



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Dan H.,<sup>1</sup>  
Complainant,

v.

Leland C. Dudek,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2023000736

Hearing No. 531-2019-00497X

Agency No. HQ-18-0862-SSA

**DECISION**

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 final action 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 action.

At the time of events giving rise to this complaint, Complainant worked as a Program Analyst, GS-0343-13, at the Agency's Office of Electronic Services and Technology in Baltimore, Maryland.

On September 18, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment in reprisal for prior protected EEO activity 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.

1. On June 11, 2018, Complainant was not selected for a promotion to the position of Lead Program Analyst, GS-14, under Vacancy Announcement No. SH-10119271, despite being qualified for the role;
2. On July 31, 2018, Complainant learned that the Agency did not choose him for promotion to the position of Lead Program Analyst, GS-14, under Vacancy Announcement No. SH-10234147, despite being qualified for the role;
3. On August 20, 2018, Complainant's supervisors failed to include him as a Subject Matter Expert (SME) in a video conference with Senior Agency staff, but instant messaged (IM) him throughout the conference to answer questions;
4. On September 18, 2017, Complainant was assigned the Detailed Office Organization Resource System (DOORS) workload; and
5. From October 2017 through September 18, 2018, and ongoing, the Agency subjected him to harassment in terms of non-selections, assignment of duties, and work conditions.

The Associate Commissioner was the selecting official regarding the non-selections at issue in claims 1 and 2 and was also aware of Complainant's prior EEO activity. Report of Investigation (ROI) at 50-51, 58. The record showed that Complainant was placed on the Best Qualified List, but he was not selected for either of the Lead Program Analyst positions for which he had applied. The undisputed record showed that an interview panel issued recommendations for the selection of the top three interviewed candidates. None of the interview panelists had knowledge of Complainant's prior EEO activity. Complainant was not one of the top six candidates. The Selecting Official testified that she relied on the lists, rankings and numerical scores provided by the interview panel and the panel's ultimate recommendations. Even if the scores were adjusted to discount the Selecting Official's input, Complainant's scores would not have been higher than the candidates interviewed. Complainant did not offer evidence showing that he had superior qualifications over the selected candidates.

Regarding claim 3, the record shows that, on August 20, 2018, he was working remotely. A video conference was convened with Senior Agency staff. Although he did not receive an invitation to a video call for the meeting, he received instant messages asking him to answer questions. Complainant admitted that his managers were not responsible for the Agency's failure to set up a video conference and that no manager distributed a call-in number for any remote workers. There was no evidence that the organizers of the meeting were aware of his prior EEO activity.

Regarding claim 4, Complainant claimed that his assignment to the DOORS workload in October 2017, constituted reprisal. The record showed that his assignment predated his EEO activity. In addition, Complainant's supervisor (S1) and the Team Leader testified that management assigned Complainant to DOORS because of an office realignment which created an opening in the newly formed division and Complainant had the relevant prior experience and skillset.

Regarding claim 5, Complainant claimed that management was "purposely causing situations in the hopes that I will react negatively so that they may justify past and future decisions to not select me for promotion." Complainant alleged that management assigned a Co-Lead on the DOORS project and that she began to harass and verbally attack him. Complainant claimed that management improperly documented his interactions with the Co-Lead in his Fiscal Year (FY) 2018 Mid-Year Performance Assessment and Communication System (PACS) assessment. Complainant's Team Leader administered the Mid-Year assessment while S1 was on leave. The Team Leader denied that an email was included in Complainant's PACS assessment regarding the Co-Lead; rather, the PACS assessment included language that indicated that Complainant's tone in emails, at times, was harsh and abrasive.

Complainant further alleged that S1 forced his unit to participate in exercises she learned in her personal therapy sessions. Complainant claimed that those sessions were called "Mental Health Thursdays" and "Self-esteem activities." Complainant objected to participation and acknowledged management excused him from the meetings. Complainant, however, found it to be harassing because he was included in the group emails as a participant and staff members still placed notes on his desk relating to the exercises. Complainant alleged that S1 contributed to creating the hostile work environment because after receiving the notes he felt he had to inquire what the notes on his desk meant.

S1 and Complainant's second-level supervisor (S2) explained that Complainant was referring to a Specific Measurable Attainable Realistic Time Bound (S.M.A.R.T.) workshop that occurred during a bi-weekly division meeting. S1 and S2 stated that the discussion was used to share helpful tools to be used in the public and private section in goal achievement, project management, and personal development. S1 and S2 denied that participation in S.M.A.R.T. or utilization of the skill set was required, but participation in the bi-weekly division meetings was mandatory.

S1 stated that, in December 2017, Complainant reported feeling stalked by the Co-Lead during a division lunch and that Complainant was agitated that the Co-Lead had volunteered to work on two of the same committees Complainant worked on. S1 held a meeting with Complainant and the Co-Lead to address the concerns. S1 affirmed that Complainant dominated the conversation during the meeting and the Co-Lead repeatedly apologized. Management was unable to resolve the situation and ultimately decided to remove the Co-Lead from the DOORS workload.

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. Over Complainant's objections, the AJ assigned to the case granted the Agency's motion and issued a summary judgment decision.

When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). This appeal followed. Complainant contends that the AJ erred by viewing the testimony in the light favorable to the Agency, rather than him, as the non-moving party.

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*).

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 retaliatory 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 factfinder could not find in Complainant's favor.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was subjected to reprisal or a retaliatory hostile work environment as alleged.

Accordingly, we AFFIRM the Agency's final action implementing the AJ's decision.

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

March 6, 2025  
Date