



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

[REDACTED]
Augustine S.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2023003053

Agency No. 2022-29304-FAA-02

DECISION

On April 29, 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 March 31, 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.

ISSUE PRESENTED

Did the final Agency decision properly find that Complainant did not establish reprisal or discrimination?

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.

BACKGROUND

During the period at issue, Complainant worked as a Supervisory Air Traffic Control Specialist, Grade AT-2152-IJ, at the Agency's Ronald Reagan Washington National Airport (DCA) tower facility in Arlington, Virginia.

At all relevant times, Complainant's immediate supervisor was the Operations Manager (African American, male). His second-level supervisor was the Air Traffic Manager (African American, female). The third-level supervisor was the Assistant General Manager (African American, male). The General Manager was a Caucasian American male.

Complainant began employment in his present position as a Supervisory Air Traffic Control Specialist at the DCA tower in December 2017.

On September 14, 2020, Complainant applied for a promotion to Operations Manager at Andrews Air Force Base.

On December 3, 2020, the Air Traffic Manager issued Complainant a proposed suspension for tardiness and careless work performance. Complainant submitted a rebuttal to the proposed suspension and the Air Traffic Manager reduced the proposed suspension action to a letter of warning.

On January 26, 2021, Complainant applied for a promotion to Operations Manager at BWI. As a result, the General Manager for BWI contacted the Air Traffic Manager who supervised Complainant at DCA. The BWI General Manager stated he needed to fill the position in May 2021. The Air Traffic Manager stated that she could not release Complainant for the promotion for the next six months. Following that discussion, the Agency selected another candidate (female, African American) for the Operations Manager position at BWI.

On April 1, 2021, Complainant learned he was not selected for the Operations Manager vacancy at Andrews Air Force Base. Instead, the Agency selected an African American, male candidate.

The Agency issues a performance of record conference (PROC) to document an employee's good performance or those that need improvement. On June 3, 2021, August 13, 2021, and September 16, 2021, the Air Traffic Manager issued Performance Record of Conferences (PROCs) to document deficiencies in Complainant's performance.

In October 2021, Complainant emailed requests to transfer to two different facilities. On October 25, 2021, Complainant's immediate supervisor informed him the reassignment to the Potomac Tracon facility was probably not going to happen.

On November 11, 2021, Complainant initiated EEO Counselor contact. The Agency and Complainant were unable to resolve the matter through informal EEO counseling.

On December 20, 2021, Complainant attended an off-site holiday party for employees of the DCA Tower. After the party Complainant overheard two unidentified non-managerial, bargaining unit employees holding a loud discussion. The employees were discussing the ability of the National Black Coalition of Federal Aviation Employees (NBCFAE) to influence the Agency's hiring or firing of managers. One of these employees made a joke "maybe you should hire the new operations manager for BWI so that Complainant doesn't have to spend so much on lawyers."

On January 10, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male, heterosexual), and in reprisal for EEO-protected activity (present complaint) when:

1. On December 30, 2020, Complainant's second-level supervisor (Air Traffic Manager) upgraded disciplinary action on him for being tardy to a suspension. Complainant states Air Traffic Manager falsely claimed he did not inform her that he was tardy;
2. On January 26, 2021, Complainant applied for a promotion to Operations Manager at BWI, and Air Traffic Manager blocked his promotion by alerting the BWI Air traffic Manager that he would not be released from his DCA position for six months;
3. On April 1, 2021, Complainant learned he was not selected for a promotion he applied for on September 14, 2020, to an Operations Manager position at Andrews Air Force Base. Complainant states he was passed over in favor of a minority candidate who has less experience than him;
4. On June 3, 2021, August 13, 2021, and September 16, 2021, Complainant was directed by either Air Traffic Manager or his third-level supervisor (Assistant General Manager) to undergo negative

performance counseling. Complainant states these are examples of a response inconsistent with the handling of comparable matters involving non-white managers;

5. On October 25, 2021, Complainant learned that his Employee Request for Reassignment (ERR) to Potomac Tracon (PCT) was probably not going to happen. Complainant believes that White managers are blocked from transfer to ensure facilities with openings reserve those spots for non-white/diverse employees; and
6. Beginning December 19, 2021, bargaining unit (BUE) air traffic control specialists at his facility began harassing him about his EEO complaint,

The Agency dismissed Claims 1 through 4 for untimely EEO Counselor contact but nevertheless investigated those matters as background to Complainant's harassment claim.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), 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 as alleged.

CONTENTIONS ON APPEAL

On appeal, in support of his reprisal claim, Complainant argued that management was aware of his protected activity, as early as October 2021, as he had informed his chain-of-command that he was being harassed and targeted. Complainant noted that the final Agency decision acknowledged that non-supervisory coworkers made harassing comments about him but the Agency denied liability because Complainant refused to identify these alleged harassers. Complainant asserted that the harassment was numerous and ongoing but that he declined to report additional claims because management declined to take action to prevent further harassment and because he feared further reprisal. Complainant recounted the conversation he overheard among two non-supervisory Air Traffic Control Specialists. According to Complainant, these employees were laughing about how the National Black Coalition of Federal Aviation Employees was able to hire and fire Agency managers.

Complainant stated that one of these individuals joked about filling a management position at BWI so that Complainant would not have to spend so much on attorneys. Complainant identified another employee as an eyewitness to the incident he described.

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”).

ANALYSIS

As an initial matter, by declining to request for a hearing before an EEOC AJ, Complainant forfeited his opportunity for further administrative investigation that might have raised possible evidentiary issues in the record. Cristobal F. v. U.S. Postal Serv., EEOC Appeal No. 0120180756 (June 19, 2019) (finding that “by choosing not to request a hearing before an AJ, a complainant waives an opportunity to further develop the record through discovery and to cross-examine witnesses”).

Untimely EEO Counselor Contact – Claims 1 – 4

Complainant initiated EEO Counselor contact in November 2021, more than 45 days after the alleged incidents identified in these subject claims. Complainant offers no justification for the delay, and we therefore determine that the Agency’s dismissal of these claims was proper.

Disparate Treatment – Claim 5

EEOC applies the Supreme Court’s three-part disparate treatment analysis from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

First, Complainant must establish a prima facie case by demonstrating that he was subjected to an adverse actions under circumstances that would support an inference of employment discrimination. In other words, Complainant's narrative must imply that his protected characteristics or his EEO activities factored into the way he was treated. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Next, the Agency must articulate a legitimate, nondiscriminatory reason taking adverse action. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). For the third and final component, Complainant must prove, by a preponderance of the evidence, that the Agency explanation was pretextual. See St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 519 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

At the relevant times, Complainant's immediate supervision was predominantly African American and all expressed awareness that Complainant identified as a straight married male. Managers had learned that Complainant complained about mistreatment through an Agency accountability board complaint. Based on the foregoing, we find that Complainant made his prima facie case.

We now examine the Agency's non-discriminatory explanations for the matters at issue and whether Complainant proved these to be pretextual.

In Claim 5, Complainant requested reassignment to a lower-level position that he had previously held as a non-supervisory Air Traffic Controller at Potomac Terminal Radar Approach Control (Potomac TRACON). Management discouraged Complainant from pursuing for two reasons. First, managers sworn statements indicated that Complainant was needed as a Supervisory Air Traffic Control Specialist at DCA tower, to ensure proper staffing at that facility. Second, General Manager explained that Complainant's request could not be granted without a difficult process, because he was a supervisory employee. Complainant's supervisory designation meant Complainant, would have to resign from the Agency in order to transfer to the non-supervisory position he desired. Whereas Complainant had claimed that the Agency had permitted Air Traffic Manager to transfer to another position, the Agency countered that Air Traffic Manager did not request reassignment. Rather she was reassigned pending the outcome of an investigation. Similarly, the Agency distinguished Complainant's reassignment request from another employee, who was allowed her requested reassignment because she was a non-supervisory who had requested reassignment to another non-supervisory position.

Indeed, the differing circumstances of Complainant's requested reassignment undermine support for his contention that the Agency's reasons for discouraging his reassignment request were pretextual.

Complainant alleges that someone in higher management has been blocking him from transfer or advancement based on his status as a strait, White male. In support of his pretext argument, Complainant has accused Air Traffic Manager of expressing a commitment to make DCA tower staffing "less white." Air Traffic Manager denied making such a statement. Here we find Complainant's testimonial evidence is, at best, in equipoise with the contrary testimony from Air Traffic Manager. As such, we find Complainant failed to sufficiently evidence his version of events. Lore v. Dep't of Homeland Sec., EEOC Appeal No. 0120113283 (Sept. 13, 2013) (complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made); Brand v. Dep't of Agric., EEOC Appeal No. 0120102187 (Aug. 23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where complainant requested a final decision and an AJ did not make credibility determinations).

Harassment/Hostile Work Environment – Claim 6

We considered the remaining discrimination allegation in the context of harassment or a hostile work environment. To establish his harassment claim, Complainant must show that: (1) he is a member of a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his protected classes; (4) the harassment had the purpose or effect of unreasonably interfering with her work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the Agency. Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11.

Whether harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

To warrant a hearing on a claim of hostile work environment, Complainant must present enough evidence to raise a genuine issue of material fact as to whether, because of his protected classes, he was subjected to conduct so severe or pervasive that a reasonable person in his position would have considered it hostile or abusive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993). The alleged harassing conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. EEOC Enforcement Guidance on Harris v. Forklift Systems, Inc., Notice No. 915.002 (Mar. 8, 1994).

We note that regarding Complainant's allegations of retaliatory harassment, Complainant needs only show that he was subjected to the type of action that would dissuade a reasonable employee from making or supporting a charge of discrimination. See Burlington Northern & Santa Fe Ry. Co. v. White, 548 U. S. 53 (2006); see also EEOC Enforcement Guidance on Retaliation and Related Issues, Notice No. 915.004 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

The Agency may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements: (a) the Agency exercised reasonable care to prevent and correct harassing behavior; and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Burlington Indus., Inc., v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, Notice No. 915.002 (June 18, 1999).

Complainant is a member of EEO-protected classes. According to his statement and that of a witness, he was subjected to unwelcome conduct in the form of the non-supervisory co-workers' comments disparaging his EEO claim. Said comments were directed against his protected characteristics or his EEO activity. Although the comments occurred during a holiday party in DCA Tower, we find they adversely altered Complainant's employment or had a chilling effect on Complainant's engaging in EEO activity.

Even so, we find the Agency has successfully asserted the affirmative defense against its liability. The record revealed that when Complainant had raised generalized concerns about mistreatment, his concerns were apparently referred by management to an internal Agency accountability board.

However, as this matter pertains to his claim about co-workers harassing him about his EEO activity, Complainant has refused to identify the alleged harassers and admittedly failed to avail himself of the Agency's preventative program. Complainant did identify a witness to the harassment who corroborated that two employees had made a mocking comment about Complainant's EEO activity. While this corroborating witness confirmed that it happened on one occasion, the witness, like Complainant, then declined to provide specifics. Complainant himself further stated although he was certain he had been subjected the harassing comment, he declined to report it because he feared reprisal. As a general proposition, fear of reprisal does not excuse the failure or reluctance to act on one's own behalf. Duncan v. Dep't of Veterans Affairs, EEOC Request No. 05970315 (July 10, 1998); Kovarik v. Dep't of Def., EEOC Request No. 05930898 (Dec. 9, 1993). Accordingly, we find that, as an affirmative defense to harassment, the Agency has established that Complainant did not take advantage of the Agency's available corrective opportunities despite having knowledge of them, hence liability cannot be imputed to the Agency.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the Agency's final 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)

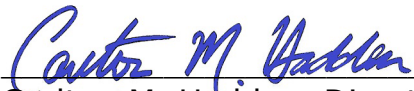
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department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

December 30, 2024

Date