



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Cletus W.,<sup>1</sup>  
Complainant,

v.

Louis DeJoy,  
Postmaster General,  
United States Postal Service  
(Field Areas and Regions),  
Agency.

Appeal No. 2022003485

Hearing No. 532-2021-00051X

Agency No. 4C-450-0105-20

**DECISION**

On June 7, 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 May 9, 2022, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Sales, Service and Distribution Associate, PS-06, at the Agency's Mount Vernon Post Office facility in Mount Vernon, Ohio.

On November 4, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of age (YOB: 1955) and in reprisal for prior protected EEO activity (Agency Nos. 4C-450-00016-17, 4C-450-0112-17) when:

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. Complainant was required to perform work that a co-worker was not required to perform; and
2. On July 11 and 14, 2020, Complainant reminded management about training they had agreed to provide, and he still has not been given the training.

The Agency accepted the foregoing claims and conducted an investigation into the matter. During the investigation, Complainant clarified that Claim 1 was about management changing window operations such that Complainant was no longer assigned primarily to the window and instead window duties were rotated among all clerks, requiring Complainant to perform more physically demanding work in the back when he was not assigned to the window while younger clerks performed the less demanding window duties.

Complainant testified he is 65 years old and that his age was common knowledge among many of his coworkers and management. He also testified that Postmaster (Age 34, prior EEO activity unknown), Supervisor (Age 42, prior EEO activity unknown), and Manager (Age 56, prior EEO activity unknown) were aware of his age from personnel records and Complainant's prior EEO cases.

Postmaster and Manager testified they were not aware of Complainant's age. Supervisor testified was not sure of Complainant's age, but he would guess Complainant was in his 50s.

Complainant identified his prior EEO activity as several previously filed EEO complaints, including Agency Nos. 4C-450-0061-20, 4C-450-0016-17, and 4C-450-0112-17. The record reflects Complainant has filed seven formal and two informal EEO complaints between May 2010 and July 2020, including one informal complaint filed in March 2020 and one formal complaint filed in July 2020. Complainant testified that Supervisor and Manager were named as responsible management officials in a prior complaint and Supervisor had provided written affidavits. Complainant testified that on April 30, 2020, he discussed his EEO complaint in Agency No. 4C-450-0061-20 with Postmaster.

Postmaster testified he became aware Complainant had prior EEO activity in the summer of 2020. Supervisor testified he was aware of Complainant's prior EEO activity due to being involved with them. Manager testified that Complainant files EEO cases regularly. He did not clarify when he became aware of Complainant's EEO activity.

#### *Claim 1 – Change in Window Operations*

Complainant testified that from June 2013 until mid-2017, he was assigned to be the window clerk every day. In mid-2017, a former postmaster implemented a system of rotating window clerks. Complainant testified that in late February 2019, he was again assigned to be the window clerk every day until about April 2020 when Postmaster re-implemented the system of rotating window clerks. Complainant testified that he had been assigned as a back office clerk, as opposed to the window clerk, on December 15, 19, and 24, 2020, among other dates.

Complainant testified that when he is not the assigned window clerk for the day, he works in the back throwing parcels, lifting heavy items, bending, twisting, turning, and running to the window when another clerk is needed. He testified this involves strain on his body that he increasingly notices, and that working in the back office involves much more physical exertion and energy than being assigned to the window all day. He testified that when he works in the back, younger clerks are at the window performing less strenuous work. He stated that on the days he works as a back office clerk, Comparator 1 or Comparator 2 is the assigned window clerk. Complainant indicated these individuals are significantly younger than he is.

Complainant identified Postmaster, Supervisor, and Manager as the management officials involved in allegation. Complainant testified he raised this issue in 2017 to the then-postmaster and he raised it again to Supervisor and Postmaster. He indicated Manager was aware of this due to Complainant's EEO cases. He testified he tried to point out the differences in age between himself and Comparator 1 and Comparator 2 and that it would be more advisable for Complainant to be the window clerk every day instead of working in the back.

Complainant stated that neither Postmaster nor Supervisor has provided an explanation for the change to rotation of window clerks and refusal to assign him primarily to the window, although he believed a prior postmaster implemented the rotation system "under the pretext of fairness." (ROI, p. 159).

Postmaster testified that all employees/clerks perform non-window service on a daily basis, although he did not recall instructing Complainant to perform non-window clerical duties on the dates cited. He denied that Complainant was denied window work. He denied making any decision to require Complainant to perform work that his coworkers did not have to do and stated he was not aware of any other management officials involved in the decision. Postmaster testified he did not provide an explanation to Complainant because an explanation to perform work within his job description was not warranted. Postmaster testified that to his knowledge, seniority does not play a role in what function a clerk is assigned. He stated he did not receive any comments from Complainant.

Supervisor testified the window position rotates because there is no position that is assigned to just the window. Supervisor testified that "everyone has the same job title and does the same work." He indicated that all clerks work together to get the job done. He indicated that the clerks made the decision and management only helps move people around when and if needed. He stated management does not have certain people do certain jobs. He indicated that Complainant did not ask why certain people were in certain areas on the dates that Complainant was working in the back office and his coworker was working the window. He noted that not everything is a seniority-based operation.

Manager denied having any information about or involvement in this claim.

When asked why he believed his age was a factor in management's actions, Complainant stated he believes "having a system of rotating window clerks, which requires [him] to periodically work in the back doing tasks more physically demanding while a much younger coworker is on the window, which is less physically demanding, is part of an ongoing agenda on the part of management of retaliation against [him], which began in 2008, for engaging first in whistleblower activity against management, and then for engaging in EEO activity." (ROI, p. 160).

When asked why he believed retaliation/his prior EEO activity was a factor in management's actions, Complainant stated retaliation "has been the agenda on the part of management towards [him] since 2008, when [he] first wrote a letter of complaint against then post master" and later filing EEO complaints. (ROI, p. 160-161, 170). "That [Postmaster] would re-implement a system a system of rotating window clerks, resulting in [Complainant] doing tasks more physically demanding than two co-workers decades younger than [him], and also with much less postal seniority than [him], also suggests to me [Postmaster] is willing to continue an agenda of retaliation against [Complainant]." (ROI, p. 170).

Postmaster and Supervisor denied that Complainant's age or EEO activity were a factor in these allegations.

### *Claim 2 – Training*

Complainant testified that he previously filed an EEO complaint in March 2020 (Agency No. 4C-450-0061-20) because he had been denied Bulk Mail (BMEU) training. Complainant testified that at the suggestion of the EEO/ADR Specialist, he discussed the matter with Postmaster on April 30, 2020. According to Complainant, Postmaster agreed to have Complainant trained "expeditiously" in the relevant work in exchange for Complainant's withdrawal of his complaint. Complainant stated (and the record reflects) he then withdrew his complaint in Agency No. 4C-450-0061-20. Complainant testified he still has not been provided the promised training. Complainant testified that EEO/ADR Specialist testified that if Postmaster did not keep his word, Complainant could file another EEO complaint and that is why Complainant has filed the instant claim.

Complainant testified that on July 11, 2020, he reminded Supervisor about the training, and on July 14, 2020, he reminded Postmaster about the training. Complainant did not state what response he received at the time, but he testified that EEO/ADR Specialist informed him that Postmaster and Supervisor had advised her that Complainant could not be trained at that time due to the COVID-19 pandemic. Complainant testified he disagrees with this reasoning because the COVID-19 pandemic was already underway when Postmaster agreed to the training on April 30, 2020, and because social distancing is not being practiced at the Mount Vernon Post Office. Complainant testified there was no reason Supervisor could not train him and he pointed out that Supervisor provided him training on a computer issue on December 28, 2020 without social distancing.

Complainant also testified that Comparator 1 was provided with training in Business Reply and Bulk Mail by Supervisor even though Complainant had requested this training. Complainant contends that training in various matters, including Bulk Mail, is to be done by seniority and it is inappropriate to train non-career postal support employees in such a task. Complainant identified several employees who he believed were treated more favorably with regard to training. However, Complainant did not identify any employees who had received Bulk Mail training after Postmaster's April 30, 2020 promise to train Complainant.

Supervisor testified that Complainant was scheduled to attend the mailing requirement training that was online and on site, but the class was cancelled due to COVID. He testified that management did not cancel the training. Supervisor also testified that other employees were not treated differently than Complainant regarding training. However, he noted that some employees had already received this training prior to working at the Mount Vernon Post Office. Supervisor also testified that Complainant had been offered this training in the past, but he declined at that time.

Postmaster testified that he cannot train Complainant on Bulk Mail Acceptance because he is not trained. He testified that Complainant has not yet been trained due to COVID-19 and social distancing still being in place. Postmaster testified he does "still plan to train [Complainant] in Bulk Mailing Acceptance. The current climate of Covid-19 has hampered my ability to get him trained." (ROI, p. 224).

Complainant testified he did not believe his age was a factor in being denied training, but he did believe his prior EEO activity was a factor for the reasons outlined in the discussion in Claim 1. Supervisor and Postmaster denied that Complainant's age or EEO activity were a factor in the decision not to provide the training.

#### *Dismissal of Complainant's Request for Hearing*

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, on April 28, 2022, the AJ dismissed Complainant's hearing request as a sanction pursuant to 29 C.F.R. § 1614.109(f)(3) for failure without good cause shown to fully and timely respond to an order of an administrative judge.

According to the AJ, after assignment to the case, the presiding AJ called Complainant on October 13, 2021 instructing Complainant to provide an email address; Complainant said Complainant would send it to the AJ's address, but did not. Around March 29, 2022, the AJ again called Complainant requesting Complainant's email address, and Complainant responded that day providing the address and saying, "I apologize for the delay and I appreciate your patience."

The record reflects that on March 30, 2022, the AJ issued an Acknowledgment Order and Order Scheduling Initial Conference to the Agency's counsel and to Complainant, by both email (to Complainant's USPS email address) and by the EEOC's Public Portal. In the email, the AJ asked both parties to confirm receipt and the AJ asked the Agency to provide additional confirmation of Complainant's email address. The Agency responded that same day confirming receipt. The Agency further stated that it was unable to confirm Complainant's personal email address. The Agency noted that in Complainant's affidavit for the instant case, Complainant denied having access to email, and that in prior EEO cases, Complainant had also denied having access to email and documents and orders were sent to him as a hard copy to his personal address.

Nevertheless, Complainant responded to the AJ's email on March 31, 2022. In his response, Complainant denied that the Orders indicated in the email were attached. Complainant's email response does not request that documents be provided by U.S. mail, nor does it state that Complainant does not have access to email. The AJ responded that same day stating that the Orders were indeed attached to the original email, but the AJ nevertheless attached the Orders to his response as well.

Both the Acknowledgment Order and Order Scheduling Initial Conference began with a conspicuous warning to "read the Order carefully." The Acknowledgement Order ordered the parties to provide a Preliminary Case Information (PCI) submission. The Acknowledgement Order stated that "**Failure to submit the PCI may result in sanctions, such as: waiver of discovery; denial of motions in the areas addressed in the PCI (*dismissals or additional evidence*); dismissal of the hearing request for final action by the Agency; or default judgment against the Agency.**" (emphasis in original). The Acknowledgement Order further stated that "Failure to follow this Order or other orders of the Administrative Judge may result in sanctions pursuant to 29 C.F.R. §1614.109(f)(3). The Administrative Judge may, where appropriate: (A) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information; (B) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (C) Exclude other evidence offered by the party failing to produce the requested information or witness; (D) Issue a decision fully or partially in favor of the opposing party; or, (E) Take such other actions as appropriate." This same language about failure to follow this or other orders was also contained in the AJ's Order Scheduling Initial Conference and Order Requiring Pre-Conference Statement. The Order Scheduling Initial Conference and Order Requiring Pre-Conference Statement also stated in the first paragraph that "Failure to follow the orders of the Administrative Judge or to comply with the Commission's regulations may result in sanctions. See 29 C.F.R. § 1614.109(f)(3)."

Complainant did not file his Preliminary Case Information report as ordered in the Acknowledgement Order. Complainant did not file a Pre-Conference Statement as ordered in the Order Scheduling Initial Conference. Complainant did not appear at the Initial Conference, and he did not answer a phone call from the AJ during the scheduled Initial Conference. The Agency filed a Pre-Conference Statement stating that they attempted to obtain Complainant's input for a joint Pre-Conference statement, but Complainant did not reply.

The AJ issued an Order to Show Cause for Complainant's failure to respond to the earlier Orders, but Complainant did not respond.

Having received no response from Complainant, on April 28, 2022, the AJ issued an Order dismissing Complainant's request for hearing as sanctions for failure to comply with the orders of the AJ.

### *Final Agency Decision*

The AJ returned the complaint to the Agency, and the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The FAD found that Complainant had made his prima facie case for discrimination based on reprisal, but he failed to establish a prima facie case for age discrimination because he had not shown he was subjected to an adverse employment action, he had not shown he was treated differently than a similarly situated younger coworker, and he had not shown his age was a determining factor. Regardless, the Agency had articulated legitimate, nondiscriminatory reasons for its actions. In Claim 1, the Agency stated that window duties were rotated among all the clerks because there is no position devoted solely to working the window. In Claim 2, the Agency stated Complainant was scheduled for training, but it was canceled due to COVID-19 and Complainant has still not been trained due to COVID-19 and social distancing. The FAD further found that Complainant had not shown these reasons were pretextual. The FAD noted that Complainant admitted his age was not a factor in not being provided the promised training and he did not otherwise provide evidence beyond his unsupported allegations that the Agency was motivated by his age or EEO activity.

Complainant filed the instant appeal.

### *Contentions on Appeal*

On appeal, Complainant seeks to have the dismissal of his hearing request reversed. Complainant contends he never received the Orders of the AJ, although he acknowledges receiving the email to which they were attached. Complainant states he has very limited computer skills and that he did not originally provide an email address with his EEO complaint because he does not communicate via email. Complainant acknowledged receiving the September 2021 phone call from the AJ requesting Complainant's email address. He stated that at that time he did not have his email address readily available although he informed the AJ it was a standard USPS email address. Complainant states he later telephoned the AJ several times in an attempt to provide his email address, but he did not receive a response. Complainant asserts he received the AJ's second phone call to him, in response to which Complainant emailed his email address to the AJ. Complainant states he had to be instructed by Supervisor on how to send this email. Complainant states he received the March 31, 2022 email from the AJ but he did not know how to access the attachments and Supervisor refused to help him. Complainant states that to this day he has never seen the Orders and in essence has never received them.

Complainant states his failure to reply and participate in the proceedings was based on his lack of knowledge of computer usage. He requests that if his case is reinstated, that communication occur in writing through USPS.

Complainant also noted that his case arose largely due to the refusal of Postmaster to keep his word regarding training, even though the COVID-19 pandemic was already occurring when Postmaster assured Complainant he would be trained without delay. Complainant disputes the arguments of Postmaster and Supervisor regarding COVID-19 and social distancing being the reasons Complainant cannot be trained because the Mount Vernon Post Office does not practice social distancing and carried on with tasks as usual. Complainant states that Supervisor has stood next to him as needed during this time frame. Complainant contends this is just another excuse to engage in an agenda of retaliatory hostility and harassment. Complainant also takes issue with Postmaster's statements that Postmaster is not authorized to instruct his subordinate (Supervisor) to train Complainant.

The Agency contends on appeal that the AJ did not abuse his discretion when sanctioning Complainant for repeatedly failing to comply with every order of the AJ. The Agency also maintains there is no new evidence that was not reasonably available prior to or during the investigation; there are no material facts in dispute; the Agency articulated legitimate, non-discriminatory, non-retaliatory reasons for its actions; and Complainant has not shown that those proffered reasons are a pretext for discrimination.

### ANALYSIS AND FINDINGS

#### *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 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”).

#### *Dismissal of Complainant’s Hearing Request as Sanction*

The Commission's regulations confer upon its AJs broad responsibility for adjudicating an EEO complaint once a complainant's hearing request has been granted, and that responsibility gives the AJs wide latitude in directing the terms, conduct, or course of EEO administrative hearings. Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). The AJ's discretionary authority includes the power to impose sanctions upon a party that fails to comply with the AJ's orders. Id.



When the a party fails without good cause shown to respond fully and in timely fashion to an order of an administrative judge, the administrative judge shall, in appropriate circumstances: (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information; (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) Exclude other evidence offered by the party failing to produce the requested information or witness; (iv) Issue a decision fully or partially in favor of the opposing party; or (v) Take such other actions as appropriate. 29 C.F.R. § 1614.109(f)(3).

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and to prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include: (1) the extent and nature of the non-compliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. Id.

In more recent cases in which the Commission affirmed the AJ's dismissal of a hearing request, such scenarios are typically characterized by multiple incidents of noncompliance, the complainant's failure to respond to the AJ's show cause order, or the lack of acts or omissions attributable to the AJ or the Agency that resulted in the complainant's noncompliance. See e.g. Melinda H. v. Dep't of Veterans Affairs, EEOC Appeal No. 2021004162 (Oct. 17, 2022). By contrast, in recent cases in which the Commission reversed the AJ's dismissal of a hearing request, we tend to find that there was a single incident of noncompliance, that the complainant timely responded to the AJ's show cause order, and that the noncompliance usually resulted from circumstances beyond the complainant's control, from an oversight that the complainant immediately sought to correct, or where the noncompliance resulted from an act or omission on the part of the AJ or the Agency. See e.g., Stuart M. v. Gen. Serv. Admin., EEOC Appeal No. 2021005010 (Nov. 21, 2022); Sean L. v. Dep't of the Air Force, EEOC Appeal No. 2020002537 (June 2, 2021), req. for recon. den. EEOC Request No. 2021003956 (Oct. 26, 2022).

In applying the first and fourth factors, we find that Complainant's non-compliance consisted of failing to submit his PCI in accordance with the AJ's Acknowledgement Order, failing to submit a Pre-Conference Statement in accordance with the AJ's Order Scheduling Initial Conference, failure to appear at the Initial Conference, and failure to respond to the AJ's Order to Show Cause. Complainant states he did not receive the Orders due to lack of computer skills, stating that he did not know how to access the attachments to the AJ's email.

However, the record reflects that he timely responded to the AJ's March 30, 2022 email sending the Orders and he did not inform the AJ in his response or thereafter that he is unable to use email or open attachments. Complainant did not request hard copies at that time. Complainant does not deny that he received the AJ's March 30, 2022 email or that he responded to it. Yet, he did not attempt to follow up with either the AJ or the Agency afterwards. Complainant also acknowledged receiving the email from the AJ dismissing his case. In considering the second and third factors, we find Complainant's failure to respond to the Orders issued by the AJ or appear at the initial conference effectively halted the proceeding and prevented the Agency from engaging in the discovery process or otherwise moving forward.

Finally, in taking the fifth factor into account, we have recently reaffirmed that there must be a showing that Complainant either willfully disobeyed the AJ's orders or unjustifiably failed to respond to those orders to warrant dismissal of the hearing request as a sanction. Sheila O. v. Dep't of the Army, EEOC Appeal No. 2021002224 (Aug. 3, 2022) citing Linda D. v. U.S. Postal Serv., EEOC Appeal No. 2019004909 (Sept. 23, 2020) (the complainant's failure to respond to the AJ's Orders impugns the integrity of the EEO process as a whole).

While we do not find that Complainant willfully disobeyed the AJ's orders, we do find that he unjustifiably failed to respond to them. Although Complainant now states he has limited computer skills and has difficulty using email, Complainant responded to the AJ's March 30, 2022 email, Complainant acknowledges receiving at least two emails from the AJ, Complainant did not inform the AJ of his difficulties using email, Complainant did not request that the Orders be sent to him by hard copy, and Complainant did not request an extension. Complainant did not act with due diligence in pursuing his case. Ultimately, we agree with the AJ that there is no justification for Complainant's failure to respond to his Orders. Consequently, the AJ's dismissal of Complainant's hearing request as a sanction was reasonable and well within the bounds of his discretion.

### *Disparate Treatment*

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). 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. McDonnell Douglas, 411 U.S. at 802, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases.

Where the Agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

Here, even assuming arguendo that Complainant established a prima facie case on all claims, the Agency articulated legitimate, nondiscriminatory reasons for its actions. In Claim 1, the Agency stated there is no window clerk position and all clerks rotate duties. In Claim 2, the Agency stated the bulk mail training was canceled due to COVID-19 and it has not been rescheduled due to COVID-19 and social distancing.

The burden incumbent upon the agency to respond to a complainant's prima facie case with a legitimate, nondiscriminatory reason for its actions is a burden of production, not persuasion. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (June 12, 2000). While the agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded a complainant. Lorenzo v. Dep't of Def., EEOC Request No. 05950931 (Nov. 6, 1997). We find the Agency has done so here.

Given that the Agency has articulated legitimate, nondiscriminatory reasons for its actions, Complainant must prove, by a preponderance of the evidence, that the agency's articulated reason for its action was not its true reason, but a sham or pretext for unlawful discrimination. Burdine, 450 U.S. at 253; see Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). “[P]retext can be demonstrated by ‘showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [Agency's] proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.’” Dalesandro v. U.S. Postal Serv., EEOC Appeal No. 01A50250 (Jan. 30, 2006) (alterations in original) (quoting Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)). The question is not whether the agency made the best, or even a sound, business decision; it is whether the real reason is discrimination. Mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext. The focus of pretext inquiry is whether an agency's actions were motivated by discriminatory animus. Further, at all times the ultimate burden of persuasion remains with Complainant to demonstrate by a preponderance of the evidence that the Agency was motivated by prohibited discrimination.” Alameda B. v. Dep't of the Treasury, EEOC Appeal No. 0120181968 (Sept. 24, 2019).

Complainant has not met his burden here. Rotating the clerks among duties, including the window and the back office, is a means of treating all clerks equally and is well within management's discretion. It does not show discrimination against Complainant.<sup>2</sup>

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<sup>2</sup> We note that if Complainant requires an accommodation to perform certain job functions, he should request the necessary reasonable accommodations from management.

Similarly, while Complainant believes social distancing is not occurring, he has not shown that the training was not cancelled or that any other employee has received bulk mail training during the relevant time period.<sup>3</sup> We do not find his arguments that Postmaster could provide the training persuasive to show discrimination or retaliation. Additionally, Complainant denied that his age was a factor in not being given training. The record is devoid of any evidence showing discriminatory or retaliatory animus. Therefore, we find Complainant was not subjected to disparate treatment.

### *Retaliatory Harassment*

Complainant has also alleged that he has been subjected to a pattern of harassment in retaliation for his whistleblowing and prior EEO activity. To establish a claim of hostile work environment harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove his claim, Complainant must establish that he was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of his protected classes. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

For a retaliatory harassment claim, the alleged retaliatory actions need not impact a term, condition, or privilege of employment. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). A complainant need only show that a materially adverse action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Id., 548 U.S. at 68. The Commission's guidance states 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 (August 25, 2016).

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<sup>3</sup> If there was a settlement agreement outlining the Agency's promise to provide training and Complainant believes this agreement has been breached, he may follow the procedures for bringing a claim of breach of settlement against the Agency.

Here, the evidentiary record reflects that the alleged incidents were more likely the result of routine supervision. Ultimately, managers have the discretion to determine how to best manage their offices to meet their needs and goals and it is within their authority to make business decisions. Complainant's subjective belief of discriminatory animus is not persuasive evidence. See Chatman v. Dep't of the Army, EEOC Appeal No. 0120080445 (Aug. 7, 2009). Without proof of a demonstrably discriminatory motive, the wisdom of the Agency's business decisions may not be second-guessed. Mendez v. U.S. Postal Serv., EEOC Appeal No. 0120090593 (May 20, 2010).

At all times the ultimate burden of persuasion remains with Complainant to demonstrate by a preponderance of the evidence that the Agency was motivated by prohibited discrimination.” Alameda B. v. Dep't of the Treasury, EEOC Appeal No. 0120181968 (Sept. 24, 2019). Here, Complainant failed to meet his burden.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the final decision of the Agency.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

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

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

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

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

September 11, 2023  
Date