



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

[REDACTED]

Bryce A.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Citizenship and Immigration Services),
Agency.

Appeal Nos. 2020001712
2021001457

EEOC Hearing No. 551-2020-00063X

Agency Nos. HS-CIS-00165-2018
HS-CIS-00606-2019

DECISION

Complainant filed timely appeals with the Equal Employment Opportunity Commission (EEOC or Commission),² pursuant to 29 C.F.R. § 1614.403(a), from the Agency's final decisions issued on December 3, 2019, and December 3, 2020, concerning his equal employment opportunity (EEO) complaints 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 MODIFIES the Agency's final decisions.

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 The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. See 29 C.F.R. § 1614.606. In this case, we note that both complaints include a failure to provide a religious accommodation claim, and that the evidence for these claims are included in both complaints. Accordingly, the Commission exercises its discretion to consolidate the captioned cases.

ISSUES PRESENTED

The issues are whether Complainant established that the Agency subjected him to discrimination or harassment based on his national origin or religion, or in reprisal for prior protected EEO activity; and whether the Agency violated the Rehabilitation Act when it disclosed Complainant's medical condition.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Immigration Services Officer (SISO) (GS-13) at the Agency's Portland Field Office in Portland, Oregon. On August 22, 2017, the Agency opened a vacancy for a Supervisory Immigration Services Officer (GS-14), advertised under vacancy announcement number CIS-10039957-POO. Report of Investigation (ROI) 1 at 188-93. Complainant stated that he applied for the position, and he received an email notifying him that he was not qualified and not referred to the selecting official. Complainant stated that he did not believe that anyone was selected because he received an email stating that the position was canceled. ROI 1 at 105-7.

On November 13, 2017, the Agency posted a vacancy for a Supervisory Immigration Services Officer (Section Chief) (GS-14), advertised under vacancy announcement number CIS-10076474-POO. ROI 1 at 329-38. Complainant stated that he applied for the position and he received an email notifying him that he was found qualified for the position, and that his application was forwarded to the selecting official. However, Complainant was not selected for an interview. Complainant stated that on January 31, 2018, the District Director (DD) (Polish, German, Irish, English, no religion) sent a global email announcing the selectee for the position, who became Complainant's first-line supervisor (S1) (USA, Omnism/Agnosticism). ROI 1 at 109-10, 113.

Complainant stated that he worked a maxi-flex schedule, working 6:00 a.m. to 3:30 p.m. Monday through Thursday; and 6:00 a.m. to 2:30 p.m. on the first Friday, with the second Friday off each pay period. ROI 1 at 119-20. On August 10, 2019, Complainant submitted a request to work credit hours. S1 responded that she would approve the requests but asked if there was anything in particular that required Complainant's request to work an additional 45 minutes every day. Complainant responded that he was trying to earn credit hours for his use on Fridays, which was the "Muslim Sabbath," and included attending prayers at a mosque. ROI 1 at 511.

Complainant stated that on October 17, 2019, his second-line supervisor (S2) (American of European descent, no religion) informed him that DD learned that Complainant had been coming into work early to earn credit hours/religious compensatory time, and that she did not want this to continue. ROI 1 at 120. On October 19, 2018, Complainant emailed S1 regarding a religious accommodation. Complainant stated that he had been working from 5:15 a.m. to 6:00 a.m. as credit hours/religious compensatory time, and then used those hours for religious activities on Fridays. Complainant noted that Fridays were Islam's holiest day of the week, and that he performed many religious activities, including attending a prayer service at a mosque.

Complainant requested that he be able to continue this schedule of working before 6:00 a.m. to accrue credit hours or religious compensatory time. Complainant added that he needed to leave work as early as possible to perform his daily mandatory prayers. ROI 1 at 508.

On October 21, 2018, S1 emailed Complainant to inform him that his prior credit hours and compensatory time were approved in error, and that no Agency employee is allowed to work outside of the hours of 6:00 a.m. and 6:00 p.m. ROI 1 at 510. On November 16, 2018, S2 issued a denial of Complainant's request for a religious accommodation. S2 stated that Complainant did not show an employment requirement that prevented him from attending his mosque on Fridays because various work schedules allowed for Complainant to work between 6:00 a.m. and 6:00 p.m. and satisfy his religious practices. S2 stated that since there was no conflict between Complainant's religious beliefs and the Agency's hours of operations, no accommodation was required. S2 also stated that there would be an undue hardship because Complainant's supervisor must approve Complainant's "continual transactions, month after month after month for years" in the Agency's time and attendance system ("WebTA"). ROI 1 at 535-6.

On November 19, 2018, Complainant met with an EEO Specialist (EEOS) and provided additional information for his request, including a religious reason to leave work early each day to catch up on his missed daily prayers. ROI 1 at 606-7. On December 11, 2018, EEOS emailed S2 to recommend a grant of Complainant's religious accommodation request because Complainant provided additional information to demonstrate that his sincerely held religious beliefs conflicted with a workplace policy. EEOS also noted that he confirmed that there was sufficient lighting in the building for the time that Complainant was requesting to work, and that other employees were also in the building at 5:30 a.m. EEOS stated that unless there was another reason of undue hardship, the Agency should reverse the denial and grant Complainant's requested religious accommodation. ROI 2 at 773-4.

On December 18, 2018, Complainant emailed S1 and S2 to inform them that he provided additional information to EEOS in support of his request for a religious accommodation and renewed his request for a religious accommodation to start work earlier than 6:00 a.m. to accumulate religious compensatory time. ROI at 287. On December 20, 2018, Complainant sent S1 a request to change his work schedule from a maxi-flex to a compressed work schedule (CWS), from 6:00 a.m. to 3:30 p.m. Monday through Thursday, and working eight hours on the first Friday, with the second Friday off. ROI 2 at 279. Complainant stated that employees only receive eight hours of pay on holidays on a maxi-flex schedule and he needed to use an hour of annual leave to cover the difference, while employees not on a maxi-flex schedule receive nine hours of holiday pay. Complainant stated that S2 informed him that the earliest start time for a CWS schedule was 6:30 a.m., and that he would need to submit a request to start at 6:00 a.m. as a religious accommodation. ROI 2 at 199-200.

On December 19, 2018, Complainant requested a full day of administrative leave to review materials sent by the Office of Equal Opportunity and Inclusion. ROI 2 at 707. Complainant stated that he mistakenly submitted his request for December 27, 2018, and that he meant to request it for December 26, 2018.

Complainant stated that initially requested annual leave for December 26, and 27, 2018, but that he came into work on December 26th due to a change in his circumstances and he reviewed his EEO file on December 27th from home. Complainant stated that S1 informed him that he could not use administrative time at home for EEO activities. ROI 2 at 210-2.

Complainant stated that on December 20, 2018, he submitted a request to earn religious compensatory time on December 22-25, 2019, which S2 denied. Complainant stated that he was informed that no religious compensatory time could be earned on holidays and that he could only earn compensatory time or credit hours on his regularly scheduled workdays, and not on the weekend. ROI 2 at 194-5.

On January 22, 2019, S2 issued a decision on Complainant's requests for a religious accommodation and schedule change. S2 noted that on December 11, 2018, EEOS submitted a request for a reconsideration on Complainant's behalf of the October 19, 2018 denial of his religious accommodation. S2 stated that EEOS's reconsideration request failed to overcome the Agency's grounds for the denial. In response to Complainant's December 18, 2018 request for a religious accommodation to start work earlier than 6:00 a.m., S2 stated that there was no conflict between Complainant's religious beliefs and the Agency's hours of operations, and that no accommodation was needed. S2 also found that an undue hardship would be imposed by the "continual WebTA transactions" and the need for other supervisors to cover Complainant's responsibilities in his absence. S2 also denied Complainant's December 20, 2018 request to change his work schedule for the reasons set forth in "paragraph 6 and 7 above," which were the reasons for the denial of Complainant's religious accommodation request. S2 also noted that Complainant's schedule change request was denied because it was made around 2:00 p.m. on a Friday before the end of a pay period and was not timely. ROI 2 at 778-80.

On April 3, 2019, S2 issued Complainant a proposal to suspend him for 14 calendar days for three specifications of Claiming Pay for Time Not Worked. S2 noted that Complainant claimed to have worked an additional 30 minutes on November 16, 2018, November 30, 2018, and December 14, 2018. S2 stated that when S1 noticed that Complainant was not in his office prior to his expected departure, they conducted an inquiry into his entry and departure logs, which revealed that Complainant misrepresented his time and attendance of the identified dates. ROI at 1175-8. On April 15, 2019, Complainant provided a written response to the proposal and stated that S1 verbally approved his telework for 30 minutes on the listed dates. Complainant also disclosed that he suffered from epilepsy since 1992. ROI 2 at 1310-40.

On April 25, 2019, S1 issued Complainant a Mid-Cycle Review. S1 stated that Complainant's emails sometimes contained "substantive errors," such as incorrect words that changed the meaning of what Complainant intends to communicate. S1 stated that she expected Complainant to proofread his correspondences, prior to sending them to others. ROI 2 at 1210-11. On May 9, 2019, S2 sent a global email announcing that the teams would be reorganized and attached a new organization chart. ROI 2 at 1284.

Complainant stated that on August 8, 2020, he discovered that S1 and S2 shared information about his EEO activity, including his WebTA requests for a religious accommodation. Complainant stated that he believed that the information was shared with “all individuals” who had access to his WebTA requests, but that he was not sure who had access to his WebTA. ROI 2 at 336-7. Complainant stated that on August 20, 2019, he discovered that DD shared his protected medical information when she gave S1 a copy of his written response to the proposed suspension. ROI 2 at 331.

On November 21, 2019, DD issued a decision to sustain the proposed suspension for fourteen (14) calendar days. DD noted that she considered Complainant’s oral and written responses to the proposal and concluded that the preponderant evidence showed that Complainant committed the misconduct as charged. DD noted that she considered the Douglas Factors, such as the nature and seriousness of the offense, and that Complainant’s position as a supervisor increased the seriousness of the offense. DD also stated that Complainant provided contradictory responses and cast blame onto his supervisors, which made it difficult to find potential for his rehabilitation. DD noted that S1 provided a statement that Complainant did not request permission to telework on the three dates at issues. DD stated that Complainant responded that he “clearly remembered” S1 verbally approving his telework requests, and that it was reasonable to conclude that Complainant would have then coded the time as telework, which he failed to do for the three dates. DD determined that Complainant received pay for time not worked three times. ROI 2 at 1291-5.

EEO Complaint (HS-CIS-00165-2018)

On December 14, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him:

1. on the basis of national origin (Middle Eastern) when on September 11, 2017, Complainant learned that he was not selected for a Supervisory Immigration Services Officer position, advertised under vacancy announcement number CIS-10039957-POO;
2. on the basis of national origin, and in reprisal for prior protected EEO activity (Agency Case NO. HS-CIS-22515-2012),³ when on January 31, 2018, Complainant learned that he was not selected for a Supervisory Immigration Services Officer (Section Chief) position, advertised under vacancy announcement number CIS-10076474-POO; and

³ The parties settled this prior EEO complaint, but Complainant alleged that the Agency breached the settlement agreement, including the Agency’s agreement to consult with the Office of Equal Opportunity and Inclusion when denying any requests for religious accommodation made by Complainant when the denial is based on undue hardship. The Commission found that the Agency did not substantially comply with this term and ordered the Agency to comply with this term. Cedrick S. v. Dep’t of Homeland Sec., EEOC Appeal No. 2020002586 (Sept. 21, 2020).

3. on the basis of religion (Islam), and in reprisal for prior protected EEO activity, when on October 19, 2018, Complainant's religious accommodation request was denied.

EEO Complaint (HS-CIS-00606-2019)

On March 5, 2019, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment based on national origin and religion, and in reprisal for prior EEO activity, when:

4. in December 2018 and January 2019, Complainant's religious accommodation requests, including requests to adjust his schedule or work compensatory time, were denied;
5. in December 2018 and January 2019, management responded to Complainant's requests for administrative time with restrictions;
6. on April 3, 2019, Complainant was issued a proposed suspension, in which he was falsely accused of falsifying his timecard;
7. on April 25, 2019, Complainant was issued an unfair midterm review;
8. on May 14, 2019, Complainant was informed that the Immigration Services Officer teams were being reorganized, and he was given a larger team, resulting in him having more work than other similarly situated employees;
9. on or about August 20, 2019, Complainant discovered that management shared protected medical information with his supervisor, in violation of their obligation to keep it private;
10. on August 8, 2019, Complainant discovered that information related to his EEO official time had been shared beyond those with a legal need to know; and
11. on November 21, 2019, Complainant was issued a 14-day suspension.⁴

At the conclusion of the investigations, the Agency provided Complainant with copies of the reports of investigations and notices of his right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's requests,⁵ the Agency issued final decisions pursuant to 29 C.F.R. § 1614.110(b).

⁴ We have renumbered the claims in complaint HS-CIS-00606-2019, as a result of consolidating the two appeals.

⁵ Complainant initially requested a hearing for complaint HS-CIS-00606-2019, but he subsequently withdrew his hearing request.

On December 3, 2019, the Agency issued the final decision for EEO Complaint HS-CIS-00165-2018. For claim 1, the Agency found that a Human Resource Specialist determined that Complainant did not meet the minimum qualifications for the position, and that the position was canceled because the vacancy announcement needed to be revised. The Agency then found that Complainant did not show that these reasons were pretexts for discrimination. Regarding claim 2, the Agency determined that DD stated that Complainant's resume did not score high enough to be selected for an interview. For example, Complainant did not address any of the following administrative areas: personnel, labor relations, financial management, training, facilities, property, health and safety, and emergency preparedness. The Agency found that while Complainant maintained that S1 did not have the work experience to justify the high score that she received, he failed to produce any evidence to support his claim.

Regarding Complainant's request for a religious accommodation, the Agency found that Complainant had bona fide religious beliefs, but he failed to demonstrate that the practice of his religion conflicted with an employment duty. The Agency noted that Complainant had been on a maxi-flex schedule and working from approximately 6:00 a.m. to 3:30 p.m., Monday through Thursday, and approximately four hours every other Friday. The Agency cited to the determination letter, which stated that Complainant had "numerous options to work within the 6:00 a.m. to 6:00 p.m. time band and still satisfy [his] religious practices." The Agency determined that Complainant produced no evidence demonstrating that his flexible work schedule conflicted with his religious observance, and that even if Complainant was able to demonstrate an existing conflict, the Agency provided Complainant with an alternative accommodation in the form of a flexible schedule. The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

On December 3, 2020, the Agency issued the final decision for EEO Complaint HS-CIS-00606-2019. The Agency again found that, while Complainant demonstrated a bona fide religious belief, he did not demonstrate that the practice of his religion conflicted with an employment duty because Complainant produced no evidence demonstrating that his flexible work schedule conflicted with his religious observance. The Agency assumed, *arguendo*, that even if Complainant was able to demonstrate a conflict, the Agency provided Complainant with an alternative accommodation in the form of a flexible work schedule.

Regarding the suspension, mid-term evaluation, and reorganization, the Agency found that management articulated legitimate, nondiscriminatory reasons for their actions. The Agency then found that Complainant failed to prove by a preponderance of the evidence that management's legitimate, nondiscriminatory reasons were a pretext for discrimination.

The Agency also determined that Complainant did not establish that anyone without a need to know his medical information obtained it, or that an unlawful disclosure otherwise occurred; and that management officials did not share information related to his EEO official time, beyond those with a legal need to know.

The Agency found that Complainant failed to prove that the Agency subjected him to an unlawful, discriminatory, hostile work environment based on national origin, religion, or reprisal. The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeals and submitted briefs in support of his appeals. The Agency opposed Complainant's second appeal.

CONTENTIONS ON APPEAL

Complainant's Contentions

As an initial matter, Complainant requests that the Commission issue a default judgment against the Agency as a sanction for the untimely issuance of the first final decision. Complainant states that there were unexplained delays, and that he repeatedly requested that the Agency issue the final decision and was informed that the delay was due to the fact that they were busy. Complainant notes that he initially requested a final decision on January 3, 2019, and that it was not issued until December 2019.

Complainant also notes that he requested to amend his second complaint in February 2020, and that his requests were ignored, but that the Agency is investigating the claims as part of HS-CIS-01511-2020. Complainant requests that the Commission reverse the Agency's dismissal of his amendment and accept evidence from complaint HS-CIS-01511-2020. In addition, Complainant states that the Agency did not properly process his EEO complaint because he provided additional evidence to the Agency, and that this was not included in the report of investigation.⁶

Regarding the failure to provide a religious accommodation claim, Complainant asserts that the Agency did not correctly understand his claim and ignored evidence which explains the conflict between his sincerely held religious beliefs and his workplace conditions. Specifically, Complainant states that a maxi-flex schedule does not eliminate the conflict. Complainant states that he must perform five daily mandatory prayers, and since he is unable to pray while at work, he was given permission from a Muslim scholar to postpone his prayers until after work. Complainant notes that he leaves work at 3:30 p.m. to go home and catch up on his missed prayers, prior to the next scheduled prayer. Complainant states that he is unable pray at work because he needs to perform a cleansing ritual prior to his prayers and his job duties require him to be available to his employees. Complainant also states that his religious beliefs require him to observe Friday as a holy day, which includes a noon prayer at his mosque.

Complainant states that for many months, he was approved to come to work prior to 6:00 a.m. to earn religious compensatory time and credit hours, and then use the hours for the first Friday of each pay period.

⁶ The Agency included the additional information provided by Complainant in an addendum to the second report of investigation.

Complainant asserts that the Agency's argument that his requested religious accommodation was an undue hardship was "illogical" because there had been no issues in the months when he was working his requested schedule. Complainant argues that the Agency did not show how using the WebTA system will result in an undue hardship because a supervisor only needs to use "one or two clicks" to approve one request that can be submitted for an entire pay period. Complainant asserts that this hardship claimed by the Agency is hypothetical and not real. Complainant also argues that the Agency did not consider the relevant factors when assessing undue hardship, including the identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation.

Complainant also argues that the denial of his religious accommodation was retaliation for filing EEO complaints against DD in 2012 and the non-selection claims (claims 1 and 2).⁷ Complainant states that the record contains evidence contradicting management officials' false statements that other employees never worked credit hours on the weekends and that credit hours could only be earned between 6:00 a.m. and 6:00 p.m., Monday through Friday. Complainant also argues that evidence shows that there were other employees who worked a CWS schedule with a start time of 6:00 a.m., while his request was denied based on the Memorandum of Agreement (MOA), which stipulates that CWS schedules start at 6:30 a.m. However, Complainant notes that he is not a bargaining unit employee, and that the MOA states that its provisions might not apply to supervisors and managers.

For claim 2, Complainant states that while he made the best qualified list, he was "deliberately screened out during the unreliable and questionable resume scoring process." Complainant states that the Agency ignored his evidence that the resume rankings were discriminatory and that his resume was unfairly given a low score, as shown by the inconsistent scores between the two panel members. Complainant also argues that DD selected a panel member who was planning to retire, and therefore, would be unavailable to participate in Complainant's EEO investigation.

Regarding the suspension claims, Complainant asserts that the use of the telework code was never enforced and that errors were routinely made due to a lack of training. Complainant also argues that verbal approval to work from home for a few hours has always been done in their office. Complainant argues that the Agency relied upon S1's memory, and that it did not "keep written notes." Complainant also argues that he requested leave for the three dates, and that the leave started after his 30-minute lunch break.

Complainant also argues that his due process rights were denied, such as when the Agency refused to provide the full video of him leaving on the dates in question. In addition, Complainant argues that DD did not apply the Douglas Factors correctly.

⁷ While we note that Complainant also argues disparate treatment when his requests to earn religious compensatory time were denied, we find that it is more properly analyzed as a claim of a failure to provide a religious accommodation.

For example, Complainant states that DD found that the evidence of Complainant's early departures was clear, and Complainant provided conflicting information about his departures, but that there were no early departures.

Complainant argues that the Agency violated the Rehabilitation Act when it placed his medical documents in his regular personnel file. Complainant states that he only intended to disclose his medical condition to the deciding official for consideration for his proposed suspension. Complainant also asserts that the Agency improperly disclosed his EEO activity; for example, to the Union and his colleagues. Complainant states that he provided evidence to show that Agency's officials purposely allowed other SISOs to view his requests for time to work on his EEO activities when he provided evidence showing that he received notices from WebTA when his fellow SISOs made requests for Time Off or Leave, and therefore, the other SISOs must have received his notifications and were able to see those requests.

Regarding his mid-year evaluation, Complainant argues that S2 reviewed it prior to issuance, which was not consistent with Agency policy, in an attempt to intimidate and harass him. Complainant also argues that it contained "discriminatory" language criticizing him for making a few typos, and that other employees did not have mid-year evaluations with these same criticisms, despite evidence of similar mistakes. Complainant also states that another SISO was taking months to review cases from her team members, while Complainant was criticized for taking two weeks.

Complainant argues that the Agency's reasons for the reorganization were pretext, and that S1 and S2 retaliated against him by assigning him the largest number of employees. Complainant states that Agency officials have not produced evidence to support their claim that the reorganization followed an established and approved Agency policy that "junior" supervisors have fewer team members. Complainant asserts that management officials intentionally provided false information, such as when S2 stated that another employee's timesheet was correct and that another employee did not work on weekends. Complainant argues that the complained of incidents also constituted per se reprisal.

Agency Contentions

The Agency states that Complainant requested to amend his second complaint on February 24, 2020, and that the Agency denied his request because the investigation was in its final stages and required to be completed by February 29, 2020. The Agency states that it agreed to include Complainant's additional information in the record. The Agency notes that, on appeal, Complainant provided ten attached exhibits and numerous unmarked exhibits in his brief, and it objects to Complainant's attempts to supplement the record on appeal. The Agency states that it already included the evidence that Complainant submitted after the Agency completed its investigation. In addition, to the extent that Complainant believed that the investigation was incomplete, or that additional evidence was necessary, he had the opportunity to engage in discovery and supplement the record at the hearing stage.

However, Complainant waived that opportunity and withdrew his hearing request before discovery responses were due. The Agency adds that Complainant did not demonstrate that the new exhibits were unavailable prior to the issuance of the February 27, 2020 ROI.

Further, the Agency states that the exhibits consisting of affidavits and exhibits collected during the course of the ongoing investigation of HS-CIS-01511-2020 are unrelated to the religious accommodation requests at issue in the instant complaint, which occurred nearly a year and a half before the subject matter of the claims included in HS-CIS-01511-2020.

The Agency asserts that its final decision correctly analyzed that there was no conflict between the available work schedules and the practice of Complainant's religious beliefs. The Agency also argues that Complainant's request to work prior to 6:00 a.m. would impose an undue hardship on the Agency because he cannot perform the essential job function of managing his employees if he works before the building hours of operation when his subordinates are not present at work. The Agency asserts that Complainant's absence when his subordinates were working would place a burden on the other two supervisors to cover his management responsibilities.

Regarding the suspension, the Agency notes that Complainant initially stated that S1 authorized him to leave early on the dates in question and later changed his story to claim that he had teleworked with S1's verbal approval. The Agency determined that DD issued a decision sustaining the charges, after thoroughly weighing the Douglas Factors. The Agency notes that Complainant repeatedly asserted that there was general confusion about when the telework code should be used in WebTA, and that other employees failed to use the correct telework code when they were teleworking and were not disciplined. However, the Agency states that Complainant was not charged with, nor disciplined for, using the incorrect telework code, but he was charged with, and disciplined for, claiming pay for time not worked.

For his mid-year evaluation, Complainant argued that the language related to his communications was discriminatory because S1 did not criticize other SISOs for similar mistakes. However, the Agency asserts that the noted mistakes by other SISOs occurred, or came to light, after the mid-term evaluations.

Regarding the disclosure of medical information, the Agency states that Complainant disclosed his medical condition within a 31-page written reply to the proposed suspension, and that his medical condition was not at issue regarding the suspension. The Agency asserts that Complainant inserted his diagnosis into his disciplinary action file and cannot now claim improper disclosure when that file was transmitted to managers who had a need to receive the file in order to make a disciplinary decision.

For the allegation that the Agency improperly disclosed Complainant's EEO activity through his WebTA requests, the Agency states that Complainant only speculates, but did not provide supporting evidence that another SISO was informed that any of his WebTA requests for administrative time were related to EEO activity.

Further, to the extent that any SISO was responsible for certifying Complainant's time, the SISO would have had a need to receive information about his leave request. The Agency requests that the Commission affirm its final decision and uphold its findings of no discrimination or retaliation.

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), at 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 AND FINDINGS

Dissatisfaction with the EEO Process

As an initial matter, Complainant describes his dissatisfaction with the way the Agency processed his second EEO complaint, and we find that Complainant is attempting to raise "spin off" complaints. The proper forum to raise such allegations would have been with the Agency official responsible for complaint processing and/or processed as part of the original complaint, rather than on appeal. See 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). As such, this appeal will only address the accepted claims in the two complaints.

In addition, Complainant argues that the Agency acted improperly when it denied his request to amend his second EEO complaint, and when it processed it as part of a separate EEO complaint. A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a complainant may file a motion with the AJ to amend a complaint to include issues or claims like or related to those raised in the complaint. See 29 C.F.R. § 1614.106(d).

However, while an amendment does extend the time for completing an investigation, the deadline for the investigation is "within the earlier of 180 days after the last amendment ... or 360 days after the filing of the original complaint." 29 C.F.R. 1614.106(e)(2). In this case, Complainant filed his second EEO complaint on March 5, 2019, and the regulatory deadline for the completion of the investigation was no later than February 28, 2020. We find that Complainant's amendment request submitted on February 24, 2020, would not have allowed the Agency enough time to investigate the amended issues and timely complete the investigation, and that the Agency properly included these newly raised issues in a separate EEO complaint.

Further, we note that Complainant requested a hearing on March 23, 2020, and there is no evidence that he requested an amendment with the AJ, prior to his withdrawal of his hearing request on October 5, 2020. Accordingly, we decline to grant Complainant's request to reverse the Agency's decision regarding his amendment.

New Claims and Evidence on Appeal

The Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004). While we note that this complaint includes an allegation related to an improper disclosure of Complainant's EEO activity when his managers allowed other SISOs to see his WebTA requests, Complainant claims that the Agency made additional disclosures of his EEO activity, for the first time on appeal. In addition, Complainant raises a new theory of discrimination of reprisal for the first time on appeal, which was not previously addressed by the Agency in either final decision. As such, we will not consider these new allegations, or new theory of discrimination, in the instant decision.

In addition, as a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation. See EEO MD-110 at Chap. 9, § VI.A.3. Here, Complainant requests that the Commission consider new evidence provided on appeal that was a part of another EEO complaint, HS-CIS-01511-2020. However, Complainant has not provided any evidence to show that these new materials were not available during the investigations of the instant complaints, or any explanation as to why they were not provided during the investigative stage. Accordingly, the Commission declines to consider this new evidence on appeal.

Request for Sanction

On appeal, Complainant requested that the Commission issue a default judgment as a sanction for the Agency's failure to timely issue the first final decision. EEOC regulations provide that an agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision. 29 C.F.R. § 1614.110(b). Because we reverse the Agency's final decisions, in part, we decline to address Complainant's request for a default judgment as a sanction.

Disparate Treatment

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once

Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

Claims 1 and 2

Complainant may establish a prima facie case of discrimination by providing evidence that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) either that similarly situated individuals outside his protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted). Generally, when an Agency cancels a vacancy announcement without making a selection, the complainant suffers no personal harm that would render him "aggrieved." See Grace v. Dep't of the Army, EEOC Request No. 05940969 (May 18, 1995). As such, we find that Complainant did not establish a prima facie case of discrimination for claim 1.

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on national origin and in reprisal for prior protected EEO activity for claim 2, we find that the Agency proffered legitimate, nondiscriminatory reasons for not selecting Complainant. DD stated that the applicants' resumes were scored on eleven criteria, and that the top three applicants were interviewed. DD stated that Complainant received a total score of 33, and that ten candidates received higher scores, with S1 receiving a total score of 60. DD also stated that Complainant's resume included numerous typos, grammatical errors, and incorrect references, and that while Complainant was applying for a GS-14 position, he did not demonstrate advanced writing skills in his resume. Supplemental ROI at 14, 22-3.

We find that Complainant has not shown that the proffered reasons were pretext for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opore-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008). On appeal, Complainant argued that the resume rankings were discriminatory and that his resume was unfairly given a low score, as shown by the inconsistent scores between the two panel members. However, the scoring matrices show that the panelists gave Complainant scores of 18 and 15, out of a possible total score of 33. Supplemental ROI at 17-18. We find that these two scores were not "inconsistent" and simply reflect differing opinions by a few points.

While Complainant disagreed with the Agency's assessment of his resume, he did not provide any evidence to show that DD's proffered reasons were not worthy of belief. In addition, Complainant did not provide any supporting evidence that DD selected the other panelist because he would be unavailable to participate in the EEO investigation due to his retirement.

In addition, in a non-selection case, pretext may be found where the complainant's qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). Complainant argued that S1 only had one year of supervisory experience, and that he had more managerial and supervisory experience than S1. ROI 1 at 109. However, the Commission has found that number of years of experience does not establish an applicant's qualifications are observably superior. See Kopkas v. U.S. Postal Serv., EEOC Appeal No. 0120112758 (Oct. 13, 2011). As such, we find that Complainant did not establish that the Agency discriminated against him based on his national origin, or in reprisal for prior protected EEO activity, when it did not select him as a Supervisory Immigration Services Officer.

Claim 5, 6, 7, 8, and 11

Assuming, arguendo, that Complainant established a prima facie case of discrimination based on national origin and religion, and in reprisal for prior protected EEO activity, for claims 5, 6, 7, 8, and 11, we find that the Agency proffered legitimate, nondiscriminatory reasons for their actions. For claim 5, S1 stated that she approved Complainant's December 2018 and January 2019 requests for administrative time, without restrictions. S1 noted that she initially denied Complainant's request for administrative time due to his mistake on the dates, but they sorted out the confusion. S1 stated that when Complainant informed her that he had teleworked the administrative hours, she reminded him that telework must be approved in advance. ROI 2 at 680-1.

Regarding claims 6 and 11, S1 stated that she reported her suspicion that Complainant was falsifying his timecard, which resulted in an investigation. ROI 2 at 682. S2 stated that he recommended the suspension because Complainant was responsible for accurately reporting his time and attendance, and he failed to carry out his responsibility. ROI 2 at 757-8. DD stated that when she decided to suspend Complainant, she considered the proposal and accompanying documentation, and Complainant's responses. DD noted that Complainant coded for time worked when he had not worked. ROI 2 at 1006-9. For claim 7, S1 stated that a rating is not issued at the midterm review, and that it was her practice to inform employees of the areas in which they needed to improve. ROI 2 at 683. S2 stated that while he reviewed Complainant's midterm review prior to its issuance, he had no role in creating the review. ROI 2 at 759.

Regarding claim 8, S2 stated that upon the reorganization, other supervisors had smaller teams, but that the members of Complainant's team were experienced, who required normal review and did not have significant performance issues. S2 stated that a new supervisor was given a smaller team due to his lack of experience, with new team members who required 100% case review and another team member with performance issues.

S2 noted that the reorganization did not lead to Complainant having more work than his peers, which was not based solely on the number of team members. ROI 2 at 762-3. S1 corroborated that other supervisors would onboard new employees, who required training and 100% review, while Complainant had an experienced team that did not require 100% review. ROI 2 at 685.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Regarding the suspension, Complainant argued that verbal approval to work from home for a few hours has always been done in their office; however, Complainant did not provide any supporting evidence. While Complainant argued that the use of the telework code was not regularly enforced, we find that Complainant did not establish that he had approval to telework on the dates he claimed to have teleworked.

Complainant also argued that the Agency relied upon S1's memory, and that it did not "keep written notes." However, an Agency merely has to articulate legitimate, nondiscriminatory reasons for its actions, and then it is Complainant's burden to prove that the Agency's actions were pretext for discrimination. See Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120123327 (Apr. 28, 2015); Yoon v. Dep't of the Army, EEOC Request No. 0520110577 (Dec. 16, 2011); O'Loughlin v. Soc. Sec. Admin., EEOC Request No. 05980011 (Apr. 26, 2001). Here, the Agency provided its legitimate, nondiscriminatory reasons for the suspension and Complainant did not provide evidence that the reasons were pretexts for discrimination.

In addition, while Complainant argued that DD did not apply the Douglas Factors correctly, the suspension decision shows DD's analysis of each Douglas Factor. For example, DD considered Complainant's prior performance evaluations; length of service; positive work relationships; and lack of prior discipline, but she found that these factors did not outweigh the seriousness of the offense or Complainant's lack of acceptance of responsibility for the misconduct. ROI 2 at 1292-3.

For claim 7, Complainant argued that his mid-year evaluation contained "discriminatory" language criticizing him for making a few typos, and that other employees did not have mid-year evaluations with these same criticisms, despite evidence of similar mistakes; and that another SISO was taking months to review cases from her team members, while Complainant was criticized for taking two weeks. However, we find that the examples provided by Complainant occurred after the issuance of his mid-year evaluation.

Regarding the reorganization, Complainant argued that the Agency's reasons were pretext, and that S1 and S2 retaliated against him by assigning Complainant the largest number of employees. However, S2 stated that when new team members join, the goal is to create equal workloads for each SISO. ROI 2 at 762. While Complainant argued that the number of team members was unequal, we find that Complainant did not show that his workload was greater than his peers.

On appeal, Complainant alleged that the managers lied. However, Complainant withdrew his hearing request and we do not have the benefit of any credibility determinations by an Administrative Judge.

Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant fails to meet that burden. See Lore v. Dep't of Homeland Sec., EEOC Appeal No. 0120113283 (Sept. 13, 2013) (complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made); Brand v. Dep't of Agric., EEOC Appeal No. 0120102187 (Aug. 23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where complainant requested a final decision and an Administrative Judge did not make credibility determinations). Here, we find that Complainant did not provide evidence showing that the management officials were not truthful regarding claims 5, 6, 7, 8, or 11.

In addition, the Commission has long held that an Agency has broad discretion to set policies and carry out personnel decisions, and it should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259 (1981); Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). We find that Complainant only makes bare assertions of discrimination and retaliation, and that there is no evidence of unlawful motivation by his managers for claims 5, 6, 7, 8, and 11. Accordingly, we find that Complainant did not establish that the Agency discriminated against him based on national origin or race, or in reprisal for prior protected EEO activity, for claims 5, 6, 7, 8, and 11.

Religious Accommodation (Claims 3 and 4)

Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation is shown to impose an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1). The traditional framework for establishing a prima facie case of discrimination based on religious accommodation requires an employee to demonstrate that: (1) he has a bona fide religious belief, the practice of which conflicted with their employment; (2) he informed the agency of this belief and conflict; and (3) the agency nevertheless enforced its requirement against the employee. Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993); Turpen v. Mo.-Kan.-Tex. R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984).

We find that Complainant has a bona fide religious belief, and that the practice of conducting five daily prayers limited his ability to work later in the day because he needed to go home to properly conduct his mandatory prayers. Complainant was able to work early in the day, and he was only limited by the Agency's policies, which set the employees' start time at 6:00 a.m., at the earliest. While Complainant requested the ability to work prior to 6:00 a.m., and on weekends and holidays, to earn religious compensatory time or credit hours as a religious accommodation, the Agency denied his requests. As such, we find that Complainant established a prima facie case of discrimination based on religious accommodation.

Once an employee establishes a prima facie case, the Agency must show that it made a good faith effort to reasonably accommodate the religious beliefs and, if such proof fails, the Agency must show that the alternative means of accommodation proffered by the employee could not be granted without imposing an undue hardship on the Agency's operations. See Tiano v. Dillard Dep't Stores, Inc., 139 F.3d 679, 681 (9th Cir. 1998); Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir. 1978); Cardona v. U.S. Postal Serv., EEOC Request No. 05890532 (Oct. 25, 1989). Here, the Agency stated that it granted an alternative accommodation of a flexible work schedule. However, we find that this was not an effective accommodation because no schedule allowed for Complainant to work prior to 6:00 a.m. While Complainant could have possibly worked regular hours, without the need to earn and use religious compensatory time or credit hours, he would have only been able to do so if he could start work prior to 6:00 a.m. As such, we find that the Agency did not provide Complainant with an appropriate alternative accommodation.

The Commission has previously found that an agency is not obligated to violate the terms of its collective bargaining agreement in order to accommodate an employee's religious beliefs. See Kiara v. Dep't of the Air Force, EEOC Appeal No. 0120131844 (Jan. 19, 2016). However, in this case, Complainant is not a member of bargaining unit.

The Agency also stated that granting Complainant's requests would be an undue hardship because Complainant's supervisor must approve "continual transactions, month after month after month for years"; and there would be a need for other supervisors to cover Complainant's responsibilities in his absence. To show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis cost. Trans World Airlines v. Hardison, 432 U.S. 63, 74 (1977). Relevant factors may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation. The employer needs to demonstrate how much cost or disruption a proposed accommodation would involve. See Don T. v. U.S. Postal Serv., EEOC Appeal No. 2019001176 (Jan. 30, 2020); Heidi B. v. U.S. Postal Serv., EEOC Appeal No. 0120182601 (Nov. 8, 2019). A showing of undue hardship cannot be merely hypothetical, but it must instead include evidence of an actual imposition on coworkers or disruption of work schedules or routines. Tooley v. Martin Marietta, 648 F.2d 519, 521 (4th Cir. 1987).

We find that the Agency has not met its burden to demonstrate that granting Complainant's requested accommodation to accrue religious compensatory time or credit hours for his use on Fridays would have been an undue hardship. We note that Complainant was granted his requested accommodation from August to October 2018, and that the Agency did not produce any evidence showing that during this time, there was any undue hardship. While S1 stated that Complainant's request presented an "unreasonable continuous cycle of WebTA transactions," and that she approved his requests for 18 business days, she did not provide any testimony describing how approving Complainant's WebTA requests was an actual imposition. ROI 1 at 504-5.

In addition, there is no testimony that Complainant's absence caused any additional burden on the other supervisors. Complainant informed S1 in August 2018 that, during the time he worked the credit hours, he reviewed his team members' decisions; searched for guidance on issues that were brought to his attention; and met with his team members who arrived early and discussed their cases. Complainant noted that three of his team members were also in the office early and off on Fridays. ROI 1 at 511. We find that the Agency's argument that the other supervisors would bear an addition burden is hypothetical, and the Agency did not present evidence showing that allowing Complainant to work prior to 6:00 a.m. to earn religious compensatory time or credit hours for use on Fridays caused an undue hardship to the Agency. Accordingly, we REVERSE the Agency's findings that it provided a religious accommodation to Complainant and ORDER the Agency to take further action, in accordance with the Order below.

Medical Disclosure (Claim 9)

Under the Rehabilitation Act, information "regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c)(1); see also 42 U.S.C. § 12112(d)(4)(C). This requirement applies to all medical information, including information that an individual voluntarily discloses. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000). Employers may share confidential medical information only in limited circumstances: supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; first aid and safety personnel may be told if the disability might require emergency treatment; and government officials investigating compliance with the ADA and Rehabilitation Act must be given relevant information on request. 29 C.F.R. § 1630.14(c)(1).

In this case, Complainant volunteered his medical information for the Agency's consideration in response to the proposed suspension, and he stated that when he disclosed his medical condition, he believed that only DD, as the deciding official for his suspension, would have access to his medical information. DD denied sharing Complainant's medical information; however, S2 stated that DD shared Complainant's written response with him because he was the proposing official. ROI 2 at 1001, 985.

We find that the Agency violated the Rehabilitation Act when DD shared Complainant's medical information, which was included in his written response to the proposed suspension. We note that there was no indication that S2 had a need to receive a copy of Complainant's response to the proposed suspension since DD was the sole deciding official on the proposal. To the extent that DD shared Complainant's response for inclusion in S2's records of Complainant's personnel file, the Commission has previously held that an agency's failure to maintain a complainant's medical information in a separate medical file violates the Rehabilitation Act and constitutes disability discrimination. See Mayo v. Dep't of Justice, EEOC Appeal No. 0720120004 (Oct. 24, 2012) (medical information was placed in a non-medical adverse action file in the Human Resources Department), req. for recon. den'd, EEOC Request No. 0520130125 (Apr. 25, 2014);

Higgins v. Dep't of the Air Force, EEOC Appeal No. 01A13571 (May 27, 2003) (medical information was placed in a non-medical work file maintained by employee's supervisor); Brunnell v. U.S. Postal Serv., EEOC Appeal No. 07A10009 (July 5, 2001) (medical information was placed in the employee's personnel file).

While Complainant included this medical information on page 24 of his response, we find that DD could have redacted or removed this one page when she shared Complainant's written response with other management officials. ROI at 1333. We note that Complainant's medical condition was not a factor in the Agency's decisions to propose or uphold the suspension, and that this disclosure did not fall within a permissible exemption of the Agency's obligation to keep an employee's medical diagnosis confidential. Accordingly, we REVERSE the Agency's finding that it did not improperly reveal Complainant's confidential medical information in violation of the Rehabilitation Act and ORDER the Agency to take further action, in accordance with the Order below.

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII or the Rehabilitation Act may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). As such, the Agency is ORDERED to conduct a supplemental investigation regarding any compensatory damages, attorney's fees, and costs for its failure to provide Complainant with a religious accommodation since October 19, 2018, and its inappropriate disclosure of Complainant's medical condition on August 20, 2019.

Disclosure of EEO activity (Claim 10)

The Commission has held that disclosure of EEO activity by a supervisor to coworkers constitutes reprisal. See Complainant v. Dep't of Justice, EEOC Appeal No. 0120132430 (July 9, 2015) (reprisal found where a supervisor broadcasted the complainant's EEO activity in the presence of coworkers and management); see also Melodee M. v. Dep't of Homeland Sec., EEOC Appeal No. 0120180064 (June 14, 2019) (affirming agency's finding of reprisal when the complainant's second level supervisor disclosed the complainant's EEO activity to others).

Here, S1 stated that she did not provide access to Complainant's WebTA profile to others. ROI 2 at 742. S2 also stated that he did not provide WebTA access to anyone other than S1. ROI 2 at 986-7. On appeal, Complainant argued that he provided evidence showing that he received WebTA notices when his fellow SISOs made requests for Time Off or Leave, and therefore, the other SISOs must have received his notifications and must have been able to see those requests. However, Complainant did not provide any evidence showing that his WebTA requests were sent to other SISOs. As such, we find that Complainant did not establish that the Agency improperly disclosed his EEO activity.

Harassment

As discussed above, we found that Complainant did not establish a case of discrimination on any of his alleged bases, aside from a failure to provide a religious accommodation and an inappropriate disclosure of his medical condition. However, as Complainant would not be entitled to any additional remedies, we do not find it necessary to address whether the Agency's actions related to these claims were also harassing. Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that any of the other actions taken by the Agency were motivated by his protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant did not show that the Agency subjected him to harassment based on his national origin or religion, or in reprisal for prior protected EEO activity.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decisions. We REVERSE the Agency's decisions on the claims related to a failure to provide a religious accommodation and disclosure of Complainant's confidential medical information, and we ORDER the Agency to take further action, in accordance with the Order below. We AFFIRM the Agency's findings that Complainant did not establish that the Agency improperly disclosed his EEO activity; or subjected him to disparate treatment or harassment based on national origin or religion, or in reprisal for prior protected EEO activity.

ORDER

1. To the extent that it has not already done so, the Agency shall provide Complainant an effective religious accommodation, within thirty (30) days of the date this decision is issued.
2. Within thirty (30) days of the date this decision issued, the Agency shall expunge all medical information concerning Complainant from non-medical files, including personnel files, and shall ensure that Complainant's medical information is maintained in a separate and appropriate medical file.
3. Within ninety (90) days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorney's fees, and costs related to the Agency's failure to provide a religious accommodation since October 19, 2018, and its improper disclosure of his confidential medical condition on August 20, 2019. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, attorney's fees, and costs no later than thirty (30) days after the completion of the investigation.

4. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training for S2 and DD. The training shall emphasize the Agency's duties to appropriately respond to employees' requests for a religious accommodation and to maintain confidentiality of an employee's medical information, to ensure that similar violations do not occur.
5. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S2 and DD. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
6. The Agency shall immediately post a notice in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its Portland Field Office facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. 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

July 29, 2021
Date