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

[redacted]
Rodrigo C.,[1]
Complainant,

v.

Deb A. Haaland,
Secretary,
Department of the Interior,
Agency.

Appeal No. 2023002362

Hearing No. 480-2022-00409X

Agency No. DOI-BIE-21-0329

DECISION

On March 13, 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 19, 2023, 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

Whether to uphold the Administrative Judge's decision to grant summary judgement to the Agency on the Complainant's allegations of harassment and disparate treatment based upon his race, color, sex and reprisal for prior EEO activity?

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Principal at the Agency's Bureau of Indian Education Sherman Indian High School in Riverside, California. Complainant is a dark-skinned Native-American male of the Cheyanne-Navajo tribe. Complainant

[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.

was a probationary employee who worked in his position for about 11 months, from August 3, 2020, to July 30, 2021. Complainant stated that he engaged in prior EEO activity when he submitted a report of discrimination concerning one of his subordinates to a named Human Resources (HR) Specialist. He also stated that his supervisors were aware of his protected classes. Report of Investigation (ROI) at 357-59. The record reflects that on or about March 10, 2021, Complainant forwarded an employee's allegation of being subjected to a racial slur to a HR specialist. See ROI at 446-47 and 734.

On November 1, 2021, Complainant filed an EEO complaint (with subsequent amendment on January 20, 2022) alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of race (Native American), sex (male), color (Dark-skinned), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On or around August 20, 2020, Supervisor 1 and Acting Principal made disparaging comments about Complainant's educational attainment when he visited the Education Resource Center in Phoenix, Arizona;

2. On or around September 23, 2020, Acting Principal made Complainant feel minimized and attacked during a leadership meeting;

3. On or around February 15, 2021, Acting Principal had a tone of harassing nature, was unprofessional, and inappropriate when she responded to an email from Complainant;

4. On an unspecified date, Supervisor 1 failed to provide employment benefits and trainings including those for leave procedures, new employment orientation, administrative site visits, with no support ever being provided;

5. In or around late Spring/early Summer 2021, Complainant's Employment Performance Appraisal Plan (EPAP) was delayed and was never completed or utilized during the review process;

6. In or around late Spring/early Summer 2021, Supervisor 1 retaliated against Complainant for fulfilling his duties which included managing, reporting, and reprimanding subordinates, and advanced multiple claims of potential harassment discrimination to two named officials and Supervisor 1, including the use of a racial slur by a subordinate with a Bureau of Indian Affairs (BIA) employee;

7. In or around late Spring/early Summer 2021, Complainant's leave request was denied despite having leave and not being trained on leave procedures. Additionally, Complainant's pay was docked for purportedly being absent without official leave (AWOL);

8. On or around March 4, 2021, Acting Principal and Supervisor 1 made disparaging comments about Complainant's educational background qualifications. Specifically, Complainant's purported lack of knowledge about the Gifted and Talented Education Program (GATE) and Complainant's perceived attitude;

9. On April 30, 2021, Complainant was charged with AWOL; and

10. On July 1, 2021, Complainant was terminated during his probationary period as Principal of Sherman Indian High School.

The Agency conducted an investigation into the complaint. 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. On July 11, 2022, the AJ assigned to the case issued a Notice of Proposed Summary Judgment (the Notice). The Notice informed the parties that upon review of the record, the AJ found the evidentiary record to be sufficiently developed; and that the AJ believed the case was appropriate for summary judgment in favor of the Agency. Complainant timely filed his response to the Notice (Complainant's response), which the AJ admitted into the record. On January 20, 2023, the AJ issued a Decision without a hearing in favor of the Agency pursuant to 20 C.F.R. §1614.109(g).

The AJ determined that taking the facts as presented in the ROI and viewing that evidence in the light most favorable to Complainant, Complainant was unable to establish that the Agency's articulated reasons for its actions were a pretext for discrimination or retaliation. The AJ made that determination based on the following facts as stipulated in the notice:

Complainant's immediate supervisors were the Education Program Administrator (Supervisor 1), and the Assistant Deputy Director (Supervisor 2). ROI at 3 and 358.

The record reflects that around the winter break period, Supervisor 1 met with Complainant to discuss his midterm EPAP, where no "red-flags" were raised besides Complainant's attendance. ROI at 12. However, before his next EPAP meeting could take place, Complainant received a letter of termination for "failure to properly execute the duties" of his position. ROI at 13 and 40. Management asserted that Complainant's EPAP was provided to him at the same time as the other principals. ROI at 411.

To the extent that Complainant claims his EPAP was unduly delayed, the record reflects that the Agency followed the EPAP scheduling protocol. ROI at 13. If it was delayed, the record does not show that any delays were due to Complainant's protected categories.

On July 1, 2021, Complainant was terminated during his probationary period. The record reflects that the reason for the termination is because of Complainant's failure to report his absences properly to Supervisor 1, despite her numerous directives to do so (e.g., on November 13, 2020; December 14, 2020; December 18, 2020; January 9, 2021; March 8, 2021; April 21, 2021; April

30, 2021; and May 3, 2021). ROI at 410 and 418. Supervisor 1 further attested that because Sherman Indian School is "located hundreds of miles away," she must rely on the school administrator "to follow policies and procedures, perform, and execute duties." The record reflects that Complainant's failure to follow the simple procedures related to his absence from the school, despite the repeated directives to do so, irreparably damaged any trust Supervisor 1 had in Complainant. ROI at 419.

According to the AJ, that Complainant merely disagrees with the decision of management official, Supervisor 1, was insufficient to prove pretext. The AJ also observed that that Complainant believed he should not have been terminated because he informed a subordinate of his absences (and management was wrong) was insufficient to prove pretext. The AJ added that that Complainant asserted another, unidentified employee acted with misconduct, but was not disciplined, without additional details, is insufficient to prove pretext. Bare assertions, without additional evidence or details, are insufficient to prove pretext. To prove pretext, Complainant must point to evidence that would allow reasonable factfinder to find that his protected categories were the reason for the complained-of employment actions.

Regarding disparaging comments about Complainant's education and abilities, Complainant attested that on or around August 20, 2020, his colleague, Acting Principal, made disparaging comments about Complainants doctorate, stating "I don't think too much of a doctorate degree." According to Complainant, Acting Principal's disparaging comment was due to a bias against his status as a highly educated Cheyenne male. ROI at 32 and 360. On or around March 4, 2021, Acting Principal referenced Complainant's abilities again when she stated that Complainant did "not know of the GATE program or care to get to know the program to operate effectively." ROI at 33 and 379.

According to the AJ, although both Supervisor 1 and Acting Principal had no recollection of the meeting, nor any memory of the comment to which Complainant was referring, the AJ stated that even if she accepted Complainant's account of the incident as true, there was insufficient record evidence to demonstrate that the alleged comments about Complainant's education were somehow related to his protected categories.

Regarding Acting Principal's inappropriate tone of harassment in the presence of others, Complainant attested that Acting Principal often insulted and harassed him in the presence of his colleagues. Specifically, Complainant alleged that Acting Principal took over Complainant's leadership meetings, and in the instance of October 2020, "quickly minimized" his role as a leader in front of his colleagues. Additionally, on February 13, 2020, an email regarding finance was sent to Acting Principal, but her dismissive response made Complainant lose confidence in communicating with management and his fellow colleagues. ROI at 32 and 363-64.

Although the AJ did not doubt that Complainant did not receive Acting Principal's responses and actions as welcomed, she stated that from an objective standpoint, there was insufficient evidence in the record to show that these actions were based upon improper considerations of Complainant's protected categories.

Complainant next asserted that Supervisor 1 and management failed to provide him with employment benefits, trainings, orientation, and administration site visits. Complainant alleged that in Spring 2021, guidance was sought, and contact was attempted, but his calls were never reciprocated, nor was any contact information provided to ease the process. ROI at 35. However, the record reflects that Complainant attended the new employee orientation his first week of work, which should have included information on employment benefits and leave procedures. Then, when Complainant contracted COVID and went on leave in December 2020, Supervisor 1 issued him an AWOL, despite him allegedly informing his subordinate of his leave request. Additionally in April 2021, Complainant submitted his annual leave request, but did not have the necessary contact information for him to report his absences. ROI at 408-09. The Agency once again charged him with AWOL. ROI at 10 and 410.

According to the AJ, the record reflects that the Agency had articulated a legitimate nondiscriminatory reason for these actions. First, it issued Complainant as AWOL because Complainant failed to submit proper leave requests. The AJ noted record evidence reflecting that absences were to be reported to the acting Education Program Administrator. ROI at 11 and 409. In the alternative, Complainant could call the ERC (numbers were provided to him) or other specifically designated school officials. Despite being provided with management contact information and the instruction that he could reach management at any time necessary, Complainant failed to do so. ROI at 410. The AJ reiterated that the record reflects that Supervisor 1 charged Complainant AWOL because he failed to contact the proper individuals to inform them of his absence, resulting in their unawareness of his absence. Id. The AJ asserted that the record did not present any evidence that Complainant's AWOL charge was connected to any of his protected categories.

Regarding retaliation for fulfilling his duties and reporting potential harassment, Complainant alleged that in late Spring or early Summer 2021, he discussed with management officials a potential harassment issue involving two other employees. Complainant alleged that his communications were dismissed and never received a response, as a supervisory employee was involved and aware of the decision regarding Complainant's termination.

However, observed the AJ, contrary to Complainant's belief, the record reflects that the Agency contacted the supervisory employee. The AJ also noted the Agency's position that because that individual was the hearing official, it was "necessary for her to remain objective and not get involved in the disciplinary process between Complainant and his staff." Moreover, asserted the AJ, the record reflects that the hearing official did not witness any harassment nor receive any additional information regarding the discriminatory conduct from Complainant when she requested follow-up information. According to the AJ, the Agency posited that the investigation report be stopped because Complainant was terminated during the investigation. ROI at 14 and 445.

Citing to Commission precedent, the AJ asserted that in reviewing these incidents as a whole, there was insufficient evidence to suggest a causal link between these incidents and Complainant's protected categories.

Additionally, asserted the AJ, in viewing these incidents as a whole, the incidents themselves were not sufficiently severe or pervasive to constitute a hostile work environment.

Lastly, observed the AJ, even if Complainant could establish the prima facie elements of a harassment case (that these incidents were indeed severe or pervasive), the record failed to establish that liability should attach to the Agency. In other words, the AJ stated, there was no basis to impute liability to the Agency, as there was no evidence that the Agency was ever aware of the alleged harassment Complainant reported to his supervisor following the event. Additionally, observed the AJ, when the alleged harassment was reported, the record reflects the Agency attempted to take prompt action (which was halted when Complainant was terminated). For this reason, the AJ stated, even if Complainant could establish a prima facie case of harassment, the AJ found no basis to attach liability to the Agency.

In sum, asserted the AJ, a careful examination of the record did not reveal any evidence that would suggest the identified management officials' articulated reasons for the complained-of actions were false, or that they were motivated by Complainant's race, color, sex, or prior EEO activities. The AJ also did not find any genuine disputes of material fact that would warrant a hearing on Complainant's claims.

The AJ reviewed and considered Complainant's response to the Notice, and examined the ROI and the exhibits Complainant submitted. In her decision, the AJ assumed arguendo that Complainant could establish a prima facie case of discrimination and retaliation, stating that even if she viewed the evidence in the light most favorable to Complainant, the AJ found that Complainant failed to establish that the reasons articulated by the Agency for his probationary termination were pretext for discrimination or retaliation. AJ's Decision at 1. Citing to Commission precedent, the AJ also asserted that even if she accepted as fact that Supervisor 1 did not follow established Agency protocol in terminating Complainant during his probationary period, Complainant presented insufficient probative evidence to demonstrate pretext.

According to the AJ, the record clearly reflected that Complainant's unexpected absences were the impetus for his termination. AJ's Decision at 1-2. The AJ observed that Complainant, in his own response, admitted that during his EPAP meeting with Supervisor 1, "the only red flag was [Complainant's] attendance." Complainant's response at 4. The AJ noted that Complainant attempted to prove discriminatory motive by arguing that he was never properly trained on proper leave procedures. However, asserted the AJ, it is undisputed by Complainant that he had "months to get the leave slip process right." Complainant's response at 5.

Further, asserted the AJ, Complainant admitted that he had two AWOLs –the first around the time he got COVID, and the second in April 2021. For the second AWOL, noted the AJ, Complainant admitted that he overslept. ROI at 15 and 367. That Complainant averred that he had ample leave to cover the absence, the AJ stated, did not establish pretext. That Complainant averred that he was unaware of the correct phone numbers or did not want to use his personal cell phone to call, the AJ also stated, was also not convincing evidence of pretext.

Given the circumstances in the record and Complainant's position as Principal, the AJ determined that the Agency's actions were not unreasonable. According to the AJ, although Complainant identified another school employee, accused of harassment, who was not terminated, the AJ did not find that individual to be a proper comparator, as that individual was not similarly situated to Complainant (same responsibilities, same duties, same conduct, etc.).

With respect to Complainant's hostile work environment claim, the AJ found that even if Complainant could establish a nexus between his protected categories and the claims, the incidents were not sufficiently severe or pervasive to constitute a hostile work environment. Thus, the AJ did not see a need to develop the record with the statements requested by Complainant of Agency employees who were involved in staff meetings and witnesses to the events described in his claims. The AJ also noted that Complainant provided a "laundry list" of witnesses he believed would establish discrimination. Yet, observed the AJ, Complainant failed to specify a proffer as to what information these witnesses would provide. Instead, the AJ noted, Complainant generally asserted that he needed discovery, that discovery would allow him to contradict the statements of the responsible management officials, and that the denial of discovery was inappropriate. However, citing to Commission precedent, the AJ asserted that discovery is not meant to be a fishing expedition. The AJ stated that other than his own self-serving statement (which she found corroborated the management official's actions), Complainant did not adequately show how any discovery would demonstrate material facts in dispute.

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. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant contests the AJ's decision, reiterates his allegations, and insinuates that the record that was the basis for the decision was incomplete. Complainant submits, raising the same arguments he presented before the AJ, that a decision without a hearing, let alone a denial of the chance to engage in discovery was inappropriate; and that at a minimum, Complainant should have been allowed to engage in discovery. Complainant asserts that the AJ erred when they concluded that there was no genuine issue of material fact in this case, accusing the AJ of wrongfully accepting the Agency's explanations despite evidence to the contrary that, Complainant states, he offered.

According to Complainant, there is a genuine issue of material fact as to whether his supervisor's actions were motivated by Complainant's protected classes. Complainant asserts that comments such as the ones by a named HR representative or Acting Principal are facially discriminatory and harassing; and that the AJ's decision was dismissive of the discriminatory animus from both of them. However, to support his contentions, Complainant rehashes the very same facts stated in his original complaint and presented in his response to the Notice.

In response, among other things, the Agency expresses agreement with the AJ's decision and reiterates its stated explanations for the challenged actions. The Agency asserts that Complainant has consistently failed to meet his burden to establish a prima facie case of discrimination, hostile work environment, or reprisal nor has he established pretext. The Agency argues that Complainant provided no evidence or argument sufficient to overturn the AJ's decision. According to the Agency, given the opportunity to elucidate specific genuine disputes of material fact, Complainant merely offers his own unsubstantiated and conclusory allegations concerning unrelated matters that are neither material nor in genuine dispute.

The Agency also asserts that Complainant's dissatisfaction with the federal workplace and with his colleagues is neither evidence of discrimination nor indicative of a genuine dispute of material fact. The Agency requests that the Commission affirm its final order adopting the AJ's decision.

ANALYSIS AND FINDINGS

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).

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. Contrary to Complainant's appeal arguments, we find, as did the AJ, that the record in this case was adequately developed. We note Complainant's repeated statements on appeal that a decision without a hearing, let alone a denial of the chance to engage in discovery was inappropriate; and that at a minimum, he should have been allowed to engage in discovery. Yet, despite repeated appeal arguments and assertions that issues of credibility remain that his witnesses would attest to, he failed to state, with specificity, any issues of material facts in dispute that the AJ had not reviewed prior to making her decision. See Complainant's Appeal Brief at 13-20 for Complainant's restatement of his allegations and basis for his belief that discrimination, retaliation and harassment occurred due to his protected bases. See also AJ's Decision at 2 for her footnote stating that the declaration of the schoolboard member that Complainant submitted did not offer any probative evidence of pretext.

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 (Claims 4, 5, 6, 7, 9, and 10)

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). 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). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination 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 the personnel action at issue, 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. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Regarding Claims 4, 7, and 8, Supervisor 1 asserted that Complainant was never denied any training or benefits. According to Supervisor 1, HR provided new employee orientation and there was also another required training available in DOI talent, the Agency's employee training system. Supervisor 1 explains that Complainant spent a week for orientation and transition activities at the Education Resource Center (ERC), and that Complainant did not inform her that he needed any additional training, nor did he request any.

Supervisor 1 also asserted that Complainant was informed that he could reach out to her, his supervisor, or anyone at the ERC with questions. According to her, the COVID pandemic information was new to everyone, and policies and guidance were released as soon as it was made available. Supervisor 1 stated that Complainant received information as it was made available and principals were asked to be on Bureau-wide conference calls with the central office staff, including HR.

Supervisor 1 also describes in detail information regarding Complainant's leave requests and lack thereof, asserting that he failed to comply with applicable Agency policy on which he had received reminders and pertinent training.

She also asserted that she notified Complainant of her reasons; why she charged him AWOL on one occasion, for example. She denied knowledge of Complainant leave request being denied despite having leave and not being trained on leave procedures; and that his pay was docked for purportedly being AWOL. ROI at 409-10 and 414-15. See ROI at 466-68 for supporting statements provided by Supervisor 2 that corroborate Supervisor 1's assertions.

Complainant himself also admitted that he received further instructions on the procedures prior to twice being AWOL. ROI at 384. He acknowledged that he had "months to get the leave slip process right." See AJ's Decision at 2. Complainant also admitted that he failed to follow established leave procedures when he texted a subordinate letting her know he could not show up "on Friday." See ROI at 410 and 579-80. See also Complainant's Appeal Brief at 15. He did not refute Supervisor 1's denial that she had no knowledge of his leave request being denied despite having leave.

Regarding Claim 5, Supervisor 1 described the three-parts EPAP, asserting that when all parts are completed, the document is signed and forwarded to HR. According to Supervisor 1, Complainant's EPAP was provided to him at the same time as the other principals, and training and attachments were sent to the group of principals at the same time. She contended that Part A was signed on November 11, 2020, but she did not recall why it was delayed. Supervisor 1 also stated that according to the signed EPAP, Part B was reviewed with Complainant on February 2, 2021, which was his midyear review, and although only one review is required, she scheduled a second review on May 5, 2021. She explained that she scheduled meetings with all of her principals during or around the same time. ROI at 411-12.

Regarding Claim 6, Supervisor 1 recalled advising Complainant to contact the named HR Specialist regarding the reported harassment by his employee. She noted that as the hearing official on possible appeal cases, it was necessary for her to remain objective and not get involved in the disciplinary process between complainant and his staff. ROI at 412. See ROI at 445-46 for the HR Specialist's assertions that the only incident of harassment Complainant informed her of involved an allegation that one of his subordinates harassed another Bureau contractor. She stated that there were no additional discussions about this matter with Complainant because the investigative report from the fact-finding investigation into the alleged incident was received in August 2021 after Complainant was terminated.

Regarding Claim 10, Supervisor 1 stated that based on her authority and applicable guidance, she decided to terminate Complainant's employment after working with HR. She stated that the reason for Complainant's termination was his failure to follow procedures, and even after being charged AWOL, he was absent on Friday, May 21, 2021, without contacting Supervisor 1. According to Supervisor 1, Complainant was given the directive on the leave policy on January 29, 2021, and was reminded multiple times thereafter. She reiterated her statements regarding the pertinent training Complainant had received regarding leave procedures, including during his week-long orientation at the ERC when he began his contract as well as opportunities to transition, available onsite assistance, and mentoring. ROI at 418-20.

Complainant contended on appeal that Supervisor 1 failed to follow applicable policies by terminating him without first disclosing to the school board and obtaining their approval. Complainant's Appeal Brief at 13. He however failed to cite to the policy that he alleged Supervisor 1 had violated.

The Agency has articulated legitimate nondiscriminatory reasons for the challenged management actions. We next turn to Complainant to show pretext.

To show pretext, a complainant must show that management displayed some sort of discriminatory animus. In January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015), the Commission stated that proof of pretext includes evidence of 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. Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

Here, Complainant repeatedly asserted in his formal complaint, in his response to the AJ's Notice, and on appeal that discrimination and retaliation were factors in the challenged management actions that led up to, and included his termination. However, the record is devoid of any agency policies that were violated; and Complainant failed to show that any such policies were inconsistently applied to him. Complainant also asserted in rebuttal that he had only received two days of orientation, not one week as Supervisor 1 stated. However, he failed to demonstrate how the challenged actions were motivated by discriminatory or retaliatory animus.

Rather, the record reflects that Complainant engaged in procedural violations that he failed to address despite being reminded to do so. ROI at 410 and 418. Therefore, he was terminated during his probationary period. Complainant did not deny that he was AWOL, admitting that on April 30, 2021 he "overslept." Complainant's Appeal Brief at 17. The record reflects that Complainant failed to follow established leave procedures for the second AWOL charge. See ROI at 578-80.

Also, even if forwarding an email from a subordinate to HR constitutes protected EEO activity as Complainant asserted, he has established no nexus between that March 10, 2021, action to his June 17, 2021 termination.

Notably, a Physical Education Teacher (Teacher [male, Native American, Brown with prior EEO activity]) stated that he did not observe or hear any of the alleged incidents; and that Complainant was a good principal. Teacher did not understand why Complainant was removed, stating that he never felt belittled or experienced any negativity in Complainant's presence; and that many of the staff were looking forward to his return. ROI at 494. However, as a probationary employee, Complainant could be terminated at any time. ROI at 878.

In that regard, the Commission has long held that, where a Complainant is a probationary employee, he or she is subject to retention, advancement, or termination at the discretion of an agency so long as these decisions are not based on a protected category. See Zachary K. v. Dep't of the Interior, EEOC Appeal No. 0120107097 (Mar. 26, 2019). Here, Complainant has presented no evidence to show that his termination was based on any protected category. Therefore, Complainant's claims fail.

We note that a finding of a hostile work environment is precluded by the determination above that the Agency's explanations demonstrate that the challenged management actions in Claims 4-7, and 9-10 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Harassment (Claims 1-3 and 8)

Complainant alleged that both Supervisor 1 and Acting Principal made disparaging comments to him. According to Complainant, it was well into the school year and Supervisor 1 commented to Complainant something to the effect of, 'Oh I didn't know you have a doctorate.' ROI at 20. He also alleged that Acting Principal commandeered his first campus leadership meeting, by "verbalizing her stance on how a leadership meeting was conducted." ROI at 363. He stated that Acting Principal would "minimize" Complainant "each opportunity she got" and wrote to him in an email in an "inappropriate tone and stoked harassment in the presence of others." Complainant asserted that Supervisor 1 and Acting Principal are Navajo women and he is Cheyenne. Complainant's Appeal Brief at 14.

To establish a claim of harassment, complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or 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 Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). 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 at 6 (Mar. 8, 1994).

Here, Complainant alleged that race and color were factors in the challenged actions because he is Cheyenne and Navajo but was raised Cheyenne and is a dark skinned Native American male with a degree; and that these factors and characteristics define him as a campus principal. ROI at 9 and 361. According to Complainant, in the weekly meetings, he was the only identifiable Native American male with a doctorate. ROI at 14 and 382-83. However, the record in this case lacks any evidence to establish the requisite link of the alleged actions and comments to any of Complainant's protected classes. The "tone" in an email which Complainant felt failed to answer a question he had asked to his satisfaction, for example, is no such evidence.

Nor is Complainant's assertion that he was the only identifiable Native American male in the principal meetings that had a doctorate; and that he was the only one terminated. Id.

Based on the totality of record evidence, and even accepting Complainant's allegations as true, we find that he has failed to describe any severe or pervasive management conduct that would constitute actionable harassment. Instead, the record indicates that Complainant considered his supervisors' management style unacceptable. He also failed to address his conduct regarding his absences despite being told to do so. However, while Complainant had no right to dictate supervisory style, the Agency had a right to manage his performance and conduct. See Al H. v. U.S. Postal Serv., Appeal No. 0120143163 (Oct. 27, 2015) (affirming summary judgment where most of complainant's harassment allegations were predicated upon incidents where Agency management was acting within its authority to oversee and instruct Complainant in the performance of his duties).

Retaliatory Harassment

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 Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). 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 Com., EEOC Appeal No. 0120160024 (Dec. 20, 2017).

Here, Complainant has not established that any of the alleged events occurred because of any purported protected EEO activity because there is no evidence that he reported harassment to management, and no one made such a report on his behalf. See ROI at 420, 448, and 476-77 for management's assertions that Complainant did not notify them he was being subjected to harassment. See also ROI at 388-89 for Complainant's own assertion that he did not report to the agency's anti-harassment coordinator that he was being subjected to harassment by his supervisor because at the time of his termination he was being directed to surrender his office keys and laptop. Complainant did not explain his failure to provide such notification prior to being directed to surrender his office keys and laptop upon his termination.

Upon careful review of the AJ's decision and the evidence of record, as well as Complainant's arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated or retaliated against, nor was he subjected to a hostile work environment by the Agency 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 AJ's decision and the Agency's final order adopting it.

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 (S0610)

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 his or her 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 22, 2024
Date