



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

[REDACTED]  
Jeremy C.,<sup>1</sup>  
Complainant,

v.

Janet L. Yellen,  
Secretary,  
Department of the Treasury  
(Internal Revenue Service),  
Agency.

Appeal No. 2023001464

Hearing No. 530-2022- 00095X

Agency No. IRS-21-0394-F

**DECISION**

On January 10, 2023, 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 December 20, 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.

**ISSUE PRESENTED**

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not subjected to discrimination, including harassment, regarding assignment, non-selection, and terms and conditions of employment on the bases of his race (African American), sex (male), and in reprisal for protected EEO activity.

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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.

## BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Support Services Specialist/Project Manager (PM) GS-0342-12, at the Agency's New York/New Jersey Territory in Philadelphia, Pennsylvania. Report of Investigation (ROI) at 2 and 305. Complainant is a African-American male. ROI at 4 and 85.

Complainant's frontline supervisor (Supervisor 1A [mixed race, African-American and Caucasian male]) until May 24, 2021 was a Section Chief. ROI at 85, 198-99. After May 24, 2021, Complainant's frontline supervisor (Supervisor 1B [Hispanic male]) was a second Section Chief. ROI at 84 and 124. Complainant's second-line supervisor (Supervisor 2 [African-American female]) was a Territory Manager. ROI at 85 and 147-48.

On or about March 18, 2020, Complainant filed a complaint under the Agency's Anti- Harassment Program policy, generally alleging that he was treated uncivilly by Supervisor 1B and Supervisor 2. Complainant did not allege that Supervisor 1B and Supervisor 2's comments or actions were based on or motivated by any protected classes. ROI at 17, 99, and 361. A management inquiry was conducted into Complainant's allegations and the deciding official determined that proactive measures should and would continue to be taken to address Complainant's allegations. ROI at 366.

Complainant initiated EEO contact on April 30, 2021. On June 2, 2021, 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 (African-American), sex (male), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. For a period of time continuing to the present, management has moved Complainant from familiar projects to unfamiliar projects, without clarifying his role in the new projects; providing assistance, or responding to his requests for clarification;
2. Complainant has been held responsible for projects beyond the dates they were reassigned to another Project Manager;
3. In April 2021, Complainant's manager stated she would not promote anyone within the department; and
4. On July 19, 2021, Complainant learned he was not selected for the Support Services Supervisor "MSP" position (Section Chief), under Vacancy Announcement #21MEM-FMMM0517-0342-05 Series/IR-0342-05.

The Agency conducted an investigation into the complaint. The investigation revealed Complainant's allegation that in 2017, Supervisor 2 stated that she would not promote a Project Manager to Section Chief. ROI at 94. Supervisor 2 denied ever having made the alleged statement. ROI at 158. Complainant did not engage in EEO counseling or file an EEO complaint in 2017 or 2018 regarding the alleged statement.

In or about 2018, Complainant was assigned to the Newark project. Complainant remained assigned to that project for approximately two years. During that period, the Newark project did not progress as far as expected. ROI at 125. By email on June 2, 2020, Supervisor 1B informed Complainant that he would not be the Project Manager for the Newark project moving forward. Complainant noted his disagreement with the reassignment decision. ROI at 222. Despite Complainant's disagreement, management elected to proceed in reassigning him from the Newark project. ROI at 86 and 125-26.

Complainant was assigned as the Project Manager for the White Plains Project. ROI at 140. By email on June 11, 2020, Supervisor 1B issued Complainant a managerial directive regarding Complainant's time on duty (TOD) while at White Plains. ROI at 258. In a June 12, 2020, email to Supervisor 2 concerning the managerial directive from Supervisor 1B, Complainant questioned whether it was necessary to have Supervisor 1B consistently threatening him with disciplinary actions for Complainant just trying to do his job effectively.

In Complainant's communication to Supervisor 2, Complainant asserted that he had an exemplary career thus far; and questioned whether it was fair for a manager to direct him to do something Complainant did not know how to do, when the manager had the power and authority to change it without Complainant's input. ROI at 258.

In her June 16, 2020, response to Complainant, Supervisor 2 explained that Supervisor 1B made several attempts as outlined in the directive dated June 11, 2020, to get Complainant to comply with Supervisor 1B's instructions to no avail, hence his managerial directive. Supervisor 2 stated that had Complainant adhered to his responsibility of responding readily to the direction of his supervisor, pursuant to IRM 6.735.1.2 (Applicable Agency policy), as well as Chapters 9A and 11A of the Agency's Ethics Handbook, a managerial directive could have been avoided. ROI at 257.

In that same email response, Supervisor 2 also noted that she wanted to remind Complainant that pursuant to Article 5, Section 7A of the 2019 NA (Applicable Agency policy), "Relationships between employees and their supervisors should be mutually conducted in a businesslike, courteous and tactful manner. Employees and their supervisors or managers are encouraged to discuss any concerns regarding their relationship." Supervisor 2 strongly suggested that if Complainant was unclear of any directives given to him by his supervisor, Complainant should bring them to his supervisor's attention in a timely and professional manner. Supervisor 2 stated that both Supervisor 1B and Supervisor 2 were "here" to assist and were always available to assist Complainant when needed. ROI at 257.

On August 21, 2020, Complainant reported a negative interaction he had with the Senior Security Specialist on the White Plains project to Supervisor 1A, noting that the security person for the White Plains project has changed numerous times. ROI at 263-64. Supervisor 1A elevated Complainant's complaints to Supervisor 1B.

On or about June 23, 2021, Complainant was listed as the Point of Contact for the project at the Bronx. ROI at 142. On June 29, 2021, Complainant emailed Supervisor 1B requesting guidance and clarification on the assignment. Supervisor 1B provided the requested information to Complainant. Id.

By email on July 1, 2021, Supervisor 1B informed Complainant that he would be assigned a new project in the Bronx. ROI at 146. By email on July 1, 2021, Complainant responded to the new assignment, expressing a desire for further discussion with Supervisor 1B; and asserting that constant change was not beneficial to effective project management. In response, Supervisor 1B noted that the White Plains project was complete, or close to completion and management wanted Complainant to move on to other projects. As for Newark, Supervisor 1B noted that management felt a new voice would move it forward since the history on it was not great. ROI at 145.

In or about June 2021, the Agency posted Vacancy Announcement #21MEM-FMM0517- 0342-05 for a Support Services Supervisor \*MSP\* (Section Chief). ROI at 317. There were only two applicants for this vacancy announcement. ROI at 358. On or about July 16, 2021, the Agency informed the applicants that there were no selections made for Vacancy Announcement #21MEM-FMM0517-0342-05. ROI at 105 and 360.

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. On August 5, 2022, the Agency filed a motion for summary judgment (Agency's motion). On August 11, 2022, Complainant filed a response in opposition to the Agency's motion (Complainant's opposition). The Agency filed a reply (Agency's reply) on August 16, 2022. The AJ assigned to the case admitted the Agency's motion, Complainant's response, and Agency's reply into the record.

The AJ reviewed the Agency's Statement of Undisputed Facts. For the most part, observed the AJ, Complainant did not dispute the Agency's articulation of facts. The AJ found the facts not disputed by Complainant to accurately capture the material and relevant facts in this matter. Therefore, the AJ incorporated and adopted by reference the Agency's Statement of Undisputed Facts numbers 1-6, 9- 29, 31-56, and 58-59.

Regarding reprisal, the AJ cited to ROI at 17, 99, and 361, noting that Complainant had generally complaints of "negative comments" and other communications with Supervisor 1B and Supervisor 2, without mention of his race, sex, or protected activity. It is also clear, asserted the AJ, the Agency's Anti-Harassment Program captured a broader range of complaints than just EEO complaints. As described in the record, the AJ did not find Complainant's March 18 activity to constitute protected EEO activity. The only other protected EEO activity reflected in the record, the AJ observed, was the instant complaint, on which Complainant made initial contact on April 30, 2021. As Complainant's protected activity predated Claims 1 through 3, and Complainant failed to show he engaged in other protected activity prior to April 30, 2021, the AJ did not find he could establish a claim of retaliation for Claims 1 through 3.

In reviewing the record and Complainant's response, the AJ also found that the Agency proffered legitimate, nondiscriminatory reasons for the alleged actions in Claims 1, 2, and 4; and that Complainant presented insufficient evidence to demonstrate that the stated reasons were pretext for discrimination. In reviewing Complainant's overall claim of harassment, the AJ concluded that Complainant failed to make a prima facie case of discriminatory harassment, finding insufficient evidence to connect any of the incidents to Complainant's race, sex, or protected activity.

Although Complainant pointed to disputes in the record, the AJ did not find the disputes to be material disputes that required discovery or an evidentiary hearing on Complainant's claims. Therefore, the AJ found it appropriate to dismiss Complainant's claims against the Agency. On November 16, 2022, the AJ granted the Agency's motion and issued a decision without a hearing in favor of the Agency. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

### CONTENTIONS ON APPEAL

On appeal, Complainant alleges that an AJ from the Commission's Philadelphia office abused her discretion and violated his 5th Amendment procedural due process rights when she transferred his case to the Los Angeles AJ, after the Agency and Complainant both agreed to Alternate Dispute Resolution (ADR). According to Complainant, the AJ did not follow through with ADR. Complainant asserts that he had a right to ADR; and that if the ADR did not result in a resolution, then it would have been appropriate for the AJ to either transfer the case or proceed with a hearing in Philadelphia. Complainant requests that the Commission review this case.

In response, among other things, the Agency reiterates its stated reasons for the challenged actions; and states that Complainant failed to raise any issue on appeal to merit disturbing the AJ's finding of no discrimination or the Agency final order implementing that finding. The Agency requests that the Commission affirm the AJ's initial decision and deny Complainant's appeal.

### STANDARD OF REVIEW

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). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See *id.* at Chapter 9, § VI.A. (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”).

### ANALYSIS

#### *Procedural matter*

We note Complainant’s appeal allegation that the AJ abused her discretion when he was deprived of the opportunity to participate in previously agreed-to ADR. The record includes the ADR agreement that Complainant signed on February 23, 2022. The record also includes Complainant’s August 16, 2022, opposition to the Agency’s motion. Nowhere in Complainant’s opposition does he raise the issue of been deprived the opportunity to participate in ADR which he agreed to do some four months prior. Nor did Complainant raise the issue at any time during the hearing process and up until the AJ issued her decision on November 16, 2022, some nine months after Complainant signed the ADR agreement. Therefore, Complainant’s appeal allegation that the AJ abused her discretion by depriving him the opportunity to participate in agreed-to ADR is uncorroborated by record evidence.

Moreover, it is the Commission’s position that given the broad discretion in the conduct of hearings, “a party claiming that the AJ abused his or her discretion faces a very high bar.” Kenyatta S. v. Lynch, EEOC No. 0720150016 (Jun. 3, 2016). Complainant failed to meet that high bar in this case.

#### *AJ’s Issuance of a Decision without a Hearing*

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 nonmoving 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, Complainant presented no additional evidence in his appeal statement to support his allegations that the challenged management actions were motivated by discrimination or retaliation. Given that Complainant had access to the ROI concerning his complaint and the opportunity to develop the record significantly during the EEO investigation and hearing process before the AJ, we find that summary judgment was appropriate in this case. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

*Disparate Treatment Based on Race, Sex, and Reprisal*

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The Commission applies the McDonnell Douglas analysis to complaints involving retaliation claims. Orlando O. v. Department of Health and Human Services, EEOC Appeal No. 0120170253 (Aug. 8, 2018) (citing Hochstadt v. Worcester Found. for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976)).

In order to establish a prima facie case of retaliation, a complainant must demonstrate that: (1) she participated in EEO activity; (2) an Agency official(s) was aware of the protected activity; (3) a subsequent adverse action took place, and (4) there is a causal link between the adverse action and the employer's knowledge of protected activity. Nida R. v. Dep't of Def., EEOC Appeal No. 0120152884 (Apr. 22, 2016) (internal citations omitted); see also EEOC Enforcement Guidance on Retaliation and Related Issues, § II.C.2, n. 154 (Aug. 25, 2016) (citing Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010)). Furthermore, "[t]he cases that accept mere temporal proximity between an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close' [in time]." Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (citing to O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (finding a three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (finding a four-month period insufficient).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race, sex, and reprisal.

Complainant meets the elements required to establish is disparate treatment claims to the extent that he is an African-American male. Complainant fails to meet any of the elements required to establish his prima facie case of reprisal. The record is devoid of any evidence that Complainant engaged in protected activity prior to the initiation of the instant complaint. The record does reflect that on March 18, 2020, Complainant filed an anti-harassment complaint under the Agency's Anti-Harassment Program. There is however no indication that the harassment complaint was based on any of Complainant's EEO-protected categories. See ROI at 17, 99, and 361.

Complainant also failed to identify any other similarly situated employees outside of his protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on his protected bases. Moreover, the Agency has provided legitimate nondiscriminatory reasons for the challenged management actions; and we find no persuasive proof of pretext.

Regarding Claim 1, the record revealed that Complainant was reassigned from projects in Newark, White Plains, and the Bronx. For the Newark project, the record reflected that Complainant's inability to progress the project as expected was the reason for his reassignment. Supervisor 1B cited to the "deteriorated working relationship between [Complainant] and GSA and [Complainant's] continued issues with communication," resulting in stagnation of progress. ROI at 125-26 and 313. Upon reassignment of the project to another PM, the project was completed within five months. ROI at 125.

For the White Plains project, the record reflected that the White Plains project was near completion and the Agency needed Complainant to assist in other active and more pressing projects. The Bronx project was cancelled, and so Complainant was not assigned to that project. ROI at 130.

Regarding Claim 2, the record showed that Complainant remained the Senior Project Manager but that the Agency assigned a different day-to-day manager. See ROI at 86 and 126-27.

Regarding Claim 3, Complainant contended that his manager stated that she would not promote anyone within the department. ROI at 24. In his affidavit, Complainant clarified that the statement occurred in 2017. ROI at 94. However, Complainant did not establish a connection between Supervisor 2's alleged statement and any of his protected bases. Importantly, Complainant had not engaged in any protected activity at the time the alleged statement, which Supervisor 2 denied making, was made.

Regarding Claim 4, the record reflects that the Agency cancelled the vacancy announcement for Section Chief, #21MEM-FMMM0517-0342-05 Series/IR-0342-05 after making a decision that it no longer required the position. The Agency had decided to collapse the section for which that position would have been responsible into another section. ROI at 194. Therefore, no selections were made.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant failed to show pretext because he failed to establish a link between the challenged management actions and any of his protected bases. Nor did he dispute management's explanations or demonstrate that their actions were motivated by discriminatory or retaliatory animus. For example, regarding Claim 1, Complainant presented no evidence to refute management's explanation that his reassignment was based on a legitimate business need. Complainant's disagreement with the Agency's decision in Claim 2, without more, is insufficient to show pretext.

For Claim 4, Complainant attempted to prove pretext by pointing to evidence that both he and the other candidate for the position at issue had prior EEO activity. He also pointed to evidence that the Agency ultimately did not collapse the section for which the position announcement had been made. See Complainant's opposition at 10-1. However, the Agency presented evidence reflecting that the management official who cancelled the announcement, Supervisor 2, later left her position; and that a different Territory Manager decided not to collapse the section. ROI at 197 and Agency's motion at 3. Therefore, Complainant failed to show that Supervisor 2's explanation for cancelling the vacancy announcement were false or that Complainant's protected bases and purported EEO activity motivated her decision.

Moreover, as Complainant failed to identify any similarly situated comparators, his claims fail and he does not prevail. See Aguilar v. U.S. Postal Service, EEOC Appeal No. 01944167 (Aug. 8, 1995) asserting that in general, in the absence of direct evidence of discrimination, if the complainant cannot identify any similarly situated comparison employees who were treated more favorably, he or she will not prevail.

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 her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her 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, sex, and his engagement in EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The Commission notes that reprisal claims are considered with a broad view of coverage and that the threshold for establishing retaliatory harassment is different than for discriminatory harassment. Retaliatory harassing conduct can be found even if when is not severe or pervasive enough to alter the terms and conditions of employment. See Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

To ultimately prevail in his claim of retaliatory harassment, Complainant must show that he was subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See id. at 57; EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017) (emphasis added).

The antidiscrimination statutes are not civility codes. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). Therefore, to ensure that his harassment claim survives summary judgment, Complainant must present enough evidence to raise a genuine issue of material fact as to whether 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 raise a genuine issue of material fact as to whether conduct of Agency management was motivated by unlawful considerations of his race, sex, and/or previous EEO complaints. Indicators of such discriminatory or retaliatory animus typically include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

Only if Complainant raises genuine issues of material fact as to both of those elements, hostility and motive, can the question of Agency liability for discriminatory or retaliatory harassment be brought before an AJ for a hearing.

In this case, we find that Complainant's hostile work environment claim must fail because there is no evidence beyond his own subjective assertions that any of the alleged incidents of harassment are due to any of his protected bases. See Ceola K. v. Dep't of Defense, EEOC Appeal No. 2022003102 (June 22, 2023).

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 discrimination or unlawful reprisal as alleged.

### CONCLUSION

Accordingly, we AFFIRM the Agency's final order adopting 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)

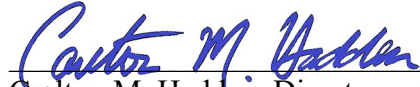
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

June 25, 2024  
Date