



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

[REDACTED]
Emmett W.,¹
Complainant,

v.

Terence G. Emmert,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2024002399

Agency No. 21-00183-00662

Hearing Nos. 430-2022-00087X, 430-2022-00258X

DECISION

On February 29, 2024, 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 February 2, 2024, final decision concerning Complainant's 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

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.

ISSUES PRESENTED

The issues presented are: (1) whether Complainant's claims are subject to dismissal on procedural grounds, including the filing of a civil action; and (2) whether the preponderance of the evidence in the record establishes that Complainant was subjected to discrimination based on disability, race, color, sex, age, and/or reprisal as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-0646-6 Cytology Technician at the Agency's Laboratory Department, Directorate of Clinical Support Services, Naval Medical Center facility in Portsmouth, Virginia. Complainant's first-line supervisor was the Anatomic Pathology Division Supervisor (Supervisor-1; Caucasian, male, born in 1963, has a disability).

Complainant is a Black man who was born in 1979. Complainant stated that he engaged in prior protected EEO activity beginning in 2018, when he first requested reasonable accommodation for his disability. Complainant also filed prior EEO complaints. Complainant identified his disability as rheumatoid arthritis/poly autoimmune-induced arthritis and right knee pain.

Complainant stated that, on February 7, 2019, his then-supervisor (Supervisor-2; female) issued a Letter of Requirement.² The record contains the February 7, 2019, Letter of Requirement, in which Supervisor-2 stated that Complainant's continued tardiness was impacting the work of the Division and that there were days when Complainant arrived late to work and said he had a doctor appointment but had not properly scheduled the appointment and requested leave in advance. Supervisor-2 also noted that Complainant was using leave as fast it was earned. According to the Letter of Requirement, Supervisor-2 would no longer tolerate Complainant arriving late for work and claiming that he had a doctor's appointment, and his failure to maintain a regular work schedule could constitute grounds for disciplinary action, up to removal.

² According to the record for Agency No. 19-00183-04050, Complainant's EEO complaint that is the subject of Appeal No. 2023003380, Supervisor-2 resigned effective August 14, 2019. Additional demographic information beyond her sex was not provided in the record.

Supervisor-2 directed Complainant to follow the proper procedures for requesting leave and to provide administratively acceptable medical documentation for sick leave and for annual leave and leave without pay (LWOP) in lieu of sick leave.

The Letter of Requirement stated that it could be canceled in writing upon the elimination of suspicion of leave abuse, that Complainant's leave record would be reviewed not later than six months from the date of issuance, and that it would remain in effect until Supervisor-1 decided that it was no longer appropriate and notified Complainant in writing. According to Complainant, the Agency never rescinded the Letter of Requirement, so the threats of adverse actions, including removal, remained in place. Complainant alleged often feeling the need to cancel doctor appointments or try to schedule multiple doctor appointments on one day so he would not be using "sporadic leave" and arouse the ire of the Agency.

A Supervisory Human Resources Specialist (HR-1; Caucasian, female, born in 1953) stated that she advised Supervisor-2 on the procedures and policies for issuing a letter of requirement. According to HR-1, the Letter of Requirement issued to Complainant expired on August 6, 2019. Supervisor-1 stated that, since becoming Complainant's supervisor in 2020, he was unaware of Complainant being subject to a Letter of Requirement, being counseled for using leave for doctor appointments, or being denied leave. According to Supervisor-1, he allowed Complainant to take leave as needed for doctor appointments as well as for disability flare ups.

Complainant alleged that he did not receive an annual performance appraisal for his 2021 work accomplishments, which should have happened in or around May or June of 2021. According to Complainant, without an appraisal, he was denied guidance on performance metrics, expectations, and avenues for possible promotion. Supervisor-1 stated that he submitted annual performance appraisals for all employees he supervised in May 2021. According to Supervisor-1, he emailed Complainant that his appraisal was available for review because Complainant was working hours when Supervisor-1 was not present. Supervisor-1 averred that, on May 6, 2021. Complainant received an automated email notification that his 2021 appraisal was complete. For the 2021 appraisal period, Complainant received Fully Successful ratings in the elements of Customer Service, Administrative, and Education Training and an Unacceptable rating in the element of Technical Skills, resulting in an overall Unacceptable rating. Complainant stated that he also never received any years of service pins recognizing his years of civil service.

Supervisor-1 averred that he had not received any such pins since joining the Division. According to Supervisor-1, these pins were provided by Human Resources, and, in the past, people had received them one to two years after reaching the milestone.

According to Complainant, on September 14, 2021, Supervisor-1 informed him that he needed to complete a SAAR³ form. Complainant alleged that he asked Supervisor-1 about the SAAR form multiple times but that, as of October 20, 2021, Supervisor-1 had not responded. Supervisor-1 stated that Complainant notified him that he was unable to sign into the Anatomic Pathology computer system and that Complainant's access was restored on September 2, 2021. Supervisor-1 averred that Complainant's system access was again removed and that, on September 14, 2021, he learned that Complainant did not have the required SAAR form on file with the Information Management Department (IMD). Supervisor-1 stated that Complainant was sent a link to the SAAR form, which he needed to complete before access could be restored. According to Supervisor-1, on September 17, 2021, Complainant stated that he did not know what a SAAR form was, so Supervisor-1 filled in the appropriate form fields so Complainant would only need to fill out the date and name fields and sign the form. On September 22, 2021, Complainant responded that he could not open the pdf, and he was directed to contact the IMD Office. On September 28, 2021, Complainant contacted the IMD Office but Supervisor-1 averred that, by that time, Complainant was unable to complete the SAAR form because his Information Awareness certificate was expired, and this certificate was required to complete the SAAR form. According to Supervisor-1, on October 12, 2021, he sent Complainant the link to the Information Awareness training and told Complainant he would come in the next day at 7 a.m. to help him fill out and submit the SAAR form. Supervisor-1 stated that, by the time he arrived on October 13, 2021, Complainant had already left work due to pain. Supervisor-1 stated that Complainant never completed the SAAR form because he was not able to return to work because of his medical condition.

Complainant averred that, although his Cytology Technician position was classified at the GS-6 level, the Agency classified some Cytology Technician positions at other facilities at the GS-7 level. Complainant alleged that all Cytology Technicians within the Agency should have the same pay level, especially if some belong to a protected class.

³ SAAR is not defined in the record.

Complainant stated that, as a qualified individual with a disability, he had requested equitable pay as a reasonable accommodation. Supervisor-1 stated that Complainant encumbered a GS-0646-6 Cytology Technician position and denied that he was reassigned or that there was a change to his position description. According to the Medical Director of Cytology (Supervisor-3; Caucasian, male, born in 1979), Complainant was not assigned to a new position, and there was not an increase in responsibilities for the position to which he was assigned.

Complainant's Complaint

On June 10, 2021, Complainant filed an EEO complaint, which he subsequently amended alleging that the Agency discriminated against him on the bases of race (Black), color (Black), disability (physical), age (born in 1979), and reprisal for prior protected EEO activity under the Rehabilitation Act when:

1. Whether the Agency discriminated against Complainant and subjected him to a hostile work environment based on disability and reprisal when the following occurred:
 - a. On June 23, 2021, the Agency did not advise Complainant on the possibility for promotion under Rule 82 FR 854 – Affirmative Action for Individuals with Disabilities in Federal Employment;
 - b. Since May 31, 2021, the Agency has not responded to Complainant's unresolved reasonable accommodation request for an ergonomic lab chair with back support and repair of floor divot in the processing area;
 - c. On May 8, 2021, Complainant did not receive an annual performance appraisal for his 2021 work accomplishments or recognition for years of civil service;
 - d. Since May 7, 2021, the Agency has not responded to Complainant's unresolved reasonable accommodation request for a parking space in the morgue parking lot due to its closer proximity to working premises;
 - e. On April 27, 2021, Complainant cancelled medical appointments as a result of the Letter of Requirement issued by Supervisor-2;
 - f. On March 17, 2021, the Agency denied Complainant reassignment/job transfer as a reasonable accommodation;

- g. On December 9, 2020, the Agency offered unsuitable job placement as part of the reasonable accommodation process that did not comply with Complainant's medical restrictions or knowledge, skills, or abilities;
h. On November 20, 2020, the Agency restricted location preferences regarding possible job reassignment searches; and
i. On November 4, 2020, Complainant was informed by Supervisor-1 that he would no longer be granted work schedule flexibility as a reasonable accommodation.
2. Whether the Agency discriminated against Complainant based on disability, race, color, sex, and/or age when, on or about October 13, 2021, the Agency assigned him to a position that had increased pay responsibilities, but his pay was not increased.⁴
3. Whether the Agency subjected Complainant to a hostile work environment or discrimination based on disability and/or reprisal when:
 - a. On July 19, 2021, BUMED's EEO Office, an Equal Employment Specialist, and Agency Counsel "refused to participate in the interactive process regarding search for reassignment and providing contact information for the new RA coordinator, after repeated attempts for info and clarification";
 - b. On July 12, 2021, the Agency initiated an "investigation" against Complainant, alleging medical inability to perform;
 - c. On August 25, 2021, the Agency withdrew an accommodation, which had previously eliminated the task of taking prepared slides to the screening room at the end of Complainant's shift;
 - d. On September 21, 2021, the Agency withdrew an accommodation of a flexible work schedule;
 - e. On or about September 12, 2021, Supervisor-1 did not answer Complainant's inquiry into or provide counsel regarding slide labeling protocol and then "chose to mislead about the subject matter in his affidavit answers and other Complaint criteria" pertaining to his abilities, limitations, and performance regarding slide labeling; and

⁴ Complainant did not allege discrimination in violation of the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) et seq.

- f. On September 25, 2021, Complainant became aware that he received a substandard annual performance evaluation that was dated June 2021.
4. Whether the Agency subjected Complainant to a hostile work environment or discrimination based on disability and/or reprisal when:
 - a. As of November 29, 2021, the Agency continued to deny Complainant's accommodation requests due to the workman's compensation claim and injury;
 - b. On November 9, 2021, the Agency refused to answer Complainant's "affidavit questions" pertaining to the proposed medical removal;
 - c. On October 26, 2021, the Agency issued a proposed removal letter based on the denial of Complainant's request for reasonable accommodation;
 - d. On October 20, 2021, the Investigating Officer issued biased, partial, and insufficient supplemental investigation findings regarding Complainant's medical condition;
 - e. As of October 20, 2021, Supervisor-1 had yet to inform Complainant about completing the SAAR form or the training required for such; and
 - f. On September 22, 2021, the Agency denied Complainant's request for reasonable accommodation.

The Agency dismissed allegation (3)(e) pursuant to 29 C.F.R. § 1614.107(a)(8) as a spin-off complaint because the allegation dealt with an affidavit in support of a motion for summary judgment the Agency filed in a separate case. The Agency dismissed claim (3)(f) pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact, stating that Complainant learned about the performance evaluation on June 5, 2021, but waited until September 24, 2021, to contact the EEO office.

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 timely requested a hearing. The AJ issued an Order directing the Agency to complete a supplemental investigation on Complainant's amended claims and dismissing the complaint without prejudice. At the conclusion of the supplemental investigation, the matter was docketed under a new hearing number.

On October 30, 2023, the AJ assigned to the case issued a Notice of Proposed Dismissal for Lack of Jurisdiction. In the Notice, the AJ took notice that the Merit Systems Protection Board (MSPB) had issued an initial decision on Complainant's mixed case complaint regarding his removal for medical inability to perform and that Complainant had filed a petition for review of the MSPB decision, which was pending with the Commission's Office of Federal Operations as Petition No. 2023002692. The EEOC AJ determined that the MSPB AJ exercised jurisdiction over many of Complainant's claims of discrimination, including whether the Agency failed to accommodate him, and that Complainant's failure to accommodate claims could not be bifurcated from the removal claim. The MSPB AJ had also addressed Complainant's allegations that Agency officials refused to respond to his affidavit questions during the removal process and that a supplemental investigation regarding his removal was conducted without his knowledge or participation. Accordingly, the EEOC AJ stated that they intended to dismiss the following claims because they had been adjudicated before the MSPB: (1)(b), (1)(d), (1)(f), (1)(g), (1)(h), (1)(i), (3)(a), (3)(b), (3)(c), (3)(d), (4)(a), (4)(b), (4)(c), (4)(d), and (4)(g). The AJ found that the MSPB had not, either expressly or implicitly, assumed jurisdiction of Complainant's remaining claims: (1)(a), (1)(c), (1)(e), (2), (3)(e), (3)(f), and (4)(e). The AJ provided the parties the opportunity to respond to the Notice of Proposed Dismissal by November 14, 2023.

On October 31, 2023, Complainant requested the issuance of a final Agency decision (FAD). The AJ subsequently issued an Order dismissing Complainant's hearing request and remanding the matter to the Agency.

Final Agency Decision

In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The FAD adopted the findings from the AJ's Notice of Proposed Dismissal and dismissed claims (1)(b), (1)(d), (1)(f), (1)(g), (1)(h), (1)(i), (3)(a), (3)(b), (3)(c), (3)(d), (4)(a), (4)(b), (4)(c), (4)(d), and (4)(g) for lack of jurisdiction. The Agency also dismissed claim (1)(a) pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. According to the Agency, the January 3, 2017, rule cited by Complainant in this claim at Volume 82 of the Federal Register, starting at page 654, sets forth the Commission's Final Rule regarding agencies' implementation of affirmative action policies for employees with disabilities. The Agency determined that Complainant had not alleged that Complainant suffered a personal harm or loss.

The Agency renumbered and rephrased the remaining claims as follows:

1. Complainant alleged that the Agency discriminated against him and subjected him to a hostile work environment based on disability and reprisal when:
 - a. On April 27, 2021, Complainant had to cancel medical appointments because of the Letter of Requirement from Supervisor-2;
 - b. On May 8, 2021, Complainant did not receive an annual performance appraisal for his 2021 work accomplishments or recognition for years of civil service;
 - c. As of October 20, 2021, Supervisor-1 had yet to inform Complainant about completing the SAAR form or training requirements.
2. Complainant also alleged that the Agency discriminated against him based on disability, race, color, sex, age, and reprisal when, on or about October 13, 2021, the Agency assigned him to a position that had increased pay responsibilities, but his pay was not increased.

In the FAD, the Agency determined that, while Complainant was an individual with a disability, he did not establish that he was qualified. Considering Complainant's disparate treatment claims, the Agency found that he established a *prima facie* case of reprisal. The Agency found that management provided legitimate, nondiscriminatory reasons for its actions and that Complainant's uncorroborated, subjective testimony was insufficient to establish that management's reasons were a pretext for discriminatory or retaliatory animus.

The Agency found that Complainant established the first element of a harassment claim based on his membership in various protected classes. Turning to the second and third elements, the Agency found that there was no evidence that Complainant was subjected to insulting verbal or physical conduct, that he was treated improperly or differently than his coworkers, or that management's actions were motivated by his protected classes. The Agency also determined that Complainant could not establish the fourth element because he did not show that the alleged harassment, which consisted of job-related conduct and management decisions, was severe or pervasive. Accordingly, Complainant did not establish that he was subjected to discriminatory harassment. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the FAD failed to address his claim that the Agency failed to reassign him as a reasonable accommodation. According to Complainant, although the Agency summarily dismissed the vast majority of his claims, the Agency is still responsible for its discriminatory actions and must provide relief to make him whole. Complainant argues that he has proven "beyond a reasonable doubt that the Agency is guilty of denying reasonable accommodation."

In response to Complainant's appeal, the Agency contends that its FAD appropriately dismissed the claims that were raised in Complainant's mixed case complaint, Agency No. 22-00183-00305, which Complainant appealed to the MSPB and was, at the time of the instant appeal, pending before the Commission as Petition No. 2023002692. The Agency asserts that other claims were appropriately dismissed for failure to state a claim. The Agency argues that Complainant did not establish that he was subjected to discrimination or harassment as alleged in the remaining claims.

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").

ANALYSIS

Procedural Dismissals

On appeal, Complainant challenges the procedural dismissals of his allegations on various grounds, including the claim that the Agency failed to reassign him as a reasonable accommodation prior to removing him for medical inability to perform.

The Agency dismissed claims (1)(b), (1)(d), (1)(f), (1)(g), (1)(h), (1)(i), (3)(a), (3)(b), (3)(c), (3)(d), (4)(a), (4)(b), (4)(c), (4)(d), and (4)(g) for lack of jurisdiction. Upon review, we find that these claims are encompassed by a pending civil action.

On September 6, 2024, Complainant filed Civil Action No. 2:24-cv-00545 in the United States District Court for the Eastern District of Virginia. Complainant filed the civil action from the Commission's decision in Emmett W. v. Dep't of the Navy, EEOC Petition No. 2023002692 (Aug. 7, 2024), in which we concurred with the MSPB's decision finding no discrimination regarding Complainant's removal. A review of the complaint filed in the civil action reflects that the allegations raised in the civil action encompass a number of the claims in the EEO complaint currently pending appeal.

EEOC Regulation 29 C.F.R. § 1614.409 provides:

Filing a civil action under § 1614.407 or § 1614.408 shall terminate Commission processing of the appeal. A Commission decision on an appeal issued after a complainant files suit in district court will not be enforceable by the Commission. If private suit is filed subsequent to the filing of an appeal and prior to a final Commission decision, the complainant should notify the Commission in writing.

Accordingly, the Commission will dismiss a pending appeal/petition under these circumstances to prevent a complainant from simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, and creating the potential for inconsistent or conflicting decisions, and in order to grant due deference to the authority of the federal district court. See, e.g., Wayne C. v. Dep't of Veterans Affs., EEOC Appeal No. 2020002855 (Oct. 6, 2020); Bart L. v. Dep't of Agric., EEOC Appeal Nos. 2020000098, 202000000100 (Mar. 10, 2021); Von E. v. Dep't of the Treas., EEOC Appeal No. 2020004947 (Feb. 17, 2022).

Following a review of Civil Action No. 2:24-cv-00545, the Commission has determined that the language in the above-referenced civil action is broad enough to encompass claims (1)(b), (1)(d), (1)(f), (1)(g), (1)(h), (1)(i), (3)(a), (3)(b), (3)(c), (3)(d), (4)(a), (4)(b), (4)(c), and (4)(d) from the EEO complaint currently on appeal. See Jackson v. Dep't of the Army, EEOC Request No. 05940414 (Sept. 1, 1994) (finding that the language of complainant's civil action was so "broad and all-inclusive" that it completely

overlapped his EEO complaint claims). Accordingly, we affirm the Agency's dismissal of these claims.

The Agency dismissed claim (1)(a) pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disability. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

Complainant also alleged discrimination based on the Agency's failure to inform him about potential promotions. However, initiatives aimed at supporting individuals with disabilities are distinct from the legal requirements for reasonable accommodation under the Rehabilitation Act. See Arthur J. v. Dep't of the Air Force, EEOC Appeal No. 2021002720 (July 27, 2022) (finding that additional efforts such as career development for individuals for disabilities "may be highly encouraged, but they are not legally enforceable under the EEOC's federal sector regulations if comparable measures are not provided to non-disabled employees"). We affirm the Agency's dismissal of claim (1)(a) because Complainant has not alleged that he suffered a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy.

The Agency dismissed claim (3)(e) as a spin-off complaint. EEOC regulation 29 C.F.R. § 1614.107(a)(8) provides that an agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint. EEO MD-110 at Ch. 5 § IV(D) defines such as a "spin off" complaint. EEO MD-110 further instructs that spin-off complaints should be referred to the agency official responsible for EEO complaint processing and/or processed as part of the original complaint, rather than on appeal. Samuel C. v. Dep't of Justice, EEOC Appeal No. 0120182823 (Nov. 15, 2018); Denis M. v. U.S. Postal Serv., EEOC Appeal No. 0120181126 (May 2, 2018).

A fair reading of the record confirms that, in allegation (3)(e), Complainant is alleging dissatisfaction with an affidavit submitted with the Agency's motion for summary judgment for a separate EEO complaint. In the Notice of Partial Acceptance of Amended Claims of Discrimination, the Agency properly advised him to contact the EEOC AJ assigned to the case with the concerns about the affidavit. Claim (3)(e) was properly dismissed as a spin-off complaint because the underlying facts concerned an affidavit submitted in connection with a previously-filed complaint.

The Agency dismissed claim (3)(f) pursuant to 29 C.F.R. § 1614.107(a)(2) as untimely raised. EEOC regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the Agency extends the time limits in accordance with § 1614.604(c). EEOC regulation 29 C.F.R. § 1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. EEOC regulation 29 C.F.R. § 1614.105(a)(2) allows the Agency or the Commission to extend the time limit if Complainant can establish that Complainant was not aware of the time limit, that Complainant did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence Complainant was prevented by circumstances beyond their control from contacting the EEO counselor within the time limit, or for other reasons considered sufficient by the Agency or Commission.

In claim (3)(f), Complainant stated that, on September 25, 2021, he learned about a substandard 2021 appraisal dated June 2021. The record contains evidence that the appraisal in question was issued on May 6, 2021, and that an automated email was sent to Complainant on that date, notifying him that the appraisal was ready for review. Complainant had initiated contact with an EEO counselor on May 1, 2021, and one of the claims he raised with the EEO counselor and in the formal complaint filed on June 11, 2021, was that, as of May 8, 2021, the Agency had failed to issue him a performance evaluation. Complainant has not denied receiving the May 6, 2021, email notifying him that the 2021 appraisal was ready for review. Complainant stated that annual performance appraisals were typically issued in May or June, but he has not explained why he allegedly did not learn about the performance appraisal that he expected to receive in May or June 2021 until September 2021.

We find that, given Complainant's concern about not receiving his performance evaluation, he should have known that the performance evaluation was issued and been able to timely initiate EEO counselor contact. Accordingly, we affirm the dismissal of this claim.

Disparate Treatment

In order to prove his complaint of employment discrimination, a 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 he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction 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 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thereafter, to ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

Complainant was an individual with a disability. We will assume for the purposes of this decision, without so finding, that Complainant established that he was "qualified" within the meaning of the Rehabilitation Act.

Complainant can establish a prima facie case of reprisal by showing that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was 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 can establish a prima

facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802). In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus).

Complainant engaged in protected EEO activity, and the record reflects that the Agency was aware of his prior protected EEO activity.

Complainant alleged discrimination based on disability and reprisal in connection with cancelling medical appointments based on the Letter of Requirement issued by Supervisor-2. While HR-1 stated that the Letter of Requirement had expired, the record reflects that the Letter of Requirement would remain in effect until it was rescinded in writing, and there is no evidence in the record that Supervisor-2 or anyone else rescinded the Letter of Requirement. However, Supervisor-1, who was Complainant's supervisor since March 2020, stated that he was unaware of any Letter of Requirement and that he allowed Complainant to request leave for medical appointments and disability-related flare ups without restrictions. Complainant generally alleged that he was cancelling medical appointments based on the Letter of Requirement, but he does not allege that Supervisor-1 enforced the Letter of Requirement or denied his requests for leave for medical appointments since becoming Complainant's supervisor. We find that Complainant has not established a prima facie case of discrimination based on disability and/or reprisal because the preponderance of the evidence in the record does not establish that he was subjected to an adverse action or adverse treatment.

Complainant alleged that the Agency subjected him to discrimination based on disability and reprisal when he did not receive an annual performance appraisal for 2021 or recognition for his years of civil service. The record reflects that Complainant's 2021 performance appraisal was issued on May 6, 2021, so he cannot establish that the Agency did not provide him with a performance appraisal as alleged. With respect to not receiving a pin recognizing his years of civil service, Complainant has not explained when he allegedly should have received a service pin. In Torie A. v. Dep't of Def., EEOC Appeal No. 2020000822 (Sept. 14, 2021) request for recon. denied, EEOC Request No. 2022000196 (Feb. 8, 2022), the Commission found that a complainant who declined to specify how long their time-in-service pin and certificate was delayed or provide additional information did not show they

were aggrieved and dismissed the claim. Here, we find that Complainant has not shown that he was subjected to adverse treatment or to an adverse action with respect to not receiving an unspecified service pin. Complainant therefore has not established a *prima facie* case of discrimination based on disability and/or reprisal.

Complainant alleged discrimination based on disability and reprisal for prior protected activity when Supervisor-1 did not inform him about completing the SAAR form or the training requirements. The preponderance of the evidence in the record reflects that Supervisor-1 provided Complainant with information and guidance regarding the SAAR form and the Information Awareness training on multiple occasions in September and October 2021. On October 12, 2021, Supervisor-1 told Complainant that he would come to work at 7 a.m. on October 13, 2021, to assist Complainant with completing the form and the training. However, Complainant left work before Supervisor-1 arrived that morning, and Complainant did not return to work because of his disability. Complainant has not established adverse treatment or an adverse action with respect to this allegation. Accordingly, Complainant cannot establish a *prima facie* case of discrimination.

Finally, Complainant alleged discrimination based on disability, race, color, sex, age, and reprisal with respect to being assigned a position with increased pay responsibilities but did receive increased pay. There is no evidence in the record that, during the timeframe covered by this EEO complaint, Complainant was assigned to a different position or that his responsibilities increased. This claim appears to be based on Complainant's contention that he should have been compensated at the GS-7 level because he heard the Agency employed some GS-7 Cytology Technicians at other facilities, including the Naval Medical Center in San Diego, California. However, whether or not the Agency employs GS-7 Cytology Technicians at other facilities, he has not specifically identified any comparators who were allegedly paid more for performing the same work as Complainant. Complainant has raised an inference of discrimination and has not established a *prima facie* case of discrimination based on disability, race, color, sex, age, and/or reprisal.

Harassment

Complainant alleged discriminatory 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), 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 disability, race, color, sex, age, and/or engagement in prior protected EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

To ultimately prevail on a claim of retaliatory harassment, Complainant must show that he was subjected to conduct sufficient to dissuade a "reasonable person from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017).

Complainant alleged harassment with respect to the Letter of Requirement. Although HR-1 stated the Letter of Requirement was no longer in effect, the record does not reflect that the February 2019 Letter of Requirement issued by Supervisor-2 was rescinded in writing. However, Supervisor-2 resigned from the Agency in August 2019, and Supervisor-1, who became Complainant's supervisor in March 2020, was never aware of a Letter of Requirement and did not deny Complainant leave for medical appointments. Complainant has not shown that the Letter of Requirement was not rescinded based on disability and/or reprisal rather than uncertainty in the wake of Supervisor-2's resignation.

Complainant also alleged harassment with respect to not receiving a performance appraisal or a service pin. The record reflects that Complainant did receive a performance appraisal and was emailed about the appraisal on May 6, 2021. To the extent that Complainant contends that Supervisor-1 should have discussed the appraisal with him, Supervisor-1 explained that he notified Complainant about the appraisal by email because he worked a different shift than Complainant. Regarding the service pin, Supervisor-1 stated that the pins, which were provided by HR, tended to be given out one to two years after the milestone was reached. Complainant has not established that this alleged harassment was based on his disability and/or prior protected activity.

Complainant alleged that Supervisor-1 failed to inform him about the SAAR form or the training requirements, but this is unsupported by the record. To the extent that Complainant experienced difficulty completing the SAAR form, the record shows that these issues were caused by his inability to open the pdf, the subsequent expiration of his Information Awareness training certificate, and Complainant working at night when Supervisor-1 and others were not present to help him. Complainant has not shown that this alleged harassment was based on his disability and/or prior protected activity.

Finally, Complainant alleged harassment with respect to being paid at the GS-6 level. However, Complainant encumbered a GS-6 Cytology Technician position and was not assigned to a new position or assigned any increased responsibilities. Complainant also has not shown any connection between this alleged harassment and his membership in any protected class.

We further find that the alleged incidents of harassment constitute commonplace workplace interactions such as work assignments, instructions, and admonishments that are not sufficiently severe or pervasive to constitute a hostile work environment. See Complainant v. Dep't of State, EEOC Appeal No. 0120123299 (Feb. 25, 2015). To the extent Complainant argues that Supervisor-1, Supervisor-2, and other management officials made him feel undervalued and treated him in a demeaning manner, we have repeatedly stated that such ordinary friction in supervisor-employee communications do not rise to the level of establishing unlawful harassment. See Wen Y. v. U.S. Postal Serv., EEOC Appeal No. 2021002631 (July 11, 2022); Marine V. v. Social Sec. Admin., EEOC Appeal No. 2019001434 (July 7, 2020). Not every unpleasant or undesirable action which occurs in the workplace constitutes an EEO violation. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120120158 (May 15, 2014). The Supreme Court has held that the legal standards for assessing discrimination claims must ensure that the EEO laws do not become a "general civility code' [and must be sufficiently rigorous to] ... filter out complaints attacking 'the ordinary tribulations of the workplace.'" Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Complainant has not established that he was subjected to a hostile work environment 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 finding no discrimination.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision.

If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

February 6, 2025

Date