



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

[REDACTED]  
Allan L.,<sup>1</sup>  
Complainant,

v.

Thomas J. Vilsack,  
Secretary,  
Department of Agriculture  
(Agricultural Research Service),  
Agency.

Appeal Nos. 2023004756  
2023004757

Hearing Nos. 550-2022-00279X  
550-2022-00016X

Agency Nos. ARS-2022-00039  
ARS-2021-00298

**DECISION**

On August 23, 2023, Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's July 24, 2023, final order concerning his equal employment opportunity (EEO) complaints 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFRIMS in part, and REVERSES in part and VACATES in part the Agency's final orders and REMANDS claims for further processing.

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

### ISSUES PRESENTED

1. Whether the Administrative Judge properly determined by summary judgment that Complainant failed to meet his burden in proving he was subjected to discrimination and harassment based on disability and age.
2. Whether the Administrative Judge properly determined by summary judgment that Complainant failed to meet his burden in proving he was subjected to discrimination and harassment based on disability and reprisal.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment with the Agency.

#### *Appeal 2023004756 (Complaint 1)*

On May 22, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (Multiple Sclerosis) and age (53) under the Age Discrimination in Employment Act of 1967 and Section 501 of the Rehabilitation Act of 1973 when:

1. On March 8, 2021, Complainant learned that he was not selected for the GS-12/13, Research Molecular Biologist (Plant), Schedule A position (ARS-D21Y - 10935059-FMM);
2. On February 22, 2021, Complainant learned he was not selected for the Research Position (ARS-D21Y-10937267-EL);
3. On multiple occasions, including January 24, 27, and March 31, 2021, management failed to forward Complainant's Schedule A hiring package for consideration, and this denied him an opportunity to compete for employment opportunities;
4. On unspecified dates, Complainant's inability to secure a permanent position restricted him from applying for external research funds, organizing groups to conduct research, international meetings and conferences to present his work; and
5. On several dates, Complainant was subjected to various incidents of harassment, including but not limited to:
  - i. Since 2014, management failed to respond to Complainant's multiple to Complainant multiple requests for assistance and information to apply for Schedule A job openings and forced him

to provide information on the nature of his disability in online applications.

The evidence developed during the investigation reveals that the position of Research Molecular Biologist (ARS-D21Y-10935059-FMM) was not a Schedule A preferred position, meaning that all candidates were considered through a competitive hiring process and preference was not given to Schedule A applicants. For this position, the Agency received 48 applicants. Complainant was certified as eligible and qualified for the position. The applications, including Complainant's application, were examined by a selection committee that consisted of six members. Complainant's application was given a mean score of 1.9 by the selection panel, which was rated twelfth. The three candidates that were selected received mean scores of 3.0, 3.0, and 2.8.

After interviews were conducted, the Hiring Manager for the position chose the selectee who had the mean score of 2.8 (Selectee 1). The Hiring Manager stated that he selected Selectee 1 because he had a unique combination of knowledge, skills, and abilities that were an exact fit for the position, including that he had years of experience with woody perennial plants and age-dependent maturation systems in tree species as well as developed and employed cutting edge sequence and bioinformatic technologies and had experience with plant tissue culture. The Hiring Manager testified that Selectee 1 also provided a presentation of a compelling future research program. On March 8, 2021, Complainant was informed that he was not selected for the position.

Complainant also applied for the Research Geneticist position (ARS-D21Y-10937267-EL) which was also not a Schedule A preferred position. Complainant's application for this position was certified and considered, and he was selected for an interview along with five other candidates. For this position there were five members of the interview panel. During the interviews, each of the candidates, including Complainant, were asked the same questions in the same order. The interview panel then evaluated the candidates considering seven different categories relating to the position and submitted their scoring sheets. The scores from each member of the panel were then added together resulting in a sum which equaled the candidates' final score. Complainant received a final score of 93, ranking him fifth among the interviewed candidates. The selectee for this position (Selectee 2) was selected for the position with the highest total score of 103. On February 22, 2021, Complainant was informed that he was not selected for the position.

Agency policy does not require that Schedule A application packages be sent to the hiring manager, but they may be sent as a courtesy. Complainant's Schedule A applicant packages for the foregoing position were not sent to the hiring manager. However, as discussed above, he was still considered for the position because he applied through the Office of Personnel Management's (OPM) online portal, since both positions were not Schedule A preferred positions.

Complainant did not identify any external research funds he applied for and was denied due to not securing a permanent position. Complainant did not identify any specific instances where the Agency forced him to provide information on the nature of his disability in online applications.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI 1) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

*Appeal 2023004757 (Complaint 2)*

On January 24, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (Multiple Sclerosis) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

- A. On or around October 4, 2021, Complainant learned he was not selected for the Research position (ARS-D21Y-11193664-AF);
- B. On prior unspecified dates in September 2021, management failed to address Complainant's inquiries regarding the position and the application process.

The evidence developed during the investigation reveals that on September 3, 2021, the Agency advertised a Supervisory Research Molecular Biologist/Geneticist Research Leader and Center Director (ARS-D21Y-11193664-AF). This position did not provide for Schedule A noncompetitive hiring authority. On September 30, 2021, Complainant applied for this position through the competitive process (OPM online portal). On October 1, 2021, Complainant also applied for the same position through the Schedule A Hiring Authority. The position announcement stated that one of the eligibility requirements for the position was that the applicant have experience leading a research project focused on plant genetic or genomics, plant breeding, or studies of plant biology that contribute to genetic improvement of crops.

Complainant was not certified as an eligible candidate and, therefore, was not considered for the position.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI 2) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case consolidated Hearing Nos. 550-2022-00279X (Complaint 1) and 550-2022-00016X (Complaint 2). After both parties submitted motions for a decision without a hearing, the AJ assigned to the case issued a joint decision without a hearing on July 18, 2023. The Agency subsequently issued a final order adopting the AJ's findings that Complainant failed to prove that the Agency subjected him to discrimination as alleged in both cases. The instant appeals followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ disregarded evidence to support his allegations, made multiple factual errors, did not apply appropriate laws and regulations in multiple instances, and disregarded several credibility concerns addressed in his Motion for Partial Summary Judgment, his Response to the Agency's Motion for Summary Judgment, and Reply to the Agency's Response.

On appeal, the Agency contends that Complainant failed to establish the Agency subjected him to discrimination on his nonselection claims. The Agency also contends that there is no evidence that Complainant was discriminated against based on age or disability, and it provided legitimate, nondiscriminatory reasons for its actions. Lastly, the Agency contends that Complainant failed to show that he was subjected to harassment.

#### 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, 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 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).

## ANALYSIS

### *Summary Judgment*

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.

Regarding the AJ's decision to issue a decision without a hearing, Complainant alleges that it was improper because there are several factual disputes that can only be resolved by a hearing. For instance, Complainant alleges that the AJ only used testimony from the HR specialist that referred to his application that was submitted through the Office of Personnel Management (OPM) portal and not the separate Schedule A process. More specifically, Complainant alleges that the AJ overlooked that there is a Schedule A process where his application should have been sent straight to the Hiring Manager. Complainant did in fact apply through the OPM process and was considered competitively as the other applicants who went through the same application process were processed.

In raising this, Complainant states his opinion on how the Agency should have handled his Schedule A application, but Complainant does not point to any evidence in the record that would raise a dispute that has the potential to affect the outcome of the case.<sup>2</sup>

In responding to the AJ's decision itself, Complainant alleged that he can in fact establish a prima facie case of reprisal and that the AJ overlooked evidence of reprisal when the SPPM sent an email to the Director of the Center for Civil Rights Enforcement stating that she did not respond to Complainant's inquiries because she was instructed not to respond to him by a senior HR officer, the Branch Chief of Personnel and Labor Solutions, because of Complainant's pending complaint. In reviewing the email cited by Complainant and his corresponding argument, we agree with his assertion and find that the email where an HR Official stated that she was instructed not to respond to Complainant's inquiries about Schedule A because he had a pending complaint is direct evidence of retaliatory harassment. We therefore disagree with the AJ's ultimate finding that the record was devoid of any evidence to establish Complainant's claims. Accordingly, we find that summary judgment in favor of the Agency on this issue, given this piece of direct evidence, was not appropriate.

Given our finding that the record does not contain any material facts in dispute, we find no reason to remand this decision for a hearing to further develop the record. However, pursuant to the de novo standard of review, we will review Complainant's claim of retaliatory harassment as well as his other claims of discrimination and harassment on his alleged bases in light of this direct evidence and issue a decision based on the Commission's own assessment of the record and its interpretation of the law.

#### Disparate Treatment – Nonselection (Claims 1, 2, and A)

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).

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<sup>2</sup> Not every factual dispute qualifies as a genuine issue that will prevent summary judgment. Adah P. v. Dep't of Veterans Aff., EEOC Appeal No. 0120140100 (Mar. 31, 2016); Complainant v. Dep't of Justice, EEOC Appeal No. 0120120271 (Aug. 21, 2014).

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 discrimination on the bases of age and disability in a nonselection context, Complainant must show that: (1) he is a member of the protected class; (2) he applied for and was qualified for the position; (3) he was not selected despite his qualifications; (4) someone outside his protected class was selected. Williams v. Department of Education, EEOC Request No. 05970561 (August 6, 1998).

It is undisputed that Complainant is a member of a protected class for age and disability. It is also undisputed that Complainant applied for and was deemed qualified for the positions listed in claims 1 and 2, but ultimately not selected. Selectee 1 was chosen for the position in claim 1 and was described as 38 years old and having no identified disabilities. Given Complainant's age (53) we find Selectee 1 to be significantly younger than Complainant and outside his protected class for age. Since Selectee 1 did not identify any disabilities, we also find that Selectee 1 is outside Complainant's protected class for disability. Selectee 2 was chosen for the position in claim 2 and was described as 53 years old and having no identified disabilities. Given that Complainant's age and Selectee 2's age is the same, we do not find this as evidence to support a prima facie case of age discrimination. However, since Selectee 2 did not identify any disabilities, we find that Selectee 2 is outside Complainant's protected class for disability. Therefore, we find that Complainant has established a prima facie case of discrimination based on age only in claim 1, and a prima facie case of discrimination based on disability in both claims 1 and 2.

For the position listed in claim A, the Agency deemed Complainant not qualified because of a specialized experience requirement. ROI 2 at 215, 252. The position announcement stated that one of the eligibility requirements for the position was that the applicant have experience leading a research project focused on plant genetic or genomics, plant breeding, or studies of plant biology that contribute to genetic improvement of crops. ROI 2 at 215. In his testimony, Complainant argued that he was in fact qualified because of his 20 plus years of work experience, extensive publication records and role as a research leader for several years.

In arguing this, Complainant generally stated that he led a research project, but did not provide any evidence to establish that he had the specialized experience of leading a focused research project as the position required. We therefore find that Complainant failed to establish the second prong of a prima facie case and as a result has not established a prima facie case of discrimination based on disability by nonselection for claim A.

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, Whitmire 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).

Complainant identified his protected activity as EEO complaints filed in March and September 2021. In claim A, Complainant named three responsible management officials, the Director of Human Resources (HR); the Deputy Director of HR; and a HR Specialist. The Director testified that he had no knowledge of Complainant's protected activity. ROI 2 at 181. However, the Deputy Director and the HR Specialist testified that they both were aware of Complainant's protected activity. ROI 2 at 188, 236. Since Complainant's latest protected activity was in September 2021 and the nonselection described in claim A occurred in October 2021 – just one month later – we find a nexus exists between Complainant's protected activity and his nonselection through temporal proximity. Therefore, we find that Complainant established a prima facie case of reprisal in claim A.

#### 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 1, Complainant alleged that he was subjected to discrimination when he was not selected for the Research Molecular Biologist position (ARS-D21Y - 10935059-FMM). In response, the Hiring Manager for the position stated that Complainant's application was not as competitive as other applicants. ROI 1 at 167. More specifically, the Hiring Manager stated that Selectee 1 had superior qualifications because as a PhD student, he worked in the specific specialized field that the Agency was looking for and remained a leading researcher ever since; authored seven papers and was at times the first to author papers in specialized fields relevant to the position; and developed and employed cutting edge sequence and bioinformatic technologies and had experience with plant tissue culture as well as provided a compelling future research program and plan. Complaint File Package at 158-59. The Hiring Manager stated that the Selectee 1's unique combination of knowledge, skills, and abilities were an exact fit for the position. Id. An HR Specialist who reviewed the applicants for the position testified that she ensured that there were no candidates with priority consideration who were overlooked. ROI 1 at 184. The HR Specialist added that for this specific position, priority consideration was only for federal employees who had been displaced or would be displaced from their position as well as veterans with an eligible veteran's preference, but that she found no candidates with any of those considerations. Id.

In claim 2, Complainant alleged that he was subjected to discrimination when he was not selected for another Research Position (ARS-D21Y-10937267-EL). The record shows that for this position, Complainant was certified and interviewed along with five other candidates. Complaint File at 151. The interview panel asked all six candidates including Complainant the same questions in the same order. Complaint File at 153-154. However, the interview panel was instructed not to compare candidates, but to just submit their scores of each candidate to the HR Specialist for the combined total score. Id. A review of the five-person interview panel total score shows that Complainant received a score of 93, while the Selectee for the position (Selectee 2) received a score of 103. See Complaint File at 156. In fact, three panel members scored Complainant lower than Selectee 2 by at least two points. Id. With his score, Complainant tied for fifth among the candidates that were interviewed. Id.

The Agency stated that Selectee 2 was selected for the position because he received the highest total score from the interview panelist.

In claim A, Complainant alleged that he was subjected to discrimination when he was not selected for the Research position (ARS-D21Y-11193664-AF). Complainant stated that he applied via the OPM website and sent his application package to the Selective Placement Program Manager (SPPM) to be considered under the Schedule A hiring authority. Complainant alleges that the SPPM refused to accept his documents in the past. In response, the SPPM testified that Complainant sent her his resume and she sent it to the Selecting Official as well as the HR Specialist who did the staffing for the position. ROI 2 at 237. The SPPM affirmed that she forwarded the Schedule A application to the hiring manager, but that the hiring manager for the position deemed Complainant not qualified for the position. Id.

The Hiring Manager for the position testified that she did the qualifications review of the applications for this position but had no role in processing Schedule A applications. ROI 2 at 251. The Hiring Manager testified that Complainant did not meet all of the specialized experience for the position and was therefore deemed unqualified. ROI 2 at 252. More specifically, the Hiring Manager found Complainant to be not qualified for the position because his resume did not show experience leading a research project focused on plant genetics or genomics, plant breeding, or studies of plant biology, which was listed in the position description as required experience. See ROI 2 at 323-324; 414.

Regarding Complainant's Schedule A application, the Deputy Director of HR added that Schedule A does not guarantee that the applicant will be interviewed or selected. Id. She stated that it is up to the hiring manager to decide if they want to interview the applicant as Schedule A does not give any special selection authority. Id.

We find that the Agency proffered 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). In a non-selection case, pretext may be found where the complainant's qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). 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.

In claim 1, Complainant stated his disability was a motivating factor because he was the most qualified and the Agency was aware of his disability. Complainant stated that the Agency's hiring managers should have taken affirmative action and started reviewing job applicants from candidates with disabilities. In arguing this, Complainant did not point to any specific evidence in the record that was submitted in his application package that establishes that he was plainly superior to Selectee 1. We also find that the Agency being aware of Complainant's disability does not in itself provide evidence of pretext. Bare assertions, such as Complainant's, are insufficient to prove pretext. See Erby v. U.S. Postal Serv., EEOC Appeal No. 0120064377 (Feb. 12, 2008).

Complainant also argued that his age was a motivating factor in claim 1 because in the past, younger candidates were selected for positions he applied for, and the position had very specific requirements regarding qualifications that very few applicants could meet. In arguing this, Complainant did not provide any evidence to support his contention regarding selectees for other positions. Additionally, we find that Complainant's argument regarding the very specific and specialized position requirements provides no evidence of pretext or discrimination. We note that there are no requirements that Agencies limit the experience requirements in posted positions in the way that Complainant alludes to in his arguments.

In claim 2, Complainant stated that he believed his protected bases were motivating factors in the Agency's decision not to select him for the position because he is over 40 and he suspects that Selectee 2 was younger and with less experience and without a disability. We find these arguments to be more bare assertions.

Additionally, 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). 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.

Despite Complainant's bare assertions in claims 1 and 2, we find that Complainant has not demonstrated that his qualifications were plainly superior to the selectees in such a way that the disparities in his qualifications and those of the selectees were of such weight and significance that no reasonable person could have chosen them over him. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006).

Complainant did not provide any persuasive arguments of pretext for claim A, but we note that Complainant made several arguments regarding the Agency's handling of his Schedule A application packages and whether it was forwarded to the Hiring Managers for the positions. In response to Complainant's arguments, the Commission has found that employers are entitled to make their own business judgments, such as hiring and selection processes. Additionally, the Commission has found that although federal agencies are authorized to use Schedule A hiring authority when considering people with disabilities, the use of this authority is not mandatory, and that while Executive Order 13548 provides that agencies shall generally increase utilization of Schedule A hiring authority, the Executive Order does not mandate the use of Schedule A authority in any particular hiring decision. See Maricruz Y. v. Dep't of Homeland Security, EEOC Appeal No. 2019000976 (Dec. 10, 2019); Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131609 (Dec. 16, 2014); Hein v. National Archives and Records Administration, EEOC Request No. 0520130314 (Aug. 5, 2013).

Regardless, the focus in a discrimination case such as this is on the employer's motivation, not its business judgment. See Matilda C. v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0720140027 (Jul. 31, 2018); Eric M. v. Dep't of the Interior, EEOC Appeal No. 0120162148 (Feb. 13, 2018); Glass v. U.S. Postal Serv., EEOC Appeal No. 07A50068 (Jun. 15, 2006). After reviewing the record, we find no evidence of discriminatory or retaliatory motive.

We also find that Complainant did not demonstrate that his qualifications were plainly superior to the selectees such that the disparities in his qualifications and those of the selectees were of such weight and significance that no reasonable person could have chosen them over him. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006). As such, we find that Complainant has not established that the Agency subjected him to discrimination based on disability and age in claims 1 and 2, or discrimination based on disability and in reprisal for protected activity in claim A.<sup>3</sup>

### Harassment

As discussed above, Complainant has not provided sufficient arguments or evidence that claims 1, 2, and A 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 3, 4, 5, and B to support his harassment claim on the bases of disability, age, 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 in claim B, 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

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<sup>3</sup> While we do not find any evidence of discrimination in these particular claims, we encourage the Agency and its HR management officials to review the Schedule A Hiring Authority policies and procedures to ensure compliance with all federal directives.

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 claim 3, Complainant alleged that the Agency subjected him to harassment when on multiple occasions management failed to forward Complainant's Schedule A hiring package for consideration, and this denied him an opportunity to compete for employment opportunities. More specifically, Complainant alleged that the SPPM did not transfer his application documents to the hiring managers for several positions because she refused to respond to his inquiries about the status of his applications. At the core of his complaint, Complainant testified that he believes some HR management officials, including the SPPM ignored OPM regulations related to Schedule A hiring authority which led to systemic discrimination.

In response, the SPPM stated that Complainant's resume was not sent to the selecting official due to an oversight.<sup>4</sup> ROI 1 at 154. However, as stated above, the Commission has found that although federal agencies are authorized to use Schedule A hiring authority when considering individuals with disabilities, the use of this authority is not mandatory. We note that in the three specific positions listed in Complainant's complaints, he applied two different ways by submitting an application through OPM and sending a Schedule A hiring package to the SPPM. As such, we find that Complainant was in fact given consideration for the positions through the applications he sent through OPM.

In claim 4, Complainant alleged that the Agency subjected him to harassment when on unspecified dates Complainant was restricted from applying for external research funds, organizing groups to conduct research, and attending international meetings and conferences to present his work. Complainant explained that since he did not have a federal position, he could not apply for funding and participate in other opportunities. We find that this incident did not occur as alleged.

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<sup>4</sup> A mistake, without more, does not establish discriminatory animus. See Calvin D. v. Dep't of the Army, EEOC Appeal No. 0120171662 (Sept. 25, 2018); Velda F. v. Dep't of the Interior, EEOC Appeal No. 0120122684 (Jul. 10, 2018).

In his deposition, Complainant admitted that not having a position within the Agency did not restrict him from applying for external research funds, organizing groups to conduct research, or attending international meetings and conferences to present his work. Complainant File at 121-122. Complainant stated that an individual just had to be associated with a research institution, not specifically the listed Agency's employee. Id.

In claim 5, Complainant alleges that the Agency subjected him to harassment when he was forced to provide information on the nature of his disability in an online application. Complainant stated that he was not able to submit his Schedule A application without providing medical information about his conditions. We find this argument to be without merit. Complainant disclosed his medical conditions on the standard form used for Schedule A applications. Applicants with disabilities are not required to disclose their disabilities but may *voluntarily* identify their particular disability by utilizing the Schedule A Hiring Authority. See OPM Guidance on 5 C.F.R. § 213.3102(u) Schedule A Hiring Authority. However, in order to be eligible for employment through the Schedule A non-competitive process, documentation of an applicant's disability is required. Id. Given that Schedule A is not mandatory, we find that Complainant was not forced to provide any information regarding his disability, but voluntarily chose to when he submitted additional applications through the Schedule A Hiring process.

We understand that Complainant was frustrated with the Agency's actions in these claims, however, there is no evidence that the incidents described in claims 3, 4, and 5 (medical disclosure) 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 and age in claims 3, 4, and 5 (medical disclosure claim).

In claim 5 and claim B, Complainant alleged that the Agency subjected him to harassment when on unspecified dates leading back to 2014, management failed to respond to Complainant's multiple requests for assistance and information to apply for Schedule A job openings and other application processes. In claim 5, Complainant stated that he was requesting advice, acceptance of documents and requests for information, but there were no responses from management officials. In claim B, Complainant states that he asked HR personnel on four occasions about the criteria upon which his application package was forwarded to the hiring managers for consideration but received no response. Complainant stated that he inquired about the status of his application after applying, did not receive responses, and believes he was harassed because he filed two complaints naming HR personnel.

A HR Specialist testified that Complainant sent a lot of emails to the Agency's HR personnel and that she responded to a September 28, 2021 email from Complainant giving him information on how to submit an application through the OPM website. ROI 2 at 191. She stated that Complainant's inquiries were addressed, just maybe not to his satisfaction. Id. The SPPM stated that she corresponded with Complainant to notify him when his resume was sent to HR and when he was not selected (deemed unqualified) for the position in claim A. ROI 2 at 238. The Hiring Manager in claim A also testified to speaking with Complainant after he was notified of his nonselection. ROI 2 at 252-253. She stated that she redirected Complainant to the SPPM for any further inquiries. Id.

While Complainant offers no evidence to suggest that the Agency's actions in claims 5 and B were taken in order to harass him on the bases of disability or age, he provided direct evidence to establish the Agency's retaliatory motive in claim B. In Complainant's appellate brief, he cited an April 19, 2021 email from the SPPM to the Director of Center for Civil Rights Enforcement stating that she did not respond to Complainant's inquiries because she was instructed not to respond to him by the Branch Chief of Personnel and Labor Solutions because of his informal complaint. See ROI 1 at 403. Complainant asserts that the SPPM's email is evidence of reprisal in support of his allegations in claim B. We agree and find that the April 19, 2021 email is direct evidence of retaliatory motive. We also find that the Agency's action in claim B in not responding to Complainant's inquiries regarding application processes and various positions was sufficient to dissuade a reasonable person from participating in protected activity. Accordingly, Complainant has established that the Agency subjected him to retaliation with respect to claim B.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM in part the Agency's final order adopting the AJ's summary judgment decision finding no discrimination in claims 1, 2, 3, 4, 5, and A; and REVERSE in part the Agency's final order adopting the AJ's summary judgment decision finding no discrimination in claim B and REMAND that claim back to the Agency for further processing in accordance with this decision and the Order below.

### ORDER

The Agency is ordered to take the following remedial actions:

1. Within **ninety (90) calendar days** of the date this decision is issued, the individuals identified in this decision as SPPM, Branch Chief of Personnel and Labor Solutions Branch, and Director of the Center for Civil Rights Enforcement shall complete 4 hours of interactive EEO training, if they are still employed by the Agency, on responsibilities under Title VII with special emphasis on reprisal; the extent to which EEO activity must be kept confidential; and the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises [their] right to oppose practices made unlawful by, or who participates in proceedings under, the Federal equal employment opportunity laws. Donte L. v. Dep't of Justice, EEOC Request No. 2019005117 (Jan. 22, 2020).

For assistance in obtaining the necessary training, the Agency may contact the Commission's Outreach, Training and Engagement Division via email, at [FederalTrainingandOutreach@eeoc.gov](mailto:FederalTrainingandOutreach@eeoc.gov). The Agency shall provide the Compliance Officer with proof of attendance, as well as the contents and materials it used for the training. If the named officials had left the Agency's employ, the Agency shall furnish documentation of their departure date.

2. Within **one hundred twenty (120) calendar days** from the date this decision is issued, the Agency shall consider disciplining the SPPM and Director of the Center for Civil Rights Enforcement. *The Commission does not consider training to be disciplinary action.* The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.
3. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall conduct and complete a supplemental investigation to determine whether Complainant is entitled to compensatory damages for the violation of Title VII in claim B. In so doing, the Agency shall:
  - (a) Issue a notice to Complainant of his right to submit evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal

No. 01922369 (Jan. 5, 1993) and request evidence from Complainant in support of compensatory damages.<sup>5</sup>

- (b) Issue a new final agency decision ("Compensatory Damages FAD") based on the findings of the supplemental investigation. The Compensatory Damages FAD shall state the amount (if any) of compensatory damages owed to Complainant and explain how the Agency determined that amount. The Compensatory Damages FAD shall include appeal rights to the Commission.

4. Within **sixty (60) calendar days** of the date the Compensatory Damages FAD is issued, the Agency shall pay Complainant the amount of compensatory damages it determined are owed. If there is a dispute over the exact amount of compensatory damages owed, the Agency shall pay the undisputed amount to Complainant. If Complainant disagrees with the agency's award, they may challenge the Agency's decision on the amount of compensatory damages by filing an appeal of the Compensatory Damages FAD with the Commission. Instructions on how to appeal, including the deadline to file, will be included in the appeal rights portion of the Compensatory Damages FAD.<sup>6</sup>

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<sup>5</sup> The Notice shall provide Complainant with **thirty (30) calendar days** to respond (with an option and instructions to request an extension in the case of extenuating circumstances). Complainant has a duty to cooperate with Agency's investigation to determine compensatory damages, including responding to agency requests for documentation or completing agency forms.

<sup>6</sup> To establish entitlement to compensatory damages, the evidence must show a causal relationship between the Agency's discriminatory action and any pecuniary (monetary) or non-pecuniary losses/harm experienced by Complainant. For more information on evidence to determine compensatory damages: EEOC Management Directive 110, Ch. 11 § VII (Aug. 5, 2015), available at [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_11.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm) (provides the types of compensatory damages available under EEOC statutes and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

5. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall post a notice in accordance with the section listed below, entitled "Posting Order." The Agency shall provide the Compliance Officer with the original signed and dated notice, reflecting the dates that the notice was posted, along with evidence that the notice was physically posted at the facility and electronically.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Beltsville, Maryland, Agricultural Research Service (ARS) Human Resources office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

#### ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket

number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint.

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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
Carlton M. Hadden, Director  
Office of Federal Operations

January 8, 2025  
Date