



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

[REDACTED]
Jacinto Q.,¹
Complainant,

v.

Michelle King,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2024003278

Agency No. DAL-23-0673-SSA

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated April 18, 2024, finding no discrimination regarding his 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, we AFFIRM the Agency's final decision finding no discrimination.

ISSUES PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination and harassment based on race and in reprisal for prior EEO activity.

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 GS-11, Claims Specialist at the Agency's Oklahoma City Field Office in Oklahoma City, Oklahoma.

On August 4, 2023, Complainant filed a formal complaint alleging that:

1. He was subjected to disparate treatment based on race (Asian) and in reprisal for prior EEO activity when on June 20, 2023, he was told to stop using a fan by a new manager despite other employees of different races using fans at their desks without such admonishments.
2. He was subjected to harassment based on race (Asian) and in reprisal for prior EEO activity when on June 20, 2023, until November 20, 2023, he was told to stop using a fan by a new manager despite allowing other employees of different races to use fans at their desks and was not provided the policy that required the removal of his fan, and when management assigned more work and required him to do more frontload duties than other coworkers, affecting working conditions.

The Agency investigated the complaint. 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 EEOC Administrative Judge or a final Agency decision. When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

As a GS-11, Claims Specialist, Complainant's duties included reviewing and authorizing social security claims. Complainant claimed that on June 20, 2023, his first level supervisor (S1), a GS-12, Operations Supervisor, told him to stop using a desk fan he used for several years without issue. Complainant indicated that he used the fan because his office gets extremely hot. Complainant stated that although S1 explained that a desk fan was not allowed due to safety rules, she did not provide him with the Agency's safety plan policy. Complainant indicated that there were several Caucasian employees (not identified) who were allowed to use desk fans.

Complainant also indicated that after he contested S1's June 20, 2023, instruction disallowing a desk fan to management, he was subjected to retaliation by being assigned more cases.

S1, who became Complainant's supervisor at the Oklahoma City Field Office in April 2023, stated that she did not know what Complainant was previously told about using a desk fan. S1 indicated that she informed all her employees, including Complainant, that under the Agency's safety plan policy, they were not allowed to use desk fans and asked them to remove any fans at their desk. S1 denied Complainant was assigned more work than his coworkers, and that all her employees were assigned work equally.

The record indicates that for his 2023 performance appraisal, Complainant received Successful Contribution (highest to lowest: Outstanding Contribution, Successful Contribution, and Not Successful) with an average rating of 4.5. Report of Investigation (ROI) at 192. Complainant received the same Successful Contribution performance appraisal with an average rating of 4.5 for his 2022 performance appraisal. ROI at 185.

Complainant's second level supervisor (S2), a GS-13, Assistant District Manager, stated that on April 26, 2023, she sent an email to her Field Office employees, including Complainant, stating that due to the Weather and Safety Plan, the use of fans within the building was prohibited. ROI at 205, 206. S2 indicated that there were 16 employees in Complainant's unit, and no one was found using a desk fan after the April 26, 2023, instruction. The Agency's Guidelines for Onsite Personnel – Management Guidance, updated in February 2022, provides, in part, that in order to support the health and safety of onsite personnel in all operations' sites, including field offices, the Agency employees *must not use personal fans at their desk to minimize airborne particles*. ROI at 266.

S2 stated that on June 20, 2023, Complainant sent an email to management stating that he needed a desk fan to stay cool since management would not turn down the temperature in his area. ROI at 204. Management, in response, checked the temperature on the thermostat and contacted the building lessor to ensure the thermostat was reading accurately. The lessor also allowed the thermostat to be turned down lower than average, making the area noticeably cooler.

S1 and S2 stated that they were not aware of Complainant's prior EEO activity (which was filed against a different supervisor/management in January 2020) until they were notified of the instant EEO complaint.

The record indicates that Complainant contacted an EEO Counselor regarding the instant complaint on July 24, 2023. The record indicates S1 assigned several work assignments to Complainant via emails, dated from May 12, 2023, to July 26, 2023.

The Agency found that Complainant was not subjected to discrimination or harassment as alleged. Specifically, the Agency stated that Complainant failed to establish a prima facie case of disparate treatment based on race or retaliation. The Agency indicated that not allowing a desk fan did not alter the terms or privileges of Complainant's employment and Complainant failed to provide evidence of similarly situated coworkers not in his protected groups who were allowed to use desk fans. The Agency also stated that neither S1 or S2 were aware of Complainant's prior EEO activity (filed in January 2020) other than the instant complaint. Further, the Agency found that management, unrebutted by Complainant, provided a legitimate, nondiscriminatory reason for not allowing a desk fan, i.e., due to its implementation of 2022 Management Guidance to minimize airborne particles in work areas. The Agency noted that management assigned cases to all employees equally.

Complainant appeals from the Agency's final decision.

CONTENTIONS ON APPEAL

Complainant contends that he was discriminated against when he was not allowed to use his desk fan to stay cool in his work area. Complainant also questions the validity of the Weather and Safety Plan imposed by management.

The Agency contends that Complainant failed to establish he was subjected to discrimination or harassment as alleged. The Agency reiterates that management did not allow its employees, including Complainant, to use desk fans in accordance with the Management Guidance to minimize the spread of airborne particles and the spread of illness. The Agency further contends that Complainant, on appeal, fails to provide any evidence to show that his subsequent work assignments were based on discrimination.

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 (EEO MD-110), Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo* standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

ANALYSIS

Disparate Treatment – Claim 1

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco 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 Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

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

In order to establish a prima facie case of discrimination based on race, Complainant must show that: (1) Complainant is a member of a protected class; (2) Complainant was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) Complainant was treated differently than similarly situated employees outside Complainant’s protected class, or there was some other evidentiary link between membership in the protected class and the adverse

employment action. McCreary v. Dep't of Defense, EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Navy, EEOC Request No. 05950927 (Jan. 9, 1998); Trejo v. Soc. Sec. Admin., EEOC Appeal No. 0120093260 (Oct. 22, 2009).

In order to establish a prima facie case of reprisal, Complainant must show 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)

Regarding his claims based on race, we find that Complainant failed to show that there were any similarly situated employees not in his protected groups who were treated differently under similar circumstances. Thus, we find that Complainant failed to establish a prima facie case of race discrimination. We also find Complainant's retaliation claim fails because there is no evidence that S1 or S2 was aware of his prior EEO activity at the time of the desk fan incident.

Further, we find that the Agency articulated legitimate, nondiscriminatory reason for the alleged incident. S1 told Complainant he was not allowed his desk fan on June 20, 2023, because he was previously notified of such via S2's April 26, 2023, email. S2 stated that she was merely implementing the Management Guidance, updated in February 2022, which, in part, prohibited employees' use of personal fans at their desk in order to minimize airborne particles to support the health and safety of the employees. Complainant failed to provide any evidence to show that the Agency's reasons were pretextual.

Harassment – Claim 2

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 Complainant is a member of a statutorily protected class; (2) that Complainant was subjected to unwelcome conduct related to Complainant's protected class; (3) that the harassment complained of was based on Complainant's protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with Complainant's 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 Complainant's hostile work environment claim, Complainant must establish that Complainant was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Regarding Complainant's allegation of retaliatory harassment, Complainant only needs to show that such actions are the type of action that would dissuade a reasonable employee from making or supporting a complaint of discrimination. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Upon review, we find that the desk fan incident can no longer be part of the harassment claim due to our finding of no discrimination, above. Regarding his subsequent work assignments and working conditions, we find that Complainant provided no evidence that the assignments were sufficiently severe or pervasive that it resulted in an alteration of the conditions of his employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994). Complainant provides no evidence S1's conduct was based on his race or in reprisal for his complaining about his desk fan.

Further, the Commission has held that routine work assignments, instructions, admonishments, and addressing performance deficiencies do not rise to the level of harassment because they are common workplace occurrences. See Isabel F. v. Dep't of Labor, EEOC Appeal No. 2021002656 (Aug. 8, 2022); Fredrick T. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2021002497 (July 18, 2022). We note that anti-discrimination statutes are not civility codes designed to protect against the ordinary tribulations of the workplace. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." See Oncale v. Sundowner Offshore Service, Inc., 23 U.S. 75, 81 (1998). Upon review, we find that Complainant failed to make such showing here.

Based on a thorough review of the record, considering all statements submitted on appeal, we find that Complainant failed to show that the Agency's actions were motivated by discrimination or retaliation as he alleged. We further find that the alleged actions are not reasonably likely to deter Complainant or others from engaging in protected activity.

CONCLUSION

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

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

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

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition.

See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. §1614.604.

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

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

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

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

February 5, 2025
Date