



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

[REDACTED]
Mauricio C.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(National Geospatial-Intelligence Agency),
Agency.

Appeal No. 2023003131

Hearing No. 560-2021-00250X

Agency No. NGA-0016-2021

DECISION

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 April 4, 2023, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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 order.

ISSUE PRESENTED

The issue presented is whether the Administrative Judge properly issued a decision without a hearing finding no discrimination or harassment as alleged.

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

At the time of events giving rise to this complaint, Complainant worked as a Branch Chief (Pay Band 4) at the Agency's Source Operations Group in Saint Louis, Missouri.

On March 22, 2021, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment based on disability (physical), and in reprisal for prior protected EEO activity (filing the instant EEO complaint and an Inspector General (IG) complaint in January 2021),² when:

1. on June 30, 2020, Complainant's first-line supervisor ("Supervisor") denied Complainant an accommodation to work from an alternate telework location;
2. in September 2020, the Division Chief minimized Complainant's concerns regarding the Supervisor's unusual leadership and communication;
3. on November 25, 2020, Complainant was denied an accommodation and forced by the Division Chief to visit the office for a meeting during peak work hours, violating the agreed upon reasonable accommodation;
4. on December 1, 2020, the Division Chief engaged in offensive communications in the Leadership Chat Room;
5. on December 3, 2020, the Division Chief directed Complainant, in an admonishing tone, to use the Leadership Chat Room;
6. on December 28, 2020, Complainant's supervisory duties were relinquished, and a Direct Report was promoted to Acting Supervisor;
7. on January 29, 2021, an email sent by the Supervisor demonstrated excessive supervision; deceit; intimidation; and constant changing of expectations;
8. on March 1, 2021, Complainant felt that managements' actions forced him to seek reassignment from his current position;³

² Complainant only alleged reprisal for claims 7, and 9-11.

³ Complainant initially alleged a constructive discharge, which the Agency dismissed because he did not resign. Report of Investigation at 118. Complainant challenged the dismissal before the Administrative Judge (AJ) and reframed the claim, and the AJ reinstated it as amended.

9. on January 14, 2021, the Division Chief engaged in unequal monitoring of Complainant's online presence;
10. on January 25, 2021, the Supervisor threatened an unfair evaluation during a conversation with Complainant; and
11. on July 20, 2021, the Supervisor rated Complainant a 3.2 for his closeout performance rating and included incorrect dates associated with performance objectives; lackluster writeups; and a failure to identify how his performance could be improved.⁴

The EEO investigation revealed that on or about June 30, 2020, Complainant asked the Supervisor for permission to work from Indiana, approximately 300 miles from his home for four (4) days due to a family emergency to assist his mother. The Supervisor denied the request, but the Division Chief granted this "accommodation." Report of Investigation (ROI) at 150-1.

On September 27, 2020, Complainant raised his concerns about the Supervisor to the Division Chief. He noted that the Supervisor "lives in a world of Black and White and Rank and File." For example, Complainant preferred to work late at night and on one occasion he worked through the night, and the Supervisor responded that Complainant should not work that long. The Division Chief agreed that the Supervisor was "black and white," and informed Complainant that she asked for a "sensing session" to obtain feedback from employees. ROI at 370-2.

Complainant requested reasonable accommodations for his disabilities, such as diabetes, hypertension, and asthma, which impacted his ability to go out in public. The Supervisor approved his reasonable accommodation requests on or about November 3, 2020, including maximum flexibility for telework. Complainant provided a proposed schedule to be in the office two days per biweek, from 10:00 a.m. to 2:00p.m., to ensure necessary overlap with his team and leadership. ROI at 145-6, 413-15. Complainant alleged that his accommodation was ignored when the Division Chief forced him to visit the office for a meeting at 9:00 a.m. on November 25, 2020. ROI at 155-6.

⁴ The AJ finalized the claims in the Order on Initial Conference and Deadlines and Record Completion. For the purposes of this decision, the claims are renumbered to eliminate the numbers of those withdrawn, dismissed, or duplicated. The AJ also noted that claim 1 was untimely as a discrete claim and considered as part of the overall harassment claim.

On November 24, 2020, Complainant notified the Supervisor and Division Chief that he would seek opportunities outside of the division based on their expressed disappointment in his performance. Complainant later informed them that he experienced shortness of breath and increased blood pressure triggered by, in part, the notifications from their work system, and the Division Chief suggested that Complainant take some time off. Complainant also stated that he felt that he could not meet their expectations because the "tempo is just too high," and he felt better suited for a more established division with a slower pace. ROI at 412, 404-5. On or about December 18, 2020, Complainant and the Supervisor discussed identifying an Acting Branch Chief to take the lead for operational branch duties/strategies and associated tasks, with Complainant retaining administrative supervisory functions and focusing on specific projects. Complainant informed the Supervisor that he asked the Direct Report to serve as Acting Branch Chief, and she accepted. ROI at 407-8.

Complainant complained of "offensive" messages from the Division Chief in the Leadership Chat Room on December 1, 2020. Specifically, she stated that "my kid just missed all audio in his first zoom meeting because he didn't 'THINK' to turn up the fmg (*sic*) volume...no shit [he] didn't have [his] volume up," and "I had to write out a menu for my kid to tell me what the hell he wanted for breakfast." The Division Chief made other negative comments, such as complaining that work was "crappy" and "sucks," and that "the Midwest sucks." ROI at 161-5.

Complainant accused the Division Chief of admonishing him when she wrote, "please make sure you are in the leadership room" on December 3, 2020. ROI at 168. The Supervisor informed Complainant on January 14, 2021, that the Division Chief mentioned not seeing Complainant online, and Complainant believed that she was unequally monitoring his online presence. ROI at 181.

On January 25, 2021, Complainant spoke with the Supervisor about "Professional Development," and the Supervisor commented that Complainant was not working at the Band 4 level, and this would be reflected in his performance evaluation. ROI at 186. Complainant alleged that the Supervisor emailed him on January 29, 2021, and demonstrated excessive supervision; deceit; intimidation; and a constant changing of expectations. Complainant averred that the Supervisor did not communicate changes for an upcoming brief and set him up for failure. ROI at 188.

In March 2021, Complainant moved to another division as a Technical Lead Data Steward (Pay Band 4). ROI at 225, 145.

On or about July 20, 2021, the Supervisor issued Complainant a close-out performance rating of 3.2 (Successful). Complainant complained that the rating reflected incorrect dates; specifically, an end date of September 30, 2021, but when an employee leaves a position earlier, the dates need to be updated. In addition, the rating contained "lackluster writeups" and did not identify how his performance could be improved. ROI at 316-25, 177-9.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. When Complainant did not object, the AJ granted the Agency's motion and issued a decision without a hearing on March 16, 2023.

The AJ found that Complainant's beliefs and perceptions of victimization were not probative evidence of unlawful harassment. The complained of incidents were routine assignments, instructions, and admonishments that were not severe or pervasive to rise to the level of abuse or to create a hostile work environment. Even assuming that Complainant established a prima facie case of discrimination and retaliation, the Agency articulated legitimate, nondiscriminatory reasons for the actions, and Complainant failed to prove that the proffered reasons were pretexts for discrimination. The AJ concluded by granting the Agency's Motion for Summary Judgment.

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.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant asserts that he was not offered a hearing in a reasonable time, and he requests a hearing. He contends that the Agency's assertions that his allegations were "normal trials and tribulations of the workplace" is "outlandish." Complainant states that he was subjected to harassment, such as being transferred to a lesser position due to a toxic workplace; receiving a lower performance evaluation; and being subjected to "verbal abuse" from the Division Chief, which he found highly offensive.

The Agency opposes the appeal, asserting that Complainant failed to point to any evidence to indicate a dispute of a material fact. The Agency requests that the Commission affirm the final order adopting the AJ's decision.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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 (EEO MD-110), 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").

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 EEO MD-110, at Chap. 9, § VI.B. (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

Decision Without a Hearing

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. Complainant contends that the Agency's assertion that his allegations were "normal trials and tribulations of the workplace" is "outlandish." Complainant Appeal Brief at 1. However, mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

Complainant also repeats his allegations of harassment, but he did not identify any genuine dispute of material facts. A review of the record does not reveal any genuine disputes of material facts. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

Reasonable Accommodation (Claim 3)

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), (p). In order to establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii).

In this case, Complainant disclosed his numerous physical and mental conditions, such as asthma; hyperglycemia; and severe anxiety, and that he must be cautious in public and be mindful of social distancing practices. ROI at 145-6. The Reasonable Accommodation Specialist determined that Complainant is an individual with a disability and qualified for his position. ROI at 252. As such, it is undisputed that Complainant is an individual with a disability and qualified.

The Supervisor granted Complainant a reasonable accommodation on or about November 3, 2020, including maximum flexibility for telework with a schedule to be in the office two days per biweekly, from 10:00 a.m. to 2:00p.m., to ensure necessary overlap with his team and leadership. ROI at 414-15. In claim 3, Complainant alleged that the Division Chief violated his reasonable accommodation when she forced him to come into the office to attend a meeting at 9:00 a.m. on November 25, 2020.

The Division Chief responded that the Supervisor verbally shared that Complainant had a reasonable accommodation in place, which included flexibility in scheduling. The Division Chief explained that no one was "ordered" to come into the building for the meeting, and that Complainant never expressed an unwillingness to attend the meeting. She added that coming into the office for this meeting would have been in line with his schedule of one day in the office per week. ROI at 214-15, 217. The Supervisor further explained that this meeting was held virtually, and not in-person, but that participants needed to be within a secure government facility to access classified systems due to the classification of the content discussed. ROI at 231.

Complainant admitted that he did not make any request but that the Division Chief should have known about the accommodation. ROI at 157. When making an accommodation request, an employee is not required to use the magic words "reasonable accommodation." Instead, the employee need only inform the Agency that he needs an adjustment or change at work for a reason related to a medical condition. See Enforcement Guidance at Q.1. Even crediting that the Division Chief was generally aware of Complainant's granted accommodation; she highlighted that Complainant came into the office once a week under his reasonable accommodation. We emphasize that an Agency needs to be aware of an employee's request for a modification, and Complainant raised no concerns with the Division Chief regarding the meeting on November 25, 2020, for any accommodation such as a change to the meeting time. As such, we find no violation of the Rehabilitation Act.

Disparate Treatment (Claims 6, 8, and 11)

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he 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. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden is on Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show 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); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004533 (August 17, 2023). As noted above, Complainant is an individual with a disability and qualified for his position.

For claim 6, the record shows that Complainant informed the Supervisor and the Division Chief of his health-related issues that triggered the subsequent naming of the Direct Report as the Acting Branch Chief and the alleged relinquishing of Complainant's supervisor duties. ROI at 404-5. As such, we will credit a causal connection between Complainant's disability to find a prima facie case of disability discrimination for claim 6.

Complainant stated that he felt forced to take a reassignment on March 1, 2021 (claim 8).

However, his email to the Supervisor and the Division Chief revealed that he already made the decision to pursue other opportunities on November 24, 2020. ROI at 412. Only incidents 1 and 2 occurred prior to November 24th, and there is no evidence that they were connected to his disability, discussed further below. As such, Complainant did not establish a prima facie case of disability discrimination for claim 8.

For claim 11, there is no evidence that Complainant's performance was due to his disability. However, the Agency provided that the Supervisor gave two comparators Excellent ratings in 2021. ROI at 615. The record did not reveal their disability status, but we will assume, for the sake of argument, that the comparators did not have a disability to establish a prima facie case of disability discrimination for claim 11.

Complainants may establish a prima facie case of reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were 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).

Complainant did not recall when he filed his EEO complaint, but he initiated an IG complaint with overlapping issues in January 2021. ROI at 148. The Supervisor learned of Complainant's prior protected EEO activity on February 8, 2021, which he later learned was an IG complaint. ROI at 226. The Division Chief stated that she learned of Complainant's EEO complaint in September 2021, and she was not aware of his IG complaint. ROI at 210.

Complainant only included claim 11 as part of his reprisal claim, and not claims 6 and 8. Claim 11 occurred in July 2021, which was over five months after the Supervisor learned of Complainant's protected EEO activity. A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001). Where there is a gap between the protected activity and the adverse treatment, "the complainant must show additional proof of causality." Archibald v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01A54280 (Sept. 22, 2005). We find that the five-month gap is not "very close," and Complainant presented no other evidence to show a nexus between his prior EEO activity and his performance rating. As such, we find that Complainant did not establish a prima facie case of reprisal for claim 11.

We now turn to the Agency's proffered legitimate, nondiscriminatory reasons for their actions in claims 6 and 11. For claim 6, the Division Chief responded that Complainant stated that the "tempo" of the office was too high, and he felt better suited for a more established office with a slower pace, and the changes were per his request. She denied that the Direct Report was promoted or that Complainant was relieved of his supervisory duties. ROI at 219-20. The Supervisor corroborated the Division Chief's explanations and added that Complainant chose to support a high-performing employee to serve as the Acting Branch Chief for operational functions, while he retained administrative/supervisory functions. ROI at 233-7. The Direct Report also confirmed that she was not promoted, and she did not fill the role of an acting supervisor. ROI at 281.

In response to claim 11, the Supervisor stated that Complainant's rating accurately reflected his performance and results. Complainant did not receive a higher score because he did not surpass or exceed the expected results. Complainant received an overall Successful for the rating period from October 1, 2020, through February 27, 2021. While Complainant complained of "lackluster writeups," the Supervisor provided specific information to support Complainant's Successful rating. For example, in the "People" element, Complainant was rated Successful for attending events to improve his leadership skills; mentoring an employee; and listening and engaging in meetings. The Supervisor added that, since Complainant's performance was acceptable, providing recommendations for improvement was not a requirement. ROI at 239-41, 316-25.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

Complainant offered no arguments or evidence on appeal to show that the proffered reasons are not worthy of belief. Complainant's bare assertions that management officials discriminated against him are insufficient to prove pretext or that their actions were discriminatory. Accordingly, we find that Complainant did not establish discrimination based on his disability, or in reprisal for prior protected EEO activity, for claims 6, 8, or 11.

Harassment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See 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). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove his hostile work environment claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, his disability or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

As discussed above, we found that Complainant did not establish a case of discrimination on any of his alleged bases for claims 3, 6, 8, or 11. Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that any of these actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant did not show that the Agency subjected him to harassment based on his disability, or in reprisal for prior protected EEO activity, for claims 3, 6, 8, or 11.

For the remaining incidents, we find that Complainant did not show a connection to a protected basis. Complainant alleged reprisal for incidents 7, 9, and 10, but they occurred in January 2021, prior to management officials' awareness of Complainant's protected EEO activity.

Regarding incident 1, Complainant explained that he requested to work from Indiana for four days due to family issues, and not because of his disability. ROI at 150. He alleged that the Division Chief minimized his concerns about the Supervisor (claim 2), but the Division Chief agreed with Complainant's criticism that the Supervisor saw things as "black and white," and she planned a "sensing session" for further action. ROI at 370-2. Complainant confirmed that this session was held. ROI at 153.

Complainant also alleged that the Division Chief admonished him when she instructed him to "please make sure you are in the leadership room" (claim 5). ROI at 168. The Division Chief explained that she asked Complainant a mission-related question and he never responded. The Division Chief did not think she was admonishing Complainant when she was "looking" for him. ROI at 218.

For claim 7, Complainant accused the Supervisor of excessive supervision, deceit, intimidation, and constant changing of expectations in an email sent on January 29, 2021. The Supervisor explained that this email only summarized their discussion of action items on Complainant's projects and associated due dates. A review of this email does not show a link between the Supervisor's conduct and Complainant's disability. ROI at 188-9, 246, Supplemental ROI at 27-8.

Regarding claim 9, the Division Chief responded that if she did not see Complainant online for an extended period, she contacted him to ask if he was ok, and she did the same for all employees. ROI at 220. The Direct Report substantiated that the Division Chief monitors everyone's online presence, and not just Complainant's. If the Division Chief asks a question, and there is no reply and she is unaware of the employee's location, she will ask about their whereabouts. ROI at 284. Another Branch Chief confirmed that the Division Chief also monitors her online presence, which was appropriate in a telework environment. ROI at 270.

In incident 10, Complainant averred that the Supervisor commented that Complainant was not working at the Band 4 level, and that the Supervisor was going to have to evaluate Complainant at that level, which was a "serious threat." ROI at 177. The Supervisor denied "threatening" Complainant with an "unfair evaluation," but that he informed Complainant of wanting to get him back to working at a Band 4 level. The Supervisor added that he believed that the conversation went well and did not recall Complainant stating that any of the Supervisor's comments were offensive or objectionable. ROI at 245.

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 his 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 as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). There is no evidence that these work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of his disability.

Complainant complained of the Division Chief's "offensive" messages in claim 4, such as her statement that her child did not raise the "fing" volume in a meeting. Complainant also took issue with her other negative comments including that work was "crappy" and "sucks," and that "the Midwest sucks." ROI at 161-5. While Complainant found these comments to be offensive, they were not related to his disability. Further, anti-discrimination statutes are not general civility codes, and the Commission has found that personality conflicts; general workplace disputes; and trivial and petty annoyances do not rise to the level of harassment. See Jeffrey R. v. Dep't of Justice, EEOC Appeal No. 2022003500 (Aug. 9, 2023); Rita F. v. U.S. Postal Serv., EEOC Appeal No. 2021002876 (Aug. 16, 2022); Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012).

Accordingly, we find that Complainant did not establish that the Agency subjected him to harassment based on his disability, or in reprisal for prior protected EEO activity.

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 order adopting the AJ's decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)


You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 17, 2024
Date