



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

[REDACTED]
Brant E.,¹
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023001921

Hearing No. 530-2019-00140X

Agency No. 200H-0460-2017100136

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's February 20, 2023,² 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final action.

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.

² EEOC regulations state that an Administrative Judge's (AJ's) decision becomes an Agency's final action if it does not issue a final order within 40 days. 29 C.F.R. 1614.109(i). The AJ issued a decision on January 11, 2023, and the Agency did not issue a final order; as such, the AJ's decision became the Agency's final action on February 20, 2023.

At the time of events giving rise to this complaint, Complainant worked as a Staff Chaplain at the Agency's Medical Center in Wilmington, Delaware.

On December 16, 2016, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment on the bases of race (African American), national origin (Nigeria), religion (Catholic), and age (YOB: 1954), and in reprisal for prior protected EEO activity, when:

1. on May 5, 2015, and November 28, 2016, Complainant's first line supervisor ("Supervisor") extended his hand to greet Complainant and placed his other hand on Complainant's back;
2. on June 27, 2016, the Supervisor targeted Complainant as a subject of a factfinding meeting regarding an incident with a volunteer on April 24, 2016;
3. on September 27, 2016, the Supervisor precluded Complainant from applying to the Leadership Development Institute (LDI) training;
4. on an ongoing basis, and specifically on November 20, and 27, 2016, the Supervisor documented Complainant's absence from his office and made Complainant verify his whereabouts;
5. on or about November 20, 2016, the Supervisor broke into Complainant's office to determine if he was there; and
6. on November 28, 2016, the Supervisor sent Complainant an email instructing him to explain his absence from the office for an extended period of time.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) 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 granted the Agency's motion and issued a decision without a hearing on January 11, 2023. The AJ noted that Complainant's two arguments in his response to summary judgment were that he was not chosen for endorsement for the LDI program due to his age; and he was retaliated against for testifying against the Supervisor in a prior EEO proceeding.

The AJ analyzed claim 3 as a discrete incident of disparate treatment. The LDI application required an endorsement from a candidate's supervisor. One of Complainant's coworkers ("Coworker") submitted his application prior to Complainant's submission.

The Supervisor and the Associate Director met with Complainant to explain that they could not have both Catholic Chaplains attend the LDI at the same time due to operational needs. They considered factors such as performance evaluations to determine that the Coworker would attend that year with Complainant the following year. Complainant applied for a similar training in 2017, with the Supervisor's endorsement, but he was not selected. The AJ observed that there was only a five (5) year difference between Complainant and the Coworker, which was not substantial. Complainant argued that he did not have a "low" rating, but he provided no evidence or explanations regarding their qualifications to create a genuine issue of material fact.

Regarding the alleged retaliatory harassment claim, the AJ assumed that Complainant engaged in protected activity, but that he did not establish adverse treatment based on a retaliatory motive or that the claimed conduct would likely deter an employee from engaging in protected activity. The AJ noted that antidiscrimination laws do not protect employees from personality quirks; personal animus; or even harsh treatment from their supervisors. The AJ concluded by entering summary judgment in the Agency's favor.

When the Agency failed to issue a final order within forty (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). The instant appeal followed.

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. (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).

Upon review, we find the record in the present case was fully developed. 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 he 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.

On appeal, Complainant argues that the AJ improperly made credibility determinations and decided material facts that were clearly in dispute. For example, the AJ downplayed the Supervisor's touching of Complainant's back, but he testified that the Supervisor "used to do this almost every day," and this was so severe that Complainant sent the Supervisor an email. The record shows that Complainant emailed the Supervisor on May 6, 2015, asking that he stop touching his back because it was a "cultural thing." ROI at 116, 251. While Complainant claimed that the Supervisor touched his back again on November 28, 2016, he did not specify any other dates. Complainant only generally testified to touching that used to be daily until he questioned the Supervisor about it. ROI at 116-18. However, Complainant did not provide sufficient evidence regarding frequency or number of incidents to show that the continued touching was severe or pervasive. Further, the Commission has found that numerous occasions of touching an employee's back did not rise to the level of unlawful harassment. See Annie F. v. National Credit Union Admin., EEOC Appeal No. 0120171111(Apr. 2, 2019) (instances of touching, including rubbing the complainant's back, did not rise to severe or pervasive conduct); Pham v. U.S. Postal Serv., EEOC Appeal No. 01992965 (Nov. 21, 2001) (touching on the back on numerous occasions was not sufficiently severe to satisfy the hostile work environment standard).

For claim 3, Complainant contends that the Supervisor stated that he did not approve Complainant's LDI application because "he is from Nigeria."³ ROI at 139. However, the Coworker was also from Nigeria, and Complainant did not explain why the Supervisor would endorse the Coworker, and not Complainant, when both were from Nigeria. ROI at 186.

³ The Supervisor was not asked about this alleged comment. Complainant stated that the Union President was a witness, but there is no statement from her in the record. The Agency noted that Complainant had years to further develop the record, but he did not move for any discovery.

Mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

Complainant further argues that he was harassed and retaliated against when the Supervisor questioned his whereabouts and broke into his office on one occasion (claims 4-6). However, Complainant did not connect these actions to a protected category. When asked how these events were based on Complainant's race, national origin, age, religion, and prior EEO activity, he responded that it was "constant humiliation, disrespect, victimization, and harassment." ROI at 150. Antidiscrimination statutes are not general civility codes, and the Commission has found that personality conflicts; general workplace disputes; and trivial and petty annoyances do not rise to the level of harassment. See Jeffrey R. v. Dep't of Justice, EEOC Appeal No. 2022003500 (Aug. 9, 2023); Rita F. v. U.S. Postal Serv., EEOC Appeal No. 2021002876 (Aug. 16, 2022); Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012).

For claim 2, the record shows that Complainant emailed the Supervisor about a volunteer incident and requested an investigation. ROI at 242-3. Complainant accused the Supervisor of "targeting" him for the factfinding, but Complainant welcomed an investigation, and he was not targeted. The factfinding by Agency police found that Complainant acted unprofessionally when he scolded the volunteer in front of the congregation. ROI at 244-6.

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 discriminated against by the Agency as alleged.

Accordingly, we AFFIRM the Agency's final order fully implementing the AJ's decision finding no discrimination.

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)

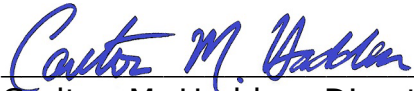
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department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