



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Bert P.,<sup>1</sup>  
Complainant,

v.

Christine Wormuth,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2020003846

Hearing No. 440-2019-00297X

Agency No. ARUSAR18SEP03744

**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 4, 2020 final decision concerning an equal employment opportunity (EEO) complaint claiming 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.

**BACKGROUND**

During the period at issue, Complainant worked as a Recreation Assistant, NF-0189-02, at the Agency's Directorate of Family, Moral Welfare and Recreation (MWR), Pine View Campground in Fort McCoy, Wisconsin.

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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.

On November 7, 2018, Complainant filed a formal EEO complaint claiming that the Agency discriminated against him based on age (YOB 1958) and in reprisal for prior protected EEO activity<sup>2</sup> when:

1. On September 19, 2018, Complainant's immediate supervisor (S1) and an Administrative Assistant interrogated him and accused him of forwarding a Command Climate Survey to Fort McCoy employees who were not affiliated with the Directorate of Family, Morale Welfare and Recreation (MWR).
2. On September 19, 2018, S1 issued Complainant a counseling statement for making three errors on the Recreation Tracking system, despite being directed by management to use his code and password to log on newly-hired flex-employees.
3. On October 20, 2018, during his final pre-complaint interview, Complainant saw annotations in the draft Counselor's Report (DA Form 7510) of comments made by a management official regarding the official's dislike of the EEO process and that employees should have to pay to file a complaint and then only get it back if and when they prevail.<sup>3</sup>

After an EEO investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant initially requested a hearing, but on December 8, 2019, withdrew his request. Consequently, on December 9, 2019, the AJ ordered the Agency to issue a final decision within sixty (60) days of receipt of the order.

On June 19, 2020, Complainant filed the instant appeal arguing that the Agency had not complied with the AJ's December 2019 order as it had not yet issued a final decision. Regarding the merits of this complaint, Complainant asserts that he was subjected to *per se* reprisal when a management official made comments during the EEO processing of his formal complaint.

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<sup>2</sup> Complainant testified that in February 2018, he filed a formal EEO complaint, Agency No. ARUSAR17OCT03929, and reported witnessing sexual harassment between a male and female co-worker which prompted an internal investigation. Subsequently, Complainant testified that he was "punished" by management and was removed from his position for twelve weeks while the investigation was underway. Complainant also indicated that he attempted to amend his formal complaint, Agency No. ARUSAR17OCT03929. However, he was informed by the EEO Office that the investigation had closed, which resulted in Complainant filing the instant complaint. Complainant asserts that the identified management officials in the instant complaint were aware of his report of alleged sexual harassment and his subsequent twelve-day removal from his position.

<sup>3</sup> Complainant clarified in his affidavit that he was not alleging age as a basis for this claim (3).

Complainant also argues that the AJ improperly denied his request to consolidate the instant complaint with the following other complaints: ARUSAR17OCT03929; ARFORSCOM19FEB00290; ARUSAR19JUN02214; and ARUSAR19MAY02214.<sup>4</sup> In support, of this matter, Complainant submits a copy of the AJ's June 9, 2020 order, pertaining to complaint ARUSAR19MAY02214, denying Complainant's request to consolidate this complaint with the instant complaint.<sup>5</sup>

Approximately one month after Complainant submitted the instant appeal, the Agency issued an August 4, 2020 final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency found no discrimination for claims 1 and 2. However, the Agency determined that Complainant had been subjected to "*per se* reprisal" in claim 3. Specifically, the Agency found that Complainant was subjected to unlawful reprisal when he learned, during his final EEO pre-complaint interview, that a management official interviewed by the counselor had expressed dislike of the EEO process and stated that he believed employees should have to pay to file a complaint.

We note that the Agency's finding of unlawful reprisal is the main argument that Complainant asserts on appeal. However, because Complainant submitted his appeal brief before the Agency issued its final decision, we review all three claims at issue.

### ANALYSIS AND FINDINGS

#### ***Request for Consolidation with Other Complaints***

Complainant has requested consolidation of this complaint with several of his prior complaints. First, Complainant disputes the AJ's decision not to consolidate the instant complaint with complaint ARUSAR19JUN02214. Based on Complainant's submissions on appeal, it appears that ARUSAR19JUN02214 is still before an EEOC AJ.<sup>6</sup> We conclude that the AJ correctly decided that since Complainant withdrew his hearing request for the instant complaint the AJ no longer had the authority to consolidate the complaints.

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<sup>4</sup> Our records indicate that complaints ARUSAR17OCT03929 (EEOC Appeal No. 2020000817) and ARFORSCOM19FEB00290 (EEOC Appeal No. 2020004981) have already been adjudicated by the Commission. Our records do not reflect complaint ARUSAR19JUN02214 as pending before the Commission.

<sup>5</sup> The AJ reasoned that Complainant had withdrawn his hearing request in the instant complaint, and therefore, it was improper to consolidate the instant complaint with ARUSAR19MAY02214 which was currently before the AJ. The AJ also denied Complainant's requests for sanctions related to the instant complaint, reiterating that the instant complaint was no longer before the AJ because Complainant withdrew his hearing request.

<sup>6</sup> Complainant provided a copy of the AJ's June 9, 2020 Order denying his request to consolidate this complaint with the instant complaint.

On appeal, Complainant cannot retroactively reinstate his hearing request for the instant complaint by attempting to consolidate it with another complaint currently pending before an AJ. Second, we have already adjudicated on appeal ARUSAR17OCT03929 (Appeal No. 2020000817) and ARFORSCOM19FEB00290 (Appeal No. 2020004981) and they are no longer in a posture for consolidation. In sum, based on the varying stages of adjudication of Complainant's complaints, we conclude that it is no longer practical to consolidate his complaints.

We will now address the merits of the instant complaint.

### ***Disparate Treatment – Claims 1 and 2***

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie 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. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Complainant initially identified his first and second level supervisors (S1 and S2) as the responsible management officials who interrogated him about his involvement in a Command Climate Survey. However, Complainant later clarified that S1 and the Administrative Assistant were the responsible management officials. Complainant explained that the survey, submitted by email, allowed employees to answer questions and express concerns anonymously. Complainant noted that while all Fort McCoy employees had a unique login and password to access the survey, another co-worker forwarded him the email containing the survey. Complainant explained that when he received the email, he noticed that there were other MWR employees who did not receive the initial email sent by the Equal Opportunity Advisor (EO Advisor).

After Complainant notified the EO Advisor of this issue, he stated that he asked, and she granted him permission, to submit the survey to other MWR employees who had not received the initial email.

Thereafter, Complainant stated that S1 and the Administrative Assistant repeatedly questioned him on September 19, 2018, regarding who he sent the survey to and specifically whether he had submitted the survey to military or civilian employees. Complainant explained that he was informed that his third level supervisor (S3)<sup>7</sup> had instructed the Administrative Assistant to obtain this information from Complainant. Complainant explained that he later learned that S3 claimed, during the counseling phase of the complaint, that Complainant had forwarded the survey to a former MWR employee. Complainant admitted he had sent the survey to a former employee but clarified that at the time he forwarded the survey, he was unaware that the MWR employee had left the Agency. Consequently, Complainant acknowledged that this lack of knowledge that the employee had left “probably” accounted for management’s belief that Complainant had sent the survey to others outside of MWR. Complainant stated that he was not disciplined for the error.

Both S1 and the Administrative Assistant testified that they were instructed by S3 to ask Complainant whether he submitted the survey to employees outside of MWR based on a counseling statement that indicated that Complainant had submitted to survey to an employee outside of MWR. However, S1 indicated that Complainant did not confirm or deny whether he sent the survey non-MWR employees. S1 and the Administrative Assistant further denied that their discussion with Complainant was an interrogation and confirmed that Complainant was not disciplined.

Complainant explained during the same discussion about the climate survey, S1 notified him of three errors he made on the reservation tracking system and issued him a letter of counseling. Complainant asserted that there was no way for S1 to know which employee made the errors because during the summer of 2018, they were short staffed and flex employees were given access to Complainant’s password and clerk codes needed to access the system. Although S1 informed him that an employee could be identified by the computer the employee used, Complainant stated that a former MWR Information Technology specialist informed him that the clerk codes and passwords used to login are the only information the computer is able to use to associate who was using the system. Consequently, Complainant perceived that S1’s reasoning for determining that he committed the errors was a lie and retaliatory.

S1 acknowledged that the Administrative Assistant had directed Complainant to provide his clerk code and password to the flex employees. However, S1 clarified that there were no multiple logins at the same time with Complainant’s same code when the errors at issue were made.

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<sup>7</sup> Complainant stated that S3 became his third level supervisor in April 2018. Complainant also identifies S3 as the responsible management official who made the statement in claim 3. The record supports that S3 retired from the Agency on December 31, 2018.

The Administrative Assistant testified that she instructed another employee, not Complainant, to share her code. The Administrative Assistant explained that she would not have asked Complainant because “he makes mistakes.” Moreover, in the event that multiple logins were used, the Administrative Assistant explained that there were different drawer numbers associated with each code, so the employee using the code could be identified.

S1 clarified that Complainant was not penalized for the error. Complainant did not receive a loss of pay, time, or any disciplinary action, and S1 denied informing Complainant that the counseling would impact his annual review. S1 indicated that he issued the letter of counseling following transaction errors Complainant had made in August 2018, which resulted in a letter of counseling, and because Complainant’s performance had not improved by September 2018.

A copy of the September 2018, letter of counseling indicates that Complainant was issued the letter for failure to follow proper daily procedures and financial irresponsibility. The letter identifies instances where Complainant (1) failed to return a customer’s deposit; (2) failed to process \$120 received from a customer; and (3) processed a transaction and overcharged a customer by \$405.

After careful consideration of the record, we conclude that neither during the investigation, nor on appeal, has Complainant proven, by a preponderance of the evidence, that these proffered reasons for the disputed actions were a pretext for unlawful discrimination based on Complainant’s age or reprisal for prior protected EEO activity.

### ***Unlawful Retaliation – Claim 3***

The anti-retaliation provisions of the employment discrimination statutes seek to prevent an employer from interfering with an employee’s efforts to secure or advance enforcement of the statutes’ basic guarantees and are not limited to actions affecting employment terms and conditions. Burlington Northern & Santa Fe Railroad. Co. v. White, 548 U. S. 53, 126 S. Ct. 2405 (2006). The Commission has found that comments that, on their face, discourage an employee from participating in the EEO complaint process may evidence a violation of the anti-retaliation provisions of the law. Binseel v. Dep’t of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (complainant told that filing an EEO suit was the wrong way to go about getting a promotion).

Agencies are obligated to ensure that managers and supervisors perform in such a manner as to “insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity.” 29 C.F.R. § 1614.102(5); Binseel v. Dep’t of the Army, supra; Woolf v. Dep’t of Energy, EEOC Appeal No. 0120083727 (Jun. 4, 2009), request to reconsider denied. EEOC Request No. 0520090560 (August 21, 2009) (violation found when a labor management specialist told the complainant, “as a friend” that his EEO claim would polarize the office); Vincent v. U. S. Postal Service, EEOC Appeal No. 0120072908 (Aug. 3, 2009), request to reconsider denied. EEOC Request No. 0520090654 (Dec. 16, 2010) (violation found where

supervisor during an employee meeting referenced that EEO complaints had been filed and said, “what goes around, comes around”).

Our review of the record supports the Agency’s *own* determination that Complainant was subjected to a violation of the anti-retaliatory provisions of Title VII. Here, the record indicates that the EEO Counselor interviewed S3 and showed Complainant the draft EEO Counselor’s report which contained the following statement by S3: “. . . employees should have to pay to file an EEO complaint and only get it back if and when they may prevail.” The agency does not deny that S3 made the statement documented by the EEO Counselor. The record further supports that Complainant notified the EEO Counselor on November 4, 2018 that when he received a hard copy of the final report, he noticed that S3’s comment had been removed. The Agency confirms that the EEO Counselor was directed by the EEO Manager to remove the comment.

We find that S3’s comment on its face could discourage an employee from participating in the EEO process. Notably, Complainant testified that based on this comment, he believed that S3 thought “complaints are frivolous and [employees] ought to pay a fee so it would deter people from making complaints.” Therefore, the Agency properly determined that Complainant had been subjected to an attempt to actively discourage his participation in the EEO complaint process in violation of the anti-retaliation provisions of Title VII.

### CONCLUSION

Accordingly, we AFFIRM the Agency’s finding of no discrimination for Claims 1 and 2. We also AFFIRM the Agency’s finding of unlawful retaliation for claim 3 and remand the matter for compliance with our ORDER below.

### ORDER<sup>8</sup>

To the extent that it has not already done so, the Agency is ORDERED to take the following actions:

1. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall commence a supplemental investigation into Complainant’s entitlement to compensatory damages for being subjected to the act of retaliation starting on October 20, 2018 (the date Complainant became aware of S3’s comments). The Agency is directed to inform Complainant about the legal standards associated with proving compensatory damages and give Complainant examples of the types of evidence used to support a claim for compensatory damages. Complainant shall be given a minimum of sixty (60) calendar days from the date he receives the Agency’s notice to provide all

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<sup>8</sup> In issuing this Order, we note that the management official responsible for the act of unlawful retaliation (S3) has retired from the Agency and therefore cannot be subject to training or potential disciplinary action.

supporting evidence of his claim for compensatory damages. Within forty-five (45) calendar days of the date the Agency receives Complainant's submissions, the Agency shall issue a new final decision determining Complainant's entitlement to compensatory damages with appropriate appeal rights to this Commission.

2. Complainant is entitled to reasonable attorney's fees and costs associated with this complaint. While the record indicates that Complainant did not have an attorney representative, this award includes any work done by an attorney retained to assist with preparation of a petition for compensatory damages. Complainant and his attorney bear the burden of establishing entitlement to fees or costs. Complainant shall cooperate in the Agency's efforts to compute the amount of attorney's fees.
3. The Agency is ordered to post at its Fort McCoy MWR 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).

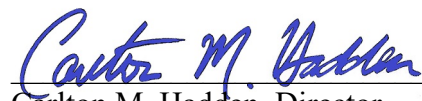
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

November 15, 2021

Date