Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2019000765 (August 18, 2020). 3

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 Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the term “Commission” or “EEOC” is used when referring to the adjudicatory authority and the term “Agency” is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints. The Chair has recused herself from participation in this decision.

3 The Agency asserts the request is untimely. In response, Complainant states that he did not receive the decision in EEOC Appeal No. 2019000765 until August 25, 2020. The Commission notes that, per the certificate of mailing attached to that appeal, it will presume that the decision was received within five (5) calendar days after it was made available to the parties. In this case, the fifth day fell on Sunday, August 23, 2020. Complainant noted that he lives on a rural carrier route and that the decision would not have been received on a Sunday. Therefore, the Commission finds that the presumptive receipt would have been the next
EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Attorney Examiner (Administrative Judge) at the Agency’s Los Angeles District Office (LADO) in Los Angeles, California.

On February 2, 2016, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), and reprisal for prior protected EEO activity when:

1. On October 29, 2015, Complainant was issued a Letter of Reprimand, after no attempt was made to take any statement from Complainant before issuing a Letter of Reprimand, and no attempt was made to ascertain whether the discussion between Complainant and a coworker (PS2) that were charged in the Letter of Reprimand as involving unspecified threats and intimidation amounted to no more than two coworkers and friends engaging in protected opposition to perceived unlawful discrimination/reprisal by the LADO Regional Attorney; and

2. Complainant’s allegation of a “direct threat” by PS2 in Complainant’s office behind closed doors was not immediately investigated and appropriate corrective action taken, similar to the corrective action taken against any other LADO employee when an allegation of a threat is made.

Complainant stated that in September 2014, following a discussion with a Regional Attorney Secretary (RAS) regarding a Paralegal Specialist (PS1), his first-line supervisor (S1) asked if he had “ambushed” RAS. Complainant provided his account of his conversation with RAS to S1, who then informed Complainant that it was preferred that Complainant did not talk to RAS about PS1. PS1 was removed from the Agency, effective October 16, 2015, and subsequently filed an EEO “mixed case” complaint alleging that his removal was motivated by discrimination based on race, sex, and retaliation for prior EEO activity. Another Paralegal Specialist (PS2) testified as an Agency witness at PS1’s hearing before the Merit Systems Protection Board (MSPB).

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business day, Monday, August 24, 2020. The instant request for reconsideration was postmarked September 23, 2020. Therefore, the Commission finds that the request is timely.
On October 21, 2015, Complainant held a conversation with PS2 about PS1’s removal. Later in the day, PS2 went to Complainant’s office to continue their conversation. PS2 stated that if Complainant informed others of PS2’s participation in PS1’s case, there would be a “problem.” Complainant asked PS2 if he was threatening him, PS2 responded “no,” and PS2 left Complainant’s office.

Following the conversation, Complainant expressed concerns that he felt that PS2 threatened him but decided not to report the incident. PS2, however, told the District Resource Manager that Complainant called him a “rat.” On or about October 22, 2015, an Agency Attorney (AA) interviewed PS2 about the incident. During their conversation, PS2 informed AA that this was not the first time that Complainant talked to him in a way that he felt was inappropriate.

S1 testified that she informed the LADO District Director (DD) about PS2’s complaint, stating that there was an allegation of intimidation by a lower-graded employee against an administrative judge. S1 also informed DD that she had previously counseled Complainant about attempting to intimidate witnesses. S1 requested to meet with Complainant on October 29, 2015 and did not respond when Complainant asked about the topic of the meeting. Complainant then emailed S1 informing her that he would send her a memo regarding PS2 “threatening” him.

On October 29, 2015, S1 met with Complainant and issued him a Letter of Reprimand. S1 noted that, on October 21, 2015, Complainant confronted PS2 and stated that he was a “rat” and disloyal to PS1. S1 expressed concern that this was not the first incident of this kind and noted that she counseled Complainant in 2014 for a similar incident with RAS, in which Complainant confronted RAS about her actions when PS1 was placed on leave for threatening to kill his supervisors. S1 stated that Complainant’s conduct was unprofessional and inappropriate, and as a GS-14 Attorney Examiner with over twenty years of service, his behavior was “particularly egregious” given the imbalance of power between himself and PS2, a GS-11 employee who had only been employed at the Agency for less than two years. S1 also noted that, as an administrative judge, he should be aware of “how inappropriate it is to interfere with or intimidate witnesses in a judicial proceeding.” S1 noted that the Letter of Reprimand was intended to improve Complainant’s conduct and cautioned him against future similar misconduct.

During the same meeting, Complainant gave S1 his written statement alleging that PS2 threatened him on October 21, 2015. Complainant wrote that, when he asked PS2 if he was threatening him, PS2 responded “No, but we are going to have a problem” if Complainant discussed PS2’s role in PS1’s termination with others at LADO. Complainant then stated to PS2, “That sounds like a threat to me.” Complainant noted that PS2 responded that he was not threatening him. Complainant wrote that he was scared because PS2 was a former Navy SEAL and a “trained killer” who had “post traumatic flashbacks.” PS2 testified that he was not a Navy SEAL but was a Tech Operator for a Navy SEAL team. PS2 also denied telling Complainant that he had post-traumatic stress disorder.
Appellate Decision

In its previous decision, the Commission, in pertinent part, reversed a contract Administrative Judge’s (AJ) finding that Complainant had proved that he was subjected to discrimination based on reprisal when the Agency issued Complainant the Letter of Reprimand. In that decision, the Commission determined that the AJ erred in finding that Complainant’s conversations with his coworkers constituted protected activity. The decision noted that despite Complainant’s argument that he engaged in protected activity because he was opposing discrimination against a coworker (PS1) by Agency officials during the discussions, the record indicated that Complainant’s actions were not reasonable because he engaged in intimidation of other employees.

The Commission reasoned that substantial evidence in the record did not support the AJ’s finding that the Agency retaliated against Complainant, as Complainant’s supervisor (S1) provided a legitimate, nondiscriminatory reason for the Letter of Reprimand. Specifically, a second individual had complained about “harassing or intimidating” interactions with Complainant and S1 felt that a second incident warranted discipline. Although Complainant argued that the underlying conduct in the Letter of Reprimand did not occur as described by Agency officials, the Commission determined that the issue was not whether Complainant actually engaged in the conduct, but whether S1 reasonably believed the allegations made against Complainant at the time she issued the Letter of Reprimand. As for the AJ’s finding that Complainant established that the Agency’s explanation was pretext, the previous decision noted that S1’s testimony and other evidence in the record supported her belief that the incident in question was Complainant’s second witness intimidation offense.

REQUEST FOR RECONSIDERATION

In his request for reconsideration, Complainant expresses pessimism concerning the impartiality of the previous decision as well as the instant matter. Complainant contends that the Commission’s previous decision involves clearly erroneous interpretations of material facts that were determined by the contract AJ based on the evidentiary record. Specifically, Complainant challenges the credibility of witnesses, reiterates his version of the nature of the conversations with his coworkers, and alleges that the prior decision conflates facts. Complainant further argues that the ruling involves a clearly erroneous interpretation of the law regarding the timeliness of the Agency’s appeal and the analysis of per se reprisal. He adds that the decision could substantially alter the impact of per se reprisal issues in the future and that the Commission erred in finding that Agency officials acted reasonably.

The Agency maintains that Complainant’s reconsideration request should be denied.

Complainant did not challenge the AJ’s finding that Complainant did not meet his burden to establish that he was discriminated against based on his race or reprisal for claim 2.
ANALYSIS AND FINDINGS

In his request for reconsideration, Complainant largely reiterates arguments made and fully considered on appeal. First, with respect to his argument that the Agency’s initial appeal was untimely, the Commission finds, as it did in the previous decision, that Complainant provided no contradicting evidence or argument to refute when the Agency received the complete hearing file.

Complainant argues that the Commission erred in its interpretation of the facts surrounding the discussions that resulted in the Letter of Reprimand. However, as noted in the previous decision, the issue is not whether Complainant actually engaged in the conduct, but whether S1 reasonably believed the allegations made against Complainant at the time she issued the Letter of Reprimand. See Matilda C. v. Equal Employ. Opp. Comm’n., EEOC Appeal No. 0720140027 (July 31, 2018); req. for recons. den’d. (Nov. 26, 2019) (no discrimination found when management believed suspended complainant used a racial slur); Lonergan v. Dep’t of Justice, EEOC Appeal No. 01976348 (Feb. 1, 2000) (no discrimination found where management reasonably believed suspended complainant engaged in misconduct).

Complainant argues again that he should have been questioned with respect to his version of events and asserts that he engaged in “mutual conversations between nonsupervisory colleagues and office friends.” However, Complainant never disputes that individuals complained about the conversations. The complaints, in combination with S1’s belief that Complainant had previously engaged in the conduct, support the Agency’s legitimate, nondiscriminatory explanation rather than discriminatory or retaliatory animus. Moreover, the Commission has held that “a mistaken, good faith belief in the rationale for a particular action is not pretextual.” Grooms v. U.S. Postal Serv., EEOC Appeal No. 0120110418 (Feb. 29, 2012), quoting Foley v. U.S. Postal Serv., EEOC Appeal No. 01924615. See also Vickey S. v. Dep’t of Def., EEOC Appeal No. 0120112893 (Nov. 17, 2015); Hsieh v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120120980 (June 4, 2012); Carroll v. Dep’t of Justice, EEOC Appeal No. 01A20985 (Jan. 21, 2003). Therefore, even assuming that Complainant’s contention is true and Agency officials were mistaken in warranting Complainant’s actions as a second occurrence of witness intimidation, this would not support a finding of pretext because the record evidence supports that the Agency acted on a reasonable belief that Complainant had acted inappropriately.

To the extent that Complainant challenges the credibility of witnesses because he was never questioned prior to the issuance of the Letter of Reprimand, the Commission finds no reason to disturb the previous finding that the AJ erred when she substituted her judgment in determining that S1 would not have believed PS2’s allegation if she had spoken with Complainant prior to the issuance of the Letter of Reprimand. The Commission has previously stated that “[a]n Administrative Judge should not substitute her judgment for that of the agency with regard to analyzing [agency personnel decisions].” Thomas v. Dep’t of Transp., EEOC Appeal No. 01945798 (Dec. 12, 1996).
Next, the Commission finds no merit in Complainant’s argument that the previous decision will have a substantial impact on future per se reprisal cases. As previously stated, the Commission concludes that the Agency was correct in taking action when it believed that Complainant was attempting to intimidate lower-graded employees who were witnesses at PS1’s hearing although the Letter of Reprimand included language with which the Commission disagreed. Complainant failed to establish that the Agency’s conduct was per se reprisal because there was no evidence of an attempt to block or discourage Complainant’s usage of the EEO process. On the contrary, S1 sought to address Complainant’s attempt to chill other employees’ participation in the EEO process at the Agency.

The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep’t of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Complainant has not presented any persuasive evidence to support reconsideration of the Commission's decision.

CONCLUSION

Thus, after reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 2019000765 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission’s decision. 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.

5 In the Letter of Reprimand, the Agency stated “Finally, I am disturbed by the fact that you have continually tried to interfere in matters involving [PS1]. [PS1’s] suspension and subsequent removal from the Commission have nothing to do with you and are not your concern. [S1] will not tolerate your attempts to interfere in this matter in any form; particularly by intimidating witnesses.”
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:

/s/Shelley E. Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

December 20, 2021

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Date