



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

[REDACTED]
Neville B.,¹
Complainant,

v.

Gina M. Raimondo,
Secretary,
Department of Commerce
(Bureau of the Census),
Agency.

Appeal No. 2022004104

Hearing No. 480-2021-00168X

Agency No. 63-2020-00424-D

DECISION

On July 23, 2022, 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 June 30, 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.

ISSUES PRESENTED

Whether the Administrative Judge properly determined by summary judgment that Complainant failed to meet his burden in proving the Agency

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.

subjected him to discrimination and harassment on the basis of national origin, disability, and reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a former Office Clerk at the Agency's Los Angeles Regional Census Center, Area Census Office in West Covina, California. Complainant was supervised by two Operations Office Supervisors (S1 and S2), and two recruiting managers (RM1 and RM2).

On April 17, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Chinese from Hong Kong), disability (physical),² and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. On January 14, 2020, RM1 told Complainant that he looked "physically perfect" and inquired about how he was able to get a disabled license plate.
2. On February 13, 2020, RM1 commented that another employee who was a Hong Kong native had "poor management skills," and asked whether Complainant was also from Hong Kong and had the same poor management skills.
3. On February 21, 2020, RM1 continued to assign Complainant duties under his supervisor, S1, although Complainant requested less contact with S1 due to reporting S1 for the sexual harassment of another employee.
4. On February 22, 2020 and March 7, 2020, S1 instructed Complainant by email that he had to raise his voice during phone calls, despite his awareness that Complainant had been suffering from nose and throat conditions since January 2020.
5. From February 23-27, 2020, S1 continually bullied and nitpicked at Complainant regarding his arrival and departure times, and time he spent on lunch and breaks.
6. On February 26, 2020, S1 accused Complainant of completing a personal task even though Complainant had verbal permission from RM1 to do so.

² Complainant described his disability as "Disabled Veteran, physical (foot/ankle/toes pain) unable to stand for long period of time." ROI at 150.

7. On February 28, 2020, S1 commented that Complainant spent 2 hours on a personal task, and RM1, who was present in the meeting, never acknowledged that she authorized Complainant to complete the task.
8. On March 4, 2020, RM1 issued Complainant an oral warning, stating that he was not authorized to use any Agency resources, including requesting assistance for proofreading a recommendation letter, even though she privately admitted that he was authorized to do so.
9. On March 5, 2020, S2 wrote a letter to Complainant instructing him to stop volunteering for fingerprinting duties until he had his own access code and reprimanded him for failing to answer a phone call, even though he was experiencing phone issues.
10. On March 8, 2020, S1 and RM2 searched Complainant's emails in an effort to justify disciplinary action against him and discovered that Complainant reported S1 to the Office of the Inspector General on February 20, 2020 regarding a threat he made to a female employee. Thereafter, Complainant received an "all-time high" number of verbal and written warnings.
11. On May 8, 2020, Complainant was terminated from his position.

During the investigation, Complainant testified that he was injured while serving in the U.S. Navy and now suffers from a physical disability with his foot, ankle, and toe region, which limits his ability to stand for long periods of time. Complainant added that he does not believe that his disability interferes with his ability to perform his job duties and that he has never requested an accommodation for this disability.

Complainant stated that management retaliated against him after he observed an incident between S1 and another employee on February 16, 2020, where S1 allegedly threatened the employee. Complainant stated that the harassment became worse when management learned he filed a complaint about the incident with the Office of Inspector General.

In January 2020, Complainant assisted with recruitment events and distributing lawn signs. As of January 2, 2020, Complainant had distributed more lawn signs than any other clerk for the West Covina office. On January 17, 2020, complainant provided a ride to RM1 and an unnamed coworker. Complainant asserted that while they were in the parking lot, RM1 told Complainant that he looked "physically perfect" and inquired as to how he was able to get a disabled license plate. On February 13, 2020, RM1 and Complainant met with a reporter. The meeting was part of preparations for a press conference to encourage people of Chinese descent to apply for jobs with the Agency.

Complainant asserted that during this meeting, RM1 commented that a non-Agency employee (who was born in Hong Kong) had bad management skills. Complainant alleged RM1 asked Complainant if he had "the same mindset as [the non-Agency employee]."

On February 16, 2020, Complainant arrived at work and took his lunch break in the kitchen. Complainant did not return promptly and S1 asked him what he was doing in the kitchen for that extended period of time. Complainant stated that he was running late, hungry, and decided to take a few bites of his lunch. As S1 was about to say something, Complainant said he would clock in a half hour late, so he had extra time before his shift started. A short time later, S1 asked an employee (C1) for a lollipop. As he was eating the candy, Complainant asked him not to eat it so loudly. Later in that day, during a conversation, for some reason, S1 made the comment to the C1, "snitches get stitches." C1 mentioned to her supervisor that the comment made by S1 made her feel uncomfortable.

After the incident was reported, S1 approached C1 and apologized for the comment. He indicated that he meant it as a joke and did not mean to make her uncomfortable. Based on the comment, S1 was issued a written warning. On February 20, 2020, Complainant sent management an email in which he requested that S1's employment be terminated due to S1's comment to C1. Complainant's email characterized S1's comment as "verbal sexual assault" and noted that while the employee involved had accepted S1's apology, the Agency was unable to guarantee S1 would not engage in additional "aggressive behavior," including bringing a weapon to the workplace. Management informed Complainant that the incident had been investigated and that appropriate action had been taken. Complainant indicated that he requested that he have less contact with S1, however, the Agency told him that this was not possible.

In or around February 2020, Complainant drafted a personal recommendation letter regarding his work performance during duty time. On February 22, 2020, S1 emailed Complainant stating that another supervisor expressed Complainant's lack of energy while picking up calls and instructed Complainant to follow the script and handle the calls with true professionalism. However, Complainant asserted that on February 22, 2020, S1 instructed Complainant to raise his voice during phone calls.

From February 23, 2020, to February 27, 2020, Complainant asserted that S1 nitpicked at Complainant regarding his arrival and departure times and time he spent on lunch and breaks.

On February 28, 2020, S1 commented that Complainant had spent two hours drafting his personal recommendation letter. On March 4, 2020, Complainant was issued an oral warning by RM1 related to his drafting the recommendation letter during duty time and asking a colleague to review the letter during duty time.

On March 5, 2020, S2 learned that Complainant was fingerprinting new candidates using another employee's personal access code and that Complainant did not have his own personal access code.³ That same day, S2 emailed Complainant stating that he needed to concentrate on his other duties until he was about to get his own personal access code because they did not want to get in trouble. Also on that day, Complainant alleged S1 reprimanded Complainant for not answering the phone even though she knew Complainant had phone issues. However, S2 averred Complainant's phone issues stemmed from his difficulty in understanding how to answer the phone, even after multiple people explained to Complainant how to answer the phone.

In or around March 2020, another manager asked Complainant to raise his voice when answering the phone because Complainant answered the phone in such a low tone that people would call back to the office because they could not hear the person on the other end. On March 7, 2020, S1 asked Complainant to raise his voice when answering incoming phone calls. On March 7, 2020, Complainant forwarded to S1 an email he had sent to a potential applicant. S1 replied by asking that in the future, Complainant copy S1, S2, RM1, and RM2 on emails to potential applicants. S1 also asked Complainant to proofread his emails before sending them and noted that "in a professional working environment, you need to write in complete sentences, to include all punctuation and to check for grammatical errors."

Complainant alleged that management searched his work email with an intent to use materials discovered to retaliate against him. Management indicated they did not do this. Furthermore, management indicated that they do not have such capabilities as that type of action would have to be completed by individuals employed in the IT department.

RM1 and RM2 decided not to extend Complainant's appointment due to their perception of unsatisfactory performance. Specifically, Complainant failed to follow Agency scripts when he answered incoming calls, even after

³ Personal access codes are required in order to fingerprint new candidates. Personal access codes are issued by a third-party organization.

Complainant was counseled regarding the need to follow the script, S1 and S2 reported that Complainant was regularly late to work. Management also states that Complainant was not extended because he performed fingerprinting duties despite not having a personal access code. As a result, on May 8, 2020, Complainant's appointment expired.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. After both parties submitted motions for a decision without a hearing, the AJ assigned to the case issued a decision without a hearing on June 21, 2022. 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 contends that the entire case is full of bias, favoring the Agency. Complainant also states that because his hearing case was transferred from the Los Angeles District office to the Chicago office, he was unable to seek any legal assistance and as a result made several mistakes due to his unfamiliarity with the EEO process. Complainant states that several important incidents and his corresponding views are missing from the record. Complainant also states that the AJ failed to mention the witness statements in the decision. In his statement, Complainant included several facts that he alleges are in dispute.

The Agency did not file a statement on appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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 Chapter 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").

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).

ANALYSIS

Summary Judgment

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.

In this case, Complainant argues that his entire case has been full of bias favoring the Agency and that there were several important facts and evidence left out of the AJ's summary judgment decision. In supporting this argument, Complainant included several details about events included in his complaint but did not specifically address how the facts were in dispute or where in the record the dispute arose. Additionally, we note that in the concluding statement of the AJ's decision, he stated, "based upon a careful review of the entire record, including argument and evidence not specifically addressed herein, this matter is appropriate for summary disposition." AJ Decision at 13.

A review of the facts and evidence listed by Complainant as not mentioned in the AJ's decision does not reveal any disputes of material facts. Further, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Complainant also alleged that summary judgment was not proper because he was unable to obtain legal assistance for his case which caused him to make mistakes throughout the EEO process. The Commission's regulations state that a complainant is responsible for proceeding with the complaint whether or not he has designated a representative. 29 C.F.R. § 1614.605(e). Therefore, we do not find that this issue is one that precludes summary judgement.

Harassment/Hostile Work Environment (Claims 1-10)

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001).

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 Northern and Santa Fe Railway 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). It is important to note, that only if both elements are present, a chilling effect on protected EEO activity *and* retaliatory motivation, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017) (emphasis added).

The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of his protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014).

It is undisputed that Complainant is a member of a protected class for his national origin and disability. It is also undisputed that Complainant engaged in protected activity when he reported S1's comments as sexual harassment. See Agency's Summary Judgment Motion at 20.

In claim 1, Complainant alleged that RM1 told Complainant that he looked "physically perfect" and inquired about how he was able to get a disabled license plate. In response, RM1 denied the allegation and stated that she never asked Complainant about his disability status and his license plate. ROI at 382. In claim 2, Complainant alleged that RM1 commented that another employee who was a Hong Kong native had "poor management skills," and asked whether Complainant was also from Hong Kong and had the same poor management skills. RM1 again denied this allegation stating that the other employee named by Complainant was not on her team, so she would not feel it was necessary to address their performance. ROI at 382. Regardless, the Commission has found that "offhand comments and isolated incidents (unless extremely serious)" will not amount to unreasonably interfering with work performance and/or creating a hostile or offense work environment. Kozak v. U.S. Postal Serv., EEOC Appeal No. 01A63021 (Aug. 23, 2006), quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

In claim 3, Complainant alleged that RM1 continued to assign Complainant duties under his supervisor, S1, although Complainant requested less contact with S1 due to reporting S1 for the sexual harassment of C1. In response, RM1 stated that Complainant did not submit or request anything to lessen his contact with S1. ROI at 383. RM1 also stated that as long as S1 still performed as Complainant's supervisor, his duty to observe Complainant's performance would continue. Id. When S1 was asked about this allegation, he stated that Complainant never mentioned anything to him about his assignments. ROI at 396.

A review of the record does not reveal any evidence to establish that this incident occurred as Complainant alleged, nor does Complainant address this incident on appeal.

In claim 4, Complainant alleged that on two separate occasions, S1 instructed Complainant by email that he needed to raise his voice during phone calls, despite his awareness that Complainant has been suffering from nose and throat conditions since January 2020. In response, S1 testified that Complainant never told him that he had nose and throat conditions and stated that if he was sick or unable to perform, he should have taken leave. ROI at 396. S1 stated that majority of the employees in the office were aware that Complainant never followed the phone etiquette anyway. ROI at 397. A coworker of Complainant's, another clerk, testified that she even told Complainant to raise his voice because they were getting call backs from people stating that they could not hear the person on the other end. ROI at 443. Complainant's coworker was the only individual to testify to knowing of his nose and throat conditions. She stated that she only learned of his conditions when he missed work and she asked if everything was okay, and he stated that he had the flu. ROI a 444.

In claim 5, Complainant alleged that S1 continually bullied and nitpicked at Complainant regarding his arrival and departure times, and time he spent on lunch and breaks. In response, S1 testified that he did discuss Complainant's attendance and tardiness, but that the term "bullied" is extremely inaccurate and misleading. ROI at 397. S1 stated that due to Complainant's previous dishonest, unprofessional and incompetent behaviors, it was his job as Complainant's immediate supervisor to monitor him and to make sure that he was not cheating the time and attendance system. Id. In fact, Complainant admitted to taking a lunch break immediately upon arriving for duty on February 16, 2020, and arriving late several times. See Agency's Discovery Response at 23. S1 simply stated that his actions were solely for Complainant's accountability. Id. S2 stated that S1 notified her when Complainant was late so she could be aware of his time and attendance when she approved his timesheet. ROI at 456.

In claim 6, Complainant alleged S1 accused him of completing a personal task in writing himself a recommendation letter and getting a coworker to review it, even though Complainant had verbal permission from RM1 to do so. In claim 7, Complainant alleged that S1 commented that Complainant spent two hours on a personal task (writing his recommendation letter), and RM1, who was present in the meeting, never acknowledged that she authorized complainant to complete the task.

In claim 8, Complainant stated that he was issued an oral warning, stating that he was not authorized to use any Agency resources, including requesting assistance for proofreading a recommendation letter, even though she privately admitted that he was authorized to do so.

In response, RM1 testified that she agreed that Complainant could draft the recommendation letter and that she would review it, but that she did not agree that he could work on it during his duty hours. ROI at 385. In line with RM1's testimony, Complainant admitted in his affidavit that he did not have proof that RM1 told him that he could work on the recommendation letter during work hours. ROI at 157. Additionally, RM1 stated that she did not authorize Complainant to ask any coworkers to modify his draft. ROI at 385. S1 added that he was the one that caught Complainant working on the recommendation letter and stated that all employees knew it was not permitted to work on personal things at work. ROI at 398. Even RM2 stated that he was surprised that Complainant was writing his recommendation letter during work hours. ROI at 430.

Additionally in response to Complainant's general allegation of nitpicking, we note that the anti-discrimination statutes are not general civility codes, and the Commission has found that personality conflicts; general workplace disputes; and trivial and petty annoyances do not rise to the level of harassment. See Jeffrey R. v. Dep't of Justice, EEOC Appeal No. 2022003500 (Aug. 9, 2023); Rita F. v. U.S. Postal Serv., EEOC Appeal No. 2021002876 (Aug. 16, 2022); Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012).

In claim 9, Complainant alleged that S2 wrote a letter to Complainant instructing him to stop volunteering for fingerprinting duties until he had his own access code and reprimanded him for failing to answer a phone call, even though he was experiencing phone issues. Complainant stated that fingerprinting was one of his job duties and he followed the instructions of the other two administrative supervisors when they said he could use their account for fingerprinting new hires. ROI at 159-160. S2 testified that she did instruct Complainant to stop volunteering for fingerprints and concentrate on answering incoming phone calls. ROI at 458. To explain, S1 states that Agency employees are not allowed to perform fingerprinting without proper access and training due to security regulations. ROI at 399. RM2 stated that once management learned that Complainant did not have his own access to the fingerprinting and that he was using someone else's credentials, management told him to stop.

ROI at 431. RM2 added that when an issue of fingerprinting came up again, instead of letting someone else do it, Complainant volunteered to do it. Id. S1 stated that Complainant disregarded those security regulations by volunteering himself without manager's knowledge or approval. ROI at 399. Complainant's coworker even testified that she asked management to redirect Complainant's attention to answering the phones instead of fingerprinting because they were still waiting for their access codes and there was a higher volume of calls coming in. ROI at 446.

S1 stated that Complainant not answering the phone was a separate situation. To explain this situation, S1 stated that all employees were required to follow a script when answering calls, and Complainant never followed the script. ROI at 399. S2 stated that Complainant was not comprehending the instructions on how to answer calls after explaining it to him various times, and that she even asked a supervisor from the Information Technology (IT) office to show Complainant how to properly use the phone. ROI at 458. S1 stated that Complainant often answered calls in Chinese before verifying the caller's preferred language. Id. He added that due to Complainant's unprofessionalism, management received many complaints from callers. Id. Complainant's coworker added that she believed Complainant used to volunteer for fingerprinting duties to avoid answering the phones and that she even mentioned it to him after he was not helping with the large amount of calls, they were receiving. ROI at 446.

In claim 10, Complainant alleged that S1 and RM2 searched his emails in an effort to justify disciplinary action against him and discovered that Complainant reported S1 to the Office of Inspector General (OIG) in February. Complainant stated after his OIG report, he received an "all-time high" number of verbal and written warnings. In response, S1 denied Complainant's allegation and states that Complainant only received one official warning during his employment. ROI at 400. S1 stated that he assumes the other verbal and written warnings Complainant referred to were "just work-related instructions, such as do this, don't do that, this is right, that is wrong." Id. S1 stated that as an office manager, he does not have the capabilities to search other employee's email. In order to do that, both S1 and RM2 stated that they would have to get official approval from the Regional Director, which "simply didn't happen." ROI at 400, 432. RM2 added that he had no knowledge of Complainant's OIG complaint at the time of this alleged incident. Id.

In claims 4 through 10, there is no evidence that the work-related incidents were abusive or offensive, reasonably likely to deter protected activity, or taken in order to harass Complainant on the basis of a protected class. Accordingly, we find that Complainant did not establish that the Agency subjected him to harassment based on national origin, disability, or in reprisal for prior protected activity.

Disparate Treatment (Claim 11)

The Commission has found that a discrete action states a claim outside of the framework of a harassment analysis and can also be reviewed within the disparate treatment context. 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). We find that incident 11 involves a timely discrete act that independently state claims outside of the harassment framework. Accordingly, we will analyze claim 11 in the context of disparate treatment.

To prevail in a disparate treatment or reprisal claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, he must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

Prima Facie Case

To establish a prima facie case of discrimination on the bases of national origin, Complainant must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) either that similarly situated individuals outside his protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

It is undisputed that Complainant is a member of protected class based on his national origin. It is also undisputed that the termination of an appointment is an adverse action.

When asked if there were any similarly situated employees who were treated differently, Complainant stated that there was another employee from Hong Kong who was treated badly as well. A review of the record confirms that the cited employee was a clerk with the same supervisors and identified with the same national origin as Complainant. In order to establish the third prong of a prima facie case of discrimination on the basis of national origin by comparator, Complainant must show a similarly situated employee *outside* of his protected class. However, considering Complainant's allegation that management made negative comments about individuals from Hong Kong (claim 2), along with Complainant's allegation that the cited employee (a Hong Kong native) was also treated poorly, we find that there are sufficient circumstances surrounding Complainant's termination of appointment that gives rise to an inference of discrimination. Accordingly, we find that Complainant has established a prima facie case of discrimination on the basis of national origin.

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (August 17, 2023). In this case, the Agency does not dispute that Complainant was qualified for his position. Complainant's immediate supervisors, S1 and S2 stated that they were both aware of his disability. ROI at 393, 452. RM1 states that she was generally aware that Complainant had problems with his leg or foot and that he could not walk for a long time. ROI at 380. However, RM2 testified that he was not aware of Complainant's disability until reading the instant complaint. ROI at 425.

In his testimony, Complainant argued that the termination of his appointment was related to his disability because his alleged poor performance and attendance was actually caused by his medical conditions. In support of this connection, Complainant pointed out that S1 accused Complainant of using his disability "a lot to excuse his poor performance at work." ROI at 393. We note that Complainant described his disability in this complaint as foot, ankle, and toe pain, but a review of the record reveals that his performance explanations were in part, due to his alleged nose and throat issues.

Nonetheless, given Complainant's arguments and the quoted statement from S1, we find that Complainant has established a prima facie case discrimination based on his disability.

A complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. See Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001); see also, Whitmere v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000) (nexus found when agency action followed complainant's participation in protected activity by approximately four (4) months).

Here, Complainant described his protected activity as reporting S1's inappropriate behavior which he described as sexual harassment on February 20, 2020. It is undisputed that management knew of Complainant's report. Complainant was terminated from his position in May, 2020, three months after his report. Given the close time period between Complainant's protected activity and his termination we find that a nexus has been established through temporal proximity. Therefore, we find that Complainant has established a prima facie case of reprisal.

Legitimate, Nondiscriminatory Reasons

After establishing a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency's explanation is a pretext masking discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In claim 11, Complainant alleged that he was terminated from his position because of discriminatory and retaliatory reasons. In response, RM1 stated that management decided not to extend his appointment due to his unsatisfactory performance.

ROI at 387. RM1 stated that she and RM2 both made the decision to not extend Complainant's appointment. *Id.* As Complainant's first level supervisor, S1 listed specific instances of Complainant's poor performance including, inter alia, that he was always late, misplaced/lost call lists, and miscommunications with management and callers. ROI at 401. In S1's testimony, he explained that after each eight-week temporary contract, employees would either get renewed or not renewed based on performance, conduct, or simply lack of work. ROI at 400. When employees were not renewed, they would go back to the applicant pool and would still be eligible for future Agency positions. *Id.* RM2 stated that termination was different than not extending an employee's contract because when an employee is terminated, they are not eligible for future federal service. ROI at 433. S1 stated that Complainant was offered another position in the Agency, but he declined the position. ROI at 400.

We find that the Agency proffered legitimate, nondiscriminatory reasons for its action.

Pretext

Since the Agency provided legitimate nondiscriminatory reasons for its actions, Complainant now bears the burden to prove pretext. Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons, and that the Agency instead was motivated by a prohibited reason.

In this case, Complainant argued that the Agency citing poor performance (late arrivals, long breaks, phone issues) as the reason his appointment was not extended is pretext for discrimination and reprisal. More specifically, Complainant stated that he was late on multiple days, but always made up the time. In arguing this, Complainant does not dispute that he was late to work on several occasions and that management spoke with him about his attendance and arrival times.

In fact, Complainant admitted to taking a lunch break immediately upon arriving for duty on February 16, 2020, and arriving late several times. See Agency's Discovery Response at 23.

Complainant also argued that his voice was low on phone calls because he was experiencing nose and throat conditions throughout January 2020 to March 2020, and that management, knowing of his condition, still instructed him to speak louder. Complainant argued that management knew of his condition because he had frequent medical appointments that needed schedule adjustments from management. While it may be true that management knew of his medical appointments, there is no evidence to suggest that management knew of his nose and throat condition. In any event, Complainant does not deny any of management's allegations of his poor performance in relation to his phone duties, including that he would not follow the script and that callers complained about him. We note again that beyond management's instructions, Complainant's coworker also instructed him to speak up while talking on the phone with callers. ROI at 443.

Additionally, The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, such as this, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency's actions. Complainant has not shown that the proffered reasons are not worthy of belief and his bare assertions that management officials discriminated against him are insufficient to prove pretext or that their actions were discriminatory. Accordingly, we find that Complainant has not established that he was subjected to discrimination on the basis of national origin, disability, or in reprisal for protected activity.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency Final Order implementing the AJ's summary judgment 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

November 25, 2024
Date