



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

[REDACTED]  
Foster B.,<sup>1</sup>  
Complainant,

v.

Carlos Del Toro,  
Secretary,  
Department of the Navy,  
Agency.

Appeal No. 2024002102

Agency No. DON-22-68438-01150

**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 January 9, 2024, 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.

**ISSUE PRESENTED**

The issue presented is whether the Agency properly determined that Complainant was not subjected to discrimination or harassment as alleged.

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<sup>1</sup> 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 an Accounting Manager (GS-12) at the Agency's Trident Refit Facility Bangor in Silverdale, Washington.

On September 27, 2022, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment:

1. on the bases of race (Chinese), national origin (China), and color (Brown) when:
  - a. on or about April 27, 2022, a coworker ("Coworker 1) directed an employee away from Complainant and stated that he was not the supervisor to publicly humiliate him;
  - b. on May 2, 2022, the Security Office contacted Complainant because he was reported for blocking the Comptroller from exiting an office;
  - c. on May 3, 2022, Complainant was reassigned from his position as an Accounting Manager to a Financial Management Analyst (GS-12), which removed his supervisory duties during his one-year supervisor probationary period; and
  - d. on May 4, 2022, Complainant was locked out of the office after reporting an issue to security.

Complainant amended his complaint to allege additional incidents of harassment:

2. on the bases of race and national origin, and in reprisal for protected EEO activity (current EEO complaint), when:
  - e. on January 10, 2023, Complainant's first-line supervisor ("Supervisor") forced Complainant to consolidate two leave forms;
  - f. on January 12, 2023, the Supervisor assigned Complainant additional work while the workgroup increased from four to six members;
  - g. on January 13, 2023, the Supervisor accused Complainant of both not working overtime when approved and working unapproved overtime;
  - h. on February 8, 2023, Complainant learned that the Supervisor changed the invoice-certifying procedure for safety footwear reimbursement when he made the "date of invoice" and "date received" the same and then failed to notify

Complainant as the certifier, which could negatively impact his career as a systemic violation of financial regulations;

- i. on February 9, 2023, the Supervisor and an Accounting Manager accused Complainant of creating a hostile work environment when he limited interactions with other personnel to repetitive questions; did not utilize notes and printed guidelines already provided; and disruptively questioned others when Complainant already had, or should have had, the answer;
- j. on February 10, 2023, the Supervisor questioned Complainant about his email communication with a coworker ("Coworker 2") in December 2022 regarding job duties in front of the workgroup in his office, and then would not explain himself when Complainant responded via email to the entire workgroup;
- k. since August 2022, the Executive Director and the Comptroller manipulated the organizational structure and personnel actions for the Comptroller Department to reward employees subjecting Complainant to a hostile work environment or willing to make unfavorable statements about him by promoting them; setting them up for promotion; putting them in positions of authority over him; and limiting competition;
- l. on September 19, 2022, the Supervisor met with Complainant regarding providing other personnel with suggestions about their actions instead of making recommendations through the chain of command, and he sent a follow-up email to document the meeting;
- m. since November 22, 2022, the Comptroller administratively excluded Complainant from personnel in the Comptroller Department and other departments, and constrained Complainant's access to resources needed to carry out his assigned duties;
- n. on March 6, 2023, the Supervisor issued Complainant a developmental counseling during a discussion of his performance and conduct, but he would not provide supporting documentation;
- o. since March 1, 2023, the Accounting Manager did not grant Complainant official time to prepare his EEO case during the supplemental investigation;

- p. on March 7, 2023, the Accounting Manager yelled at Complainant in his cubicle and later accused him of not following directions (working on his EEO complaint when he was supposed to work on a particular task);
- q. since May 3, 2022, management has not provided a position description that outlines the duties Complainant was currently performing as a GS-12 in accounting, but instead referred to budget work;
- r. in early January 2023, Complainant learned that the Supervisor stored multiple files alleging harassment against Complainant on a shared drive that was accessible to Comptroller personnel;
- s. on April 20, 2023, the Accounting Manager issued Complainant a Notice of Proposed Removal and a Memorandum of Administrative Leave,<sup>2</sup> and she had security escort Complainant out of the facility; and
- t. on May 11, 2023, the Supervisor issued Complainant a "1 - Unacceptable" performance appraisal.

The EEO investigation revealed that on April 27, 2022, an employee walked into their office and asked for a supervisor, and Coworker 1 responded that Complainant was "not the supervisor." Report of Investigation (ROI) at 405. On May 2, 2022, Complainant initiated a discussion about Coworker 1 with his supervisors. The Comptroller tried to excuse herself because she felt that the matter should be handled at the lowest level, but Complainant repeatedly stated that she should stay and stood in front of the door. The Comptroller reported the incident to security, and Complainant was contacted by a security officer. ROI at 519, 406.

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<sup>2</sup> While a notice of proposed removal can constitute an adverse action for a claim of reprisal, after a proposal has merged with the decision on the proposal and has become appealable to the Merit Systems Protection Board (MSPB), the claim is no longer within the EEOC's jurisdiction once the complainant filed a mixed-case appeal. See Coleman H. v. Dep't of the Army, EEOC Appeal No. 2023001066 (Apr. 8, 2024); Parker v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131700 (July 31, 2013). Complainant appealed his removal before the MSPB. He filed a petition for review of the MSPB's decision to uphold the removal before the Commission, which was addressed separately in Martin S. v. Department of the Navy, EEOC Petition Number 2024004063 (August 19, 2024).

On May 3, 2022, the Comptroller notified Complainant that his supervisory status was terminated during his supervisory probationary period. The Comptroller noted that she previously raised concerns that Complainant's staff complained that he was "off putting" and set unrealistic and unattainable expectations. However, Complainant did not change his approach with his employees. Complainant was reassigned to a Financial Management Analyst position. ROI at 38-40. Complainant alleged that since May 3, 2022, management has not provided a position description that outlined the duties he was performing, but instead, it refers to budget work. Supplemental ROI at 718.

Complainant first visited the Security Office regarding the Comptroller's accusation that he stopped her from exiting an office, and he returned to the Security Office on May 4, 2022, to ask for personnel to "watch [his] back." When he reported back to his office, the door was locked. ROI at 407. A Financial Management Lead informed the Comptroller that she locked the door because Complainant was acting "weird" when he walked back and forth while mumbling. An employee reported that Complainant stated that he would go home and come back, which raised concerns because they just had active shooter training. Complainant also requested a ride to the police station. ROI at 520.

In September 2022, Complainant provided notes to two employees regarding their behavior, which he explained were "private" and unrelated to their job duties. One employee complained to the Supervisor that Complainant instructed her not to carry a cup around because it made her look like the "big boss," and to not lift or put heavy things above her head. The Supervisor met with Complainant on September 19, 2022, and Complainant admitted to the interactions but stated that he did not mean any harm. The Supervisor stated that Complainant should not give his personal opinion to those who have not asked for it and instructed him to refrain from approaching people without their permission or awareness. ROI at 409, 461-3; Supplemental ROI at 711.

Complainant alleged that since November 22, 2022, the Comptroller excluded him from personnel in the Comptroller Department and other departments, and she constrained his access to resources needed to carry out assigned duties. For example, he could not access accounting directives and essential guidelines and was not given explanations about the business procedures of the Comptroller Department. Supplemental ROI at 712.

On January 10, 2023, Complainant submitted a leave form, but the Supervisor was confused if this request was in addition to another request and asked that Complainant submit one form. Complainant replied that he did not want to consolidate his requests. Supplemental ROI at 13, 16.

Complainant alleged that the Supervisor assigned him an additional workload on January 12, 2023, which was previously assigned to others. Supplemental ROI at 568-9. Complainant also claimed that he learned in January 2023, that the Supervisor stored multiple files containing harassment allegations against Complainant that were accessible to Comptroller personnel. Complainant did not describe the information contained in these documents, but only stated that these files "exclusively" discriminated against him. Supplemental ROI at 1036.

On January 13, 2023, the Supervisor emailed Complainant that he had been observed working past his scheduled time without proper authorization. The Supervisor noted that when overtime was offered, Complainant primarily chose not to work. While Complainant could elect to not work overtime, he could not decide on his own to stay after hours and work, without prior authorization. Supplemental ROI at 551. On February 8, 2023, the Supervisor informed Complainant that an invoice date and the invoice received date are the same because they are most likely received and paid on the same day. Supplemental ROI at 618-19.

Complainant claimed that on February 9, 2023, the Supervisor and Accounting Manager accused him of creating a hostile work environment when he limited his interactions to repetitive questions; did not utilize notes and printed guidelines; and asked disruptive questions when Complainant already had, or should have, the answer. The Supervisor's Memorandum of Record of their meeting noted that they discussed Complainant's behavior because employees had complained that he asked the same or similar questions over and over. The Supervisor also observed that Complainant had put away all his notes and did not appear to be utilizing them or other information he had previously received. Supplemental ROI at 707, 666-7.

On or about February 10, 2023, the Supervisor questioned Complainant about an email he sent to Coworker 2. Complainant followed up and asked why the Supervisor inquired about this email. The Supervisor responded that he also had a supervisor to answer to, and that the Supervisor needed to be aware that everyone has information and tools to perform their tasks. Supplemental ROI at 708-9, 673-80.

Complainant accused the Executive Director and the Comptroller of manipulating the organizational structure and personnel actions to reward employees who subjected Complainant to a hostile work environment, or who were willing to make unfavorable statements about him, by promoting them; putting them in positions over Complainant; and limiting competition. Supplemental ROI at 709.

Complainant claimed that since March 1, 2023, the Accounting Manager did not grant him enough official time to prepare his EEO case. He further alleged that on March 7, 2023, the Accounting Manager yelled at him, accusing him of not following directions. Complainant replied that he was working on an emergency issue (communicating with the Security Office), not his EEO complaint, but she forced him to work on other matters. Supplemental ROI at 716-18. The Accounting Manager disagreed that she yelled at Complainant, but rather, she instructed him in a normal volume to work on the "EXP" tasker. Supplemental ROI at 1811.

On March 6, 2023, the Accounting Manager issued Complainant a Developmental Counseling for performance improvement and professional development. She provided specific examples, including a vendor payment issue, for which Complainant failed to take responsibility or suggest a resolution. The Accounting Manager also raised communication issues regarding Complainant's constant and rapid emailing, which created confusion. She instructed him to consolidate by topic with clear intentions and requests for information. Supplemental ROI at 99-101.

On April 20, 2023, the Accounting Manager issued Complainant a Notice of Proposed Removal based on his conduct and performance, and she specified eight (8) incidents. For example, in February 2023, Complainant found invoices that were erroneously paid twice, and he requested "zero-dollar invoices," which did not meet basic accounting standards. Complainant had to turn to the Accounting Manager for guidance. She stated that Complainant's issues occurred almost daily and resolving matters took days or weeks. Further, Complainant did not receive guidance, and his actions demonstrated a failure to follow basic accounting principles, despite his education and experience. The Accounting Manager lost confidence and trust in Complainant's ability to work independently. Supplemental ROI at 176-87. The Accounting Manager also placed Complainant on administrative leave through May 20, 2023. Supplemental ROI at 188.

On or about May 11, 2023, Complainant was issued his performance appraisal, with an overall rating of Unacceptable. Supplemental ROI at 271.

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).

The Agency noted that claims 1(c), 1(d), 2(f), 2(n), 2(s), and 2(t) were timely discrete claims and analyzed them as disparate treatment claims. The Agency assumed a prima facie case of discrimination and reprisal, and found that management officials provided legitimate, nondiscriminatory reasons for the actions. For Complainant's reassignment, the Comptroller explained that this was based on complaints, such as an employee requesting a transfer due to feeling pressured and singled out by Complainant and other employees expressing frustration with their interactions with Complainant. The Comptroller stated that when she informed Complainant of his reassignment, he responded that he did not want to be a supervisor and only took the position because he wanted to move to the Seattle area.

The Comptroller explained that the office door was locked because Complainant had been acting strangely. The Supervisor responded that they were short-staffed and two new employees needed time to obtain access to programs and training. The Supervisor maintained that Complainant should have been more productive than lower-graded employees, but he denied increasing Complainant's workload disproportionately.

The Accounting Manager stated that she issued the counseling to inform Complainant of areas of improvement, but she did not understand his request for documentation because Complainant was on the emails that she relied upon for the counseling. The Accounting Manager averred that she proposed Complainant's removal and gave him an Unacceptable rating due to deficiencies in his performance, including his admissions of not completing work. She added that Complainant failed to take corrective action from the counseling. The Agency found that Complainant did not show that the reasons were pretextual.

The Agency also determined that Complainant did not establish his hostile work environment claim because he failed to demonstrate that the conduct was motivated by a protected class. Regarding Complainant's request for official time to work on his EEO case, the record showed that the Accounting Manager approved 25.5 hours between February 17, 2023, and March 23, 2023, which was reasonable. The Agency concluded that Complainant failed to prove that he was subjected to discrimination as alleged.

The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency's allegations against him were unsubstantiated and false.<sup>3</sup> He contends that management officials lied, but he did not specify the alleged lies. Complainant also notes that he previously requested that claim 2(f) be withdrawn.

The Agency opposes Complainant's appeal and asserts that the final decision correctly found that he did not show discrimination on any basis. Complainant failed to provide anything more than his own speculation and beliefs to support his allegations. The Agency requests that the Commission affirm its 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 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").

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<sup>3</sup> The Commission's regulations provide that "[a]ny statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal." 29 C.F.R. §1614.403(d). Here, the Commission granted an extension for Complainant to file his appeal brief through March 20, 2024. Complainant uploaded numerous additional documents after March 20, 2024, and they will not be considered because they were not timely submitted.

## ANALYSIS

### *Disparate Treatment (Claims 1(c), 1(d), 2(n), 2(s), and 2(t))*

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainants may establish a prima facie case of discrimination by providing evidence that: (1) they are a member of a protected class; (2) they suffered an adverse employment action; and (3) either that similarly situated individuals outside their protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

It is undisputed that Complainant is a member of protected classes based on his color, national origin, and race, and that he suffered adverse employment actions in claims 1(c), 1(d), 2(n), 2(s), and 2(t). Complainant named employees outside of his protected categories who were purportedly treated more favorably, but he did not establish that they were similarly situated. ROI at 416.

Among other things, to be considered “similarly situated,” the comparator must be similar in substantially all aspects, so that it would be expected that they would be treated in the same manner. See Grappone v. Dep’t of the Navy, EEOC No. 01A10667 (Sept. 7, 2001), reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002). Complainant did not assert that any comparator engaged in similar conduct such that it would be expected that they be treated in the same manner.

Complainant also averred that there were very few Chinese employees at the Bangor location. Supplemental ROI at 715, 1048. However, he did not show that the circumstances of these claims raised an inference of discrimination. As such, we find that Complainant did not establish a prima facie case of discrimination based on his color, national origin, or race for claims 1(c), 1(d), 2(n), 2(s), or 2(t).

Complainants may establish a prima facie case of reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were 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). Complainant initiated the instant EEO complaint on June 10, 2022. ROI at 20. The Accounting Manager disclosed that she learned of Complainant’s protected EEO activity when he verbally requested official time to work on his EEO case in late January or early February 2023. Supplemental ROI at 1802.

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. Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001). We find that incidents 2(n), 2(s), and 2(t) occurred within a few months of the Accounting Manager’s awareness of Complainant’s protected EEO activity,<sup>4</sup> and we will credit a temporal proximity to find that Complainant established a prima facie case of reprisal for these claims.

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<sup>4</sup> While Complainant named the Supervisor as the responsible management official for claims 2(n) and 2(t), the record shows that the Accounting Manager was responsible for these actions.

The Agency proffered legitimate, nondiscriminatory reasons for its actions. For claim 1(c), the Comptroller explained that Complainant's former first-line supervisor ("Former Supervisor") approached her with concerns about Complainant's performance. The Comptroller was advised to remove Complainant during his probationary period, but she decided to create a non-supervisory position for him instead because he moved to the area with his family and would be required to reimburse the relocation incentive. ROI at 521-3. The Former Supervisor emailed specific concerns about Complainant's struggles with his supervisory duties. For example, she noted that Complainant failed to develop a constructive working relationship with the Travel Administrator, and he had taken a "zero error" approach. The Former Supervisor observed that the Travel Administrator was visibly upset by Complainant's strict and harsh attitude. The Supervisor also informed the Comptroller that the Travel Administrator reported that she was upset by Complainant's "constant berating," and she considered looking for another job. ROI at 476, 528-30. Coworker 1 witnessed Complainant yelling at the Travel Administrator and reported this to the Supervisor. ROI at 730. The Comptroller noted that other employees complained of the uncomfortable environment created by Complainant. She determined that Complainant's actions showed that he was not ready to be a supervisor. ROI at 536, 554.

For claim 1(d), the Comptroller responded that the Financial Management Lead called to report that Complainant had been acting "weird," and she locked the door. The Comptroller was not in the office at the time, and she learned that employees complained that Complainant appeared agitated and had been walking back and forth while mumbling. It was reported that Complainant stated that he was going to go home and return, which raised concerns due to the recent active shooter training. ROI at 520. The Financial Management Lead attested that she had the doors locked due to Complainant's hostile and demeaning attitude towards her and employees' reports of his erratic and hostile behavior. The door was unlocked after it was determined that Complainant posed no harm to anyone in the office. ROI at 704-5. The Former Supervisor added that someone conveyed that Complainant stated, "someone was going to pay for this." ROI at 492.

The Accounting Manager stated that she issued the counseling memo (claim 2(n), with the Supervisor as a witness, to address Complainant's performance concerns such as improper accounting procedures; lack of initiative in problem solving; and discourteous emails.

She noted that Complainant refused to sign the counseling or agree to a course of action. Complainant complained that they did not provide supporting "files," but the Accounting Manager replied that he was included on the emails referenced in the counseling memo. Supplemental ROI at 1806.

Regarding claims 2(s) and 2(t), the Accounting Manager issued Complainant a Memorandum of Administrative Leave and an Unacceptable performance rating due to the specific instances in the proposed removal notice and his refusal to agree to a plan of action from the previous counseling. She averred that it was clear that Complainant was not performing his duties and others had to assist him or redo his work. The Accounting Manager spent a lot of time addressing Complainant's performance issues, and she did not believe that he could be rehabilitated. She noted that Human Resources recommended that Complainant be sent home during the response period for the proposed removal, and he was placed in a paid administrative status. They met in the Security Office because they needed to take Complainant's badge, but security personnel escorted him out of the facility due to his agitated behavior. Supplemental ROI at 1819-21, 1830.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

On appeal, Complainant generally contends that management officials lied, but he did not specify the alleged lies. Further, Complainant did not request a hearing and he bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant fails to meet that burden. See Lore v. Dep't of Homeland Security, EEOC Appeal No. 0120113283 (Sept. 13, 2013) (complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made); Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (Aug. 23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where

complainant requested a final decision and an Administrative Judge did not make credibility determinations).

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. In addition, the Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep’t of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). In this case, there is no evidence of unlawful motivation for the Agency’s actions.

Accordingly, we find that Complainant did not establish discrimination based on his color, national origin, or race, or in reprisal for prior protected EEO activity, for claims 1(c), 1(d), 2(n), 2(s), and 2(t).

#### *Official Time (Claim 2(o))*

EEOC Regulation 29 C.F.R. § 1614.605(b) provides that, “if the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information.” “Reasonable” means “whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information.” EEO MD-110, Chap. 6 § VII.C.1. The number of hours to which a complainant is entitled “will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency’s need to have its employees available to perform their normal duties on a regular basis.” Id. When an agency denies a request for official time, “the agency must include a written statement in the complaint file noting the reasons for the denial.” Id. at § VII.C.6. When the denial occurs before the complaint is filed, “the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant subsequently files a complaint.” Id.

The Accounting Manager explained that she approved 25.5 hours of official time to work on EEO matters between February 17, and March 23, 2017. Supplemental ROI at 1811.

Emails in the record confirm that the Accounting Manager consistently approved Complainant's requests for official time. For example, on March 2, 2023, the Accounting Manager granted official time, but she highlighted that there was a backlog of transactions and reminded Complainant that he needed to complete his work, which was consistent with the Commission's guidance for employees to balance their official duties with EEO activity. In addition, the Accounting Manager's denials for any overtime was proper based on 29 C.F.R. § 1614.605(b). Supplemental ROI at 119-27. While Complainant preferred additional hours and overtime pay, we find that the Agency granted him a reasonable amount of official time.

### *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 color, national origin, race, or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

As discussed above, we found that Complainant did not establish a case of discrimination on any of his alleged bases for claims 1(c), 1(d), 2(n), 2 (o), 2(s), or 2(t).

Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that any of these actions were motivated by his protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant did not show that the Agency subjected him to harassment for claims 1(c), 1(d), 2(n), 2(o), 2(s), and 2(t).

Regarding the remaining incidents of alleged harassment, Complainant did not show that some occurred as alleged. For claim 2(r), the Supervisor responded that he was unaware of any file containing harassment allegations against Complainant. Supplemental ROI at 1782. In response to claim 2(k), the Comptroller stated that the organizational structure remained pretty consistent, and that all employees who were promoted applied for open vacancies and were selected and she denied any manipulation for promotions. The Executive Director denied taking part of any planning or executing of any organizational changes in the Comptroller Department. Supplemental ROI at 1864, 1866, 1872. The Comptroller also explained for incident 2(m) that she was not involved in the daily management of Complainant, and she was unaware of any resources he was purportedly unable to access. Supplemental ROI at 1867.

Even crediting Complainant's version of events for the incidents that occurred, he did not offer any connection to a protected category. Complainant only provided general assertions that he was one of very few Chinese employees at the command and would be respected, supported, and subjected to less discrimination if he were African American, Hispanic, or White; and that those who were White and American were not subjected to similar stress. ROI at 408; Supplemental ROI at 567. However, he did not explain how any of the incidents were based on his color, national origin, race, or prior protected EEO activity. For example, Complainant attested that Coworker 1 stated that Complainant was "not the supervisor" (incident 1(a)), which harmed his dignity, without describing how the comment was based on a protected class. ROI at 406.

Certain events were related to the management of Complainant's conduct, such as his insistence that the Comptroller stay in a meeting in incident 1(b) and the meetings to discuss Complainant's behavior from complaints raised by other employees (incidents 2(i) and 2(l)). The Supervisor confirmed that Complainant blocked the Comptroller from exiting the office, and that he informed Complainant of the negative impact of his unsolicited personal opinions to employees. ROI at 472, 457.

In addition, Complainant complained of work-related matters including an increased workload; a change to procedure; and instructions to consolidate leave requests and to work on a specific assignment.

However, 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 the work-related incidents were abusive or offensive, or 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 his color, national origin, race, or in reprisal for prior protected EEO activity.

### 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 21, 2025

Date