



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

[REDACTED]
Terrance A.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury,
Agency.

Appeal No. 2020002047

Agency No. TIGTA-19-1079-F

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 13, 2020, final decision concerning his equal employment opportunity (EEO) complaint 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. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUE PRESENTED

The issue is whether Complainant established that the Agency subjected him to discrimination or harassment based on sex or in reprisal for his prior protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Criminal Investigator (Assistant Special Agent in Charge) (GS-14) at the Agency's Office of Investigations, Operations Division, Complaint Management Team in Washington, D.C.

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.

Complainant stated that on April 10, 2019, he was contacted by an Assistant Special Agent in Charge (ASAC) to discuss an intake that Complainant had closed. Complainant stated that the Special Agent in Charge (SAC1) asked ASAC to review Complainant's work, but not the work of any other manager within the division. Report of Investigation (ROI) at 161.

Complainant stated that on April 12, 2019, the Deputy Inspector General for Inspections (DIGI) made inappropriate comments regarding the Office of Chief Counsel having settled Complainant's prior EEO complaint. Complainant stated that a Deputy Special Agent in Charge (DSAC) informed him that DIGI complained to a Special Agent (SA) that Agency counsel settles complaints that the Agency can win. Complainant stated that these comments were made after he and the Agency had reached an agreement to settle his prior EEO complaint, which was signed on April 24, 2019.² Pursuant to the settlement agreement, Complainant agreed to withdraw his EEO complaint (EEOC No. 570-2019-00149X, Agency Case No. TIGTA-18-0349-F). In exchange, the Agency agreed to many terms, including providing Complainant with a two-week detail assignment as an Acting Assistant Special Agent in Charge in Laguna Nigel, California, and giving Complainant priority consideration for the permanent Assistant Special Agent in Charge position, if he timely expressed interest. The detail assignment was scheduled to begin on June 23, 2019. ROI at 145-46, 242-49.

Complainant stated that starting May 6, 2019, he submitted leave requests to SAC1, who failed to timely approve his requests. Complainant noted that, if SAC1 does not approve his leave requests, his plans are affected, such as his ability to buy plane tickets. Complainant also stated that SAC1 failed to timely respond to his emails, work products, and other various requests. ROI at 153-56. Complainant stated that on May 10, 2019, SAC1 denied him the opportunity to serve as an Acting Special Agent in Charge while working remotely. ROI at 167.

Complainant stated that during the week of May 13, 2019, DSAC warned him that SAC1 said that Complainant "better be careful" because if he continued to file complaints, "they" would come after him. Complainant stated that SAC1 also informed DSAC that he gets upset because he must complete affidavits and answer questions for Complainant's complaints. ROI at 151-52.

Complainant stated that on May 22, 2019, SAC1 inadvertently called him, and Complainant believed that the call was during a meeting with DIGI and other management officials to discuss the candidates for an open position. Complainant stated that he heard DIGI question Complainant's experience and state that Complainant "was not that bright" and "did not do that job." ROI at 147-48.

² Complainant alleged that the Agency breached the settlement agreement. The Commission determined that the terms of the settlement agreement were too vague to be enforced and void, and we ordered the Agency to reinstate Complainant's settled EEO matter from the point processing had ceased. Terrance A. v. Dep't of Treasury, EEOC Appeal No. 2019005518 (Jan. 24, 2020).

Complainant stated that on May 29, 2019, SAC1 denied his request to telework and that, in June 2019, Complainant was informed that he was no longer allowed to telework one day per week. Complainant stated that SAC1 had never previously denied his telework requests or questioned his telework activities until SAC1 received questions from the Office of Chief Counsel related to a non-compliance order that Complainant filed related to his settlement agreement. ROI at 162, 165.

Complainant stated that on June 5, 2019, he met with SAC1 to review his performance and drop files. Complainant stated that, when he noticed several documents that were outside of the retention period and asked that they be removed, SAC1 responded that Complainant would need to address this with the permanent Special Agent in Charge, once that individual was selected. Complainant stated that he raised the issue with DIGI, who advised that he removed the documentation from Complainant's drop file. ROI at 170, 172.

Complainant stated that he began his detail assignment on June 23, 2019, pursuant to his settlement agreement. ROI at 184. On July 1, 2019, the Special Agent in Charge (SAC2) of the Western Field Division issued Complainant a Counseling Memorandum regarding his office attire on June 27, 2019. SAC2 stated that it was reported that Complainant wore skinny jeans, a polo shirt with the collar popped, and a zippered hoodie-style sweatshirt. SAC2 stated that he had previously advised Complainant that the dress code was business casual, with "no jeans." SAC2 directed Complainant not to wear jeans for the remainder of his detail assignment. Complainant responded that SAC2 was provided with incorrect information and that he had worn black pants, and not jeans, into the office. Complainant also stated that he did not wear his collar popped, and while it was possible that his collar was raised by his lanyard, he did not believe that was the case. Complainant added that he wore a jacket with a hood, but that it was not a sweatshirt. ROI at 604-06. Complainant stated that, based on SAC2's action, he did not pursue the permanent position in Laguna Nigel. ROI at 179.

EEO Complaint

On June 18, 2019, Complainant filed an EEO complaint alleging that the Agency subjected him to harassment on the basis of sex/sexual orientation (homosexual),³ and in reprisal for prior protected EEO activity (Agency Case Nos. TIGTA-18-0349-F,⁴ TIGTA-19-0197-F), when:

³ In Bostock v. Clayton Cty., the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. ___, 140 S. Ct. 1731 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

⁴ Although Complainant's formal complaint referenced Agency Case No. TIGTA-18-1349-F, the correct number is TIGTA-18-0349-F.

1. on April 12, 2019, DIGI made inappropriate comments related to the Office of Chief Counsel having settled Complainant's prior EEO complaints;
2. on May 22, 2019, DIGI spread false rumors regarding Complainant's performance to prevent his advancement and selection for vacancy announcement number 19-TIGTA-140;⁵
3. DSAC warned that Complainant "better be careful" because if he continues to file complaints "they" will come after him, and that SAC1 remarked to others that he gets upset if Complainant files complaints because he must complete affidavits or "answer questions";
4. SAC1 failed to timely approve, respond to, or follow through with processing Complainant's leave requests, emails, work products, and various other requests with the intention of harming his work performance, rating, and character;
5. SAC1 had ASAC review Complainant's work;
6. SAC1 denied Complainant's May 29, 2019, request to telework; in June 2019, SAC1 informed Complainant that he was no longer authorized to telework one day per week; and SAC1 did not allow Complainant to serve as the Acting Special Agent in Charge of the Operations Division while working remotely;
7. in June 2019, SAC1 refused to remove outdated, one-sided documents from Complainant's drop file that were included to make him look bad; and
8. on July 1, 2019, Complainant received a Memorandum of Counseling regarding clothing that he wore to the office on June 27, 2019.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

As an initial matter, the Agency found that incident 1 predated Complainant's global settlement agreement, which included any claims "that could have been raised" up to the date of the settlement agreement on April 24, 2019.⁶

⁵ Complainant stated that ASAC was selected for the position, and that he was not challenging the selection. ROI at 150.

⁶ The Commission has since found that the settlement agreement was void; as such, we find that incident 1 is properly included in the instant complaint.

The Agency then determined that Complainant did not substantiate his claim of discriminatory or retaliatory harassment because he did not establish that any of the actions were motivated by discriminatory or retaliatory animus. The Agency further found that Complainant did not show that the actions were sufficient to deter a reasonable person from engaging in the EEO process.

The Agency also found that Complainant established that he engaged in prior protected EEO activity and that management officials were aware of his activity. The Agency then determined that Complainant did not establish that he was subsequently subjected to adverse treatment or show a nexus between his protected EEO activity and the issuance of the Counseling Memorandum. The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeal and submitted a statement in support of his appeal. The Agency did not respond to Complainant's appeal.

CONTENTIONS ON APPEAL

Complainant states that he requested a different EEO Investigator because he believed that the one who conducted the investigation for his prior EEO complaint did not adequately address his claims. Complainant asserts that the investigation for the instant complaint was also completed without addressing all the facts. Complainant notes that the Agency would not accept the recording of the conversation related to incident 2, and that he had the recording transcribed. Complainant also states that, when he contacted the Director of the Agency's Office of Civil Rights and Diversity with his concerns, she blocked his emails.

Complainant asserts that SAC1 admitted that he did not take the EEO process seriously and that it was a waste of time, which was why SAC1 retaliated against him. Complainant notes that SAC1 stated that the EEO process was "ridiculous" and informed DSAC that he was tired and upset when he must respond to questions. Complainant argues that the Agency failed to consider the evidence that proves his allegations, such as his timesheet records which show that SAC1 had the ability to approve Complainant's leave. Complainant also argues that SAC1 told DSAC that he hopes that Complainant dies of Acquired Immune Deficiency System (AIDS), which is directly related to his homosexuality because the AIDS epidemic became linked to gay men in the 1980s.

Complainant states that DIGI has ruined his reputation, which has prevented his selection for promotions. While DIGI stated that he did not make the selections, Complainant asserts that DIGI has spread false rumors about Complainant's performance, which influenced others' opinions. Complainant states that he did not receive his requested desk audit, and that he should have been promoted to the GS-15 level upon a review of his position.⁷

⁷ 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

Complainant requests that the Commission find that he was subjected to reprisal and other discrimination, and award him remedies.

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, 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 EEO process

As an initial matter, we note that Complainant describes his dissatisfaction with the way the Agency processed his 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 complaint.

Disparate Treatment

The Commission has found that a discrete action states a claim outside of the framework of a harassment analysis and can also be reviewed within the disparate treatment context. See Moylett v. U.S. Postal Serv., EEOC Appeal No. 0120091735 (Jul. 17, 2012); Sedlacek v. Dep't of Army, EEOC Appeal No. 0120083361 (May 11, 2010). We find that incidents 4, 6, and 8 involve timely discrete acts that independently state claims outside of the harassment framework. Accordingly, we will analyze incidents 4, 6, and 8 in the context of 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).

(Apr. 22, 2004). Should he wish to pursue this new claim regarding a desk audit, Complainant is advised to contact an EEO Counselor to initiate the administrative process

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, 715-16 (1983).

Complainant may establish a prima facie case of sex 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). We find that Complainant is a member of a protected class based on sex, and that he suffered from adverse employment actions in claims 4, 6, and 8. However, we find that Complainant did not identify similarly situated individuals outside of his protected class who were treated differently, nor show that the circumstances surrounding the actions gave rise to an inference of sex discrimination, for claims 4 or 8.

For claim 6, Complainant argued that ASAC was treated more favorably; however, Complainant stated that ASAC does not like to work from home and prefers to work from the Agency's Beltsville, Maryland, location. ROI at 165-66. Complainant also stated that SAC1 allowed the Assistant Special Agent in Charge of the Statistics and Results and Inspection Team to work remotely four days per week, but Complainant noted that she was also homosexual, and therefore, not outside of his protected class. ROI at 162, 166.

Complainant argued that an Assistant Special Agent in Charge in Georgia and an Administrative Assistant were also treated more favorably with regards to telework. ROI at 168-69. However, to be considered "similarly situated," all relevant aspects of the comparative employee's work situation must be identical or nearly identical to that of Complainant, including but not limited to reporting to the same supervisor, performing the same job function, and working the same schedule. See Cantu v. Dep't of Homeland Sec., EEOC Appeal No. 01A60528 (Jul. 14, 2006); Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001), request for recon. denied, EEOC Request No. 05A20020 (Dec. 28, 2002). Here, the Administrative Assistant holds a different job and the other Assistant Special Agent in Charge is assigned to the Training Center in Georgia, and they are not similarly situated to Complainant. ROI at 553.

We find that Complainant has not shown that similarly situated employees, who were outside of his protected class based on sexual orientation, were treated more favorably with regards to telework, and he did not establish a prima facie case of sex discrimination for claim 6. Accordingly, we AFFIRM, the Agency's finding that Complainant did not establish that the Agency discriminated against him based on sex.

We find that Complainant established a prima facie case of reprisal for claims 4, 6, and 8. A complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). It is undisputed that Complainant engaged in prior protected EEO activity and that management officials were aware of his EEO complaint. SAC1 stated he learned of Complainant's EEO activity on February 7, 2019. ROI at 522.

SAC2 stated that he "heard rumors" that Complainant filed EEO complaints in the past. ROI at 589. We note that SAC2 did not specify when he heard these rumors. However, SAC2 stated that, when he met with Complainant on June 26, 2019, while he was not aware of the specific details, they discussed the "agreement" that Complainant had with the Agency, and Complainant confirmed that they generally discussed his EEO settlement agreement, which allowed for Complainant's detail assignment. ROI at 588, 174. As such, we find that SAC1 learned of Complainant's EEO activity on February 7, 2019, and that SAC2 was aware of Complainant's prior EEO activity on June 26, 2019.

We find that a nexus between Complainant's protected EEO activity and the adverse actions can be established due to the temporal proximity. A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 273-74 (2001). The proximity must be "very close," and a period of more than a few months may be too attenuated. Id. Where there is a gap between the protected activity and the adverse treatment, "the complainant must show additional proof of causality." Archibald v. Dep't of Housing and Urban Dev., EEOC Appeal No. 01A54280 (Sept. 22, 2005).

For claims 4 and 6, SAC1 learned of Complainant's EEO activity on February 7, 2019, and the adverse actions began in May 2019, which was only a few months later.⁸ For claim 8, SAC2 issued the Counseling Memorandum on July 1, 2019, which was less than one week after they discussed Complainant's prior EEO activity on June 26, 2019. Accordingly, we find that Complainant established a prima facie case of reprisal for claims 4, 6, and 8.

The Agency proffered legitimate, nondiscriminatory reasons for their actions. For claim 4, SAC1 stated that he did not have easy access to Complainant's leave requests, and that he was unable to approve leave requests for most of the supervisors in the division.

⁸ Complainant also alleged that the adverse actions began soon after SAC1 was contacted regarding Complainant's allegations related to his settlement agreement; however, Complainant did not specify when SAC1 was contacted.

SAC1 also stated that he provided timely responses to all of Complainant's requests, and that he did not recall Complainant notifying him that Complainant felt that his leave requests, emails, work products and various other requests were responded to in an untimely manner. ROI at 539-41, 543.

Regarding claim 6, SAC1 stated that Complainant was under a telework agreement that allows for "Episodic Participation," which was essentially "task-based." SAC1 stated that he denied Complainant's May 29, 2019, telework request because Complainant did not explain why he was requesting telework and the request was for multiple days that month, which did not fall within a task-based arrangement. ROI at 547-48. SAC1 stated that he explained to Complainant in June 2019 that he was no longer authorized to telework because the episodic nature of his telework agreement did not mean that he could telework one day per week. SAC1 also stated that he felt that Complainant was abusing the telework program. ROI at 550-51. SAC1 stated that he denied Complainant the ability to act as the Special Agent in Charge, while working remotely on May 10, 2019, because he did not believe that an individual acting on a short-term basis should do so remotely. ROI at 552.

For claim 8, SAC2 stated that he issued Complainant the Counseling Memorandum because, while he did not personally witness it, the Administrative Assistant (AA) advised him that Complainant wore jeans into the office on June 27, 2019. SAC2 stated that AA informed him that Complainant's jeans were "incredibly tight" and looked like "women's yoga leggings." ROI at 591. AA stated that Complainant wore "extremely tight blue jeans" with a polo shirt and a zip-front hoodie. ROI at 649.

We find that Complainant has shown that the proffered reasons were pretexts 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).

For claim 4, SAC1 stated that he did not have easy access to Complainant's leave requests. However, we find that this explanation is not believable because the record contains Complainant's Timesheet Summary statements, which show that SAC1 approved Complainant's leave requests in April 2019, but left Complainant's May 2019 requests as "pending." ROI at 261-62, 265, 268, 271. SAC2 then approved some of Complainant's June 2019 leave requests. ROI at 274-75, 277, 280. The evidence in the record contradicts SAC1's proffered reason, and we find that Complainant established pretext for discrimination when SAC1 failed to timely approve, respond to, or follow through with processing Complainant's leave requests.

We note that for the additional incidents for claim 4, Complainant and SAC1 accuse each other of lying. However, 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, there is no other evidence in the record to support Complainant's assertion that SAC1 is lying about the other incidents included in claim 4. Therefore, we find that Complainant did not establish pretext for discrimination for the remaining incidents in claim 4.

Regarding claim 6, SAC1 stated that he denied Complainant's May 29, 2019, telework request because Complainant did not explain why he was requesting telework and the request was for multiple days that month, which did not fall within a task-based arrangement. However, the record shows that SAC1 repeatedly approved Complainant's prior telework requests, which did not include reasons for the requests. ROI at 571, 575, 577-78. We further note that the record shows that Complainant provided an explanation for his May 29, 2019, telework request. Specifically, Complainant stated that it would be beneficial to work outside the office without disruption for certain tasks, such as creating a desk reference manual. ROI at 299. We find that the evidence showing that SAC1 regularly approved Complainant's unexplained telework requests, and the email proving that Complainant provided SAC1 with a reason for his May 29, 2019, telework request, contradict SAC1's proffered reasons for the denial of Complainant's telework request.

In addition, a review of Complainant's telework agreement does not show that there was a restriction on the number of telework days for Episodic/Situational Telework. ROI at 290-98. To the extent that SAC1 claimed that Complainant abused telework, we find that SAC1 routinely approved Complainant's requests, and there is no evidence that SAC1 ever raised concerns that Complainant was abusing telework. Regarding SAC1's decision to not allow Complainant to act as the Special Agent in Charge while working remotely on May 10, 2019, we note that it is undisputed that ASAC acted that day, but it is not clear where he worked that day. As such, we find that Complainant established pretext for discrimination when SAC1 denied Complainant's telework request on May 29, 2019, and removed Complainant's ability to telework one day per week in June 2019.

For claim 8, Complainant stated that he and SAC2 spoke on the telephone on July 2, 2019, and Complainant expressed concern about being written up for something that did not occur. Complainant also stated that SAC2's belief that he informed Complainant of the "no jeans" policy was inaccurate. Complainant added that the table of penalties for such violations typically start with a verbal conversation, as opposed to a written counseling. ROI at 175-77.

Even crediting SAC2's assertion that he informed Complainant of the "no jeans" policy, and he relied upon AA's report that Complainant wore jeans, we find that there is no evidence that SAC2 followed the Agency's policy regarding discipline.

Specifically, the record shows that Douglas Factors should be considered prior to the issuance of discipline, such as whether the offense was intentional or technical or inadvertent, and the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question. ROI at 697-98. An Agency's departure from, or failure to apply its policies, without explanation, can be probative of pretext. See Carl M. v. Consumer Fin. Prot. Bureau, EEOC Appeal No. 0120160005 (Nov. 16, 2017).

It is undisputed that SAC2 did not contact Complainant prior to emailing the Counseling Memorandum, and there is no explanation why SAC2 did not contact Complainant to determine if his offense of wearing jeans to work was intentional or technical or inadvertent. We note that Complainant stated that he had a suit in his car and could have changed into his suit, if SAC2 had informed Complainant that there was an issue with his work attire. ROI at 231. Further, SAC2 included Complainant's yellow polo-style shirt and hooded sweatshirt in the Counseling Memorandum, and there is no evidence that Complainant was previously warned that these items were inappropriate. We find that SAC2's deviation from the Agency's discipline policy, without explanation, demonstrates pretext for discrimination for claim 8.

Accordingly, we find that Complainant established that the Agency retaliated against him for his prior EEO activity when it failed to timely approve, respond to, or follow through with processing Complainant's leave requests; denied Complainant's request to telework on May 29, 2019; removed Complainant's ability to telework one day per week in June 2019; and issued Complainant a Counseling Memorandum on July 1, 2019, and we REVERSE the Agency's finding that Complainant did not establish that the Agency discriminated against him in reprisal for his prior protected EEO activity.

Harassment

Harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of a complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994). To establish a claim of harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998).

We find that Complainant belongs to statutorily protected classes based on sex and prior protected EEO activity, and that he was subjected to unwanted verbal conduct. However, we find that the record does not support that incidents 1, 2, 5, or 7 occurred because of Complainant's protected categories. While Complainant argued that SAC1 stated that he hoped that Complainant dies from AIDS, we find that there is no evidence to support this assertion.

For incident 1, we find that the evidence does not show that DIGI's comments were about Complainant or his EEO activity. DIGI denied having a conversation with SA about Complainant. ROI at 514. SA confirmed that DIGI expressed frustration with the Agency's decisions to settle complaints and believed that the complaints should be fought and they should let the "chips fall where they may," but SA stated that there was no mention of a specific case or name. ROI at 608-09. DSAC stated that while it was her opinion that DIGI was referring to Complainant's settlement, she did not remember the timing of Complainant's settlement or DIGI's conversation with SA, so she could not confirm that DIGI had referred to Complainant's settlement. ROI at 618.

Regarding incident 2, even crediting Complainant's version of events, we find that there is no evidence that DIGI made the alleged comments due to Complainant's sexual orientation or prior EEO activity. Complainant specified that he heard DIGI state that Complainant was "not that bright" and "did not do the job." While we note that these comments are not flattering, they are unrelated to Complainant's protected categories. In addition, the record contains statements from three witnesses who may have attended this meeting, and no one could confirm that DIGI made the alleged comments about Complainant. ROI at 622-37.

For incident 5, SAC1 stated that he never asked ASAC to review Complainant's work, and ASAC stated that SAC1 did not ask him to review Complainant's work. ROI at 544, 645. Regarding incident 7, SAC1 stated that he typically goes through drop files at the end of a fiscal year but had not gone through the files, and we find that there is no evidence that SAC1's failure to remove these documents was due to Complainant's protected bases. ROI at 554. As such, we find that Complainant did not establish that he was subjected to harassment based on sex, or in reprisal for prior protected EEO activity, for incidents 1, 2, 5, or 7, and we AFFIRM, in part, the Agency's finding that Complainant did not establish that the Agency harassed him based on sex or in reprisal for prior protected EEO activity.

However, we find that Complainant established that he was subjected to retaliatory harassment for incident 3. "The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment.⁹ If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.B, ex. 17. (Aug 25, 2016).

DSAC stated that while she did not recall the exact words SAC1 used, or what she told Complainant, she interpreted SAC1's comments to mean that the Agency was "getting tired of all the frivolous complaints that [Complainant] was filing and they were going to see what they could legally do to stop the frivolous complaints," and that SAC1 was "tired of having to answer

⁹ Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006).

questions all the time.” ROI at 618-19. SAC1 stated that he did not recall making the alleged statements to DSAC, but that he may have complained about needing to respond to “these ridiculous (*sic*) complaints.”¹⁰ SAC1 stated that he made this statement because he was “tired” of answering the ridiculous complaints. ROI at 536-37. We find that DSAC’s relay to Complainant of SAC1’s specific comments about Complainant’s EEO complaints and the Agency’s attempts to legally “stop” his EEO activity, and SAC1’s repeated comments that he believed that Complainant’s complaints were ridiculous, would have a sufficiently chilling effect to deter a reasonable person from filing EEO complaints. As such, we find that Complainant established that the Agency subjected him to retaliatory harassment for incident 3, and we REVERSE the Agency’s finding that Complainant did not establish retaliatory harassment for incident 3.

An employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). While we note that SAC1 is no longer in Complainant’s chain of command, SAC1 was Complainant’s first-line supervisor from January 2019 until approximately June 14, 2019, which was when SAC1 made the comments about Complainant’s EEO activity. ROI at 532-33. Accordingly, we find that the Agency is vicariously liable for SAC1’s statements that constituted retaliatory harassment.

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. 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 related to the Agency’s retaliation against Complainant when it failed to timely approve, respond to, or follow through with processing Complainant’s leave requests; denied Complainant’s request to telework on May 29, 2019; removed Complainant’s ability to telework one day per week in June 2019; issued Complainant a Counseling Memorandum on July 1, 2019; and informed Complainant that his EEO complaints were ridiculous and it would attempt to legally “stop” his 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 decision finding that Complainant did not establish that the Agency subjected him to discrimination or harassment based on sex, or in reprisal for prior protected EEO activity, and we ORDER the Agency to provide the remedies as specified in the Order herein.

¹⁰ SAC1 repeatedly used the term “ridicules” in his affidavit; however, based on the context of his statement, the Commission will assume that he meant to say “ridiculous.”

ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency will rescind the Counseling Memorandum issued on July 1, 2019.
2. Within 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. 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 30 days after the completion of the investigation.
3. Within 90 days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to SAC1 and SAC2, with an emphasis on the Agency's obligation not to retaliate against employees who have engaged in protected EEO activity.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against SAC1 and SAC2. 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 employment, then the Agency shall furnish documentation of their departure date(s).
5. Within 30 days of the date this decision is issued, the Agency shall post notices in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Investigations locations in Washington, D.C. and Laguna Niguel, California copies of the attached notice. Copies of the notices, 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).

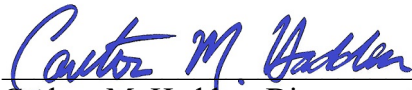
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 13, 2021

Date