



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Norbert K.,<sup>1</sup>  
Complainant,

v.

Antony Blinken,  
Secretary,  
Department of State,  
Agency.

Appeal No. 2021001898

Agency No. DOS021820

**DECISION**

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's January 7, 2021 dismissal of his complaint alleging unlawful 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.

**ISSUE PRESENTED**

Complainant is an Asian American, who immigrated from the People’s Republic of China. Complainant alleged that one of his subordinates harassed him on the bases of his race (Asian) and national origin (Chinese) by engaging in various types of unwelcome conduct, including, but not limited to:

- disparaging Chinese immigrants;
- mocking Complainant’s language and communication skills due to his perceived foreign accent; and
- interfering with work performance by engaging in efforts to subordinate Complainant, such as regularly skipping meetings, walking out on meetings just as Complainant was starting to talk, not doing assignments, finishing assignments late, not acknowledging

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant’s name when the decision is published to non-parties and the Commission’s website.

Complainant's emails, and trying to bypass Complainant's authority by attempting to report directly to Complainant's superiors.

Complainant also alleged that his supervisors were aware of this subordinate's unwelcome conduct but failed to effectively stop it.

Assuming the allegations of the subordinate's unwelcome conduct to be true, was the subordinate's conduct sufficiently severe or pervasive to alter the conditions of Complainant's employment such that Complainant stated an actionable claim of discriminatory harassment in violation of Title VII?

### BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Branch Chief and Supervisory Diplomatic Interpreter, GS-15, at the Agency's Office of Operations, Office of Language Services, Non-European Language Branch, in Washington, D.C.

On July 10, 2020, Complainant filed a formal EEO complaint alleging that he was subjected to ongoing harassment/a hostile work environment on the bases of race (Asian) and national origin (Chinese) by one of his subordinates. Complainant further alleged that management officials were aware of the harassment but failed to adequately address it.

The subordinate was assigned to Complainant's branch on February 3, 2020, after completing a 15-year stint at the Agency's U.S. Embassy in Beijing, China. Complainant and his supervisors, the Division Chief and the Office Director, were already familiar with the subordinate, whose employment with the Agency dated back to the 1980s.

In his EEO complaint, Complainant alleged that, during the relevant time frame, the Division Chief and the Office Director were aware of several, if not all, of the subordinate's alleged harassing actions, which included:

1. In 2017, while visiting the Washington, D.C. office, the subordinate made mocking and disparaging remarks about Chinese immigrants to Complainant, who is a Chinese immigrant, and since then, the subordinate repeated the comments to the Division Chief.
2. The subordinate complained about being singled out by "someone" in the office, for "being an American" and that "someone" had accused him of being "American-centric," "pro-Taiwan" and "insensitive to Chinese culture." Complainant believed these comments were directed at him.
3. Since 2017 and as recent as May 5, 2020, the subordinate made disparaging comments and taunted Complainant, which Complainant alleges were "thinly

veiled attempts to paint [Complainant] as someone other than white and born in a foreign country who holds a grudge against" an American.

4. Beginning February 3, 2020, and ongoing, the subordinate regularly attempted to report directly to the Division Chief and Office Director instead of Complainant, disregarding their repeated instructions that he report through his line of supervision.
5. Beginning February 3, 2020, and ongoing, nearly all of the subordinate's communication toward Complainant was disrespectful, such as "very rude emails."
6. Beginning February 3, 2020, and ongoing, the subordinate continuously thwarted Complainant's supervision by, among other things, seldom acknowledging Complainant's emails, ignoring deadlines, and deliberately failing to satisfactorily complete assignments.
7. Between February 3, 2020 and July 10, 2020, the subordinate attended four out of the 40 meetings Complainant hosted or co-hosted as the Branch Chief, and in at least one instance (a Branch-wide staff meeting Complainant called for March 9, 2020), the subordinate made a point of leaving the office in front of Complainant's other subordinates when the staff meeting was about to start.
8. The subordinate made fun of Complainant's phrasing in an email he sent requesting an assignment from the subordinate, even though the phrasing, the result of Complainant's non-native English, did not impact the content of the message.
9. The subordinate pretended not to understand Complainant's pronunciation of the phrase "Go Virtual" and asked him to repeat himself multiple times in a manner that made Complainant self-conscious and uncomfortable.
10. From March 17, 2020 through July 10, 2020, the subordinate completed only two of the 10 assignments Complainant had given him despite Complainant's emails and extensions.
11. On July 8, 2020, during a phone meeting about the subordinate's Mid-Year Review, the subordinate parsed Complainant's words, such as "work" and "assignment," and then told Complainant, "you need to improve your English and learn how to make yourself clearer in the future."
12. On July 8, 2020, during the Mid-Year Review phone meeting, the subordinate revealed that he was aware that Complainant had initiated an EEO complaint,

accused Complainant of playing “the race card”, and told Complainant, “don’t play that game with me.”

In its final decision, the Agency dismissed the complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. In summary fashion, the Agency determined the alleged conduct was not sufficiently severe or pervasive to state a viable claim of harassment in violation of Title VII. The instant appeal followed.

### ANALYSIS AND FINDINGS

After careful review of the record, we determine that the allegations in this complaint, taken together, state a viable claim of discriminatory harassment. Nearly all of the alleged harassing incidents occurred on or after February 3, 2020, within the supervisor/subordinate relationship between Complainant and the subordinate, which involved frequent interaction and directly impacted Complainant’s work performance. As for the allegations of events that occurred before Complainant became the subordinate’s supervisor, they can be considered as additional evidence in support of Complainant’s overall harassment claim.

#### *Severity or Pervasiveness of Subordinate’s Alleged Harassing Conduct*

Generally, discriminatory harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Severity or pervasiveness may be determined, in part, by examining management’s responses to the alleged harassment.

When the Commission reviews a claim of harassment for viability, we must consider complainant’s allegations together and assume them to be true. See Cobb v. Dep’t of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997). We evaluate the harasser's conduct from the objective viewpoint of a reasonable person in the victim's circumstances. EEOC’s Enforcement Guidance on Harris v. Forklift Systems, Inc., Notice No. 915.002 (Mar. 8, 1994). The evaluation "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81 (1998). See also, EEOC’s Enforcement Guidance on National Origin Discrimination, Notice No. 915.005 (Nov. 18, 2016) (“EEOC Guidance No. 915.005”).

When, as here, a complainant alleges harassment by a subordinate employee, the complainant’s allegations may state a claim where, among other things:

- The complainant’s supervisors or management “condoned” or “tolerated” the subordinate’s harassing conduct, or alternately, the Agency exhibited a history or culture of tolerance at the complainant’s work site. See, e.g., Opal v. Dep’t of State, EEOC Appeal No. 2020004444 (Oct. 8, 2020) (stating a sex-based subordinate harassment claim where management allegedly condoned constant gender-based remarks of two

subordinates and rendered complainant's supervisory role "irrelevant" by communicating directly with subordinates and excluding complainant from the communications).

- The complainant's supervisors or agency management ineffectively responded to the subordinate's harassing conduct. See, e.g., Raney v. Dep't of Veterans Affairs, EEOC Appeal No. 01A22635 (Jan. 7, 2003) (stating a national origin-based subordinate harassment claim where management instructed a subordinate, who stated he did not like "foreign doctors," repeatedly referenced his expertise as a marksman, made gestures in the shape of a gun, and slammed doors, to limit contact with complainant but failed to enforce the directive); Complainant v. Nat'l Sec. Agency, EEOC Appeal No. 0720120011 (Jun. 11, 2013), reconsideration denied, EEOC Request No. 0520130573 (Dec. 13, 2013).

Complainant has alleged that his supervisors were aware of the subordinate's harassing conduct towards him but failed to effectively stop it. In fact, Complainant alleged that the harassing behavior of the subordinate continued without abatement through the filing of his complaint.

A complainant may demonstrate the necessary severity or pervasiveness to state a harassment claim by alleging that the harassing actions unreasonably interfered with his or her work performance.<sup>2</sup> In cases involving subordinate harassment, the impact on work performance typically manifests itself by reducing the complainant's effectiveness as a supervisor or undermining the complainant's credibility or authority in the eyes of other subordinates or coworkers. See, e.g., Opal; Gilberto S. v. Dep't of the Air Force, EEOC Appeal No. 0120151198 (Mar. 11, 2016). Here, Complainant alleged that the subordinate continually undermined his authority as a supervisor, including with other employees witnessing his conduct. Taking Complainant's allegations together and assuming them to be true, we determine that the subordinate essentially refused to recognize Complainant as his supervisor, which unreasonably and directly interfered with Complainant's work performance. For example, Complainant alleged that the subordinate continually reported to Complainant's supervisors instead of Complainant, rarely acknowledged Complainant's emails or satisfactorily completed assignments, attended only four out of 40 meetings Complainant hosted or co-hosted during the relevant time frame, and completed only two out of 10 assignments.

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<sup>2</sup> Enforcement Guidance on Harris, EEOC Notice No. 915.002. (In order to show that "[the alleged conduct] unreasonably interferes with . . . work performance, the employee need not show diminished performance but only that the alleged offensive conduct made it more difficult for him/her to do his/her job. See Harris (Ginsburg, J., concurring), slip op. at 1-2; see also Harris, slip op. at 4 ("even without regard to these tangible effects [such as detracting from employees' job performance], the very fact that the discriminatory conduct was so severe or pervasive that it created an environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of work place equality").

According to Complainant, these alleged harassing acts drained Complainant's time, as he describes sending "dozens" of emails to try and get the subordinate to complete his assignments. Complainant alleged that the subordinate's conduct impacted Complainant's own productivity and effectiveness, as well as the morale of the team. See, e.g., Opal; Gilberto S. v. Dep't of the Air Force, EEOC Appeal No. 0120151198 (Mar. 11, 2016).

Under Title VII, discrimination on the basis of national origin means discrimination because an individual (or their ancestors) is or is perceived to be from a certain place or has (or is perceived to have) the physical, cultural, or linguistic characteristics of a particular national origin group. Harassment based on national origin can take different forms, including ethnic slurs, ridicule, intimidation, workplace graffiti, "jokes", physical violence, or other offensive conduct directed toward an individual because of his birthplace,<sup>3</sup> ethnicity, culture, language, appearance, dress or foreign accent. See EEOC Enforcement Guidance on National Origin Discrimination, No. 915.005 (Nov. 18, 2016).<sup>4</sup>

The subordinate's alleged behavior occurred in the context of a nation-wide increase in reports of harassment against Asian Americans.<sup>5</sup> Asian American workers face multiple sources of discrimination. One source is language or accent discrimination. Perceptions of Asian accents may negatively affect the communication skills and perceived competence of Asian American workers. Asian American and Pacific Islander Work Group Report to the Chair of the Equal Employment Opportunity Commission.<sup>6</sup> Another source of discrimination is the perception of Asian Americans as "forever foreign." Perceptions of Asian Americans as foreign can negatively impact assessments of communication ability, competence and, importantly, trustworthiness. Id.

In considering Complainant's allegations, we determine that the subordinate's alleged behavior falls squarely in these two sources of Asian American discrimination.

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<sup>3</sup> With respect to "birthplace" a specific location is not required to state a claim. EEOC's guidance provides that "an allegation of national origin can state a claim where the alleged harassment is based on their "foreign-born" status, or "non-American" (or perceived non-American) status. 29 C.F.R. § 1606.1; EEOC Guidance No. 915.005, ref. Zuckerstein v. Argonne Nat'l Lab., 663 F. Supp. 569, 576-77 (N.D. Ill. 1987).

<sup>4</sup> Available at <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination>.

<sup>5</sup> Resolution of the U.S. Equal Employment Opportunity Commission Condemning Violence, Harassment, and Bias Against Asian Americans and Pacific Islanders in the United States (March 19, 2021).

<sup>6</sup> Available at <https://www.eeoc.gov/federal-sector/reports/asian-american-and-pacific-islander-work-group-report-chair-equal-employment>.

First, with respect to language or accent discrimination, the subordinate allegedly made comments about Complainant's accent or use of the English language, ostensibly for clarification, but delivered in a manner that Complainant alleges was intended to degrade and embarrass him. Notably, record reveals that the subordinate was familiar with Chinese accents, given that he spent many years working in Beijing, China.

Second, the subordinate allegedly perceived Complainant as foreign by engaging in rude emails, taunts, and comments insinuating that Complainant was "un-American," "anti-American," or had a "grudge against America." The subordinate also voiced alleged negative opinions of Chinese immigrants. Before the subordinate was assigned to Complainant's supervision, the Office Director and Division Chief were allegedly aware that the subordinate made disparaging references to Complainant's national origin, including his perceived "un-American" status. The subordinate allegedly used the term "foreigner" in a derogatory manner in reference to Chinese immigrants, allegedly implying that they (and Complainant, as a Chinese immigrant) were not American regardless of naturalized citizenship. And when the subordinate worked at the Agency's U.S. Embassy in Beijing, China, the subordinate allegedly had a reputation for bullying locally hired Chinese employees and referring to them as "communist spies."

In sum, if proven true, we conclude that the actions alleged by Complainant are sufficiently severe and pervasive to state a viable claim of discriminatory harassment on the bases of race (Asian) and national origin (Chinese) that requires investigation and further processing.

### *Reprisal*

A complainant is also protected from any retaliatory harassment that is reasonably likely to deter them or others from engaging in protected activity. See Maclin v. United States Postal Serv., EEOC Appeal No. 0120070788 (Mar. 29, 2007).

Remarks or comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a violation of the law. Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (complainant told that filing an EEO suit was "wrong way to go about getting a promotion"); see also, Vincent v. United States Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), recon. denied, EEOC Request No. 0520090654 (Dec. 16, 2010) (violation where supervisor commented "what goes around comes around" with respect to EEO complaints that had been filed); Ashby v. Dep't of the Treas., EEOC Appeal No. 0120090364 (Feb. 27, 2012), recon. denied, EEOC Request No. 0520120435 (Jul. 12, 2012) (violation where supervisor mentioned the complainant's prior EEO activity to a colleague and made inappropriate comments about the complainant's EEO complaints).

Although Complainant did not raise reprisal as a basis for discrimination in his complaint, the harassment described in allegation 12, on its face, could be found reasonably likely to deter Complainant or others from engaging in protected activity.

In the context of a contentious hour-long phone meeting, where he already made derogatory remarks about Complainant's English proficiency, S1 notified Complainant that he was aware of Complainant's EEO activity. The phrase, "don't play that game with me," and accusation of "playing the race card" in reference to Complainant's EEO activity were stated in a manner that that could be found reasonably likely to deter EEO activity. There is no evidence that management took any steps to prevent or address the retaliatory conduct, which, along with S1's apparently cordial relationship with Complainant's supervisors, further supports that these statements, while made by a subordinate, state a viable claim of retaliation.

If Complainant wishes to include reprisal as an additional basis for the instant complaint, he should notify the Agency's EEO manager and the EEO investigator assigned to his case.

### CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The complaint is hereby REMANDED to the Agency for further processing in accordance with this decision and the Order below.

### ORDER (E0618)

The Agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g).



The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

#### STATEMENT OF RIGHTS - ON APPEAL

##### RECONSIDERATION (M0920)

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

Alternatively, Complainant can submit his or her 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 his or her 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(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

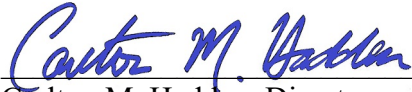
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency or filed your appeal with the Commission. 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 his or her 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. **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:



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Carlton M. Hadden, Director  
Office of Federal Operations

April 19, 2021  
Date