



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Ervin A.,¹
Complainant,

v.

Walter Cruickshank,
Acting Secretary,
Department of the Interior
(National Park Service),
Agency.

Appeal No. 2023000110

Hearing No. 520-2022-00165X

Agency No. DOI-NPS-21-0247

DECISION

On October 1, 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 September 23, 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.

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.

ISSUES PRESENTED

1. Whether the Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.
2. Whether the Agency's final order properly found that Complainant was not subjected to a discrimination or a hostile work environment because of his race, color, religion, disability and previous EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Maintenance Worker, GG-4749-05, at the Gateway National Recreation Area in Staten Island, New York. In a formal EEO complaint filed on July 8, 2021, and subsequently amended, Complainant alleged that the Agency discriminated against him on the bases of race (African American), color (Black), religion (Catholic) disability (hearing impairment), and in reprisal for prior protected EEO activity when:

1. On May 7, 2021, Complainant was issued a Letter of Reprimand for disrespectful conduct;
2. On various dates, Complainant was given undesirable assignments and harassed to include but not limited to the following incidents:
 - a. he was asked to work in an unsafe manner by working by himself,
 - b. his request for a spotter, due to his weight, to go up a two-story house to install a window screen was denied,
 - c. he was instructed to clean the gutters at 301, another two-story high job with no helper,
 - d. he was instructed to pick up trash (that is roads and grounds job), and clean gutters which is his job but with a bucket truck; and, he was physically assaulted and verbally abused by a co-worker and no action was taken;
3. on October 7, 2021, when Complainant received an email about violating the policy on Government Vehicle Parking to include but not limited to the following:
 - a. he was instructed not to get a vehicle from the mailroom,
 - b. he was instructed to use the Building and Utilities vehicle instead,

- c. he could not park the government vehicle at his residence, and
 - d. he was instructed to park the assigned vehicle at Building 301; and
4. On November 6, 2021, Complainant was pulled out of training at the Smith and Solomon School before completing the training.

Complainant identified his race as African American, his color as Black, and his religion as Catholic. Investigative Report (IR) 98-99. When asked about his previous EEO activity, Complainant responded that he had filed multiple EEO complaints but could not remember the dates on which he did so. IR 99-100. Complainant's first-level supervisor, the Supervisory Facility Operations Specialist (S1), admitted that Complainant had named him in at least one of those complaints. IR 324. When asked about his disability, Complainant responded that he had had a hearing impairment since birth, and that he took medication for high blood pressure, usually brought on by stress. He also stated that when his hearing aids malfunction, he automatically speaks louder to compensate. He maintained that he was able to perform the essential functions of his position, but that whether he needed a reasonable accommodation often depended on the specific tasks he was required to do. IR 100-01, 546. S1 averred that he was not aware of Complainant's disability. IR 324-25.

Allegation (1): Complainant averred that S1 issued him a letter of reprimand for disrespectful conduct towards another employee. He denied the charges in the letter. IR 101-02, 184. According to the reprimand, Complainant engaged in a verbal altercation with an employee who, like him, lived in government housing. The argument occurred on that property. The letter indicated that Complainant screamed and cursed at the other employee in a highly unprofessional manner. Several witnesses corroborated the other employee's statements. The Administrative Officer (AO) consulted with an Employee Relations Specialist before directing S1 to issue the letter. IR 325-26, 370-72, 430-32, 437-45, 454-56.

Allegation (2): Complainant alleged that S1 had required him to work by himself in an unsafe manner, denied his request for a spotter when he had to use a ladder, ordered him to clean gutters without a helper, and pick up trash without a bucket truck. IR 108-10, 112. He also averred that he had been physically and verbally assaulted by a coworker on January 15, 2020, and that management had taken no corrective action since the incident. IR 113-14. He further reported that management selected this coworker to serve as his acting supervisor from June 28 to July 2, 2021. IR 184.

S1 responded that he did not consider cleaning gutters on a ladder to be unsafe, that spotters were available if he needed assistance, and that he had assigned several maintenance workers to clean gutters, including Complainant. Further, S1 stated that Complainant was not certified to use a bucket truck, which was not necessary to clean gutters. S1 further averred that picking up trash was part of Complainant's regular duties as a maintenance worker. IR 330-35. As to management's alleged failure to discipline the coworker for the incident that occurred on January 15, 2020, S1 affirmed that he first became aware of Complainant's assault accusation against the coworker when he was notified of the instant EEO complaint. IR 335-36.

Allegation (3): Complainant alleged that in September and October 2021, S1 sent him harassing emails regarding his use of government vehicles in ways that violated the Agency's parking and other vehicle-related policies. IR 122. In particular, he claimed that S1 instructed him not to use vehicles designated for the mailroom and to use vehicles from Buildings and Utilities, to park the vehicle in front of Building 301, and not to park the vehicle at his residence. IR 123-26.

S1 responded that he was merely following the Agency's policy governing usage of government vehicles, which, among other things, prohibited Agency employees from parking those vehicles at their residence. IR 340-41, 343, 348, 351, 460, 477. S1 also averred that since Complainant was assigned to Buildings and Utilities, which was housed in Building 301, he thought it was appropriate that Complainant be assigned vehicles from Buildings and Utilities rather than from the mailroom. Further, those vehicles should be parked at Building 301. IR 341-44, 459, 461.

Allegation (4): Complainant claimed that on November 5 or 6, 2021, S1 and AO notified him by phone and email that he was being removed from a training class on operating heavy equipment that he had previously signed up for with management's approval. The purpose of the class was to allow Complainant to obtain a commercial driver's license (CDL). According to Complainant, the reason he was given for the action was that he was taking too long to finish the training. IR 129-30, 463-65.

S1 denied that Complainant was removed from the class. Rather, Complainant was allowed to take annual leave as needed to complete the course in addition to the paid government time he was already given. IR 314-18, 468, 472-73.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report (IR) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

At the outset, the AJ dismissed that part of allegation (2) involving the verbal and physical assault by a coworker that allegedly occurred on January 15, 2020, for untimely contact with an EEO counselor. As to allegation (1), the AJ found that Complainant was given the letter of reprimand for his unprofessional and disrespectful conduct toward a fellow employee, that the reasons for the reprimand were documented in the letter, and that AO had consulted with the Human Resources Office before directing S1 to issue the reprimand. Concerning allegation (2), the AJ found that none of the assignments that S1 gave to Complainant were outside the scope of his position description. Regarding allegation (3), the AJ found that the demands that S1 made upon Complainant regarding the use of his government vehicle were consistent with the Agency's policy regarding employee use of government vehicles. With respect to allegation (4), the AJ found that, through a combination of paid government time and annual leave, Complainant was given the time he needed to complete his CDL course.

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 or reprisal as alleged.

The Agency issued a final order fully adopting the AJ's decision. The instant appeal followed. Complainant did not submit a timely statement or brief in support of his appeal.²

² Any statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. 29 C.F.R. § 1614.403. Complainant did not submit his appeal brief until 17 months after the period for filing the brief had expired. Accordingly, we will not consider it.

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

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.

AJ's Dismissal of the Assault Incident at issue in Allegation (2)

We find at the outset that the AJ may have mischaracterized the assault as the event at issue in the complaint. It was not the assault itself, but rather the Agency's ongoing failure to take disciplinary action against the coworker or otherwise look into the matter for which Complainant sought relief. However, for the reasons discussed below, we find that no genuine issue of material fact exists with respect to this incident.

Hostile Work Environment

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), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).; 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 Harassment in the Workplace, supra.

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. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Complainant satisfies the first element of the harassment analysis in that he is a member of several protected classes pertaining to race, color, religion, and disability, and had engaged in previous EEO activity.

He also satisfies the second element in that the incidents he raised in his complaint were certainly unwelcome from his own subjective point of view.

As to the third element of the hostile work environment analysis, the Commission has long held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. Cletus W. v. Dep't of Housing & Urban Dev., EEOC Appeal No. 2022003717 (Sept. 19, 2024) citing 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, the Commission does not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment. Id., citing Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014).

With regard to the Agency's failure to take action in connection with the alleged assault, S1 gave sworn testimony that he had not heard anything about the January 2020 incident until he became aware that he had been named as a responsible management official in the instant complaint. Complainant did not present any documentary or testimonial evidence that contradicts S1's affidavit. With respect to the CDL training at issue in allegation (4), no adverse action occurred in that Complainant was permitted to complete the course and was allowed to take leave in order to do so. Further, Complainant did not contend that any other employees were not required to take leave in order to attend such training courses. Concerning the reprimand, the letter was issued after an inquiry had been conducted, after witness testimony taken, and after the Human Resources Office had been consulted. As to the remaining allegations, work assignments and vehicle usage policy fall under the rubric of routine work assignments, instructions, and admonishments. Complainant has not presented any evidence sufficient to demonstrate he was subjected to actions by management that were inconsistent with his position description or the Agency's policy regarding use of government vehicles. We therefore find that the evidentiary record is not sufficient to raise a genuine issue of material fact as to the existence of the third element of the discriminatory harassment analysis. Moreover, none of the incidents set forth in the above allegations are reasonably likely to deter Complainant or others from engaging in protected EEO activity. Helen G. v. U.S. Postal Serv., EEOC Appeal No. 2024003949 (Dec. 9, 2024), citing Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

Even if we assume that the incidents in question were severe or pervasive enough to constitute a hostile work environment, Complainant's claim of hostile work environment would still fall short on the issue of discriminatory motive, the fourth element. Indicators of unlawful motive include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, unequal application of Agency policy, deviations from standard procedures without explanation or justification, and inadequately explained inconsistencies in the evidentiary record. Tammy S. v. Dep't of the Army, EEOC Appeal No. 2021000578 (May 5, 2022).

When asked why he believed that his race, color, religion, disability, or previous activity were motivating factors in the actions of S1 and AO, Complainant responded that S1 mentioned that he had hearing problems, that he was treated differently than white employees with respect to various aspects of his employment, such as overtime, preferential assignments. He also asserted, in essence, that he was held down by low expectations on the part of S1, and that S1 "hated" him. IR 102-03, 108-16, 123-27, 130-32, 458. Beyond his own speculative assertions, however, Complainant has presented neither affidavits, declarations, or unsworn statements from witnesses other than themselves nor documents sufficient to undermine or contradict the explanations provided by S1 and AO for the various incidents. He has likewise not presented testimonial or documentary evidence sufficient to cause us to question the truthfulness of these individuals as witnesses. He has also not presented evidence sufficient to establish the existence of at least one of the indicators of unlawful motive listed above.

Ultimately, we agree with the AJ that the evidentiary record as a whole is insufficient to raise a genuine issue of material fact as to the existence of a discriminatory or retaliatory motive on the part of any Agency official. Furthermore, to the extent Complainant claims that he was subjected to disparate treatment regarding these claims, the Commission finds that Complainant has not proffered any evidence that would be sufficient to raise a genuine issue of material fact as to whether the Agency officials' explanations for their actions were pretext for discrimination or reprisal. Ingrid C. v. Soc. Sec. Admin., EEOC Appeal No. 2021003868 (Oct. 19, 2022). Accordingly, the Commission finds that Complainant was not subjected to discrimination or a hostile work environment as alleged.

CONCLUSION

Based on a thorough review of the record, 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

February 10, 2025
Date