



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Frederick A.,¹
Complainant,

v.

Charlotte A. Burrows,
Chair,
Equal Employment Opportunity Commission,
Agency.²

Appeal Nos. 2022003887 and 2022004927

Agency Nos. 2019-0037 and 2021-0030

DECISION

On July 9, 2022 and September 16, 2022, respectively, Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 10, 2022 and August 17, 2022 final decisions concerning his equal employment opportunity (EEO) complaints 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. For the reasons that follow, the Commission **AFFIRMS** the Agency's final decision.

ISSUES PRESENTED

The issues presented concern whether Complainant was subjected to discrimination based on his race, national origin, sex and/or age, as well as in unlawful retaliation for his prior protected

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

² As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints. The Chair has abstained from participation in this decision.

activity, when management denied him a transfer, suspended him for seven days, provided him with negative job references, denied him a bonus, provided him with a performance assessment that rated his work lower than he believed was accurate, did not select him for several supervisory positions, placed him on a performance improvement plan, and subjected him to other workplace harassment.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as an Investigator at the Agency's District Office in Phoenix, Arizona.

Complaint 1: Agency No. 2019-0037

On June 20, 2019, Complainant filed an EEO complaint (Agency No. 2019-0037) (Complaint 1) alleging that the Agency discriminated against him on the bases of national origin (Hispanic), sex (male), age (YOB: 1975), and reprisal for prior protected EEO activity when:

1. On April 3, 2019, during a Strategic Enforcement and Litigation Plan (SELP)³ meeting, a Phoenix District Office Supervisory Trial Attorney (STA) became belligerent with Complainant and yelled and pounded his closed fists on the table while discussing a charge.
2. On April 3, 2019, Complainant's coworker (Coworker 1) touched Complainant in a manner Complainant deemed as sexual harassment, and Complainant opposed Coworker 1's unwanted touching.
3. Whether Complainant has been subjected to discrimination and reprisal when:
 - a. On April 9, 2019, Complainant's coworker (Coworker 2) provided false information about Complainant to management.
 - b. On April 23, 2019, Complainant learned that, as a result of a complaint by Coworker 2, an investigation was conducted, and Complainant was interviewed without being informed of his rights.
 - c. On May 21, 2019, Complainant's request to transfer to the Las Vegas Local Office was denied.
 - d. As a result of the investigation, connected with Coworker 2's complaint, Complainant served a 7-day suspension, beginning May 28, 2019.
 - e. On or about May 29, 2019, Complainant was informed that negative references from the EEOC impeded his selection for hire by another agency.
 - f. On September 30, 2019, the FY 2019 ended without Complainant receiving a bonus for FY 2019.

³ Complainant explained that a SELP meeting is a meeting in which legal and enforcement teams discuss previous and potential future actions on cases.

- g. On October 24, 2019, Complainant was issued his FY 2019 performance evaluation, rating his performance as “Fully Successful.”
- 4. On April 15, 2020, Complainant was referred to the hiring manager for the Phoenix District Office Supervisory Equal Opportunity Investigator position (Vacancy Announcement No. IMP-10759590-20-MR), but not selected for an interview for the position. On April 30, 2020, Complainant was notified that he had not been selected for the Phoenix District Office Supervisory EO Investigator position (Vacancy Announcement No. IMP-10759590-20-MR).
- 5. Whether Complainant has been subjected to continuing discrimination and reprisal when:
 - a. On May 4, 2020, Complainant was notified that he had not been selected for the Las Vegas Local Office Director (Supervisory EO Investigator) position (Vacancy Announcement No. IMP-10781652-MR).
 - b. On May 29, 2020, Complainant contacted the Human Resources Specialist assigned to Vacancy Announcement No. IMP-10781652-MR to obtain feedback on his interview, the reasons that he was not selected for the position, how he could improve his skills, and a copy of his interview package. To date, Complainant has not been provided the requested information.
 - c. On June 9, 2020, Complainant’s May 19, 2020 request to transfer to the Las Vegas Local Office was denied.
 - d. Complainant asserts the Phoenix District Office Director provided negative references to Los Angeles District Office management and management in Agency Headquarters in retaliation for his pending EEO complaint.⁴

During the investigation into this complaint, Complainant stated that he attended the April 3, 2019 SELP meeting with the Supervisory Trial Attorney (STA) along with the Deputy Director

⁴ After filing his formal complaint, Complainant submitted two EEO contact forms alleging additional incidents of discrimination which were treated as amendments to his formal complaint. Then, after receiving the Notice of Acceptance of his complaint, Complainant filed a response, stating that the Notice of Acceptance did not accurately reflect his claims and omitted reprisal as a basis. Thereafter, Complainant submitted a request to amend his complaint, which the Agency accepted in the Second and Third Notices of Amendment. The Agency dismissed one claim, that on April 19, 2019, Complainant received a Notice of Proposed Fourteen (14) Day Suspension, for failure to state a claim because it did not indicate a present harm and because the proposed suspension ultimately resulted in the 7-day suspension which was accepted as claim 3(d). See Report of Investigation (ROI) at 303-305.

and the District Director and another trial attorney. See Report of Investigation (ROI), Part 1 at 88.⁵ He stated that during the meeting, the STA became belligerent with him, pounded his closed fists on the table and told him that his opinion was wrong. See ROI 1 at 89. He further stated that no one told the STA to stop what he was doing and he himself did not oppose the STA because he had previously been told to respect the positions represented in meetings and he could be considered insubordinate if he did not. See ROI 1 at 89. The Deputy Director testified that Complainant came to the SELP meeting unprepared and was reporting the same information from the previous SELP meeting. See ROI 3 at 336. She stated that the STA became angry and started to speak to Complainant in a loud voice about how there had been no movement on his “SA” cases for over a year. See ROI 3 at 336. She testified that she later spoke to the STA about his behavior and requested that he not speak to any Investigator like that, and the STA apologized and said he would apologize to Complainant as well. See ROI 3 at 336. The District Director confirmed that Complainant has historically neglected his priority cases and, at that meeting, she recalled that Complainant stated he had not read a document that had been provided to him on a priority case in May 2018. See ROI 3 at 421. Complainant denied that he came to the meeting unprepared and further states that he never received an apology from the STA. See ROI 1 at 137.

After the SELP meeting, the record indicates that Complainant was very angry, yelling and screaming and using profanity, saying he was going to “kick [the STA’s] ass,” and threatening to sue. See ROI 3 at 386; Supplemental ROI at 11. A co-worker, Coworker 1, tried to calm Complainant down by tapping Complainant on the shoulder, but Complainant responded angrily, saying, “Get your f*****g hands off me.” See ROI 3 at 386; ROI 4 at 602. Complainant asserts that this was inappropriate touching by Coworker 1 and he felt “alarmed, angry, defensive, intimidated, marginalized, startled, and violated.” See ROI 1 at 91. Another of Complainant’s coworkers, Coworker 2, reported Complainant’s yelling and use of profanity to the Supervisory Investigator (Supervisor), who was Complainant’s first-line supervisor. The Supervisor said he investigated the matter and that staff witnessing the event all corroborated Coworker 2’s statement of the events, confirming that Complainant had been yelling, using profanity, and had threatened to “kick [the STA’s] ass,” and that Coworker 1 had only tried to calm Complainant down by touching Complainant’s shoulder. See ROI 3 at 386-400.; Supplemental ROI at 11. The Supervisor stated that when he first asked Complainant about it, Complainant denied that Coworker 1 ever touched him. See ROI 3 at 441. The Supervisor and the District Director both stated that Complainant was suspended for seven days because of his use of profanity and threatening a coworker in violation of Agency policies. See ROI 3 at 423; 443.

Complainant further takes issue with the fact that when the Supervisor has been out of the office, he appointed other coworkers to serve in an acting role, but not Complainant, which he believes is discriminatory and puts him at a disadvantage for promotion. See ROI 1 at 98. The Supervisor explained that he appointed the other employees to be acting managers because they have

⁵ The investigation into the first complaint is divided into six files. Citations to the record for the first complaint will be identified by the file number in which the specifically-referenced page is located.

consistently earned outstanding ratings, spend a considerable amount of time assisting their juniors, and were well-respected. See ROI 3 at 439. He stated that he has not appointed Complainant because of his performance issues and unprofessional behavior. See ROI 3 at 439.

Complainant stated that he applied for a transfer to the Las Vegas Office in April 2019, but his request was denied on May 21, 2019, and he believes that the delay in responding to his request was due to discrimination. See ROI 1 at 102. According to management, the transfer was denied due to “operational needs such as office workload and office staffing.” See ROI 3 at 377. Complainant disputes the reasoning because other employees have been permitted to transfer even though the Phoenix office has always needed people. See ROI 1 at 102.

Complainant further alleged that after he returned from his suspension, he was placed on a “Performance Improvement Plan” (PIP) with no warning. See ROI 1 at 101. The Supervisor stated that he told Complainant at a performance evaluation meeting in October 2018 that Complainant needed to show improvement in the areas of Case and Charge Management. See ROI 3 at 445. The Supervisor stated that he told Complainant that his performance would be reassessed in early 2019 and if he did not improve, he would be placed on a PIP. See ROI 3 at 445. The Supervisor explained that the progress reviews were delayed due to the government shutdown and given in May and June 2019, and he decided to place Complainant on a PIP because his performance had not improved. See ROI 3 at 445.

Complainant successfully completed his PIP and received a rating of “Fully Successful” in FY 2019. See ROI 3 at 450. Complainant stated that he produced the most, or at least tied for the most, successful conciliations for FY 2019 and brought in the most financial relief from the successful conciliations, which he says should have entitled him to a bonus or at least a “kudos” for his performance. See ROI 2 at 157. The Supervisor explained that, under Agency policy, he nominated employees under his supervision for awards based on special acts they perform beyond their regular duties, not for their regular work like the conciliations claimed by Complainant. See ROI 3 at 520.

Complainant stated that he applied for a position at the Department of Veterans Affairs and had been told that he was a top candidate and asked for references but then in May 2019, he was told that he had not been selected due to poor references from the Agency. See ROI 1 at 95-96. The Selecting Official at the VA stated that he asked for two supervisory references (a current supervisor and a previous supervisor) and a nonsupervisory reference and Complainant stated that he did not feel comfortable providing his current supervisor as a reference, which concerned the Selecting Official. See ROI 6 at 1078. He further explained that when he spoke to Complainant’s references, they were “tight lipped” and seemed “[a]s if they were holding back from saying something bad.” See ROI 6 at 1079. He stated that, ultimately, they provided neutral references and he decided not to hire Complainant because the internal candidate had experience which Complainant did not have, and he was also concerned because of Complainant’s eagerness to take a lower-graded job and his unfamiliarity with the VA. See ROI 6 at 1079-80.

Complainant also challenged his non-selection for a Supervisory EO Investigator position at the Phoenix District Office in April 2020. See ROI 1 at 60. He stated that he was on leave when the position was announced and so he was not informed about the announcement or its closing at the time and he believed the timing of the posting was deliberate. See ROI 2 at 161. The Deputy Director stated that she was not involved in the timing of the vacancy announcement going out and that only two investigators expressed interest in the position. See ROI 3 at 335. The District Resources Manager (DRM) stated that he assisted the Hiring Manager with the selection process as far as making the certificate of eligibles available for her review and the Hiring Manager decided to make a selection without an interview because only two internal candidates expressed interest. See ROI 5 at 831.

Complainant stated that he was not selected for the position of Director of the Las Vegas Office, noting that his interview was divided into two parts which he believed disadvantaged him. See ROI 1 at 63. He further stated that upon learning of the non-selection, he reached out to the Los Angeles District Director (LA Director) who had set up the interview asking for feedback but that he has not received a response. See ROI 1 at 63. The LA Director, who was the selecting official, explained that the interviews were scheduled for a fixed amount of time, so everyone was given the same amount of time for the interviews. See ROI 5 at 808. The interviewers explained that Complainant had technical issues and so was late joining the call, so they agreed to provide him with additional time to complete the interview. See ROI 5 at 814; 820; 826. They stated that all the candidates were asked the same questions and they reached a consensus on which candidates to refer to the LA Director for further consideration. See ROI 5 at 813-14. They explained that Complainant was not the best qualified candidate, and the recommended candidates had more management experience and their responses to the interview questions were more comprehensive and detailed.⁶ See ROI 5 at 814-15; 820-21; 826. The LA Director and the interviewers all stated that they do not have a policy or practice of providing feedback to unsuccessful candidates and have never done so. See ROI 5 at 809; 815; 821; 827.

Complainant requested to be transferred to the Las Vegas office a second time on May 19, 2020. See ROI 1 at 66. The request was denied on June 9, 2020, because the Las Vegas office was fully staffed. See ROI 1 at 64. He disputes the reason for the denial because he states that there was an opening for an Investigator in the Las Vegas office at the time that was designated as bilingual, which he asserted was deliberately retaliatory because the District Director told the Las Vegas office that he does not speak Spanish. See ROI 2 at 266-68. The District Director stated that the decision to deny Complainant's transfer request was made by the Office of Field Programs (OFP) at Headquarters, but that at the time, Complainant was in the middle of the disciplinary process and that Complainant had also previously requested and been granted a transfer to the Dallas District Office but had turned down the offer. See ROI 3 at 424-25. The LA Director stated that the OFP Director asks district directors for their input on inter-office transfer requests. He advised the OFP Director that the Las Vegas Office was fully staffed, and he did not have work for another investigator at the time. See ROI 5 at 809.

⁶ We further note that the LA Director and all of the interviewers stated that they had no knowledge of Complainant's protected activity. See ROI 5 at 807; 813; 819; 825.

Complaint 2: Agency No. 2021-0030

On October 30, 2021, while Complaint 1 was pending, Complainant filed a second complaint (Agency No. 2021-0030) (Complaint 2) alleging that the Agency discriminated against him on the bases of race (Caucasian), national origin (Hispanic), sex (male), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when, on May 14, 2021, he was issued a Performance Improvement Plan (PIP).⁷

The memorandum for the PIP stated that it was being issued for unacceptable performance in the elements of Charge and Case Management and Investigation. See ROI (Complaint 2) at 36-44. The notice specifically outlined the reasons for unacceptable performance, namely that 76% of his pending inventory had been assigned to him for more than 424 days when his performance standard required that no more than 25% of his end of year inventory contain cases older than 424 days. The notice provided a list of the aged cases, many of which dated back to 2015. See ROI (Complaint 2) at 38. The memorandum further stated that Complainant had failed to make timely recommendations on next or final actions on investigations, giving examples of specific cases and Complainant's lack of timely action on those cases. See ROI (Complaint 2) at 40-43.

The Supervisor stated that he and the District Director met with Complainant on March 2, 2021, to discuss the lack of progress on Complainant's aged cases because Complainant had the highest number of aged cases in his inventory in the Phoenix office and he told Complainant at the time that if progress had not been made on those aged cases by the mid-year evaluation, he would be placed on a PIP.⁸ See ROI (Complaint 2) at 91-92. He explained that the PIP was unrelated to the overall number of Complainant's closures but rather on Complainant's failure to resolve the aged cases in his inventory and manage his workload without the assistance and prompting of the Supervisor, as was expected of a GS-12. See ROI (Complaint 2) at 93. The Deputy Director explained that Complainant was placed on a PIP for failing to work independently by planning and managing his workload and failing to complete additional work on cases as instructed. See ROI (Complaint 2) at 147-48. The evidence in the record also includes contemporaneous emails related to Complainant's performance deficiencies, which includes an email from the Deputy Director on March 2, 2021, specifically informing Complainant of his responsibility to complete his aged cases in a timely manner. See ROI (Complaint 2) at 127-135; 143; 152-165.

⁷ The Agency also dismissed a claim that on April 7, 2021, Complainant was again denied a transfer to the Las Vegas Local Office, pursuant to 29 C.F.R. §1614.107(a)(2), for untimely counselor contact. See Report of Investigation (ROI) (Complaint 2) at 51-53.

⁸ The District Director retired prior to the beginning of the investigation and did not respond to the investigator's requests for an interview. See ROI at 176.

Final Agency Decisions on Complaints 1 and 2

At the conclusion of the investigations into the two complaints, the Agency provided Complainant with a copy of the reports of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued separate final decisions (FAD1 and FAD2) for each of Complainant's complaints pursuant to 29 C.F.R. § 1614.110(b). FAD1 found that, even assuming *arguendo* that Complainant established a prima facie case, the Agency articulated legitimate, nondiscriminatory reasons for its actions with respect to the discrete actions and that there was no evidence to support Complainant's assertions of discriminatory animus. FAD1 further found that Complainant did not establish that he was subjected to an unlawful hostile work environment because there was no evidence that any of the alleged incidents were motivated by any of Complainant's protected bases. Finally, FAD1 found that there was no evidence that the unwanted touching incident by Coworker 1 was due to Complainant's sex or that it was severe enough to interfere with his work performance. FAD1 therefore concluded that Complainant failed to prove that the Agency subjected him to discrimination or retaliation as alleged. FAD2 found that the Agency had articulated legitimate, nondiscriminatory reasons for placing Complainant on a PIP and that Complainant had not established that the reasons were a pretext, and therefore had not established that he was subjected to discrimination or unlawful retaliation.

CONTENTIONS ON APPEAL

Complainant appealed but did not raise any specific arguments on appeal.

The Agency filed response briefs in both appeals, each contending that Complainant's appeals are without merit as there is no evidence supporting Complainant's assertions of discriminatory or retaliatory animus.

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").

ANALYSIS AND FINDINGS

Untimely Counselor Contact – Complaint 2 Issue

We first briefly address the Agency's dismissal in Complaint 2 of Complainant's 2021 request to be transferred to the Las Vegas office, which was dismissed for untimely EEO counselor contact. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. Complainant stated that he was denied the transfer to the Las Vegas office on April 7, 2021. See ROI (Complaint 2) at 14. He contacted the EEO counselor on June 11, 2021, more than two months after the denial. See ROI (Complaint 2) at 24.

Complainant has not provided any justification for his failure to contact an EEO counselor about the denial of his transfer request in a timely manner. We note that Complainant had previously filed an EEO complaint and therefore knew or should have known of the 45-day limit. We therefore find that the Agency properly dismissed the claim for untimely counselor contact. See Adriene B. v. Dep't of Veterans Affs., EEOC Appeal No. 2020003600 (Aug. 18, 2020).

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. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

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

No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

We find that the Agency articulated legitimate, nondiscriminatory reasons for its actions with respect to the discrete claims of discrimination. The Supervisor and the District Director stated that Complainant was suspended for seven days because of his use of profanity and threatening a coworker, the STA, in violation of Agency policies. See ROI 3 at 423; 443. The Supervisor explained that he has not appointed Complainant as acting manager on days when the Supervisor is out of the office because of Complainant's performance issues and unprofessional behavior. See ROI 3 at 439. The Supervisor stated that Complainant was placed on a PIP because of performance issues related to the areas of Case and Charge Management and that the PIP was intended to give Complainant a chance to improve. See ROI 3 at 445. The District Director stated that, when she was contacted for a reference by someone at the VA, she was asked if Complainant had any issues with performance or was under any discipline, she said no so as not to negatively impact Complainant's ability to get the position. See ROI 3 at 427. The Selecting Official at the VA explained that he decided not to hire Complainant because the internal candidate had experience which Complainant did not have and that he was also concerned by the "tight-lipped" references he received, as well as Complainant's eagerness to take a lower-graded job and his unfamiliarity with the VA's personnel application. See ROI 5 at 1079-80. The interviewers for the Las Vegas Director position explained that Complainant was not recommended for the position because he was not the best-qualified candidate, the recommended candidates had more management experience, and their responses to the interview questions were more comprehensive and detailed. See ROI at 814-15; 820-21; 826. Finally, the record reflects that both of Complainant's requests to transfer to the Las Vegas office were denied due to operational needs and the Las Vegas office not needing another investigator. See ROI at 64; 377; 809.

With respect to the PIP at issue in Complaint 2, we also find that even assuming *arguendo* that Complainant could establish a prima facie case, the Agency articulated legitimate, nondiscriminatory reasons for issuing Complainant a PIP. The memorandum on the PIP stated that it was being issued for unacceptable performance in the elements of Charge and Case Management and Investigation, specifically because Complainant had failed to process 76% of his inventory in a timely manner and because he had not made timely recommendations on next or final actions on investigations. See ROI (Complaint 2) at 36-44. The Deputy Director stated that Complainant was placed on a PIP for failing to work independently by planning and managing his workload and failing to complete additional work on cases as instructed. See ROI (Complaint 2) at 147-48.

We further find that Complainant did not submit any evidence to show that the Agency's reasons are a pretext for discrimination due to any of his protected bases. While Complainant questions the veracity of the Agency's explanations, there is no evidence in the record to support his assertions. Complainant argues variously that he never used profanity or that he should not have been suspended because other employees also use profanity and also denies ever threatening the STA. He moreover asserts that his use of profanity in response to Coworker 1's unwanted

touching was justified and protected behavior in opposition to sexual harassment. The evidence does not support Complainant's assertions that he did not commit the misconduct for which he was suspended. To the contrary, all of Complainant's coworkers who witnessed the incident agreed that Complainant was yelling and using profanity and threatened to "kick [the STA's] ass." See ROI 3 at 386-400. While it is clear that Complainant feels he has been treated unfairly, the Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination are insufficient because subjective belief, however genuine, does not constitute evidence of pretext. See Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019); Richardson v. Dep't of Agriculture, EEOC Petition No. 03A40016 (Dec. 11, 2003). To the extent Complainant asserts that his performance did not warrant being placed on a PIP and that he should have been selected for promotion above the actual selectees, there is no evidence to support his assertions. Complainant cannot demonstrate pretext based on his subjective assessment of his own performance or his qualifications. See Palmer N. v. Dep't of Defense, EEOC Appeal No. 0120140070 (March 18, 2016).

Furthermore, to the extent Complainant argues that he should not have been placed on the PIP at issue in Complaint 2 because he had closed almost the same number of cases the previous year for which he received a "fully successful" rating, we note that Complainant's argument is irrelevant. The Supervisor explained that the PIP was unrelated to the overall number of Complainant's closures, and instead was due to Complainant's failure to resolve the *aged* cases in his inventory. See ROI (Complaint 2) at 93. Moreover, Complainant's argument is unrelated to any protected class. Mere disagreement with the Agency's actions is not sufficient to establish discriminatory motive. See Owen W. v. Dep't of Veterans Affs., EEOC Appeal No. 2019000144 (Dec. 19, 2019). It is well-established that agencies have broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation, which is not present here. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120130083 (Aug. 8, 2014).

Sexual Harassment

In order to establish a prima facie case of sexual harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his sex; (3) that the harassment complained of was based on his sex; (4) that 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) that there is a basis for imputing liability to the employer. Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Coworker 1 stated that he only touched Complainant on the shoulder in order to calm him down and this explanation is supported by the other coworkers who witnessed the incident.⁹ See ROI 4 at 602; ROI 3 at 386-400. We cannot find that a reasonable person in Complainant's position would find the behavior of Coworker 1 to be related to his sex, based on his sex, or have the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment.

Hostile Work Environment Harassment (Non-sexual)

To establish a claim of hostile environment harassment, Complainant must show that: (1) he is a member of a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct; (3) the harassment complained of was based on the 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 to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); see also Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001); Fox v. General Motors Corp., 247 F.3d 169 (4th Cir. 2001); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998).

In other words, to prove his hostile work environment 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 a protected basis; in this case, his national origin, sex, age or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

In this case, we find that Complainant's hostile work environment claim fails because there is no evidence to support his assertions that any of the alleged incidents of harassment are due to any of his protected bases. See Malekpour v. Dep't of Transp., EEOC Appeal No. 0120113988 (Feb. 14, 2012). Complainant himself acknowledged that the STA has also treated other coworkers who do not share his protected classes poorly. See ROI at 89-90. The Supervisor confirmed that he has received complaints about the way the STA speaks to investigators from at least two other employees and Coworker 2 stated that the STA is generally abrasive with everyone. See ROI 3 at 441; Supplemental ROI at 12. The Deputy Director stated that she spoke to the STA about changing the way he communicates with enforcement staff. See ROI at 336-37. In addition, the record indicates that all of the alleged incidents of harassment consist of routine supervision and managerial discipline or personality conflicts and general workplace disputes unrelated to a protected basis, which we have held are insufficient to establish a hostile work environment. See Complainant v. Dep't of Veterans Affs., EEOC Appeal No. 0120131234 (Dec. 3, 2015). Complainant's subjective assertions that he has been harassed and treated

⁹ We also note that when first questioned about the incident by the Supervisor, Complainant denied that Coworker 1 had ever touched him. See ROI 3 at 441.

unfairly are not sufficient to establish an objectively offensive hostile work environment as required by Title VII. See Harris v. Forklift Systems, 510 U.S. 17, 21 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive -- is beyond Title VII’s purview.”).

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 final decisions finding that Complainant did not establish that he was subjected to discrimination as alleged.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124)

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(f).

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:

/s/Raymond Windmiller
Raymond Windmiller
Executive Officer
Executive Secretariat

February 21, 2024
Date