



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Thaddeus N.,¹
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023004779

Hearing No. 420-2022-00035X

Agency No. ARREDSTON21JUN02153

DECISION

Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's July 25, 2023, final order 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

At the time of events giving rise to this complaint, Complainant worked as a Materials Engineer at the Agency's Structures and Materials Division in Redstone Arsenal, Alabama.

On August 11, 2021, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and harassment on the bases of age

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.

(67), race (Middle Eastern), and national origin (Turkey),² and in reprisal for prior protected EEO activity, when:

1. he was subjected to harassment from on or about September 3, 2020, to July 30, 2021, when:
 - a. from on or about April 15-July 30, 2020, the Branch Chief excluded Complainant from regularly scheduled Materials Branch team meetings;
 - b. from on or about July 7-30, 2021, the Branch Chief and Team Lead added duties without reason;
 - c. from July 16-22, 2021, the Branch Chief unnecessarily questioned Complainant's analysis of work matters, in an attempt to make him look incompetent;
 - d. on June 9, 2021, the Team Lead questioned the thoroughness of Complainant's work and accused him of not doing a full response to a matter he intended to fully respond to;
2. on June 14, 2021, the Director failed to take corrective action concerning Complainant's allegations of harassment by the Branch Chief and Team Lead; and
3. effective July 30, 2021, the Director and the Branch Chief subjected Complainant to a constructive discharge when they compelled his retirement due to a hostile work environment and a failure to take corrective action.³

² The Commission notes that Turkey has since changed the spelling of its name to Türkiye.

³ The Agency did not process Complainant's constructive discharge claim as a mixed-case claim, which can be appealed to the Merit Systems Protection Board (MSPB). 29 C.F.R. § 1614.302. Nevertheless, the Commission may properly assume initial jurisdiction of a mixed-case issue when, for example, the allegation is so firmly enmeshed in the EEO process that it would unduly delay justice and create unnecessary procedural complications to remand it to the MSPB. See Richardson v. Dep't of Veterans Affairs, EEOC Appeal Nos. 01982915 01984977 (Nov. 5, 2001). Here we find that this claim is so firmly enmeshed in the EEO forum that it would better serve the interests of administrative economy to address it in the instant appeal.

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). Complainant timely requested a hearing.

Complainant moved to reinstate a dismissed claim when:

4. on or about July 29, 2021, the Branch Chief rated Complainant a grade of "C" on his most recent performance appraisal and refused to provide a performance bonus.

The AJ granted Complainant's request.

The Agency subsequently filed a Motion for Summary Judgment. Complainant filed a Motion for Partial Summary Judgment for claim 4, and a separate opposition to the Agency's motion. The Agency opposed Complainant's motion. Over Complainant's objections, the AJ granted the Agency's motion and issued a decision without a hearing on July 5, 2023. The AJ determined that Complainant failed to show that the Agency's actions were motivated by discriminatory or retaliatory animus and granted the Agency's motion in its favor.

The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

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. (as revised, August 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).

Upon review, we find the record in the present case was fully developed. 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 he must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute.

On appeal, Complainant asserts that he has shown discriminatory animus; for example, Complainant has an accent, and the Team Lead confirmed that he was aware of Complainant's national origin. In addition, Complainant claims that harassment and reprisal have been ongoing since his EEO complaint in 2020. However, a management officials' awareness of a protected category does not prove a causal nexus to a complained of action. Mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in his favor. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

For claim 1(a), a coworker explained that Complainant was not excluded from team meetings, and that all government members of the Materials Branch were invited. Rather, Complainant informed this coworker of technical issues that prevented him from calling into the meetings. ROI at 512. Complainant did not show that the alleged harassment in claims 1(b) through 1(d), were based on a protected class. Further, the Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010).

Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of his protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). There is no evidence that these work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class. We further find that the complained of incidents would not deter a reasonable person from engaging in protected EEO activity. Accordingly, we find that Complainant did not establish that the Agency subjected him to harassment based on age, race, or national origin, or in reprisal for prior protected EEO activity.

Regarding the alleged constructive discharge (claim 3), a discriminatory constructive charge occurs when an employer, motivated by discriminatory animus, creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in Complainant's position would feel forced to resign. See Cullors v. Dep't of Defense, EEOC Appeal No. 01A41560 (Jun. 27, 2006). However, the Commission has found that an extremely difficult and upsetting employment situation is not enough for a reasonable person to find working conditions intolerable. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120121920 (Jun. 25, 2014) ("dissatisfaction with work assignments, a feeling of being unfairly criticized or difficult or unpleasant working conditions are not so unreasonable as to compel a reasonable person to resign," quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)). To compare, the Commission found a constructive discharge after an employee resigned due to the open and repeated use of racial epithets in front of multiple witnesses in Complainant v. Dep't of the Air Force, EEOC Appeal No. 0120123332 (September 10, 2014). We find that Complainant did not prove that his working conditions were discriminatory or so intolerable that a reasonable person would resign.

For claim 4, Complainant contends that the Agency failed to provide any admissible evidence, specifically a sworn statement, regarding his "C" performance rating in 2021.⁴ Complainant Appeal Brief at 26-7.

⁴ Complainant argues that the Agency failed to ask for summary judgment for claim 4, and the AJ's grant of summary judgment did not address this claim. However, the Agency included Complainant's alleged lowered performance evaluation within its argument for the harassment claim. Agency Motion for Summary Judgment at 10.

However, in Complainant's affidavit, he testified that the Branch Chief put "negative comments" in his rating as "entry level tasks" on July 29, 2021, and Complainant submitted a document with detailed comments about his performance. While this statement does not reveal the author or date, we will credit Complainant's attestation that the Branch Chief sent this to him on July 29, 2021. The comments included that the vast majority of Complainant's tasks were entry level, and he struggled to complete them in a timely manner. Complainant also frequently only stated "no issue" in his work products, which did not provide a detailed materials engineering analysis as a rationale for approval or indicate why it took an average of twenty (20) calendar days to complete his tasks. ROI at 163, 197-9.

While the Branch Chief did not specifically reference this performance rating, he provided sworn testimony that is consistent with the evidence provided by Complainant about his performance issues. Notably, the Branch Chief averred that Complainant struggled to complete simple entry level tasks on time. Further, his tasks were the type that would be assigned to a brand-new employee, and Complainant's workload was well below the norm for a senior level Materials Engineer. Regarding a specific task, the Branch Chief asked that Complainant provide a reference and rationale, but he initially refused. When Complainant finally uploaded the reference, he never explained his rationale to demonstrate his understanding of the chemistries involved. The Branch Chief added that Complainant was non-responsive to the Team Lead's questions, and he was argumentative. ROI at 362-4. We find sufficient record evidence of the Agency's legitimate, nondiscriminatory reasons for Complainant's "C" performance rating issued on July 29, 2021.

Complainant contends that his performance was exceptional, and he deserved an "A." However, the Commission has held that a complainant cannot demonstrate pretext based on a subjective assessment of his own performance. See Frederick A. v. Equal Employment Opportunity Comm., EEOC Appeal Nos. 2022003887 and 2022004927 (Feb. 21, 2024); Britany N. v. U.S. Postal Serv., EEOC Appeal No. 2021004882 (Jul. 11, 2023); Trent M. v. Dep't of Commerce, EEOC Appeal No. 2022000776 (Nov. 2, 2022). 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.

Accordingly, we AFFIRM the Agency's final order fully implementing the AJ's 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

March 6, 2025

Date