



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

[REDACTED]
Junior T.,¹
Complainant,

v.

Todd B. Hunter,
Acting Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024000272

Hearing No. 420-2020-00315X

Agency No. 200I-0005-2020-103005

DECISION

On September 25, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 28, 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.

ISSUES PRESENTED

- (1) Whether the EEOC Administrative Judge's (AJ) 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 and harassment based on reprisal for prior protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Technologist, GS-2210-12, at the Agency's Office of Information and Technology, Tuscaloosa Veterans Affairs Medical Center in Tuscaloosa, Alabama.

Complainant initially contacted an EEO counselor on February 28, 2020. Thereafter, on April 5, 2020, Complainant filed a formal EEO complaint alleging he was subjected to a hostile work environment based on his prior EEO activity when:

1. On October 1, 2019, he was reassigned from Lead IT Specialist to IT Specialist.
2. Since October 1, 2019, he has been subjected to allegations of improper handling of computers.
3. On February 19, 2020, a fact-finding investigation was initiated regarding his alleged improper storage of computers in an IT closet.
4. On February 19, 2020, his professional designation of "Ph.D." was ignored by his supervisor.

Complainant identified his prior EEO activity as follows: his filing of formal EEO complaints in 2012 and 2016; his request for whistle blower protection in 2018, related to an alleged hostile work environment; and his undated request to Office of the Inspector General related to an alleged hostile work environment.

Regarding claim 1, Complainant stated that Supervisor-1 told Complainant that a job had been created as a GS-12 IT specialist that was designed just for Complainant. Complainant stated that Supervisor-1 told Complainant that no one else would get the job and all that Complainant needed to do was apply. Complainant reported a belief that he had previously been passed over for promotions to supervisory positions, such as in 2016. Complainant stated that it was important for him to be able to lead, as he had been doing in his GS-11 Lead IT position for approximately five years.

Complainant's first-line supervisor (Supervisor-1) stated that the Agency posted a job announcement. Supervisor-1 stated that Complainant applied for the position and was selected for the position. Supervisor-1 reported confusion with how Complainant accepting the new position could be considered harassment. Complainant's third-line supervisor (Supervisor-3) stated that Complainant applied for a GS-12 non-supervisor, non-lead IT specialist position. Supervisor-3 stated that Complainant applied for and was selected for the position. Supervisor-3 stated that the organization was moving away from lead positions. The record contains the SF-50 showing Complainant's promotion from the GS-11 position to his current GS-12 position effective September 29, 2019.

Claims 2 and 3 are discussed together as they are intertwined. Supervisor-1 stated that on or around October 1, 2019, a security specialist found computers stored in a closet. Supervisor-1 stated that he then verbally told all technicians to stop storing computers in closets. Supervisor-1 reported that the security specialist found more computers stored in a closet a few days later. Supervisor-1 described researching to find out the employee responsible for placing the computers in the closet, contrary to his order, and determining that Complainant was responsible. The record shows that Supervisor-1 and Complainant had a contentious exchange over email regarding the computers and their storage. Supervisor-1 stated that he worked with local human resources to have a fact-finding investigation into Complainant placing the computers in the closet and his subsequent email response. Supervisor-1 stated that an Agency employee was chosen who was outside of Supervisor-1's scope and influence so the fact-finding would not be deemed biased.

Complainant stated that he was well within his authority to place computers in the IT closet. Complainant reported a belief that placing the computers in the closet before they are deployed was common practice at the Agency. Complainant stated he left a meeting with Supervisor-1 believing that he and Supervisor-1 agreed that Complainant could leave the computers in the closet while Complainant and Supervisor-1 developed a solution to the potential lost work. Complainant stated that Supervisor-1 created the whole problem when Supervisor-1 had a device removed that would have allowed Complainant to store the computer in Complainant's office. Complainant stated that he did not receive the results of the fact-finding. Complainant stated that he asked for a chance to respond to the accusations but that he was denied. Complainant stated he was not allowed to start a fact-finding into Supervisor-1 who made the initial accusation.

Regarding claim 4, Complainant stated that Supervisor-1 knew that Complainant has a doctorate degree and that they had previously discussed that Complainant would prefer to be addressed as "doctor" Complainant stated, "[Supervisor-1] forcibly said 'okay [Complainant]' with a 'Yeah right, whatever look on his face'." Report of Investigation (ROI) at 85. Complainant stated this occurred during a private conversation without any witnesses. Complainant stated that Supervisor-1 addresses other people who have doctorate degree as doctor and identified two individuals. Supervisor-1 stated that he has never been asked to refer to Complainant as doctor; nor has he been shown any documentation of such a degree. Supervisor-1 stated the only related discussion he has had with Complainant was whether educational designations could be added to the signature blocks for emails. Supervisor-1 stated that he directed Complainant to the person who issued the relevant guidance. Supervisor-1 stated that the two individuals Complainant identified were introduced to Supervisor-1 as doctors, but that Complainant has never asked to be referred to as doctor.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. The AJ assigned to the case issued a Notice of Intent to Issue a Decision Without a Hearing on July 28, 2023. Complainant and the Agency responded to the Notice. Thereafter, the AJ issued a decision without a hearing finding no discrimination on August 23, 2023. 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.

CONTENTIONS ON APPEAL

Complainant contends that the claims in the case should be viewed as part of a pattern of harassment. Complainant contends that the pattern developed after Complainant began to oppose hostility in 2018. The Agency requests affirmation of its final order.

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

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.

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), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).; 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. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 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; in this case, his engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

We find that Complainant failed to prove that the conduct complained of was based on Complainant's prior EEO activity. In the instant case, Complainant failed to present any evidence that could support a finding of retaliatory animus. Complainant failed to identify how his prior protected activity was related to the incidents in the complaint.

Furthermore, we find the conduct of which Complainant complained is part of the ordinary tribulations of the workplace. The record demonstrates that Complainant was not reassigned but had applied for and accepted a promotion to the non-lead IT position at issue in claim 1. In claims 2 and 3, it is undisputed that Complainant placed the computers in the closet, which was contrary to Supervisor-1's verbal instructions. Supervisor-1 explained that he initiated an impartial fact-finding to determine whether Complainant committed a punishable offense. The Commission has held that routine work assignments, instructions, admonishments, and addressing performance deficiencies do not rise to the level of harassment because they are common workplace occurrences. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120130465 (Sept. 12, 2014); Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010).

We note that anti-discrimination statutes are not civility codes designed to protect against the ordinary tribulations of the workplace. See Faragher v. Boca Raton, 524 U.S. 775, 788 (1998) (judicial standards must “filter out complaints attacking the ordinary tribulations of the workplace”). Rather, they forbid “only behavior so objectively offensive as to alter the conditions of the victim’s employment.” See Oncale v. Sundowner Offshore Service, Inc., 23 U.S. 75, 81 (1998). Upon review, we find that Complainant failed to make such showing here. Therefore, we find that Complainant failed to establish a prima facie case of discrimination.

CONCLUSION

Accordingly, the Agency’s final order 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)

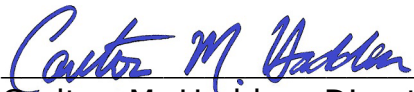
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

February 6, 2025

Date