



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

[REDACTED]
Sheldon M.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023002161

Hearing No. 440-2022-00140X

Agency No. 200J0556-2021-103507

DECISION

On February 28, 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 February 13, 2023, 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

1. Whether the Agency properly dismissed Complainant's claims regarding a denial of advanced leave and overtime pay, and AWOL charge as untimely.
2. Whether the Agency properly dismissed Complainant's claim regarding his FLMA package as a collateral attack on another forum's processes.
3. Whether the Agency subjected Complainant to discrimination on the basis of his disability and in reprisal for protected activity regarding a denial of advanced leave and overtime pay.

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.

4. Whether the Agency subjected Complainant to a hostile working environment on the basis of his disability and in reprisal for protected activity in the alleged actions of this complaint.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Housekeeping Aide at the Agency's Captain James A. Lovell Federal Health Care Center facility in North Chicago, Illinois.

On July 29, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (mental: PTSD) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. From December 2019 through March 13, 2021, the Housekeeping Supervisor (S1) and the Chief of the Environmental Management Service (EMS) denied Complainant advanced leave and overtime pay.
2. On January 29, 2021, Complainant became aware that S1 had charged him with being Absent Without Leave (AWOL) for approximately 130 hours from December 28, 2020, through January 29, 2021.
3. From March 14, 2021, through July 2021, S1 and the EMS Chief denied Complainant advanced leave and overtime pay.
4. On April 29, 2021, S1 returned Complainant's FMLA package to him without appropriate signatures; and management delayed the Complainant's FMLA package by instructing him to coordinate it through the union, the timekeeper, and then back to S1 for signature.

The Agency procedurally dismissed Complainant's claims 1 and 2 as untimely independent claims and claim 4 as a collateral attack. The Agency, nonetheless, accepted claims 1-4 for investigation into Complainant's overall harassment claim. The Agency also accepted claim 3 as an independently actional claim. 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 requested a hearing, but the AJ dismissed Complainant's hearing request on the grounds of noncompliance.² As a result, the AJ remanded the complaint to the Agency, and 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 or harassment as alleged.

² On appeal, Complainant does not challenge the AJ's dismissal of his hearing request. Therefore, it will not be addressed in this decision.

The instant appeal followed. On appeal, the Agency argues that its FAD correctly found insufficient evidence of discrimination or hostile work environment. The Complainant did not file anything additional on appeal.

ANALYSIS AND FINDINGS

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”).

Procedural Dismissals

The Agency procedurally dismissed claims 1 and 2 as untimely. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. In claim 1 and 2, Complainant alleges that he was subjected to discrimination and harassment based on disability and reprisal when management denied his advanced leave and overtime pay between December 2019 through March 13, 2021, and charged him as AWOL for hours between December 28, 2020, and January 29, 2021. Complainant did not initiate contact with an EEO Counselor until April 28, 2021, which is well beyond the forty-five (45) day limitation period. Through his investigative statements, Complainant does not allege that he was unaware of the time limits or that despite due diligence, he was prevented by circumstances beyond his control from contacting a Counselor in the appropriate amount of time. As such, we find that the Agency properly dismissed claims 1 and 2 as independently actionable claims for untimely EEO Counselor contact.

The Agency dismissed claim 4 as a collateral attack. A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's proceeding, such as the grievance process, the workers' compensation process, an internal agency investigation, or state or federal litigation. See Fisher v. Dep't of Defense, EEOC Request No. 05931059 (July 15, 1994). The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Dep't of Defense, EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993).

In Claim 4, Complainant alleges that he was subjected to discrimination and harassment based on disability and reprisal when management generally mismanaged his FMLA package. The FMLA is governed by the U.S. Department of Labor (DOL), which has an enforcement mechanism for complainants against employers concerning FMLA leave. The proper forum for Complainant to have raised his concerns regarding the FMLA process is within the designated DOL process. As such, we find that the Agency properly dismissed claim 4 as a collateral attack on the DOL FMLA complaint process.

Nonetheless, the Commission has recognized that harassment/hostile work environment can involve harassing incidents linked by a pattern of conduct. A discriminatory harassment complaint will not be time barred where acts constituting the claim are part of the same unlawful practice and at least one act fell within the time limit. See Wegener v. Dep't of the Interior, EEOC Appeal No. 01A03847 (June 11, 2003); National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002). Therefore, we will include Complainant's untimely claims (claims 1 and 2) in the analysis of Complainant's hostile work environment claim along with claim 3.

Disparate Treatment (Claim 3)

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, he must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In order to establish a prima facie case of disability discrimination, a complainant must show proof of the Title VII criteria set forth in McDonnell Douglas. A complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

After establishing a prima facie case, the burden then shifts to the agency to articulate a legitimate, non-discriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (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's articulated reasons are pretextual and that the agency instead acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Indicators of pretext include, but are not limited to, 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). At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons, and that the Agency instead was motivated by a prohibited reason.

This established order of analysis in disparate treatment 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 its actions, 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.³

In claim 3, Complainant alleges discrimination on the basis of his disability and in reprisal for prior protected activity when management denied his advanced leave and overtime pay. In response, S1 stated Complainant's advanced leave was denied because of operational needs. ROI at 135. The Chief of EMS went further in stating that Complainant's advanced leave was denied because of operational needs, but also because of Complainant's excessive AWOLs. ROI at 146-147. The Chief mentioned that advanced sick leave is not an entitlement. Id.

Regarding overtime pay, Complainant stated that management deducted lunch breaks from 80% of his overtime worked. In response, the Chief stated that according to pay records, Complainant was not denied overtime for the alleged period. ROI at 147. The Chief further stated that Complainant did not lose 30 minutes of pay lunches during overtime because lunch breaks are always unpaid, and that lunch breaks during an 8-hour shift are required by the national agreement enforced by the union. ROI at 154-155. The Chief stated that he told Complainant many times that if he was unhappy with overtime schedules or processes, that he should not volunteer for overtime, but at no point was Complainant barred from overtime. Id. Complainant's former supervisor added that the workplace policy that overtime has to be preapproved by a supervisor and cannot be approved if an employee is in an AWOL status. ROI at 167.

³ U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

In an attempt to establish pretext, Complainant argues that his leave was denied because of false accusations of “leave abuse,” which is not accurate or supported by any record of counseling. We disagree. Several management officials testified to Complainant’s leave record and associated concerns. See ROI at 146 (Complainant had “excessive AWOL statuses” and prior allegations of misconduct including theft and sleeping while on tour); 166 (former supervisor stating Complainant had multiple AWOLs under his supervision); 167 (“[Complainant] was absent quite a bit.”). As such, we find that Complainant has not established pretext in this claim and therefore, fails to establish that the Agency subjected him to discrimination on the basis of his disability or in reprisal for EEO activity as alleged in claim 3.

Hostile Work Environment

As discussed above, Complainant has not provided sufficient arguments or evidence that claim 3 was motivated by discrimination or retaliation. As such, we do not find claim 3 to be supportive of Complainant’s harassment claim.⁴ Complainant, therefore, remains with claims 1 and 2 to support his harassment claim.

Harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of a complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994). To establish a claim of harassment, Complainant must show that: (1) he is a member of a statutorily protected class or engaged in prior protected activity; (2) he was subjected to unwelcome verbal or physical conduct; (3) the harassment complained of was based on the protected class or prior protected activity; (4) the harassment 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 to the employer. See Flowers v. S. Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001); see also Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. Such conduct “must be both objectively and subjectively offensive, [such] that a reasonable person would find [the work environment to be] hostile or abusive, and ... that the victim in fact did perceive it to be so.” Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, *and* that it was taken in order to harass Complainant on the basis of their protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014) (emphasis added).

⁴ See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Further, the Commission has long held that “[p]articipation in the EEO process does not shield employees from uniformly applied standards of conduct and performance; nor are the statutory anti-retaliatory provisions a license for employees to engage in misconduct.” Berkner v. Dep’t of Commerce, EEOC Petition No. 0320110022 (June 23, 2011).

Nonetheless, 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). It is important to note, that only if both elements are present, a chilling effect on protected EEO activity *and* retaliatory motivation, 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).

Here, Complainant alleges that the Agency subjected him to harassment by denying his advance leave and overtime pay and charging him AWOL for approximately 130 hours. In response to claim 1, management stated there are no pay records that corroborate Complainant’s allegation that he was denied overtime. ROI at 147. Management also stated that Complainant’s advanced leave was denied for operational needs and because of his past attendance record, and that advanced leave is not an entitlement. Id. In claim 2, Complainant alleges that management charged him with 130 hours of AWOL. In response, management stated Complainant was charged with AWOL because he did not have any approved leave for the periods where he was not at work. ROI at 147.

The Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep’t of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In an attempt to establish unlawful motivation on the part of the Agency in claim 2, Complainant argues that the management had the option to give him Leave without pay (LWOP) instead of AWOL, but still chose to assign him AWOL. However, we do not find this to be evidence of unlawful motivation. Employers are entitled to make their own business judgments and the reasonableness of the employer’s decision may be probative of whether discrimination or harassment occurred. However, the focus is on the employer’s motivation, not its business judgment. See Matilda C. v. Equal Emp’t Opportunity Comm’n, EEOC Appeal No. 0720140027 (Jul. 31, 2018). Complainant does not argue or allege anything additional that shows management’s explanations for the actions are unworthy of credence or that there is any evidence to suggest that management was more likely motivated by unlawful discrimination.

Accordingly, we find that Complainant has not established that the Agency subjected him to a hostile working environment as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we **AFFIRM** the Agency's final decision finding no discrimination or harassment.

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

January 31, 2024
Date