



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

[REDACTED]  
Darrell K,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Defense Health Agency),  
Agency.

Appeal No. 2023003415

Hearing No. 531-2021-00338X

Agency No. DHANCR20-0037

**DECISION**

On May 23, 2023, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 16, 2023 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**ISSUE PRESENTED**

The issue is whether the Administrative Judge (AJ) properly issued a decision without a hearing finding that Complainant did not establish that the Agency subjected him to discrimination or harassment based on his age or in reprisal for protected EEO activity.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Performance Improvement Specialist at the Agency's Walter Reed Medical Center in Bethesda, Maryland.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On May 25, 2021, Complainant filed a formal complaint alleging that the Agency subjected him to hostile workplace discrimination on the bases of age and reprisal for prior protected EEO activity when:

- a. During the month of October 2019, he received an “unsatisfactory” on his mid-term performance evaluation for fiscal year 2019/2020;
- b. From August 2019 through March 2020, his supervisor yelled at him and told him to “stay in [his] lane” when [Complainant tried] to assist co-workers, and his managers terminated twenty or more of his projects; and
- c. Between August 2019 and April 2020, his supervisor made negative comments about his technological abilities, for example saying, “What’s wrong with you? You’re the only one having trouble.”

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. However, the Agency submitted a motion for a decision without a hearing, and Complainant responded. Adopting the Agency’s motion, the AJ subsequently issued a decision by summary judgment in favor of the Agency.

The Agency issued its final order adopting the AJ’s finding that Complainant failed to prove discrimination or unlawful retaliation as alleged.

The instant appeal followed. Complainant recounts his claims and contends that he is a victim of unlawful discrimination.

#### STANDARD OF REVIEW

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. (Aug. 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*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ’s, and Agency’s, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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 AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

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. Here, Complainant has failed to point to any particular evidence in the investigative file or other evidence of record that indicates such a dispute. Our review of the evidence of record produced during the investigation reflects that it has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003) (AJ may issue a decision without a hearing only after determining that the record has been adequately developed). For the reasons discussed below, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in his favor.

#### *Disparate Treatment*

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. Affairs 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).

Here, the AJ correctly found that Complainant failed to establish he had been subjected to discrimination or retaliation based on his protected bases. The AJ noted that the Agency has articulated legitimate, non-discriminatory reasons for its actions. Concerning claim (a), Complainant's first-level supervisor observed that Complainant did not demonstrate the expected understanding of data extraction and analysis, despite being sent to Lean Six Sigma training and being given a mentor. Additionally, Complainant focused on issues being addressed by medical staff, and he provided irrelevant information during presentations on projects assigned to him. Regarding claim (b), Complainant's first-level supervisor noted that Complainant attached himself to projects assigned to other team members. Additionally, Complainant's co-worker asserted that this supervisor did not yell, but attempted to make himself heard over Complainant's near-constant interruptions. Complainant's removal from projects came in part at the behest of his third-level supervisor. These removals stemmed from a briefing that Complainant gave to her in August 2019 and a complaint from the President of the Medical Staff regarding an "unintelligible, rambling" e-mail from Complainant. With respect to claim (c), Complainant's immediate supervisor attempted to help Complainant with technological challenges that were unprecedented during the first COVID-19 lockdown. Complainant failed to show that management's reasons were pretext for unlawful discrimination.

#### *Hostile Work Environment*

To prove his harassment 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 age or prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Furthermore, an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998).

However, where the harassment does not result in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) the employer can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating that it exercised reasonable care to prevent and correct promptly any harassing behavior; and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

The AJ determined that Complainant failed to show any discriminatory or retaliatory animus motivated the acts at issue. The AJ concluded that management's actions comprising Complainant's harassment claims are not sufficiently severe or pervasive to create a hostile work environment. We agree. Beyond conjecture, Complainant has not shown that he was subjected to a hostile work environment based upon his claimed bases.

In sum, the preponderance of the evidence does not establish that management was motivated by discriminatory or retaliatory animus. The image which emerges from considering the totality of the record is that there were conflicts and tensions with Agency management style that left Complainant feeling aggrieved. However, the statutes under the Commission's jurisdiction do not protect an employee against all adverse treatment. See Bouche v. U.S. Postal Serv., EEOC Appeal No. 01990799 (Mar. 13, 2002). See also Jackson v. City of Killeen, 654 F.2d 1181, 1186 (5th Cir. 1981) ("Title VII is not a shield against harsh treatment at the workplace; it protects only in instances of harshness disparately distributed. The essence of the action is, of course discrimination."). Discrimination statutes prohibit only harassing behavior that is directed at an employee because of his or her protected bases. Here, the preponderance of the evidence does not establish that any of the events in dispute were motivated by discriminatory or retaliatory animus. Complainant's claim of harassment in violation of the ADEA is precluded based on our findings that Complainant failed to establish that any of the actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' 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 by the Agency as alleged.

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 29, 2024

Date