



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

[REDACTED]  
Arturo B.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Citizenship and Immigration Services),  
Agency.

Appeal No. 2023000119

Agency No. HS-CIS-00363-2022

**DECISION**

On October 7, 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 8, 2022, final decision 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 decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Immigration Services Officer, GS-1801-09, at the Agency's Vermont Service Center in Essex Junction, Vermont.

On December 23, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and in reprisal for prior protected EEO activity<sup>2</sup> when:

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

<sup>2</sup> Complainant explained in his affidavit that the basis of claim 1 was sex and the basis of claim 2 was reprisal.

1. On or about November 4, 2021, a supervisor created a new seniority list for the December Collateral Duty Calendar and 14 female coworkers with less seniority were placed above Complainant, and he was denied the benefit of picking second for the Batch Print Collateral Duty.
2. On November 16, 2021, Complainant was threatened with materially adverse actions.

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). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Regarding claim 1, Complainant identified a Supervisory Immigration Services Officer (Manager) as the management official who created the new seniority list. Complainant stated that Manager was not part of Complainant's supervisory chain. Complainant stated that there are 16 employees on the seniority list, with one male employee and 15 female employees. Complainant stated that Manager reduced Complainant to the fifteenth place on the seniority list. Complainant stated that he should have been ranked second on the list because only one other employee had more seniority than him. Complainant stated that his reduction in place on the list for 14 female coworkers demonstrates it occurred because of his sex. Complainant acknowledged that reprisal had no relationship to claim 1 because Complainant's alleged opposition activity occurred after the events of claim 1.

Manager stated that she maintains the seniority list and that the list rotates monthly. Manager explained that rotates means that the first person to pick one month then picks last the next month. Manager noted that the rotation applies to all employees, regardless of sex. The record contains an email from Manager to Complainant where she explains that the seniority list rotates every month. The record contains emails corroborating that the rotation system applied to female employees as well. For instance, emails show that the female employee who selected collateral duty days first in October 2021, then selected last in November 2021.

Regarding claim 2, Complainant connected the threat of "material adverse actions" to an email dated November 16, 2021. Complainant stated that Manager threatened to scrutinize Complainant's attendance more closely in the month of December than that of other employees. Manager stated that she understood an email Complainant sent on November 15 to mean that Complainant would not select days himself under the rotating seniority list. Manager stated that she instead assigned Complainant his days to perform the collateral duties based upon management's right to assign work to employees. Manager acknowledged that the email where she communicated Complainant's assigned days also included an explanation of possible adverse actions if Complainant did not show up to perform Complainant's assigned collateral duties.

Manager stated that she included the consequences because of the following: (1) Complainant had previously made comments expressing disagreement with the Agency policy that he could not use annual leave on a day when he was assigned to batch print; and (2) to cover all possible scenarios for Complainant using various methods, such as sick leave, to not show up on days when he was required to perform a collateral duty.

The record contains the relevant emails. On November 10, Complainant was notified that it was his turn to select collateral duty days. On November 15, Complainant was notified, in part, that he had not yet picked days and that it was delaying the process. On November 15, Complainant responded to Manager as follows: "I have a reasonable, good-faith belief that this new process is prohibited discrimination and I'm not comfortable with participating in this new process until there's a resolution on my EEO complaint."<sup>3</sup> On November 16, Manager sent Complainant the following:

I acknowledge that you do not wish to select a duty date using the current selection process. Therefore, management, as an assignment of work, has assigned you the following duty dates in order to move the collateral duty calendar forward for completion. Batch Print: December 21st. Back Up Batch Print: December 27th.

You are expected to perform the duty on the date/dates assigned. If you request non-emergent leave on the dates you have been assigned, we can deny the request based on operational need and charge you with AWOL [Absent Without Leave] if you don't report for duty. Additionally, if you call out sick more than once surrounding and on your assigned duty date/dates, you can be asked for a doctor's note to substantiate.

Please reach out to your supervisor or myself if you have questions or concerns.

The foregoing November 16 email is the email that Complainant identified as the harassing behavior.

#### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), 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").

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<sup>3</sup> Complainant identifies this November 15 email as his prior EEO activity.

### ANALYSIS AND FINDINGS

To prevail in a disparate treatment claim such as this, 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 or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction 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 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Complainant v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Complainant v. Dep't of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Complainant v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Complainant must prove that the employer's reasons are not only pretext but are pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 and 516 (1993). A factual issue of pretext cannot be established merely on personal speculation that there was discriminatory intent. Complainant v. U.S. Postal Service, EEOC Appeal No. 01A11110 (May 22, 2002); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008). Pretext means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000).

To establish a claim of harassment, a complainant must establish that: (1) she or he belongs to a statutorily protected class; (2) she or 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 her or 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 (11<sup>th</sup> Cir. 1982).

Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). 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 at 6 (Mar. 8, 1994).

For purposes of analysis, we assume *arguendo* that Complainant established a prima facie case of discrimination on the alleged bases. We find that the Agency articulated a legitimate, nondiscriminatory reason for the personnel action at issue. Regarding claim 1, Manager explained that the seniority list rotates each month, and that the rotation applies to all employees regardless of sex or prior EEO activity.

After a review of the record, we find Complainant failed to show that the Agency’s articulated reason for claim 1 was a pretext for discrimination. Complainant relied only on his contention that his understanding of seniority, which would have allowed him to pick second in line, was not applied and benefitted 14 female employees. The record corroborates that the rotational system was applied uniformly across all employees regardless of sex as the female employee who selected collateral duty days first in October 2021, selected last in November 2021. Additionally, even if the Agency and Complainant had differing understandings of seniority or whether a rotational system was allowed under the collective bargaining agreement, there is no indication that the Agency’s application of the seniority and rotational system was in any way motivated by discrimination.

Regarding the alleged harassment, we find that Complainant failed to prove that the conduct complained of was based on Complainant’s membership in a statutorily protected class. Regarding claim 2, Manager pointed to previous comments made by Complainant that established Manager’s belief that Complainant may attempt to not show up on a day when he was required to perform collateral duties and that such belief, rather than retaliation for prior protected EEO activity or Complainant’s sex, was the basis for referencing potential consequences in the email.

Furthermore, the record establishes that Complainant has reacted negatively to ordinary tribulations of the workplace. In this case, Complainant did not like being advised of Agency policy regarding failure to perform the assigned duties on the dates assigned. Anti-discrimination statutes are not general civility codes designed to protect against the “ordinary tribulations” of the workplace. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); see also Lassiter v. Dep’t of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between an alleged harasser and a complainant do not rise to the level of harassment). Instead, EEO laws address discriminatory conduct that alters the work environment. See Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). The record does not contain evidence that similarly situated employees not in Complainant’s protected groups were treated differently under similar circumstances.

### CONCLUSION

Accordingly, the Agency's final decision 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).

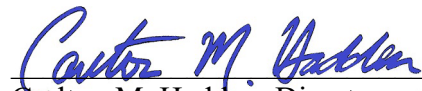
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (S0124)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

January 23, 2024  
Date