



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

[REDACTED]
Terrance A.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022004859

Hearing No. 460-2019-00136X

Agency No. 2003-0740-2018104650

DECISION

On September 8, 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 August 10, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Medical Support Assistant (MSA) at the McAllen Veterans Affairs Outpatient Clinic in McAllen, Texas. Complainant was hired into his position effective August 20, 2017, and was subjected to a one-year probationary period. Person A was Complainant's first level supervisor from August 20, 2017, until October 1, 2017. Person B was Complainant's supervisor from October 2, 2017, until May 4, 2018. Person C served as backup to Person B. Person D served as Complainant's second level supervisor during the relevant time. Complainant was removed from the Agency on May 4, 2018.

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.

On June 13, 2018, Complainant initiated contact with an EEO Counselor. When the matter was not resolved, the Agency issued Complainant a Notice of Right to File a formal complaint.

On September 21, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (White), national origin (Anglo), sex (male), and disability (Traumatic Brain Injury (TBI), Post Traumatic Stress Disorder (PTSD), hearing loss, back, knees, ankles, and feet) when:

1. From August 20, 2017, thru May 3, 2018, Person B, Administrative Officer, did not provide Complainant with training for his position.
2. From September 1, 2017, thru April 20, 2018, Person B treated female employees more favorable than Complainant.
3. From September 1, 2017, thru May 3, 2018, Person B failed to respond to Complainant's reasonable accommodation request for additional time to review work assignments and to stay after work.
4. From August 31, 2017, thru May 3, 2018, Person B continuously made derogatory remarks to Complainant about his work assignments.
5. On April 20, 2018, Person B did not provide Complainant with information he requested pertaining to paternity/Family Medical Leave Act (FMLA) leave.
6. On April 24, 2018, Person C, Program Analyst, denied Complainant's sick leave request and charged him absent without leave (AWOL).
7. On May 3, 2018, Person B yelled at and berated Complainant.
8. On May 3, 2018, Person B terminated Complainant during his probationary period effective May 4, 2018.

The Agency issued a partial acceptance letter. The Agency noted that Complainant appeared to raise a claim that he was dissatisfied with mediation. The Agency found matters involving Complainant's dissatisfaction with mediation failed to state a claim. Further, the Agency noted event 6 constituted a discrete act that was not raised within 45 days of occurrence and thus, was dismissed as an independently actionable claim. The Agency noted event 6 would be considered as part of Complainant's overall harassment claim. The Agency found events 3 and 8 constituted timely raised discrete acts and accepted them as independently actionable claims. The Agency noted that all events 1-8 would be considered as part of Complainant's harassment claim.

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.

The Agency filed a Motion for Summary Judgment. Complainant filed a Motion for Continuance and Preliminary Response to Agency Motion for Summary Judgment (Response). Thereafter, the Agency filed its Reply in Support of Motion for Summary Judgment and Response to Complainant's Motion for Continuance (Reply). On July 26, 2022, the AJ granted the Agency's Motion for Summary Judgment and found no genuine issues of material fact sufficient to require a hearing. Further, the AJ found Complainant was not subject to a hostile work environment nor the victim of intentional discrimination on any of the alleged purviews.

On August 10, 2022, the Agency issued a final order. The Agency's final order fully implemented the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Thereafter, Complainant filed the instant appeal. On appeal, Complainant notes that when he filed his Response, he noted that he continued to have deficits as a result of his TBI and had difficulty obtaining counsel as a result of the COVID-19 Pandemic. He states in his Response he also noted that he had not yet had an opportunity to conduct an investigation for evidence of his claims and requested additional time to investigate his claims. Complainant claims that as he was not represented by an attorney at the time he filed his Response, his filing should have been treated as a Motion for Leave to Conduct Discovery.

Additionally, Complainant notes that the EEO investigator did not interview Person A. Complainant also notes that he alleged that Coworker 1 and Coworker 2 witnessed Person B belittling him. Complainant states the EEO Investigator was unable to verify this since Coworker 1 and Coworker 2 declined to provide testimony.

Complainant also argues that summary judgment was not appropriate. Complainant contends the Agency failed to provide him with any reasonable accommodation and set him up to fail by not providing him appropriate training, failing to provide him with written instruction materials, failing to appropriately respond when he had questions, failing to provide him an adequate computer, and charging him AWOL when it was not appropriate.

The Agency filed a brief opposing Complainant's appeal. Regarding Complainant's contention that his request for a continuance should have been taken as a Motion for Leave to Conduct Discovery, the Agency states that Complainant failed "to name any information in any specificity in his response." The Agency notes that on appeal, Complainant now asserts several items were missing from the record; however, it claims that the items alleged to be missing do not contest any material fact that the Agency contends, but instead confirms what the record already believes to be true as all justifiable inferences must be drawn in the non-moving party's favor. Further, the Agency claims Complainant has only identified general conclusory statements, disguised as facts. The Agency notes that on appeal, Complainant still fails to demonstrate that Person B took any actions based on his protected characteristics.

ANALYSIS AND FINDINGS

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*).

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 Commission has found that mere allegations, speculations and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Complainant v. Dep't of Homeland Sec., EEOC Appeal No 0520110581 (Jan. 12, 2012) (citation omitted). It is well settled that mere assertions of a factual dispute without more are not sufficient to defeat a motion for summary judgment. See Darrell C. v. U.S. Postal Serv., EEOC Appeal No. 10200181833 (July 12, 2019). For the reasons discussed herein, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in his favor.

At the outset, we note that Complainant does not challenge the Agency's dismissal of event 6 or the dismissal of his claim alleging dissatisfaction with mediation. Thus, we do not address the dismissal of those events.

Next, we address Complainant's contention that he was denied the opportunity to conduct discovery. Upon review, despite Complainant's argument to the contrary, we do not find Complainant moved for discovery while his case was pending before the AJ. While Complainant stated in his Response that he had "not yet had the opportunity to point to relevant excerpts from pleadings, depositions, answers to interrogatories, admissions, or affidavits" and requested "to be allowed to obtain appropriate counsel to investigate and prosecute his case," we do not find these statements, which lacked specificity, to constitute a valid request for discovery.

Further, we address Complainant's claim that the investigation conducted by the Agency was inadequate. EEOC Regulations provide that the Agency and any employee of a Federal agency shall produce such evidence as the investigator deems necessary. 29 C.F.R. § 1614.108(c)(1). Complainant claims that the investigation lacked statements from Person A, Coworker 1, and Coworker 2. The record contains a memo from the investigator stating that Person A was no longer a federal employee at the time of the investigation and that the facility did not have contact information for Person A. Additionally, the record indicates that at the time of the investigation, Coworker 2 was no longer a contractor at the Agency. Thus, the record reveals there was no avenue for the investigator to obtain Person A or Coworker 2's testimony. The record reveals that Coworker 1 was contacted but declined to provide an interview.² Complainant contends that Coworker 1 witnessed Person B's belittling statements. For purposes of summary judgment, we assume Person B made the statements alleged by Complainant. Other than stating that Coworker 1 heard Person B's belittling statements, which we assume occurred, Complainant has not indicated how Coworker 1's testimony would have materially affected the outcome of this proceeding. Thus, despite Complainant's arguments, the Commission determines that the investigation was properly and adequately conducted.

Regarding event 1, Complainant claims that from the date he was hired, through his termination date, Person B did not provide him with training for his position. However, the record reveals Complainant completed the standard mandatory two-week MSA training. In his affidavit, Complainant acknowledges attending the two-week MSA National Onboarding Training. Further, the Agency notes Complainant signed the annual MSA competency checklist, certifying he understood all tasks, principles, and concepts of his position. The record shows the competency checklist contained approximately 145 performance tasks and that Complainant initialed all but 18 boxes on the checklist. The Agency notes that none of those 18 boxes were covered at training as they did not pertain to Complainant's position. Complainant also claims that he was not provided training materials such as a standard operating procedure (SOP). However, Person B states a copy of the SOP was emailed to Complainant and that Complainant had a hard copy at his desk. Further, we note the record contains a February 6, 2018 email from Person B to Complainant sending Complainant the "non VA Care Coordination SOP." When asked why he believed his race, national origin, sex, or disability was a factor, Complainant responded that he was the only white, non-Hispanic, disabled, male veteran working for Person B in McAllen. We find Complainant did not show the Agency denied him training or that its handling of his training was motivated by any of his protected bases.

Regarding event 2, Complainant claims that from September 1, 2017, through April 20, 2018, Person B treated female employees more favorably. Complainant claims that when female employees would call Person B and ask him questions, Person B was much more apt to respond. Complainant notes one occasion when his "female counterpart" requested Person B show her an upload and Person B reviewed the upload with her and showed her where corrections were needed.

² It is unclear if Coworker 1 was a contractor. If Coworker 1 was not a federal employee at the time of the investigation, she would not be required to provide testimony.

In contrast, Complainant states that when he requested Person B review an upload, Person B responded by saying, “What the hell, [Complainant’s first name], get out of the way” and then Person B completed the upload without allowing him time to ask questions. Complainant also claims he was assigned a computer that was inadequate for his work and when he told Person B of his concerns about his computer speed and capability, Person B stated he had to “deal with it.” Complainant states that when Information Technology (IT) staff reviewed his requests, they found his computer was inadequate and replaced his computer. Complainant states in contrast, a female coworker was assigned a computer that contained the most current processor and operating system. Person B states he assisted Complainant on several occasions when Complainant asked. Further, Person B noted that IT tickets are entered by employees and not by the supervisor. Person B states he is unable to determine when Complainant’s coworker requested a computer replacement. In both of the examples cited, Complainant fails to identify the female comparative and further fails to state when the alleged incidents occurred. Additionally, Complainant fails to provide any evidence or argument that his race, national origin, or disability were factors in this event.

Regarding event 3, Complainant claims that he informed Person B and Person D on multiple occasions of his disabilities and need for accommodations. He states he asked for more time to complete self-study continuing education modules and was told by Person B that if everyone completes it in the allotted time, he should be able to do so also. Also, Complainant states he asked if he could do the modules after hours or at home and was told no. Person B and Person D deny that Complainant requested reasonable accommodation for a disability. We note Complainant failed to provide any specific information as to when his request was made and failed to provide any documentation showing he requested reasonable accommodation for any of his disabilities. Upon review, we find Complainant failed to show the Agency denied him a reasonable accommodation for any of his alleged disabilities.

Regarding event 4, Complainant alleges that from August 31, 2017 through May 3, 2018, Person B made continuous derogatory remarks to him about his work assignments. Complainant claims that Person B called him “stupid,” “retarded,” “moron,” “dumbass” and “fucking retarded.” Complainant states that when Person B made these derogatory remarks about him and his work, he did all he could to make the necessary changes to his work. Complainant claims that he never heard Person B say any of these things to his female coworkers. Person B denies calling Complainant any of the names alleged. When asked why he believed his race, national origin, sex, or disability were factors regarding this event, Complainant stated that no supervisor should refer to an employee with a TBI as “fucking retarded.”

Regarding event 5, Complainant claims that on April 20, 2018, Person B failed to provide him with information he requested pertaining to paternity/FMLA leave. Person B states that Complainant never made a request relating to FMLA paperwork. Person B notes on April 20, 2018, he was on leave. When asked why he believed his race, national origin, sex, or disability was a factor in this event, Complainant states that as a disabled veteran, he had been absent from work on a few occasions and Person B resented his absences and Complainant believes his FMLA inquiries further aggravated Person B.

We find Complainant failed to show the event occurred as alleged. Further, we note other than his own speculation, Complainant has produced no evidence that the Agency's actions were related to any of his alleged bases.

Regarding event 6, Complainant claims that on April 24, 2018, Person C denied him sick leave and charged him AWOL. Complainant states on April 24, he signed in at the sick call area, which is near his work office, and asked to be notified when he could be seen. Complainant claims he told his coworker that he would use his 15-minute break to go back to sick call. Complainant notes he was seen by a nurse who ordered x-rays. Complainant states before going to radiology, he went back to his workstation and told his coworker where he was going, and alleges the coworker stated that everything was under control. Complainant states when he returned to his workstation, the coworker told him to see Person E, who was assisting Person C in Person B's absence. Complainant states that Person E said she would approve his leave, which Complainant claims she did. Complainant explains he later received an email from Person C denying his leave request and charging him AWOL for one hour, which Complainant claims was longer than the time he was away from his desk. Person C states he charged Complainant with AWOL due to Complainant leaving his assigned duty station on two separate occasions to attend medical visits without seeking prior approval. Regarding the amount of AWOL charged, Person C noted that Complainant created his leave request in the VATAS (VA time and attendance) system for one hour; thus, after determining Complainant was away from his duty station without prior approval, Complainant was charged with AWOL for the amount of time he cited in his leave request. Person E denies speaking to Complainant about leave on April 24, 2018. Upon review, we find Complainant failed to show that this event was motivated by any of his protected bases.

Regarding event 7, Complainant states that on May 3, 2018, Person B yelled at and berated him. Specifically, Complainant explains that on the morning of May 3, 2018, he walked into the work area and Person B told him in front of his colleagues that he had something "special" for Complainant and that they would talk as soon as Complainant was finished working on his task. Complainant states when he told Person B he was finished with his task, Person B told him to lock his computer and follow him and Person B announced, "this is going to be a big day for you." Complainant states he followed Person B and once they entered a conference room, Person B handed him an envelope which contained a termination letter and told him to read it quickly. Complainant states after he read the letter, he asked Person B for an explanation. Complainant states Person B told him, "I don't give a shit what you do. You have until close of business tomorrow to quit if you want to." Complainant states he told Person B he did not want to quit and told Person B he wants to learn the system and do his job. Complainant states Person B became irate and yelled, "Ok, you can either quit or you will be terminated tomorrow afternoon, got it?" When asked why he believed his race, national origin, sex, or disability was a factor in this event, Complainant stated that Person B was pushing the only White, non-Hispanic, disabled veteran from his staff.

Regarding event 8, Complainant challenges his termination effective May 4, 2018. Person B states Complainant was removed for unsatisfactory performance during his probationary period. Complainant claims that Person B failed to mentor him and set him up for failure. When asked why he believed his race, national origin, sex, or disability was a factor, Complainant stated that Person B eliminated the only White, non-Hispanic, disabled, male. The record reveals Complainant was counseled many times regarding his performance. Complainant received a Needs Improvement for his mid-year evaluation for FY 2018. When asked why his race, national origin, sex, or disability was a factor in this event, Complainant replied that by terminating him, Person B removed the only White, non-Hispanic, disabled veteran from his staff. Upon review, we find Complainant failed to present evidence that his removal was based on any of his protected bases.

With regard to Complainant's hostile work environment claim, to establish a claim of hostile environment harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

In other words, to prove his harassment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove the question of Agency liability present itself. Even assuming Person B made the comments alleged in event 4 and event 7, we find the evidence fails to prove that the alleged conduct was based on Complainant's race, national origin, sex, or disability. Furthermore, we find that the events in the complaint were not severe or pervasive, did not interfere with Complainant's work performance, and did not objectively, under the reasonable person standard, create a hostile work environment.

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is AFFIRMED.

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).

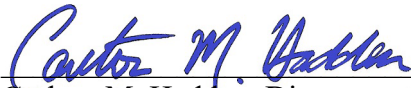
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

January 22, 2024

Date