can only be analyzed as a hostile work environment claim. The Agency admits these events, including the various oral criticisms, occurred as alleged by Complainant. But Complainant has not linked his protected characteristics and activity to any of these facially neutral incidents. Given that Complainant was making frequent mistakes, it is not surprising that friction existed with his co-workers and supervisors. No reasonable factfinder, even viewing the evidence in the light most favorable to Complainant, could conclude these events were motivated by Complainant's protected characteristics and activity. Alternatively, assuming these ordinary workplace occurrences were discriminatorily motivated, their cumulative effect would not have been sufficiently severe or pervasive to alter the terms or conditions of Complainant's employment. And double-alternatively, assuming these slight frictions were retaliatorily motivated, their cumulative effect would not have dissuaded a reasonable employee from engaging in EEO activity.

In his appeal brief, Complainant through counsel mainly asserts that a hearing is warranted in this matter, and the AJ failed to consider all his proffered evidence. The Agency maintains that the AJ's conclusions are correct and asks that we affirm its final order.

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. (as revised, August 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).

We find the record in the present case was fully developed. While Complainant asserts on appeal that the parties provided evidence which could further be examined through cross-examination at hearing, and would materially change the outcome in this matter, we disagree.

Having reviewed the entire record before us, we do not find an abuse of discretion by the AJ in both his consideration and analysis of pertinent evidence.

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. 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.

As the AJ correctly noted, all of Complainant's numerous allegations stem from Complainant's poor performance as a registered nurse during his probationary period. As explained above, the Agency's concerns were valid, and while the Agency exercised various options in its efforts to help Complainant acclimate to his new position, Complainant failed to adequately improve, consistent with the Agency's expectations for a person holding Complainant's position. Furthermore, because the Agency explained its rationale for actions taken, Complainant cannot show that he was subjected to a hostile work environment.

We find Complainant failed to show that the alleged actions were based on discriminatory animus. Moreover, Complainant failed to show that he was a target of retaliation.

Accordingly, we AFFIRM the Agency's final order fully 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:



Carlton M. Hadden, Director  
Office of Federal Operations

March 6, 2025

Date