



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Antony Z.,<sup>1</sup>  
Complainant,

v.

John E. Whitley,  
Acting Secretary,  
Department of the Army,  
Agency.

Appeal No. 2020005108

Hearing Nos. 420-2019-00432X  
420-2019-00389X

Agency Nos. ARREDSTON19JAN00142  
ARREDSTON18OCT04216

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 10, 2020, final order concerning his consolidated 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

**BACKGROUND**

In January 2017, Complainant was hired by the Agency in its Multi-National Aviation Special Projects Office in Huntsville, Alabama as a Senior Logistic Analyst, NH-0346-03. S1, Division Chief, Supervisory Logistics Management Specialist, was Complainant's first-line supervisor. S2, Deputy Product Director, was his second-line supervisor. S3, Colonel, was the Project Director. Complainant was considered a probationary employee for the first two years of employment, through January 2019.

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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.

Subsequently, he filed EEO complaints alleging that he was discriminated against and subjected to harassment (non-sexual) on the bases of race (Caucasian), color (white), sex (male), age (over 40), and in reprisal for previous EEO activity when: 1(a). on October 18, 2018, S2 relieved him from his duties as Assistant Product Director – Sustainment program integrator on the fourth floor to a less than desirable position of no responsibility and very little work which will impact future evaluations; and 1(b). on October 19, 2018, S2 met with his former colleagues and told them that he was relieved and they were to have no contact with him; and 2. he was discriminated against on the bases of race, color, sex, age (over 40), and in reprisal for previous EEO activity when on January 2, 2019, he was terminated during his probationary period by his supervisor S1.

After its investigation into the complaints, the Agency provided Complainant with copies of the reports of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant requested a hearing. The Agency submitted a motion for a decision without a hearing on the consolidated complaints, which was opposed by Complainant. The AJ subsequently issued a decision by summary judgment in favor of the Agency. The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination and harassment as alleged. The instant appeal followed.

In May 2017, C1, an employee complained to A1, an Agency director, that Complainant and another employee were using offensive language and hanging pictures/cartoons intended to make fun of him. Complainant acknowledged the use of offensive language but stated that the pictures were meant to be "jokes" and that C1 was too sensitive. A1 counseled Complainant and warned him about future use of offensive language. On December 1, 2017, A1 prepared a Memorandum for Record (MFR) regarding another incident where Complainant used offensive, derogatory, and angry language towards another employee. A1 counseled Complainant for a second time regarding his use of offensive language and reminded him of their previous conversation in May, and the need to treat his fellow team members with respect. Complainant responded that he did not have time to train the team and it was easier to do the work himself.

On August 14, 2018, S1 gave Complainant a letter of counseling regarding allegations that he used improper language of a vulgar or sexual nature in numerous meetings and in the workplace. This was in response to a Sexual Harassment/Assault Response and Prevention (SHARP) complaint which alleged Complainant had made sexually explicit references to body parts. The letter of counseling was not made part of Complainant's official personnel file.

On August 20, 2018, Complainant told S1 that he had observed C2, another employee, recording a telecom with his personal cell phone, and during a meeting to discuss this allegation, Complainant stated that he believed C2 was the person who had made the SHARP complaint against him. Later that day, there was a verbal confrontation between Complainant and C2, during which Complainant referenced the SHARP complaint. C2 stated that Complainant called him a liar.

On August 23, 2018, Complainant sent S1 an email complaining that C3 was using profanity, and that C2 did not complain about her conduct. According to the Agency, A1, who was C3's supervisor, spoke to her immediately and instructed her to stop; and he told Complainant that he had taken appropriate corrective action. C3 stated that she used the language in frustration at a training video and was not directing it at anyone personally.

On October 9, 2018, C4 and C5, contractor employees, stated that they were at their desk areas when Complainant came in to make coffee. C4 stated that Complainant stated that C6, a female contractor, was "not worth a s\*\*t", did not know her job, and all she knew or cared about was pizza. C4 maintained that he was not comfortable working in an environment where upper level government employees made such comments. Later that day, S1 received a complaint from C6 regarding Complainant's comments and she requested a formal grievance as well as an apology from Complainant.

On October 9, 2018, Complainant requested a Management Directed Reassignment (MDR) and was told that would be granted. On October 10, 2018, after a telecom, C4 reported that Complainant was again making derogatory comments about C6, stating that she did not know how to do her job. C4 again expressed his discomfort with this type of comment that he felt was unprofessional and bad for cohesiveness in the section.

On or around October 10, 2018, a second SHARP complaint regarding Complainant was received. S1, S2, and S3 were notified. S1 met with Complainant to discuss the allegations, and Complainant stated that he believed C4 was the person who made the report. S1 refused to provide that information to Complainant at that time. Complainant contacted the Contract Lead and told him to check C4's timecard because C4 had left early the day before and he wanted to make sure the time "was properly accounted for" on the timecard. S2 indicated that Complainant was not C4's supervisor. Following these incidents, S1 contacted Agency Personnel officials seeking consideration of Complainant's separation because he was a probationary employee and it appeared, he was not a good fit for the position.

On October 18, 2018, S1 was notified that Complainant was questioning contractor employees, asking them if they had been asked to prepare an MFR regarding the allegations against him. A meeting was held with S1, S2, A2, and other Agency officials to discuss the escalating tensions with Complainant and to determine the best path forward. At that time, S2 made the decision to move Complainant to an assignment on the second floor. The relocation did not change Complainant's position description, pay grade or series, and was not an official personnel action.

S2 scheduled a meeting with Complainant and B1, Program Support Specialist/SHARP Victim Advocate, to inform him of the move to the second floor. S2 also told Complainant not to communicate with the contractors on the 4<sup>th</sup> floor outside of programmatic issues. S2 denied relieving Complainant of Program integrator duties because, in S2's opinion, Complainant never had such duties and Complainant was a Logistic Management Specialist working for S1. Complainant, he stated, became very belligerent, argumentative, combative, and disrespectful. S2 maintained that he felt threatened.

Although S2 denied calling a meeting to inform Complainant's coworkers that he was being relocated, he acknowledged that he most likely did inform the employees that Complainant was being moved off the fourth floor and would be assigned new duties. S2 did not recall the specific details of his conversation.

S1 felt that Complainant's confrontational reaction to S2 was the culmination of his previous disrespectful and disruptive behavior, for which he had been counseled multiple times. Following Complainant's response to S2's reassignment instruction, Personnel advised management that separation was appropriate.

Complainant worked on the second floor for one week, and was reassigned to a new section on October 25, 2018, reporting on October 29, 2018. On December 12, 2018, S1 contacted Personnel to initiate the formal termination process, and on January 3, 2019, S1 issued a notice of termination to Complainant for refusal to follow directions, inability to maintain good working relations, and disruptions to the work force.

Complainant alleged that other employees also used profanity but were treated differently. They were: C3, Black female; C7, Black male; C8, White male; and C9, White male, contractor. Complainant alleged that C3 and C7 used profanity during conversations in their cubicles and that C8 expressed displeasure over a training contract. He also felt that age was a factor in the Agency's treatment of him because S2 asked him about retirement and S1 stated that "sometimes change is good." S1 stated that his comment about change was related to the MDR and the change in supervisor as requested by Complainant. S2 denied that he ever had a conversation with Complainant about retirement, noting that he was a probationary employee with only two years of service, so it would not have made sense to ask him about retirement.

The AJ found that the record contained sufficient information upon which to base a decision without a hearing; that there are no genuine disputes of material facts; and that, based on the undisputed evidence of record, no reasonable juror could conclude that the Agency's articulated non-discriminatory reasons for its actions were pretextual or that the true reason for its actions was discrimination on any protected basis.

### ANALYSIS AND FINDINGS

We must first determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249.

At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We have carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. For reasons that will be discussed below, we find that the AJ correctly determined that there were no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

To meet his ultimate burden of proving that the Agency's actions were discriminatory, Complainant needs to demonstrate such "weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the [Agency's] proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." Evelyn S. v. Dep't of Labor, EEOC Appeal No. 0120160132 (Sept. 14, 2017).

Assuming, arguendo, Complainant established a prima facie case of discrimination on all alleged bases, we find that the Agency articulated, legitimate, non-discriminatory reasons for its actions as were set forth in detail above. Complainant has not provided any evidence that raises a genuine issue of material fact that any of his protected factors played any role in the Agency's actions regarding his being reassigned, and eventually being terminated. With respect to the individuals that Complainant provided as comparators, we note that he did not establish that these individuals were similarly situated to him. Even if, as Complainant contends, they used vulgar or profane language, there is no evidence that it was analogous to Complainant who was counseled on several occasions about his language and actions.

In addition to being verbally counselled, Complainant received a letter of counselling; and was the subject of two SHARP investigations because of his behavior, which was characterized as both disrespectful and disruptive.

Regarding Complainant's termination, we specifically note that where a complainant is a probationary employee, we have long held that he or she is subject to retention, advancement, or termination at the discretion of an agency so long as these decisions are not based on a protected category. Kaftanic v. U.S. Postal Serv., EEOC Appeal No. 01882895 (Dec. 27, 1988) (citing Arnett v. Kennedy, 416 U.S. 134, 152 (1974)). As noted above, Complainant did not provide any evidence that raised a genuine issue of material fact that any of his protected factors played a role.

To the extent that Complainant raised a hostile work environment claim, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) that Complainant's claim of a hostile work environment must fail with respect to his relocation and termination. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that these actions were motivated by discriminatory animus. See Oakley v. United States Postal Service, EEOC Appeal No. 01982923 (Sep. 21, 2000).

As for claim 1(b), Complainant's allegation that S2 met with his former coworkers and told them about his relocation and that they were to have no contact with him, we find that even if this matter occurred as alleged, there is no evidence that creates a genuine issue of material fact that this conduct was due to his protected categories. Additionally, we find no evidence that it was severe or pervasive enough to rise to the level of unlawful harassment.

Upon careful review of the AJ's decision and the evidence of record, as well as the arguments on appeal, we conclude that the AJ correctly determined that Complainant did not establish the existence of a genuine issue of material fact regarding his claim that he was subjected to discrimination and harassment by the Agency as alleged.

### CONCLUSION

Accordingly, we AFFIRM the Agency's final order finding no discrimination.

### 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).

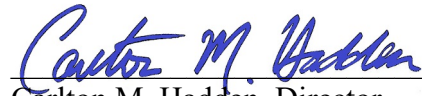
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

  
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Carlton M. Hadden, Director  
Office of Federal Operations

April 14, 2021  
Date