



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

[REDACTED]
Hayden R.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024000798

Agency No. 200P-663-2022-145872

DECISION

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 October 31, 2023, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

The issues presented are whether the Agency properly dismissed two claims and found that Complainant was not subjected to retaliatory harassment as alleged.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Chief Logistics Officer at the Agency's Puget Sound Health Care System in Seattle, Washington.

On March 13, 2023, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment based on reprisal for prior protected EEO activity when:

1. on or after September 30, 2021, Complainant's first-line supervisor ("Supervisor") attended an LGBTQ+ EEO committee meeting and spoke of the importance of EEO and how senior leadership was going to protect employees and enforce EEO standards;
2. in or about December 2021 or January 2022, after Complainant received a finding of discrimination, Complainant was forced to listen to the Director congratulate the Supervisor for doing an outstanding job and announce his selection for a task force;
3. in or about January 2022, the Chief Logistics Officer for the Veterans Integrated Service Network (VISN) 20 changed the inspector for one of Complainant's inspection categories and the new Inspector failed Complainant's warehouse inspection; and
4. in or about May 2022, the Supervisor contacted the VISN 20 logistics office and "bad mouthed" Complainant and his office, stating that they were not doing their job and failing, and the Supervisor asked for access to reports for Complainant's office.

The EEO investigation revealed that the Agency previously issued final decisions on October 23, 2020, and August 5, 2021, finding that the Supervisor discriminated against Complainant for two non-selections. The Agency also found that the Chief Logistics Officer acted with retaliatory intent as a member of a selection panel. The Agency was ordered to consider disciplining the Supervisor, but not the Chief Logistics Officer because he was not responsible for the non-selection. Report of Investigation (ROI) at 371, 381, 447-68, 470-94.

On June 3, 2022, Complainant filed a formal complaint alleging retaliation when management did not discipline the Supervisor or the Chief Logistics Officer per the Agency's table of penalties, and instead, provided career enhancing opportunities, such as the Supervisor's selection to the task force and the Chief Logistic Officer's promotion to an Acting Deputy Director

position. The Agency dismissed the complaint for failure to state a claim. Complainant appealed. The Commission agreed that this allegation failed to state a claim. To the extent that Complainant challenged the remedies in the previous final decisions, the appellate decision noted that Complainant was advised on how to appeal those decisions to the Commission. However, Complainant raised other incidents of reprisal and the Agency did not attempt to clarify or address them. As such, the complaint was remanded for the Agency to obtain additional information on Complainant's additional claims. Milton D. v. Dep't of Veterans Affairs, EEOC Appeal No. 2023000087 (Feb. 27, 2023).

Upon remand, the Agency accepted the retaliatory harassment claim for investigation. However, it dismissed the claim regarding the Agency's alleged failure to discipline management officials in accordance with the table of penalties, and instead, providing career enhancing opportunities. The Agency also dismissed Complainant's allegation that the Director did not endorse an employee (a nurse in another department) for an award based on Complainant's nomination for failure to state a claim. ROI at 59-60.

For the accepted harassment claim, Complainant alleged that on or about September 30, 2021, the Supervisor and the Chief of Staff attended a meeting of the LGBTQ+ committee to discuss the importance of EEO. ROI at 129. Following the meeting, Complainant emailed the Chief of Staff and expressed his surprise at seeing the Supervisor at the meeting discussing EEO issues because he had done nothing to "bounce back from mistakes" from his EEO violations. ROI at 215.

In December 2021 or January 2022, the Director announced that the Supervisor was selected for the Assistant Secretary for Human Resources/Labor Relations task force to renegotiate union contracts, which Complainant claimed was prestigious. ROI at 131.

The annual Puget Sound inspection was scheduled for January 2022, and Complainant learned a few days prior to the inspection that the Chief Logistics Officer changed the inspector. The previous year's inspection went well but the new Inspector failed Complainant's warehouses. He claimed that the change in inspectors was to sabotage their inspection. ROI at 133.

In May 2022, Complainant learned that the Supervisor contacted a Supply Management Specialist at the VISN 20 office, and he allegedly stated that Complainant's team was "failing to support the hospital properly," and he requested access to reports to check their performance. ROI at 135.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). As an initial matter, the Agency concurred with the earlier procedural dismissals. The Agency then found that Complainant was unable to prove that the events at issue occurred because of his protected EEO activity. Management officials provided credible explanations for their actions, which were unrebutted by Complainant. The Agency concluded that Complainant failed to prove that he was subjected to retaliatory harassment as alleged.

CONTENTIONS ON APPEAL

Complainant states that he does not understand why the Agency does not feel it is required to discipline the wrongdoers in accordance with its table of penalties. Further, they are rewarded with "grooming assignments." Complainant also avers that a Nurse Executive told people that Complainant manipulated the EEO system and that he would manipulate them too.²

The Agency opposes Complainant's appeal. Regarding the dismissed claims, the Agency contends that Complainant was not aggrieved. The Agency further asserts that management officials provided legitimate, nondiscriminatory reasons for the actions, and Complainant did not prove that these explanations were pretextual. The Agency requests that the Commission affirm the final decision.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the

² This allegation was not part of the accepted claim, and the Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Security, EEOC Appeal No. 01A40449 (Apr. 22, 2004). Should he wish to pursue any new claims, Complainant is advised to contact an EEO Counselor to initiate the administrative process.

factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

Dismissed Claim

On appeal, Complainant appears to challenge the dismissal of his claim related to the alleged failure to discipline the wrongdoers. However, the dismissal of this claim was appropriate because the regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides that the Agency shall dismiss a complaint that states the same claim that is pending before, or has been decided by, the Agency or Commission. The Commission issued a prior appellate decision finding a failure to state a claim in Milton D. v. Department of Veterans Affairs, EEOC Appeal Number 2023000087 (February 27, 2023).

The Agency also dismissed the alleged inaction on Complainant's nomination to award another employee for failure to state a claim. Complainant offers no arguments on appeal about this claim to contest the dismissal. We find that the Agency properly dismissed the claim and there is no reason to disturb the Agency's decision. Accordingly, we AFFIRM the Agency's procedural dismissals.

Harassment

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.

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.

“The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment.³ If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.” EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.B, ex. 17. (Aug 25, 2016).

We find that Complainant has not shown that any of the complained of conduct was based on his prior protected EEO activity. For incident 1, the Chief of Staff explained that the outgoing LGBTQ+ Veterans Care Coordinator stated that she was leaving, in part, because she did not feel supported. For example, she encountered delays in ordering Pride Month flags and did not receive them until Pride Month was over. The Chief of Staff noted that the Supervisor’s department was responsible for hanging the flags, and they met with the committee to explain the situation. The Chief of Staff highlighted that the Supervisor was simply doing his job when he explained their mistakes and requested feedback. ROI at 209-11.

In response to incident 2, the Director stated that the Lead Negotiator inquired about the Supervisor being a member of the negotiation team based on his qualifications, and the Director agreed because previous discipline was not a factor. The Director specified that the announcement of the Supervisor’s participation on the team was routine business, and not focused on Complainant or retaliation for previous EEO activity. ROI at 172.

³ Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

Regarding incident 3, the Chief Logistics Officer responded that it is the VISN team's responsibility, and he has no knowledge of who is handling any given review. The Chief Logistics Officer denied changing an inspector or discussing Puget Sound with the Inspector, and he averred that he would never give instructions on a review. ROI at 237. The Inspector corroborated that the Chief Logistics Officer did not assign her work, and that they never discussed reassignment of inspectors; sabotage; or intentionally failing or reinterpreting standards of an inspection. The warehouse was inspected by two analysts on her team. ROI at 242. The previous inspector added that if a facility performed poorly, the standards were reviewed by the Inspector and the three Supply Systems Analysts, and no single person was responsible for scoring. The team members discuss their assessments to ensure accuracy and validate their findings, and very little was left to the discretion of an inspector. ROI at 259.

For incident 4, the Supply Management Specialist testified that the Supervisor contacted him to request access to reports, but it did not come across as "bad mouthing." Rather, it seemed inquisitive as someone trying to understand and gather data. The Supply Management Specialist refuted that the Supervisor stated that Complainant was "failing to support the hospital properly," but that the Supervisor expressed concern about feedback he received from clinical staff and his inquiry was to obtain information. ROI at 269-70.

Complainant offered no supporting evidence to show that these complained of events were connected to his prior EEO complaints. Accordingly, we find that Complainant did not establish that the Agency subjected him to retaliatory harassment as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

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 14, 2025

Date