



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Darrin H.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022001862

Hearing No. 443-2020-00016X

Agency No. 200J-0695-2019101658

DECISION

On February 22, 2022, 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 January 27, 2022, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a part-time Diagnostic Radiologist, GS-0647-15, at the Agency's Clement J. Zablocki VA Medical Center in Milwaukee, Wisconsin.

On March 5, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment in reprisal for prior protected EEO activity when:

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.

1. since January 29, 2019, and continuing, the Chief of Radiology (Chief) does not answer his emails;
2. on January 2, 2019, Complainant's patient's medical records were altered, making him subject to a peer review;
3. on December 27, 2018, the Chief scheduled a meeting to exclude Complainant;
4. on December 27, 2018, the Chief denied/precluded Complainant's leave request;
5. on December 27, 2018, the Chief threatened to charge Complainant Absent Without Leave (AWOL);
6. on December 27, 2018, the Chief emailed Complainant a written counseling;
7. Complainant learned that, on January 17, 2019, and continuing, that the Chief assigned him inequitable work hours;
8. On January 30, 2019, and continuing, the Chief assigned him extra half day work assignments and the least favorite rotation; and
9. On January 30, 2019, high "RVU" cases were taken from him.

In response to Claim 1, the Chief admitted that he sometimes did not answer Complainant's emails but explained that Complainant and two other radiologists have been "at odds with each other" concerning assignments and speed of productivity, and all three have complained to the Chief. The Chief said that he articulated to all three radiologists their roles in the hospital and expectations. Therefore, the Chief no longer responds to emails on this topic.

Complainant explained that Claim 2 concerned a chest x-ray. In a subsequent x-ray of the same patient taken nine months later by a different radiologist, a "new finding" was made and investigated through a CT scan. After the finding, the Chief directed that radiologist to add an addendum to the report suggesting that "the finding could be seen 'in retrospect' on" Complainant's chest x-ray. Complainant argued that the radiologist disagreed with this assessment. As a result of the addendum, Complainant was subjected to a Peer Review on January 7, 2019, which concluded that Complainant's original reading of the chest x-ray was appropriate. Complainant argued that the Chief retaliated against him by seeking to adversely influence the Peer Review and increase the chances Complainant could be sued for medical malpractice.

The Chief denied that he took action for the purpose of subjecting Complainant to peer review. Rather, he sought to correct an error. Further, the Chief said that this situation involved the detection of a cancer.

When the hospital detects cancer on a radiology study, they are obligated to review prior studies to determine whether they missed the cancer. “If there is a reasonable conclusion that the cancer was present on the prior study, I send the case to the peer review committee to determine whether the radiologist that read the study should have seen the cancer but missed it.” The Chief noted that he has been peer reviewed in the past. The Chief concluded that “every physician in the [Agency] must accept the fact that they can and will be peer reviewed when there are concerns about veteran patient care, including delayed diagnosis of cancer.”

In addition to the meeting identified in Claim 3, Complainant alleged that the Chief excluded him from meetings on June 14, 2019, and August 9, 2019. During the meeting on December 27, 2018, the Chief created the vacation schedule for the next six months without Complainant’s participation. As a result, the Chief denied Complainant weekend and full week annual leave for six months, as alleged in Claim 4. Complainant was only able to get a weekend off when another radiologist agreed to swap with him. Complainant said that the Chief did not explain why he denied Complainant’s leave request.

The Chief denied Complainant’s accusation and explained that the radiologists all have different schedules. Complainant is on-site on alternate weeks Wednesdays, Thursdays, and Fridays. Another radiologist works the weeks that Complainant is not on-site. Further, each of the full-time radiologists have a different day off during the week. Therefore, the Chief’s “secretary tries to find dates that maximum number of staff radiologists can attend.” The Chief maintained that radiologists who are not on the schedule could always call into the meeting, which was an option provided to Complainant. The Chief further denied Complainant’s allegation that he denied Complainant’s leave request. The Chief explained that the facility requires weekend coverage and once the six-month schedule is set, the pool of four radiologists can swap shifts upon mutual agreement. Because Complainant was unable to swap coverage, the Chief could not approve his leave requests.

Claims 5 and 6 concerned a memorandum from Chief to Complainant. In the December 27, 2018 memorandum, the Chief discussed Complainant’s request to reclassify time used for Annual Leave to Official Time to prepare for EEO matters. The Chief noted that he approved 20 hours of Official Time, which Complainant exhausted by November 23, 2018, and that he would not approve more than that. Despite the limitation, Complainant requested 30 hours of Official Time on November 29, 2018, and made an additional request on December 7, 2018. The Chief denied both requests. In the memorandum, the Chief threatened Complainant with AWOL if he continued to “fail to properly enter leave requests.” The Chief concluded that:

“[t]he purpose of this memo is to remind you that you must immediately improve your conduct by following instructions provided to you regarding the amount of official time that has already been provided to you and for your need to properly enter leave into [the timekeeping system]. You are a professional, and it is expected that you conduct yourself as such. Failure to do so may result in disciplinary action.

Complainant argued that the memorandum suggested that Complainant's requests for Official Time to work on EEO matters constituted unacceptable conduct. The Chief responded that he had never threatened Complainant with AWOL, but rather communicated to Complainant the expectations of the Agency.

In Claim 7, Complainant argued that the Chief increased the hours for the three other part-time radiologists, but decreased Complainant's own hours. Complainant elaborates that he frequently stayed beyond his normal tour of duty with no extra pay but was reimbursed his normal hourly rate. However, about one week after he filed his prior EEO complaint, the Chief told Complainant that he would no longer reimburse Complainant for staying late. Complainant argued that the prior fee arrangement saved the Agency a substantial amount of money and therefore, there was no reason to end it.

Regarding Claim 8, Complainant explained that the radiologists rotate between different assignments such as Plain Film Reader, Fluoroscopy, and MRI scans. Complainant defined Plain Films to mean "ER/STAT/plain films." Complainant contended that Plain Films are the least favorable rotation, and that he was the backup reader. However, a month after he sought reasonable accommodations, he became the primary reader. As a result, he was assigned a minimum number of films to read, which put him at risk of verbal counseling and losing bonus pay.

Complainant acknowledged that the Chief recently reverted his schedule to what it was prior to his request for accommodation.

The Chief responded to both Claims 7 and 8 by explaining that the hospital staffing levels changed, which necessitated a change in assignments to the radiologists. According to the Chief, the hospital had "radiologists that used to exclusively read the . . . high volume/critical x-ray plain films during the week and week-ends. All these radiologists either retired, became disabled, or died." Therefore, Complainant and two other part-time radiologists were used to replace the retired, disabled, or deceased radiologists. The Chief noted that the MRI, CT, and ultrasound studies were being carried out by the full-time radiologists, which made it difficult for the Chief to redistribute these assignments to the part-time staff. The Chief admitted that "most of the radiologists do not like to carry out these 'least favorable assignments' . . . but do participate in those." The Chief concluded that the part-time radiologists were hired for the purpose of reading Plain Film.

Further, the Chief explained that reassignments for extra half day work frequently occur due to scheduled leave and unscheduled sick leave. The Chief asserted that all of the "radiologists have at one time or another been reassigned over the past decade."

Complainant argued that by taking away high RVU cases, as in Claim 9, the Chief was creating a false impression that Complainant was performing less work than the other radiologists.

In his response, the Chief explained that high RVU cases were used primarily to determine staffing levels and have no effect on staff compensation or benefits. The Chief elaborated:

I do not use RVUs in my assessment, because they are most favorable to MRIs and least favorable to x-ray plain films. If I did go by RVUs for my assessments, the radiologists would be literally at each others' throats to read MRIs and avoid x-ray plain films.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing; however, prior to the hearing, Complainant withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). In the decision, the Agency concluded that Complainant failed to prove that he was subjected to reprisal as alleged.

The instant appeal followed.

ANALYSIS AND FINDINGS

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 Chapter 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”).

Retaliatory Hostile Work Environment

As a general matter, the statutory anti-retaliation provisions prohibit any adverse treatment that is sufficient to dissuade a “reasonable person” from making or supporting a charge of discrimination. See Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. *Id.* Moreover, 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. “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, e.g. 17.

Except with respect to the Written Counseling at issue in Claims 5 and 6, as discussed more above, we find the Chief articulated legitimate, non-retaliatory reasons for his actions. In Claim 1, the Chief described a difficult working relationship among the radiologists and admitted not answering emails that touched on that working relationship. The Chief also explained it was a routine, if uncommon, practice to initiate a Peer Review as alleged in Claim 2, when a cancer is discovered on a subsequent scan, in order to determine whether it should have been identified earlier. The Chief also denied excluding Complainant from meetings in Claim 3, explaining that there is no one day on which all radiologists are on duty. If a radiologist is not on duty that day, they are free to call in.

The Chief then explained that at the meeting on December 27, 2018, the schedule for the next six months was set, which made it difficult for him to grant Complainant’s leave requests. Further, all of the radiologists were permitted to swap shifts on their own, which Complainant admits he was able to do once.

In Claim 7, the Chief explained that staffing levels changed, and that Complainant was performing the job he was hired to perform. To this end, in Claim 8, the Chief rotated assignments and Complainant inevitably needed to perform some of the least desirable work. In Claim 9, the Chief explained that high RVU cases are meaningless to a radiologist’s performance, and matter only in evaluating the overall staffing levels.

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency’s reasons were not the real reasons and that the Agency acted on the basis of retaliatory animus. Complainant reiterates his allegations and argues that the other radiologists had preferable shifts and work compared to him, but Complainant does not set forth evidence to dispute the Chief’s reasons for his actions. Accordingly, the Commission finds that Complainant was not subjected to reprisal as to these claims.

Regarding claims (5) and (6), the Commission has stated that adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute unlawful retaliation, EEOC Compliance Manual, Section 8: Retaliation (May 20, 1998); Burlington Northern and Santa Fe Railway Co. v White, 548 U.S. 53 (2006) (finding that the antiretaliation provision protects individuals from a retaliatory action that a reasonable person would have found “materially adverse,” which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process).

As a general matter, the Commission has held that the actions of a supervisor may constitute *per se* reprisal when the supervisor intimidates an employee and interferes with the employee's EEO activity in any manner. See Israel F. v. U.S. Postal Serv., EEOC Appeal No. 0120181863 (Sept. 26, 2019) (citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998). Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a *per se* violation of the law. Id. Central to a finding of *per se* reprisal is that the conduct is reasonably likely to have a chilling effect on the complainant or a reasonable employee from engaging in, or pursuing, protected activity. Id. (citing Christeen H. v. U.S. Postal Serv., EEOC Appeal No. 0120162478 (June 14, 2018)).

In this case, the Chief issued Complainant a memorandum in which he directly referenced Complainant's requests for Official Time to work on his EEO complaint and explained that Complainant was granted 20 hours of Official Time and would not be granted any further time. The Chief then explained that Complainant needed to "immediately improve [his] conduct by following instructions provided to [him] regarding the amount of official time that has already been provided to you" The Chief criticized Complainant's professionalism and concluded that if Complainant failed to conduct himself professionally, the Chief would consider disciplinary action.

The memorandum, on its face, has the effect of chilling an individual's participation in the EEO process. Therefore, we find that the issuance of the Written Counseling to Complainant constitutes *per se* reprisal.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's decision with respect to Claims 1-4 and 7-9, and REVERSE the Agency's decision with respect to Claims 5 and 6, and REMAND the matter for further processing in accordance with the ORDER below.

ORDER

The Agency is hereby ORDERED to take the following actions:

1. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the Agency's retaliatory action and his pecuniary or nonpecuniary losses, if any. Effective the date that this decision is issued, the Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claim for compensatory damages. Complainant shall have 30 days from the date Complainant receives the Agency's notice to submit his compensatory damages evidence. Complainant has a duty to cooperate in determining compensatory damages, including

providing evidence/input/documents (including responding to Agency requests for documentation or completing agency forms). Within 60 days of the receipt of this decision, the Agency shall determine the appropriate amount of compensatory damages. Within 60 days of determining the amount of compensatory damages due Complainant, the Agency shall issue a final decision, with appeal rights to the Commission, on the issue of compensatory damages, and payment of any undisputed funds. 29 C.F.R. § 1614.110. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.

2. Within 30 days of the date of this decision is issued, the Agency shall expunge the retaliatory Written Counseling and/or any related documents from Agency records.
3. Within 90 calendar days from the date that this decision is issued, the Agency shall provide at least four hours of in-person or interactive EEO training to the Chief. The training shall have a special emphasis on reprisal and the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings under, the Federal equal employment opportunity laws.
4. Within 30 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the Chief. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

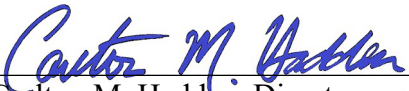
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 25, 2023

Date