



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

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Woodrow B,<sup>1</sup>  
Complainant,

v.

Vincent Micone,  
Acting Secretary,  
Department of Labor  
(Bureau of Labor Statistics),  
Agency.

Appeal No. 2023002125

Hearing No. 440-2021-00194X

Agency No. 20-05-083

**DECISION**

On February 24, 2023, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 19, 2023 final order concerning an 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.

During the relevant time, Complainant worked as a Economic Assistant (EA), Grade GS-6, at the Agency's Consumer Price Index Branch in Chicago, Illinois.

On December 17, 2019, Complainant initiated EEO Counselor contact. Informal efforts at resolution were not successful.

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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.

On March 19, 2020, Complainant filed a formal complaint alleging that the Agency discriminated against him based on disability (mental) and in reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973. The formal complaint consisted of 16 separate claims. However, only claims 15 and 16 were adjudicated on the merits for the reasons discussed below.

Regarding claim 15, Complainant raised the following matters.

15. In November 2019, Complainant's supervisor took the following actions:

- A. Ignored Complainant's request for more hours. Complainant thereupon requested sick leave and during a phone call, Complainant's supervisor yelled at Complainant, and sent Complainant an email stating that Complainant's request was disruptive;
- B. Complainant's supervisor granted, but later denied, Complainant's request for indefinite leave prior to submitting RA requests from previous months and/or resignation from Complainant's position;
- C. Complainant's supervisor denied Complainant's request for leave without pay despite Complainant not qualifying for the Family Medical Leave Act (FMLA);
- D. Complainant's supervisor denied Complainant's request for assistance with medical treatment/mental health due to Complainant's post-traumatic injury stemming from July 2018; and
- E. Complainant's request for a third-party to accompany Complainant with any personal communication and Complainant's request for a co-worker to accompany Complainant during Complainant's data collection observations, performance reviews, and phone calls remains pending; and

Regarding claim 16, Complainant raised the following matters.

16. In December 2019, management officials took the following actions:

- A. Was monitoring Complainant's communications as Complainant had put them on notice of Complainant's EEO complaint;
- B. Reprimanded Complainant in front of Complainant's peers;

C. Complainant's supervisor started the termination process by sending Complainant a return-to-work memorandum and marking Complainant Absent Without Leave; and

D. Complainant's supervisor continued to ask Complainant for medical records.

After its investigation, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for a decision without a hearing. Complainant opposed the motion. The AJ dismissed Claims 1-14 as untimely raised with an EEO Counselor.<sup>2</sup> The AJ subsequently issued a decision by summary judgment regarding claims 15 and 16, in favor of the Agency. The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged.

The instant appeal followed. On appeal and through Counsel, Complainant maintains that the Agency subjected him to a hostile work environment throughout to his employment. Complainant argued that Claims 1-14 should have been considered on their merits as part of an ongoing claim of harassment. Complainant argues that Complainant had made his case for violations of the Rehabilitation Act in that after he was assaulted on the job, and then the Agency denied his requests for a co-worker to accompany him on data collection visits and for assistance with filing a police report. The Agency was also accused of denying Complainant's request to have a third-party present when he had discussions with his supervisor. According to Complainant, instead of assisting with his claim for workers compensation claim, the Agency misled him. Complainant averred that the Agency targeted him for reprisal by conducting an investigation, without Complainant's consent, into his work relationship with his supervisor. Complainant recounted how his supervisor would yell at him, insult him over the phone and make threatening gestures toward him in addition to accusing him of taking excessive sick leave.

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<sup>2</sup> We concur because those alleged discriminatory acts occurred between April 2018 and October 2019 which was more than 45 days prior to EEO counselor contact on December 17, 2019.

Complainant described how the Agency had retaliated against him when, in response to a survey that he had sent his co-workers, management belittled him by not only instructing employees not to complete the survey, but also by stating that Complainant was disliked so responses to his survey would have been low. Complainant determined that summary judgment was improper and concluded that the matter should be remanded.

The Agency opposed Complainant's appeal.

As an initial matter, we determine that the AJ properly determined that the first fourteen claims raised by Complainant were untimely raised with an EEO Counselor. The AJ first acknowledge that the initial EEO contact was on December 17, 2019, and that only claims 15 and 16 of the hostile work environment claim occurred after that date. The AJ then determined that

the majority of Complainant's complaint consists of acts which are untimely and survive only if there is some act contributing to that claim which falls on or after November 2, 2019 [the expiration of the 45-day period for timely EEO contact]. If there is not, though, the untimely hostile work environment claim must be dismissed. Accordingly, Issues 1-14 need not be assessed of Issues 15 and 16 are not acts of discrimination.

We now turn to the analysis of claims 15 and 16.

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. 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, 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.

Regarding Complainant's claims concerning leave, the record showed that his supervisor was reasonably "frustrated" because Complainant took unscheduled sick leave on more than one occasion, but only once, in 2018, provided documentation to account for such medically-related absences. Similarly, Complainant's request for indefinite leave was properly denied and was not a Rehabilitation Act violation because EEOC Technical Assistance guidance holds that indefinite leave constitutes an undue hardship for the employer.

As to Complainant's claim about having a union representative present for his discussions with his supervisor, the AJ correctly found that Complainant did not prove that the Agency prevented him from arranging for union representation presence, rather he wanted his supervisor to automatically include such third parties in their communications.

We agree with the AJ's analysis of Complainant's claims about management's negative reactions to his efforts to survey his co-workers. The record showed that Complainant's survey was an effort to generate positive references for himself in seeking jobs elsewhere. Indeed, Complainant apologized because his survey involved impermissible use of government resources.

Regarding the January 2020 return-to-work memorandum which warned Complainant that he could be marked AWOL or be terminated, as did the AJ, we find that this memorandum was not retaliatory given Complainant's acknowledged deficiencies in accounting for his unscheduled absences. Moreover, Agency management's 2019 request that Complainant update his medical documentation from 2018 was not an excessive one so as to violate the Rehabilitation Act.

Overall, we concur with the AJ in that the Agency articulated legitimate non-discriminatory reasons for its actions which Complainant did not show to be pretextual. Complainant also failed to present evidence that the Rehabilitation Act was violated.

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the EEOC to affirm the Agency's final order, because the AJ's issuance of a decision without a hearing was appropriate and a preponderance of the record evidence does not establish that discrimination occurred.

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)

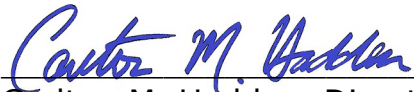
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department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

March 6, 2025

Date