



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Hilton L.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(National Cemetery Administration),
Agency.

Appeal No. 2023003529

Agency No. 200J-769-2022-147035

DECISION

On June 1, 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 May 18, 2023, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether the Agency properly determined that Complainant failed to meet his burden in proving that the Agency denied him a reasonable accommodation.

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.

Whether the Agency properly determined that Complainant failed to meet his burden in proving that the Agency subjected him to discrimination and harassment based on disability and reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Support Assistant at the Agency's National Cemetery Scheduling Office (NCSO) facility in St. Louis, Missouri. Until July 17, 2022, Complainant's first-level supervisor was a Supervisory Program Specialist (S1A). After July 27, 2022, Complainant's first-level supervisor was a new Supervisory Program Specialist (S1B). The Supervisor Scheduling Officer (S1C) was another first-level supervisor assigned to a different team. Complainant's second-level supervisor was the NCSO Division Chief (S2); his third-level supervisor was the NCSO Assistant Director (S3); and his fourth-level supervisor was the NCSO Director (S4).

On September 12, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (mental-social phobia; physical-irritable bowel syndrome (IBS)) and reprisal for protected EEO activity (instant complaint) under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. On July 1, 2022, Complainant's reasonable accommodation request was denied.
2. Beginning on July 1, 2022, a supervisor told Complainant that he would have to use annual or sick leave when he used the restroom.
3. On August 10, 2022, a supervisor placed negative comments on Complainant's Performance Evaluation.
4. On August 25, 2022, Complainant became aware he was not selected for Vacancy Announcement No. RP-22-TDJ-11554396-769-BU.²
5. On September 6, 2022, a supervisor accused Complainant of logging off the computer early.

² The Agency dismissed this incident as an independently actionable discrete claim because Complainant did not raise it until December 13, 2022, and it was therefore untimely. However, the Agency accepted this incident as part of Complainant's overall harassment claim. On appeal, Complainant did not contest the Agency's dismissal of this claim; as such, we will only address this incident as part of Complainant's overall harassment claim. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § IV.A.3 (Aug. 5, 2015).

6. On November 17, 2022, a supervisor accused Complainant of not showing up for work.
7. On January 6, 2023, a supervisor tried to force Complainant to discuss a computer issue.
8. On January 12, 2023, a supervisor issued Complainant a written counseling.³

The evidence developed during the investigation reveals that during the relevant time, Complainant and his colleagues were teleworking. On an unknown date in approximately March 2022, the Agency leadership announced that, beginning on May 1, 2022, employees would need to report to the office once a pay period. On March 31, 2022, Complainant emailed S1A and S2, requesting a reasonable accommodation of working completely remotely. S2 responded to Complainant immediately, acknowledging receipt and directing Complainant to complete a form regarding his request. Complainant completed the form as directed and sent it to S1A who then forwarded it to the Reasonable Accommodation Coordinator (RAC).

On April 4, 2022, the RAC informed Complainant that he had received his form, which indicated that Complainant would have loose bowels when he is around other people. The RAC asked Complainant if he was asserting any other limitations that would prevent him from performing the essential functions of his job. Complainant responded as follows:

“I have limitations on driving due to social phobia, IBS, and chronic back and neck pain. I cannot drive a distance more than a few miles due to my spinal injuries. I asked my leadership when I was first hired if I could use a heat pad at work and they denied my request because they said it is a fire hazard. However, while working from home, I am able to utilize a heat pad.” ROI at 359.

The RAC advised Complainant to received medical documentation reflecting his medical conditions and associated limitations (specifically, one form from a mental health provider pertaining to the social phobia-related limitations). The RAC also asked Complainant if he had a valid driver’s license and, if so, if there were any restrictions placed on his license. Complainant responded that he had a license with no restrictions.

³ In testimony, Complainant stated this counseling was issued “verbally on Microsoft Teams.” ROI at 94.

On April 6, 2022, Complainant emailed S1A the following "On 04/06/2022 I was on break for service connection for 6 min 10 seconds." In response, S1A stated:

I have been doing this incorrectly with the extra breaks that you have been taking. I can no longer approve the extra breaks that you take. This means that the extra breaks that you take will be reflected on your numbers specifically on your agent availability. The one prior to this one that you are reporting will not be input; the ones prior have been inputted and will stay on your numbers. ROI at 147.

On April 11, 2022, Complainant emailed the RAC stating that, per the employee handbook, he believed he could work remotely for 90 days since he had filed for a reasonable accommodation. On May 3, 2022, Complainant emailed the RAC stating that his doctor needed guidance on what verbiage to put on the reasonable accommodation paperwork. Complainant also asked the RAC for an update as to management's decision on his "90-day request to remain on telework permanently." In response, the RAC stated that management had not yet decided on permanent telework and that he could not advise the physician on the medical documentation verbiage. The RAC states that the doctor must complete the form and address the limitations that Complainant was experiencing. The RAC also reminded Complainant that there should be two sets of medical documentation – one from a medical doctor to address the physical limitations and one from a medical doctor to address the mental limitations.

Complainant provided medical documentation dated May 27, 2022 which stated that he was unable to perform the key duties involving "employee stated limitations associated with phobias." The documentation also stated that Complainant's impairment required frequent trips to restroom, decreased interactions with coworkers, and frequent missed days of work due to his illness. The recommended accommodation was increased/frequent use of restroom for to increased diarrhea with increased anxiety. When asked how the recommended accommodation would assist Complainant in performing the essential functions of his job, the documentation stated, "working from home decreased social interaction, decreasing illness, and increasing productivity." ROI 356-57.

The RAC emailed S1A on June 6, 2022, stating that Complainant had requested a reasonable accommodation of working at home full-time; that Complainant had been found to be a qualified individual with a disability; that Complainant's doctor had identified limitations of increased frequency of bathroom usage and a decrease of interactions with others; and that Complainant's doctor had recommended working from home and close proximity to a restroom. The RAC informed S1A that the next step was to meet with Complainant to engage in an interactive discussion about his request.

On June 23, 2022, S1A offered Complainant alternative accommodations, effective July 5, 2022, to be allowed to break his two 15-minute breaks into two smaller segments, move his workstation closer to a restroom and away from interacting with other employees." Complainant rejected the alternative accommodation because of driving to the office. In response, Complainant stated that he would see if he could get a new accommodation letter to address driving.

On June 1, 2022, S1A emailed Complainant a screenshot of his "Agent availability" average for the month of June, which reflected an average of 79.51%. S1A stated, "your numbers have fallen below the 80% agent availability. I need you to work on that. Other than that, everything is looking good." ROI at 184. In response, Complainant stated, "my health hasn't been the greatest this month as you can tell on certain days," to which S1A replied, "remember you only receive 30 minutes of breaks and a 30-minute lunch. Anything beyond that should be working." Complainant then asked whether "unexpected bathroom breaks" were alright, to which S1A replied:

"That was part of the discussion we had about breaking up the breaks and lunches. There's no such thing as extra time. In actuality, if you didn't want it to affect your numbers, you would have to work past or before your shift to pay the organization back their time they are paying you for." ROI at 144.

Subsequently, Complainant emailed S2, asking for a new supervisor.

On August 2, 2022, S1C sent Complainant a message through Teams stating, "please don't log out before your shift ends at 6:45. The daily log on duration is 8 hours and 30 minutes and the daily report is going to confirm that you logged out before your shift ends."

In response, Complainant stated he did not mean to logout but noted that his ethernet cable was not plugged in that morning and wondered if, perhaps, it accidentally came unplugged the evening before. S1C responding that it was understandable and that things happen.

On August 4, 2022, a resume review panel convened to review applicants' resumes for the position of Program Analyst, which was posted as a competitive announcement on USAJOBS.gov. There were 45 applicants, including Complainant, to fill ten vacancies. Three resume review panel members (PM1, PM2, PM3) reviewed the applicants' resumes and job applications, scoring each one independently. The panel members were not privy to the other panel members' scoring of applicants. The top 24 applicants were referred to the Selecting Official for further consideration. Complainant's resume was ranked 29th out of the 45 total applicants and, therefore, he was not referred to the Selecting Official for further consideration. All three panel members testified that they had no knowledge of Complainant's disability or of any protected activity. The Selecting Official also testified that he had no knowledge of Complainant's disability or of any protected activity.

On September 6, 2022, Complainant email S1C stating he was taking compensatory time (time off in lieu of overtime pay). In response, S1C stated that there was still one call in queue that Complainant should have taken and that he logged out when calls were still in queue. Complainant stated that he logged off after 6:45PM as instructed and had not seen another call in the queue on his screen. S1C stated that they were going off the time Complainant sent his request for compensatory time but stated that Complainant was correct in the situation.

On September 7, 2022, Complainant emailed the RAC, asking to reopen his reasonable accommodation request. Complainant asked the RAC "what specifically needs to be in the medical form to ensure 100% telework." In response, the RAC stated again that he could not tell Complainant or his doctors what to put on the form.

On October 6, 2022, Complainant emailed S3 and S4 stating that he had opened an EEO case of discrimination against S1A.

On October 11, 2022, Complainant received his annual performance appraisal. He was rated as "Exceptional" for four of five performance elements and was rated as "Fully Successful" for the fifth element of "Scheduled Adherence/Availability."

On November 17, 2022, S1C emailed Complainant stating that according to the time and attendance system, Complainant logged in 33 minutes late for his 9am shift and would need to input 30 minutes of leave. Complainant replied that he had logged in on time for his shift but had to reset his computer due to a technical issue. S1C noted that they did not see any emails or notifications to any of the supervisors from Complainant stating that he was having computer issues. Following this exchange, Complainant emailed S1B, S2, S3, and S4, relaying that S1C had accused him of being late to work even though he was one minute early for work and had to reset his computer system. Complainant also mentioned the exchange with S1C on September 6, 2022, and stated he felt like he was "under a microscope" and that the work environment was "becoming a hostile environment." A few hours later, S1B emailed Complainant stating that he had not heard from Complainant since his earlier email. Complainant responded that he was waiting on a call from the Union and S4. S1C asked him to "go into ready status" until he received those calls.

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). In accordance with Complainant's request, 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

Complainant did not file a statement on appeal.

On appeal, the Agency argues that the Final Agency Decision (FAD) is correct in finding that Complainant failed to establish that he was discriminated against based on his disability and/or reprisal, or that he was subjected to a hostile work environment.

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

Reasonable Accommodation (Claim 1)

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 “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 (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002). The Agency does not dispute that Complainant is a qualified individual with a disability. As such, an agency is required to make reasonable accommodations to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o), (p).

The term “reasonable accommodation” means, in pertinent part, modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position in question. See 29 C.F.R. §1630.2(o)(1)(ii). Reasonable accommodations may include but are not limited to job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. §1630.2(o)(2)(ii).

In this claim, Complainant alleged that management denied him a reasonable accommodation of full-time telework. Complainant’s request for full-time telework on April 1, 2022, was submitted shortly after the Agency’s announcement that employees would begin reporting to the worksite once per pay period.

Complainant argued that he should have been able to work from home full-time because he was fully capable of performing his duties while at home permanently. In support of his request, Complainant provided medical documentation that stated Complainant's limitations included frequent trips to the restroom and anxiety around coworkers and that working from home had decreased Complainant's social interaction and resulting symptoms. Outside of his medical documentation, Complainant stated that working from home increased his productivity.

S1A and the RAC both testified that Complainant's reasonable accommodation request was not denied. ROI at 177, 338. In response to Complainant's request, S1A offered Complainant an alternative accommodation of a flexible schedule, permitting him to break his two 15-minute breaks into smaller segments, and relocating his workstation closer to a restroom and away from other employees. S1A testified that he provided the alternative accommodation based on the medical information provided, including the listed limitations and recommendations. ROI at 177. S1A also stated that the RAC provided some recommendations for him to consider as well. *Id.* S2 also testified that Complainant's reasonable accommodation went through the proper channels, and ultimately the medical evidence did not support granting the employee fulltime telework. ROI at 253-254.

On June 24, 2022, Complainant rejected the Agency's alternative accommodation stating it was because of "driving to the office." ROI at 187. While the Rehabilitation Act provides that qualified individuals with a disability be granted an effective reasonable accommodation, it does not entitle them to the accommodation of their choice. See Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994); see also Enforcement Guidance at Question 9. The burden to prove that the accommodations offered by the Agency were not effective rests with Complainant. See, e.g., Victor M. v. National Security Agency, EEOC Appeal No. 0120152103 (Dec. 22, 2017) (complainant failed to prove that the provision of his classmates' notes was not an effective accommodation); Wimbush v. U.S. Postal Serv., EEOC Appeal No. 0120090109 (Feb. 13, 2009) (complainant failed to prove that the accommodation offered by the agency was not effective).

In reviewing Complainant's medical documentation stating that he needed an accommodation to have frequent bathroom breaks and limited social interactions, we find that Complainant has not established why the Agency's alternative accommodation, which addressed both of the named limitations,

was ineffective. Complainant's only reasoning for rejecting the alternative accommodation was that it required him to drive to work. The Commission recognizes that disability accommodations related to commuting can be required under the Rehabilitation Act in appropriate circumstances. See Hackney v. U.S. Postal Serv., EEOC Appeal No. 01984048 (Aug. 22, 2001). However, Complainant has the burden of establishing that there is a nexus between his disability and his need for accommodation, in order to be entitled to a reasonable accommodation. See Struthers v. Dep't of the Navy, EEOC Appeal No. 07A40043 (Jun. 29, 2006). Given that driving was not listed as a concern or limitation in his medical documentation, we find that there is no supported nexus between Complainant's disability and his need for fulltime telework specifically, so he does not have to drive to the workplace.

Complainant cannot simply assert that an accommodation would not work for him either, as this does not demonstrate good faith engagement in the interactive process. See Alexandria S. v. Fanning, EEOC No. 0120160912, 2016 WL 1296250, at *2 (Mar. 18, 2016) (complainant failed to act in good faith in the reasonable accommodation interactive process by refusing to explore the agency's proposed accommodation). After rejecting the alternative accommodation, Complainant stated that he would work with his doctor to submit a new reasonable accommodation request letter, but the RAC testified that no additional documentation was received through the time of his testimony on December 19, 2022. ROI at 338-339. In reviewing the record, we find that the Agency engaged in the interactive process with Complainant when it provided an alternative accommodation that addressed Complainant's medical limitations listed in his supporting documentation. We further find that in declining the Agency's alternative accommodation and not establishing how it was ineffective, Complainant ended the interactive process, and the Agency was no longer obligated to continue in the interactive process. Therefore, we find that the Agency did not fail to provide Complainant with a reasonable accommodation.⁴

⁴ S2 reported that the employees were not asked to come back into the office due to COVID-19 and as of December 13, 2022, no further action to bring Complainant into the office was taken. ROI at 255.

Disparate Treatment (Claims 3 and 8)

To prevail in a disparate treatment or reprisal claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, he must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

Prima Facie Case

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. Dep't of the Air Force, EEOC Appeal No. 2021004539 (August 17, 2023).

As mentioned above, the Agency does not dispute that Complainant was qualified for his position. It is also not disputed that claims 3 and 8 allege adverse actions. S1A, the named management official in claim 3 and S1B, the named management official in claim 8, both stated that they were generally aware of Complainant's disability. ROI at 174; 235-36. When asked why he thought claim 3 was related to his disability, Complainant stated he believed management tried to punish employees by taking away their telework privileges. ROI at 84-85. In claim 8, Complainant did not allege any causal relationship between the Agency's written counseling and his disability. A review of the record does not reveal any causal connection between either claim and Complainant's disability. Therefore, we find that Complainant failed to establish a prima facie case of discrimination based on his disability.

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

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. See Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001); see also, Whitmere v. Dep’t of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000) (nexus found when agency action followed complainant’s participation in protected activity by approximately four (4) months).

Here, Complainant described his protected activity as filing the instant complaint which he initiated on July 1, 2022. S1A testified that he became aware of Complainant’s protected activity on July 12, 2022. ROI at 174. Since the incident described in claim 3 occurred on August 10, 2022 – just a month after S1A’s knowledge of Complainant’s protected activity – we find a nexus exists through temporal proximity. S1B testified that he generally became aware of Complainant’s protected activity on September 12, 2022. ROI at 236. Given that the time between S1B’s knowledge of Complainant’s protected activity and the incident described in claim 8 was four months, we find a nexus exists through temporal proximity for this claim as well. Therefore, we find that Complainant established a prima facie case of reprisal for claims 3 and 8.

Legitimate, Nondiscriminatory Reasons

After establishing a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency’s explanation is a pretext masking discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In claim 3, Complainant alleged S1A placed negative comments on his performance evaluation. More specifically, Complainant stated that S1A stated that his availability had dropped from 80% to 79%. In response, S1A stated that there were no negative comments on Complainant’s performance evaluation. ROI at 178. S1B stated that at Complainant’s request for a progress review he wrote “You are still considered fully successful however agent availability has decreased slightly.” Id. S1A stated that the statement was put on Complainant’s progress review to notify him of the decrease of his average agent availability. Id.

To support the statement, S1A showed Complainant's agent availability from October 1, 2021 to March 31, 2022 as 83.23% and the additional progress review requested by Complainant for October 1, 2021 to June 2022 was 82.38%. Id. S2 testified that Complainant ultimately rated "Fully successful" for that year and based on his performance received a Special Contribution award. ROI at 255. S2 also added that Complainant does a great job for the job, his numbers were good, and he was a great employee. ROI at 256.

In claim 8, Complainant alleged S1B issued him a written counseling. In his affidavit, Complainant clarified that S1B counseled him verbally on Teams, but stated that he was counseled for trying to contact the Union. In response, S1B stated that he did counsel Complainant for his conduct on January 6, 2023, but that the claim did not occur as stated. ROI at 248. S1B stated that Complainant's conduct (messages on Teams and refusing to call S1B when requested) was unprofessional and disrespectful and that he was in an unapproved not ready status without any prior communication or approval. Id. S1B stated that he explained to Complainant that he had the right to contact the Union, however, it would be best for him to set meetings so management could account for his unavailability. Id. S1B continued by stating it is the employee's responsibility to remain in contact with supervisors and that any extended amounts of unapproved release time will reflect negatively on an employee's monthly availability rate and performance evaluation. ROI at 248-49. S1B stated that he forwarded the Teams conversation between him and Complainant to Employee and Labor Relations and they recommended up to a day suspension, but S1B chose only to counsel Complainant. ROI at 248.

We find that the Agency provided legitimate, nondiscriminatory reasons for its actions.

Pretext

Since the Agency provided legitimate nondiscriminatory reasons for its actions, Complainant now bears the burden to prove pretext. Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

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

When asked if the comments were accurate in claim 3, Complainant responded that he did not know. More specifically, he admitted that he did not know how the Supervisors track employees' availability. ROI at 84. In claim 8, Complainant did not make any arguments of pretext besides simply stating that he was subjected to a hostile work environment. Complainant did not show that the proffered reasons are not worthy of belief and his bare assertions that management officials discriminated against him are insufficient to prove pretext or that their actions were discriminatory. See Erby v. U.S. Postal Serv., EEOC Appeal No. 0120064377 (Feb. 12, 2008). Therefore, we find that Complainant has not established that the Agency subjected him to discrimination based on his disability or in reprisal for protected activity in claims 3 and 8.

Harassment (Claims 2-8)

As discussed above, Complainant has not provided sufficient arguments or evidence that claims 1, 3, or 8 were motivated by discrimination or reprisal. As such, we do not find those claims to be supportive of Complainant's harassment claim. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Complainant, therefore, remains with claims 2, 4, 5, 6, and 7 to support his harassment claim on the bases of disability and reprisal.

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).

To 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). It is important to note, that only if both elements are present, a chilling effect on protected EEO activity *and* retaliatory motivation, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep’t of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017) (emphasis added).

In this case, we find that the complained of conduct did not occur as Complainant described, or it was related to the management of Complainant’s assignments, performance, and conduct.

In claim 2, Complainant alleged that beginning on July 1, 2022, S1A told him that he would have to use annual or sick leave when using the bathroom. In response, S1A testified that this incident did not occur as alleged. ROI at 175. S1A explained that after talking with Complainant about his performance, Complainant stated that his health had not been the greatest during that month. At that time, S1A stated that he responded by reminding Complainant that he only had 30 minutes of breaks and 30 minutes for lunch. ROI at 175, 183. S1A also stated that he did not order him to use annual or sick leave when he used the restroom. ROI at 175. S1A stated that Complainant asked how he could get extra time during the day and S1A stated that he could use leave for any additional time or breaks that he wanted beyond what was already mentioned. Id.

In claim 4, Complainant alleged that he was subjected to harassment when he was not selected for a position. All members of the resume review panel stated that Complainant was qualified for the position, but that based on his qualifications Complainant did not receive a score high enough in comparison to the other applicants to move on to the interviews with the Selecting Official. ROI at 286, 303, 320. All three panel members also testified that neither Complainant’s disability nor protected activity were involved in their determination of his qualifications. ROI at 286, 302, 319. In fact, none of the panel members were aware of Complainant’s protected activity at the time of the nonselection. ROI at 287, 302, 319. The Selecting Official for the position added that Complainant ranked 29th out of the 45 applicants. ROI at 277.

The Selecting Official stated that he offered all applicants who were not selected a chance to hear feedback on their application and selection process, but Complainant did not reply to his offer for a meeting to receive feedback. ROI at 280-81.

In rebuttal, Complainant argues that applicants with less qualifications were either hired or interviewed over him. More specifically, Complainant stated that one applicant who is not a Veteran and did not have a master's degree was hired over him. However, we find that the possession of a master's degree does not show that Complainant was plainly superior to the applicant, who had a different degree, in a way that provides an inference of discrimination or harassment. See David R. v. Dep't of the Treasury, EEOC Appeal No. 0120172021 (Feb. 25, 2019). More generally, the Commission has previously found that an Agency has the discretion to choose among candidates whose qualifications are relatively equal as long as the decision is not premised on an unlawful factor. Devance-Silas v. U.S. Postal Service, EEOC Appeal No. 0120110338 (March 23, 2011), citing Texas Dept. of Community Affairs, 450 U.S. at 248, 252-259; Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985); Canham v. Oberlin College, 555 F.2d 1057, 1061 (6th Cir. 1981). Further, we note that in the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications. Texas Dept. of Community Affairs, 450 U.S. at 259.

In claim 5, Complainant alleged that on September 6, 2022, S1C accused him of logging off the computer early. In claim 6, Complainant alleged that on November 17, 2022, S1C accused him of not showing up for work when his status was showing offline while he was fixing a computer issue. Complainant alleged that both of these incidents were a result of reprisal because S1C was aware that Complainant filed a complaint against S1A. However, S1C stated that he was never told that there was a complaint against S1A. ROI at 208. Additionally, the record reveals that after Complainant explained the situation in claim 5, S1C stated that Complainant was totally correct, and that the situation was "all good." ROI at 210. In claim 6, S1C attached a log of Complainant's status history, and it does reflect that Complainant was in ready status at 9:33am. ROI at 216. S1C stated that he was just doing time keeping and accountability to ensure that all employees were available for their shift at the prescribed times. ROI at 218. The email correspondence regarding the incident indicate that S1C provided Complainant an opportunity to explain why he was not in ready status until 9:33am and included additional supervisors and management officials to confirm whether there were present computer issues. ROI at 216.

In claim 7, Complainant alleged that on January 6, 2023, S1B tried to force Complainant to discuss a computer issue. Complainant also alleged that he was emailing two individuals about his complaint when S1B took control to his computer remotely and made him take a scheduling call. In response, S1B stated that this incident did not happen as alleged. ROI at 237. S1B stated that Complainant notified him via a Teams group chat at 12:50pm that he was having computer issues. ROI at 237. S1B stated that he messaged Complainant privately to ask him to keep in contact with him directly if he was having computer issues, not via Teams group chat. Id. S1B also asked Complainant to call him to discuss the issue, but Complainant refused stating that he would call S2 instead. ROI at 237, 244. S1B stated that after Complainant refused to call him, he messaged Complainant to ask if there was a reason he was not in ready status for the past 40 minutes. Complainant simply replied "yes." S1B testified that he then put Complainant into a ready state to be prepared to work. ROI at 238. S1B stated that only after he put Complainant into a ready state did Complainant say that he was waiting to speak with his union representative. ROI at 238, 245. S1B testified that he repeatedly asked Complainant to notify him of his whereabouts so that his time and attendance as well as availability for calls could be tracked appropriately. Id.

The Commission has held that routine work assignments, instructions, and admonishments, such as the incidents described in claims 5, 6, and 7, 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). In this case, there is no evidence that the work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class. There is also no evidence that the other allegations occurred as alleged or were taken in order to harass Complainant on the basis of a protected class.

Accordingly, we find that Complainant did not establish that the Agency subjected him to harassment based on 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 Final Agency Decision finding no discrimination.

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 10, 2024
Date