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

[redacted]
Felton Z.,[1]
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(Centers for Disease Control and Prevention),
Agency.

Appeal No. 2022004900

Hearing No. 410-2022-00141X

Agency No. HHS-CDC-0180-2021

DECISION

On September 14, 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 24, 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the AJ's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

[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.

Whether certain of Complainant's allegations were timely raised with an EEO counselor or failed to state a claim.

Whether the Agency's final order properly found that Complainant was not subjected to discrimination on the basis of race when the Agency did not promote him to the GS-14 level.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Security Specialist, GS-0080-13 at the Agency's Office of Safety, Security Asset Management in Atlanta, Georgia.

On May 4, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the basis of race (African American) when:

1. on February 11, 2021, Complainant became aware that Factors 3 (Guidelines), 5 (Scope), 8 (Physical Demand), and 9 (Work Environment) in his Position Description (PD) were rated incorrectly;

2. on March 5, 2021, management sent an email which falsely stated Complainant was selected for a Lead Telecommunications Specialist, GS-0080-13 position to cover up the fact that he had been performing duties synonymous with said position for the past five years;

3. on May 29, 2020, Complainant learned a decision had been made regarding his desk audit in which he was never interviewed despite management instructions and Agency Desk Audit policy;

4. on January 16, 2019, Complainant was provided a PD that he had never seen before and that was submitted without Complainant's knowledge, which did not reflect Security Specialist responsibilities he assumed in April 2016. Complainant further noted the PD had him working at the agency level, but only receiving Organization points; and

5. in April 2016, Complainant became the Special Security Officer (SSO)/Classification Security Officer (CSO) and the Secure Compartmented Information Facility (SCIF) Operations (Ops)

> Supervisor and took on all duties and responsibilities associated with the position but his PD remained a GS-0319-13 Telecommunications Specialist.

Complainant's job duties twice underwent a desk audit. In 2015, the desk audit resulted in Complainant's position being upgraded from a GS-12 position to a GS-0391-13 position. In this position, Complainant was a Lead Telecommunication Specialist. Complainant's supervisor (S1) was a GS-14 Lead Physical Security Specialist who oversaw the SCIF Operations and Controlled Unclassified Information (CUI), as well as the Defensive Counter Intelligence/Insider Threat Team. The Agency asserted that S1's responsibilities meant that he performed two different series of work and supervised 10 employees. S1 left the Agency in March 2016, and the Agency abolished his position.

Upon S1's departure, Complainant assumed the SCIF Operations Team duties, while the Defensive Counter Intelligence/Insider Threat Team duties were absorbed by Complainant's subordinates. The Deputy Director of the Public Health Intelligence Office (DD) became Complainant's supervisor.

In January 2019, Complainant and DD discussed upgrading his position to a GS-14 Supervisory Security Specialist position. During these discussions, Complainant reviewed his PD and noticed that it had been revised. Therein, the position title was different and Factor 5 (Scope and Effect) was at a level 4, which contributed 225 points out of a possible 325 points toward his overall position rating. Complainant position had previously received the full 325 points. Complainant made his concerns known with DD, who asked a Specialist in the Agency's Human Resources office (Specialist) to review the PD.

During discussions with DD and Specialist, Complainant asserted his belief that his position should be reclassified from a 0391 series to a 0080 series, and then upgraded to GS-14.

Specialist performed a desk audit on Complainant's job description. Specialist agreed from the start that Complainant's position should be reclassified to a 0080 series but conducted a desk audit to determine whether Complainant should be at the GS-13 or GS-14 level. Specialist had Complainant and DD complete questionnaires as more information was needed to determine whether Complainant's position should be upgraded to a GS-14 position.

During the desk audit, Specialist did not interview Complainant directly nor did she observe Complainant performing his duties. After Specialist issued her decision on the desk audit, Complainant, DD, and Specialist engaged in multiple email communications discussing the various factors. Complainant was also concerned that Specialist did not interview him or observe him performing the duties of his job. Specialist believed that she was unable to interview Complainant due to the sensitivity of Complainant's position in the SCIF, but nonetheless believed that she had sufficient information to complete the desk audit. Specialist testified that an interview was optional but not mandatory. Agency management conceded that the sensitive nature of Complainant's position did not preclude Specialist from interviewing Complainant. Complainant argued that Agency policy required an interview to take place.

The Agency's Standard Operating Procedures for desk audit states that a "desk audit is nothing more than a conversation about a position with the incumbent, the supervisor, or both of these individuals (typically in person, telephonically, or by review of all information submitted in support of the request)." The policy also encouraged desk audits to be performed on site, in person, whenever possible, but "[t]elephonic audits are authorized as well."

On May 26, 2020, Specialist issued her desk audit report of findings. Complainant's job series was changed from Telecommunications Specialist to Information Security Specialist, but the grade level remained at the GS-13 level.

In June 2020, Complainant appealed the findings on the basis that he did not have a formal interview with Specialist, and argued that several factors were not graded as highly as they should have been. The Agency denied his appeal and provided him with the option of appealing further to the Office of Personnel Management (OPM). There is no evidence in the record that Complainant appealed to OPM.

Complainant and Specialist continued to discuss Specialist's assessment of his duties, and on February 11, 2021, Specialist interviewed Complainant. As a result of that interview, Specialist upgraded some of the factors associated with Complainant's position description. However, Complainant remained at the GS-13 level. Complainant and Specialist discussed these factors in emails until March 5, 2021. In those emails, Complainant argued that he had effectively been placed in S1's position and therefore had been performing GS-14 work all along.

Through multiple, extensive emails in the record, Complainant and Specialist discussed the various factors associated with his position. Specialist consistently explained that her assessment had to be based on the duties that Complainant performed, not the duties any other employee performed, including S1.

On March 5, 2021, DD sent Complainant an email explaining how S1's position had been abolished after his departure, and that the duties had been divided between Complainant and another employee. DD also noted in the email that the Agency had advertised a Lead Telecommunications Specialist, GS-0080-13, position, and placed Complainant in that position effective October 4, 2015.

Complainant argued that DD's assertion regarding being competitively placed into the Lead Telecommunications Specialist position was designed to cover up the fact that he had been performing those duties for far longer than June 2020, when the desk audit resulted in a reclassification of his position.

DD averred that her statement regarding Complainant's position was incorrect. Rather, DD explained that after the April 2015 desk audit, the Agency determined that Complainant was performing at the GS-13 level instead of the GS-12 level. In order to place Complainant at the GS-13 level, the Agency generated a certificate with Complainant's name, and Complainant was selected from the certificate.

The Agency argued that its management team determined that expanding requirements within the Agency supported the creation of a new position, Intelligence Research Specialist, GS-0132-14, and advertised the vacancy in 2016. One of Complainant's subordinates (CW1) applied for, and was hired into the position. The Agency noted that Complainant did not apply for the position.

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 timely requested a hearing.

The Agency moved to dismiss the complaint on the grounds Complainant failed to timely contact an EEO counselor, the claims were moot, and/or the complaint failed to state a claim. In the alternative, the Agency argued that summary judgment in its favor was appropriate because Complainant did not demonstrate the Agency's actions amounted to discrimination.

As to its motion to dismiss, the Agency noted that Complainant first contacted an EEO counselor on March 17, 2021. Therefore, Claims 3 through 5 should be dismissed as untimely. The Agency also argued that Claim 1 should be dismissed as untimely because the factors in Complainant's PD had been scored as such at the time the Agency denied Complainant's appeal in August 2020.

The Agency contended that Claim 3 was also moot because, although Complainant was not interviewed at the time of the desk audit, Specialist ultimately interviewed Complainant and took that interview into account. Moreover, the subsequent interview did not ultimately change Complainant's pay grade.

The Agency argued that Complainant failed to establish his allegation of a hostile work environment because he did not demonstrate that he was subjected to harassment, or that the harassment was based on his race. Rather, the Agency argued that the allegations consisted of routine management decisions.

In response, Complainant objected that the Agency's motion far exceeded the AJ's 15-page maximum on dispositive motions and sought to strike the Agency's motion to the extent it exceeded the page limit.

As to his allegations, Complainant argued that he established a hostile work environment because he "was subjected to a myriad of behaviors which hindered his ability to perform his job and caused stress and emotional harm." Complainant argued that the Agency's actions with respect to his desk audits and position descriptions were unwelcome. Complainant suggested that Caucasian employees were treated differently. Complainant specifically pointed to CW1, who was promoted to a GS-14 level position.

Over Complainant's objections, the AJ granted the Agency's motion and issued a summary judgment decision in favor of the Agency. The AJ first denied Complainant's motion to strike because the Agency exceed the page limit. Further, the AJ noted that the Agency was within its discretion to file a separate motion to dismiss and a motion for summary judgment, as well as a separate statement of fact, and the AJ exercised his discretion to permit function over form. The AJ granted the Agency's motion to dismiss on the grounds of untimely EEO Counselor contact with respect to Claims 3 through 5.

As to Claims 1 and 2, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for classifying Complainant's position and rejected Complainant's argument that CW1 and S1 should have been comparators. Rather, CW1 worked in a different series than Complainant, and competed for his GS-14 position. S1 also encumbered a different position that was later abolished with its duties divided up among Complainant and other employees. The AJ concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. As a result, the AJ found that Complainant was not subjected to discrimination as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argued that the AJ improperly dismissed his Motion to Strike because the Agency violated the guidelines set forth in the AJ's Scheduling Order. Complainant noted that the Scheduling Order provided that "failure to follow the Order may result in sanctions."

As to the AJ's decision to dismiss Claims 3 through 5, Complainant argued that the claims should not have been dismissed as untimely and rather should have been considered as part of his overall claim of a hostile work environment. To that end, Complainant maintained that he has been subjected to a hostile work environment since April 2016. Because Claim 2 fell within the 45 days prior to his initial contact with an EEO counselor, Complainant argued his entire complaint should have been considered timely.

As to the merits of his complaint, Complainant argued that the AJ failed to construe the evidence in the light most favorable to him. To do so, the AJ was required to scrutinize the facts as articulated by the Agency. Had the AJ done so, Complainant contended that the evidence was sufficient to show that he established he was subjected to a hostile work environment. Accordingly, Complainant requests that the Commission reverse the final order.

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

The AJ's Denial of Motion to Strike

We first address Complainant's contention that the AJ improperly denied his motion to strike the Agency's motion to dismiss and motion for summary judgment on the grounds it exceeded the page limit as imposed by the AJ's Scheduling Order. The Commission notes that Commission regulations and precedent provide AJs with broad discretion in matters relating to the conduct of a hearing. See 29 C.F.R. § 1614.109(e); Equal Employment Opportunity Commission Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015). In his decision, the AJ concluded that striking the Agency's motion in whole or in part would be excessive and explained that the Agency could have filed two separate motions and a separate statement of fact. Complainant does not demonstrate how the AJ's decision exceeded the discretion afforded to the AJ under our regulations. While Complainant points to the scheduling order as grounds for granting sanctions, we note that the language therein merely permits, but does not require, sanctions. We therefore find that it is well within the AJ's broad discretion to accept or reject parties' filings in accordance with their orders.

Dismissal of Claims 3 through 5

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

Complainant argues that his entire complaint should be considered timely because he alleges a hostile work environment, and the most recent incidents, Claims 1 and 2 are timely. The continuing violation doctrine does indeed allow for an otherwise untimely claim to be accepted for processing if it is part of a series of related violations where at least one discriminatory event occurred within the relevant timeframe. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

Complainant does not dispute that Claims 3, 4, and 5, were untimely raised with an EEO counselor. To the extent they constitute discrete claims, dismissal was proper. We will, however, consider them as background evidence in support of Complainant's overall claim of a hostile work environment.

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.

Disparate Treatment – Claim 1

To prevail in a disparate treatment 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). Complainant must initially 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. Corp. 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 804 n.14.

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) he is a member of a protected group; (2) he suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

In this case, Complainant establishes that he is a member of a protected basis because he is African American. He also established that he was subjected to an adverse action when scores within the desk audit did not result in a promotion to the GS-14 level. However, Complainant failed to establish that there is a causal link between the desk audit results and his protected basis. While he argues that CW1 should be a comparator, he does not dispute that CW1 worked in a different position which he gained through a competitive process. There is no other evidence raising an inference of discrimination.

Notwithstanding we find that Specialist articulated legitimate, nondiscriminatory reasons for the factor scores in the desk audit. Specifically, Specialist assessed Complainant's job duties through questionnaires that were answered by Complainant and his supervisor, and then interviewed Complainant when he appealed the results of the desk audit. Specialist explained that she was obligated to assess Complainant's series and grade classifications based on Complainant's duties.

At this stage, Complainant fails to articulate any argument that sufficiently demonstrates the Specialist's assessment to be pretext for discriminatory animus. Complainant focuses on his belief that he encumbered S1's position after S1's departure, and that CW1 is in a GS-14 level position. We have already addressed CW1's status as a comparator, and the Agency adequately demonstrated that S1's position was abolished and divided, and that Complainant assumed some, but not all of the work. Complainant failed to establish he was subjected to discrimination in Claim 1.

Hostile Work Environment – All Claims

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 her 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). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove his hostile work environment 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 that the conduct was taken because of a protected basis; in this case, his race. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The Commission finds that, construing the evidence in the light most favorable to Complainant, the alleged incidents were not sufficiently severe or pervasive to establish a legally hostile work environment. The Commission notes that the anti-discrimination statutes are not a civility code. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). Even assuming the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, the Commission finds that Complainant failed to show that the Agency's actions were based on discriminatory animus, as discussed more fully above. The record reflects that the alleged incidents were more likely the result of ordinary workplace interactions, routine supervision, and general workplace disputes and tribulations. Accordingly, we find that Complainant has not established that he was subjected to a discriminatory hostile work environment as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order.

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

December 5, 2024
Date