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

[redacted]
Jess P.,[1]
Complainant,

v.

Brendan Carr,
Chairman,
Federal Communications Commission,
Agency.

Appeal No. 2025000106

Hearing No. 520-2024-00064X

Agency No. FCC-EEO-2023

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 28, 2024, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

1) Whether the EEOC Administrative Judge's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination and harassment based on his race (African American), color (black), national origin (Africa), and in reprisal for prior protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant had worked in the Agency's Enforcement Bureau as an Electronics Engineer, or Senior Agent, in its Boston field office since 2016. Beginning in March 2016, S1 became his supervisor. S1 was the Director of Region One in the Office of the Field Director and was based in Maryland. He managed four field offices, including the Boston office.

On April 1, 2023, Complainant filed an EEO complaint against the Agency alleging he was subjected to discrimination and a hostile work environment based on race (African American), color (black), national origin (Africa), and reprisal (engaging in protected activity) when:

> 1. On January 25, 2023, he was verbally counseled by his first-level supervisor who indicated that a new employee complained about Complainant but did not provide additional information regarding the nature of the complaint; and
> 2. On January 30, 2023, he was counseled, in writing, by his first level supervisor and falsely accused of failing to communicate with a new employee and coordinate training for the new employee.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing. After a motion by the Agency, which was opposed by Complainant, the AJ determined that the complaint did not warrant a hearing and issued a decision by summary judgment in favor of the Agency. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

The record indicates that, for many years, Complainant was the only field agent in the Boston office. On November 21, 2022, E1, a new field agent, began working in the office. On December 16, 2022, S1 asked Complainant to "develop a comprehensive training schedule for [E1]" after the new year.

Complainant's duties include training "staff in investigative techniques, current operating procedures, and policies." S1 also asked Complainant to train E1 on investigating unlicensed (pirated), radio stations, and, specifically, on a matter involving an unlicensed station operating on a certain frequency. Subsequently, E1 told S1 that he had performed an abbreviated investigation of the unlicensed station, but not one that included all of the standard investigative procedures for pirated stations. S1 told E1 that he was disappointed that he "did not get the training that [he] had asked [Complainant] to perform with you."

S1 sent a spreadsheet with training topics to Complainant, E1, A1 (a senior agent in Chicago), and E2 (a new hire in the Chicago office), asking the senior agents to track the progress of the training for the new employees, E1 and E2. S1 also told his supervisor, S2, the Acting Field Director, that he was having trouble getting his senior agents engaged in training the new employees.

On January 9, 2023, S1 told Complainant that "there does not appear to be any coordination with [E1] on his training" and asked Complainant to "dedicate time each week working with him on his cases and yours and following the training guideline that I sent." On January 18, 2023, E1 spoke to S1 about several matters, including the training efforts and his hope for better communication with Complainant going forward. During that conversation, E1 indicated that he wanted to be trained on pirate radio investigations. S1 decided that he would visit the Boston office to speak with Complainant in person about E1's concerns about his lack of training.

S1 asked Complainant and E1 to be in the Boston office on January 25, 2023, "for a meeting to discuss training and day-to-day coordination and other topics of interest." On January 23, 2023, he reminded Complainant about their meeting. During a staff meeting for the region that day, S1 instructed all Region One field agents that the senior field agents were "responsible [for] oversee[ing] the training of the new staff" and he would be "hosting meetings with all Senior Agents to review the training plans." He indicated that he would be holding a meeting with Complainant to discuss training that week.

S1 traveled to Boston and, on January 25, 2023, had an in-person meeting with Complainant. On January 30, 2023, he sent Complainant an email titled "Follow-up to our meeting Jan 25, 2023," where he summarized their meeting and listed the concerns noted during the meeting. According to the email, he and Complainant discussed:

- Not keeping EBATS[2] updated with pertinent details of the investigation,
- Not specifying the plan of action in EBATS for resolving difficult cases,
- Not being able to resolve the more complex radio interference issues,
- Failing to communicate with the new hire, [E1],
- Failing to coordinate [E1's] training.

S1 noted that he had asked Complainant to "make it a priority to train [E1] on a pirate radio investigation," but that [E1] had "indicated recently that … he has not had that training." S1 indicated that he "spent Thursday training [E1] on Pirate Radio investigations." S1 stated that he thought the issues raised could "be easily addressed" and that he wanted to see Complainant "succeed and enjoy the job."

The record indicates that Complainant did not receive any disciplinary action during or as a result of the meeting with S1 on January 25, or his January 30th email. The communications did not become part of Complainant's personnel records. He did complete the required training of E1 over the next couple of months, and S1 gave him a passing rating on his performance review, noting that his performance had been "very successful this past rating period."

Complainant stated that, for several years, he was the only employee managing the Boston office. S1, he maintained, showed a tendency to assume negative characteristics about minority employees, including himself, for example, going so far as to double-check their reports by directly contacting stakeholders. Complainant claimed that S1 did not do this with non-minorities. Complainant stated that he was not the only employee who filed discrimination complaints against S1. He cited two black coworkers, C1 and C2, and C3, a Hispanic male.

Complainant maintained that S1 was inconsistent with respect to enforcing deadlines by holding minority agents to strict deadlines, while not penalizing their Caucasian counterparts for similar delays. Minority agents, he also claimed, often face more severe criticism than their Caucasian counterparts for common errors. For example, he stated that although he was scrutinized for failing to update the EBATS database on time, Caucasian agents who made the same oversight faced no repercussions. Normal differences in opinion, he argued, were treated as a more significant issue when involving

[2] EBATS stands for the Enforcement Bureau Activity Tracking System.

minority agents. S1, he felt, treated these differences as a "lack of cooperation" or an unwillingness to be a team player.
Furthermore, he accused S1 of allocating job duties based on "an apparent" belief that Caucasian agents were more qualified than their minority counterparts. S1, he stated, also criticized minority employees for tardiness in attending meetings more than White employees. The cumulative effect of these actions and attitudes, Complainant felt, suggested a pattern of racial and ethnic discrimination that needed to be comprehensively addressed.

With respect to Claim 1, Complainant stated that after S1 arrived in Boston on January 23, 2023, over the next couple of days, they discussed "the burden" of his caseload and training E1. According to Complainant, S1 entered his office and closed the door, which he found intimidating. S1, he stated, then told him that E1 complained about him, but S1 never elaborated on the allegation.

With respect to claim 2, on the morning of January 30th, Complainant sent an email to the Director of the Agency's Office of Workplace Diversity (OWD) complaining about S1's conduct. In the email, he indicated that he was formally filing a complaint of discrimination and harassment against S1 and stated that S1's conduct on January 25, was another example of harassment. Complainant maintained that later that day, S1 called him while he was in the field investigating a complaint and told him that he knew Complainant had filed an EEO complaint against him. That evening, S1 sent Complainant the email outlining Complainant's alleged deficiencies.

In granting the Agency's motion for summary judgment, the AJ found that Complainant did not state a prima facie claim of disparate treatment discrimination. Specifically, the AJ found no evidence that any adverse action was ever taken against Complainant, or that he encountered any negative consequences from either incident. The AJ noted that there was no evidence that either the January 25, 2023 meeting or January 30, 2023 email altered the terms of Complainant's employment, or that the statements made by S1 were anything more than instructions and constructive feedback from his supervisor.

The AJ also found that the Agency had legitimate, nondiscriminatory reasons for its actions, i.e., S1 was providing supervisory feedback and instructions to Complainant. Prior to the January 25 and 30, 2023 communications, he instructed Complainant multiple times to conduct training for E1 but found that Complainant did not do so based on his review of the EBATS records and E1's complaints. The AJ found, based on the record, that S1 gave

Complainant ample notice that he was disappointed in his failure to train E1, and advised Complainant that he planned to discuss this in person with him. The January 25, 2023, meeting and January 30, 2023 follow-up email, the AJ found were the direct result of these discussions. Finally, the AJ noted that although Complainant took issue with the instructions and feedback he received, he did not set forth specific facts or evidence in the record that raised a genuine issue that S1's reasons for the communications were a pretext for discrimination.

Regarding Complainant's reprisal claim, the AJ found that Complainant was also unable to establish a prima facie case. Although Complainant engaged in protected activity by filing EEO complaints in 2018 and 2020, which S1 was aware of, the AJ found that there is no temporal proximity between these complaints and the matters at issue in the instant complaint which took place in 2023. The AJ found that Complainant did engage in protected EEO activity by sending an email to the Office of Workplace Diversity (OWD) about S1 on the morning of January 30, 2023. However, the AJ found that Complainant offered no evidence to suggest that S1 was even aware Complainant had sent the email to the OWD. The AJ noted that there was no evidence that Complainant contacting the OWD had any bearing on the January 30, 2023 email because S1 had already been asking Complainant to train E1 for several weeks and was checking in on the status of his cases. The January 30, 2023 email continued those prior conversations and consisted of routine feedback and instructions from a supervisor. The AJ also found that the record was devoid of evidence that the email was based on Complainant's email to the OWD that morning. Even if S1 was aware of the email to OWD before he sent his January 30, 2023, email to Complainant, the AJ found that S1's email was merely a written recap of the earlier January 25 meeting.

Finally, the AJ found that Complainant failed to allege facts to establish that the Agency's actions created a hostile work environment based on race, color, national origin, or prior EEO activity. Claims 1 and 2, the AJ noted, did not describe conduct that was sufficiently severe or pervasive that it changed Complainant's employment conditions into an abusive work environment. On the contrary, he found it to represent employment actions that were clearly within the realm of managerial prerogative, authority, and responsibility.

CONTENTIONS ON APPEAL

Complainant did not raise any arguments on appeal. The Agency, in pertinent part, requests that we affirm its final order.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review. . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a

decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, we find that Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact finder could not find in Complainant's favor.

Disparate Treatment

To prevail in a disparate treatment claim, 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 Constr. Co. v. Waters, 438 U.S. 567, 576 (1978).

To establish a prima facie case of disparate treatment based on race, color, or national origin, Complainant must show that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) he was treated differently than similarly situated employees outside his protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nannette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (Mar. 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008), request for recons. denied, EEOC Request No. 0520080545 (June 20, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

For his reprisal claim, Complainant may establish a prima facie case by showing that: (1) he engaged in a protected activity; (2) the agency was

aware of the protected activity; (3) subsequently, he 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); see also Carr v. U.S. Postal Serv., EEOC Appeal No. 0120065298 (June 26, 2007); O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1252 (10th Cir. 2001); Hochstadt v. Worcester Found. for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976).

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. Tex. Dep't of Cmty. Affs. 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 Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. 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 (or retaliatory) 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.

Like the AJ, we find that Complainant did not establish a prima facie case of discrimination bases on race, color, or national origin with respect to claims 1 and 2. We do not find that the verbal and written comments by S1 to Complainant on January 25 and 30, 2023, were adverse employment actions that affected the terms and conditions of Complainant's employment situation. There is no evidence that any disciplinary action was taken against Complainant, or that he suffered any negative consequences from the statements S1 made to him.

We also find that Complainant did not establish a prima facie case of reprisal discrimination. Complainant's protected activity includes the filing of EEO complaints in 2018 and 2020, as well as sending an email to the OWD Director, about S1 on January 30, 2023. Although S1 was aware of the 2018 and 2020 complaints, we find no temporal nexus between them and claims 1 and 2, which arose years later. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (a three-month period was not proximate enough to establish a causal nexus). With respect to Complainant's January

30, 2023 email to the OWD, the AJ found that there was no evidence that S1 was aware that Complainant had written the Director. Even if S1 was aware of this contact with the OWD, there is no dispute that the January 30 email to Complainant was merely a written recap of the January 25 meeting, which, as we have already determined, was not an adverse employment action.

Regarding Complainant's reprisal claim, we also note that the Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999). Instead, claims based on statutory retaliation clauses are reviewed "with a broad view of coverage. Under Commission policy, a complainant is protected from any retaliatory discrimination that is reasonably likely to deter...complainant or others from engaging in protected activity." Maclin v. U.S. Postal Serv., EEOC Appeal No. 0120070788 (Mar. 29, 2007). For the reason set forth above, we find that S1's actions as set forth in claims 1 and 2 were not reasonably likely to deter either Complainant or others from engaging in protected EEO activity. These matters were not adverse employment actions

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 (Sep. 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 race, color, national origin, 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.

We find that beyond his bare assertions and speculation in his affidavit, Complainant failed to show by preponderant evidence that any of the complained-of actions were taken because of his protected bases or were reasonably likely to deter someone from engaging in protected EEO activity. Even assuming all of Complainant's claims occurred as he described, the record supports a determination that these incidents were more likely the result of routine supervision and are therefore insufficient to establish a hostile work environment.

The Commission has held that routine work assignments, instructions, admonishments, and addressing performance deficiencies do not rise to the level of harassment because they are common workplace occurrences. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120130465 (Sep. 12, 2014); Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Employees will not always agree with supervisory communications and actions, but absent discriminatory motives, these disagreements do not violate EEO law.

CONCLUSION

Based on a thorough review of the record, we AFFIRM the Agency's final order 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 10, 2025
Date