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

[redacted]
Abraham G.,[1]
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2023005323

Hearing No. 520-2022-00324X

Agency No. 4B-060-0112-21

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 22, 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. 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 AFFIRMS the Agency's final order.

ISSUES PRESENTED

(1) Whether the EEOC Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

[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.

(2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination or harassment on the bases of race and age.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Postmaster at the Agency's Mansfield Center Post Office in Mansfield, Connecticut.

On September 15, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on race (Asian/Bangladesh) and age (60) when, on July 26, 2021, management attached Complainant's discipline letter to an email that was sent out to the Connecticut District email distribution list. Complainant does not challenge the framing of the complaint.

The Agency originally dismissed the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1). Complainant appealed the dismissal to the Commission, which reversed the dismissal and remanded the matter to the Agency for investigation. Bart M. v. U.S. Postal Serv., EEOC Appeal No. 2022000610 (Feb. 9, 2022). 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 EEOC Administrative Judge (AJ). Complainant requested a hearing. Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

During the relevant period, Complainant's supervisor (S1A) was Manager of Post Office Operations. Before S1A became Complainant's supervisor, Complainant was supervised by a different acting supervisor (S1B), Postmaster. On May 19, 2021, Complainant and S1B (who, as of several months prior, was no longer Complainant's supervisor) received an email from the Agency's Threat Detection division, which administered the Agency's "CyberSafe" system. ROI at 148. The subject line of the email, sent on behalf of CyberSafe, indicated that it was a "Cybersecurity Policy Violation Memorandum (Major)." Id.

Because S1B was still listed in the CyberSafe system as Complainant's supervisor, he received the email and not S1A.

The email indicated that, on the day before, it was discovered that Complainant had connected an "unauthorized removable device" to his workstation that "contained inappropriate content." ROI at 145. The email also attached a corresponding screenshot showing the files that were on the removable device. One of these files was titled "Kalliny Nomura." Id. at 149. Upon receiving the email from CyberSafe, S1B forwarded it to S1A, stating "I received this in error. This is bad[.] Look at some of the names of the files he opened. This is for you." Id. at 148.

Later that afternoon, Complainant repeatedly contacted S1B requesting to speak with him about the incident, and S1B responded by text message:

> Look, this is the last time your inability to respect and preserve your career at the post office is going to shit on me. I wish I was still your boss. I'd make sure you would never cause me anymore trouble[.] You run your mouth about me every chance you get. But I am the one you come to when you fuck up. Oh, I almost forgot, Killany says hello.

ROI at 154. Complainant took S1B's mention of "Killany" to be a reference to one of the titles of the files contained on the removable device ("Kalliny Nomura"). Id. at 135. S1B admitted to sending the text message "out of sheer frustration" because Complainant had called his home and mobile phone over 15 times and was "drunk and belligerent." Id. at 176.

S1A eventually discussed the incident with Complainant, who did not deny the alleged conduct. As a result, on July 20, 2021, S1A issued Complainant a Proposed Letter of Warning in Lieu of 14-Day Time-Off Suspension (LOW). The LOW charged Complainant with unacceptable conduct for connecting an unauthorized device that contained "inappropriate content files," violating the Agency's Cybersecurity Policy, and endangering the Agency's information technology network. ROI at 145.

Several days later, on July 26, 2021, S1A received an email from a Postmaster at a different facility regarding arrow key certifications.[2]

[2] An arrow key is a type of master/universal key used by Agency personnel to access collection boxes and apartment mailbox panels.

The email, with the subject line "PLEASE READ Clarification: Arrow Key Certifications," was sent to several Connecticut-area Agency email addresses and management officials, including S1A. ROI at 142. S1A replied-all to this email—stating that the certifications must be done by Friday—and, in doing so, attached a document titled "[Untitled].pdf" that contained Complainant's LOW. Id. S1A averred that he had meant to attach a different item to the email "and did not realize the pasted attachment was the wrong one." ROI at 162. The next morning, S1A was notified of the mistake. According to S1A, he attempted to recall the email immediately, sent a follow-up email telling recipients to disregard the contents of the prior email, told his own supervisor, and called Complainant to apologize.

The AJ initially found that whether Complainant could establish a prima facie case of discrimination based on race or age was "suspect," as he suffered no adverse consequences as a result of his LOW being attached to an unrelated email, even if it was embarrassing. AJ Decision at 6. Assuming that Complainant could establish a prima facie case of discrimination, the AJ found that the Agency articulated a legitimate, nondiscriminatory reason for its actions that Complainant failed to rebut as pretextual, namely that S1A sent the LOW by accident and attempted to recall the email.

The AJ also found that Complainant could not establish that he was subjected to harassment. The AJ concluded that the incident was not sufficiently severe or pervasive and that it had not affected a term or condition of Complainant's employment. The AJ further determined that, while it was not explained how the LOW became attached to an unrelated email about arrow keys, there was no evidence that S1A sent the email (or that his purpose in attaching the LOW) was because of Complainant's age or race.

In responding to the Agency's motion for summary judgment before the AJ, Complainant attached as an exhibit an unsworn email sent to him on January 5, 2023, purportedly from a Rural Carrier (RC) who had worked at a different post office with Complainant and S1B, and was also from Bangladesh. In the statement, RC stated that S1B had discriminated in "various ways" against Complainant and that RC understood S1B to "not like Ban[g]ladeshi people." Complainant's Resp. to Agency's Mot. for Summ. J., Ex. A.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ improperly issued the summary judgment decision. Complainant maintains that he can establish prima facie cases of both discrimination and harassment based on race and age. He argues that the AJ erred by finding that he did not suffer adverse consequences from the incident and that the incident was not sufficiently severe. Complainant also argues that there is a genuine dispute of material fact regarding S1A's motives, because Complainant has presented evidence showing that S1B had "a history of blatant discrimination against Complainant, was involved in the process to get Complainant reprimanded for his actions and publicizing such reprimand." Complainant contends that S1B, when he was Complainant's supervisor, tried to replace him with a younger supervisor, spread information throughout the facility of Complainant's prior drunk driving infraction, and made fun of Complainant's accent. Complainant also argues that the text message S1B sent him evinces discriminatory animus. Based on this, he argues that S1B "was significantly involved in the publication of Complainant's [LOW] and he did so because" of Complainant's race and age. Complainant further argues that the Agency's explanation of the incident (i.e., that it was an accident) is pretextual and that credibility determinations must be made at a hearing, since S1A's and S1B's affidavit statements contradict Complainant's own recollections.

The Agency opposes Complainant's appeal and requests that we affirm the AJ's decision. The Agency argues that Complainant's repeated references to S1B are irrelevant, as there is no evidence that S1B was involved in the issuance or dissemination of the LOW. The Agency argues that S1B properly forwarded the CyberSafe email to S1A, as S1B was no longer Complainant's supervisor. The Agency further maintains that Complainant's evidence of discriminatory animus on S1B's part consists only of unsupported and self-serving claims, and there is no other evidence to show that S1A's actions were motivated by Complainant's protected bases. The Agency also argues that the incident does not rise to the level of severe or pervasive conduct.

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 Chap. 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

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact finder could not find in Complainant's favor.

As an initial matter, we note that although the accepted claim, as defined by the Agency, mentioned harassment only, the parties and the AJ also analyzed the claim under a disparate treatment framework. We therefore will analyze the claim under both frameworks.

To prevail in a disparate treatment 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). Complainant must initially establish a prima facie case by demonstrating that Complainant 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.

To establish a prima facie case of disparate treatment based on race or age, Complainant must show that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) he was treated differently than similarly situated employees outside his protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nannette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (Mar. 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008), request for recons. denied, EEOC Request No. 0520080545 (June 20, 2008).

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). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

We find Complainant has established the first element of a prima facie case, as he is Asian and over 40 years old.

For purposes of the second element, an "adverse employment action" is an action by the employer "resulting in a material change in [a complainant's] work duties or working conditions," as well as "tangible personnel actions" (such as hiring, firing, demotion, promotion), or "significant change[s] in [a complainant's] responsibilities." Cucukow v. Dep't of Educ., EEOC Appeal No. 0120064678 (July 22, 2008). Here, we find that the dissemination of the LOW to the Agency's Connecticut District email distribution list was not an adverse employment action. We note that the complaint does not challenge the LOW nor does Complainant deny that the conduct as stated in the LOW occurred; rather, the claim involves only S1A's attachment of the LOW to an email sent to area management. While Complainant asserts that this embarrassed him and made his coworkers aware of his LOW, the record does not indicate that the incident sufficiently changed Complainant's working conditions to constitute an adverse employment action. As to the third element of a prima facie case, Complainant has not established an evidentiary link between his protected bases and S1A's actions. Complainant makes much of S1B's purported bias against him, but he has not shown that S1B had any influence over S1A (except insofar as S1B notified S1A of the CyberSafe email, which was supposed to be sent to Complainant's current supervisor).

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions that Complainant fails to rebut as pretext for race or age discrimination. S1A averred that the attachment (which we note appeared to be an untitled PDF document) of Complainant's LOW to the email was inadvertent and unintentional and that, upon learning of it, he immediately tried to recall the email and apologized to Complainant. S1A also denied that S1B had any involvement in the incident. See ROI at 170-71. Therefore, the Agency's explanation is that it was merely a mistake on S1A's part, unrelated to Complainant's protected bases.

Outside of his own bare assertions and speculation, Complainant provides no evidence that creates a genuine dispute regarding pretext. We note that a mistake made by an agency is not evidence of pretext unless there is evidence that the mistake was based on a complainant's protected classes, and there is no such showing here. See Irvin W. v. Dep't of Transp., EEOC Appeal No. 0120141275 (Sept. 1, 2016); (citing Vickey S. v. Dep't of Def., EEOC Appeal No. 0120112893 (Nov. 17, 2015)).

Complainant's contentions that S1B made fun of his accent and his English pronunciations, tried to replace him with a younger supervisor, and then later influenced S1A to attach the LOW to the email because S1B could no longer discriminate against Complainant as his supervisor, are based solely on Complainant's own affidavit and deposition statements. We note that, in addressing an AJ's issuance of a decision without a hearing, a complainant's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for a hearing. See Celotex, 477 U.S. at 324. While Complainant also relies on RC's unsworn statement sent to him via email to show that S1B harbored discriminatory animus, we note that RC's statement is entirely conclusory and unspecific as to S1B's alleged discriminatory acts. RC's statement is also irrelevant to the issue of how or whether S1B influenced S1A to attach the LOW to the email.

We also note that the text message to which Complainant cites as evidencing S1B's discriminatory animus does not make any references to Complainant's race or age. While the text message—sent after Complainant's numerous attempts to speak to S1B about the cybersecurity incident—might indicate frustration or dislike of Complainant, there is no evidence within the text of racial or age-related bias. The reference in the text to "Killany" appears to be a gibe at Complainant for the inappropriate content found on the removable device; other than calling this "intentional harassment," Complainant fails to explain how this reference was related to his race or age. We find that, even viewing the record in the light most favorable to Complainant, he failed to establish that the Agency's explanation is a pretext for discrimination.

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); see also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001).

The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Enforcement Guidance on Harassment in the Workplace (Harassment Enforcement Guidance), EEOC Notice No. 915.064 (Apr. 29, 2024).

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

We find that Complainant fails to establish his harassment claim for either of his alleged bases. Under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), Complainant's claim of hostile work environment must fail. See Harassment Enforcement Guidance. A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Complainant therefore fails to establish the third element of a prima facie case of harassment.

Furthermore, we find that the incident as alleged in Complainant's complaint does not rise to the level of severe or pervasive. A single incident or group of isolated incidents will not be regarded as discriminatory harassment unless the conduct is severe. See James v. Dep't of Health & Hum. Servs., EEOC Request No. 05940327 (Sept. 20, 1994); Marvin D. v. U.S. Postal Serv., EEOC Appeal No 0120171622 (June 26, 2017). Here, even if Complainant had been able to show a genuine dispute of material fact with regard to S1A's motives in attaching the LOW to the email, we find that this single event did not subject Complainant to conduct so severe or pervasive that a reasonable person in his position would have considered it hostile or abusive. Harris, 510 U.S. at 22. S1A also quickly attempted to remedy the situation: upon realizing his mistake the next day, S1A recalled the email, sent a follow-up to disregard it, and apologized to Complainant, which Complainant does not dispute. We note that the antidiscrimination statutes are not a civility code. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). We therefore find that Complainant has not established that he was subjected to a discriminatory hostile work environment as alleged.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is AFFIRMED.

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

January 15, 2025
Date