



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

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Michael V.,<sup>1</sup>  
Complainant,

v.

Dr. Mark T. Esper,  
Acting Secretary,  
Department of Defense,  
Agency.

Appeal No. 0120181500

Hearing No. 570-2014-00802X

Agency No. 2013-PFPA-051

DECISION

On March 28, 2018, 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 February 12, 2018, final order 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. Our review is de novo. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Police Officer, AD-0083-07, at the Pentagon Police Department in Washington, D.C.

On July 13, 2013 (and amended numerous times), Complainant filed an EEO complaint wherein he claimed that the Agency subjected him to discrimination and a hostile work environment on the bases of race (Caucasian), sex (male), religion (Catholic), color (white), age (42) and in reprisal for his prior protected EEO activity 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. On October 23, 2012, Complainant was yelled at after filing a report and questioned about his abilities as a Police Officer;
2. During the October through December 2012 timeframe, Complainant was spoken to in a dominating and threatening manner;
3. On May 7, 2013, Complainant was issued a written warning for conduct unbecoming a federal police officer;
4. On May 21, 2013, Complainant's third-level supervisor spoke to him in a demeaning manner while discussing the written warning;
5. On June 6, 2013, Complainant received a memorandum which rescinded his authority to carry a duty weapon and placed him on limited duty pending a Fit for Duty exam;
6. While attending Field Training Officers' training on August 15, 2013, Complainant's Supervisor addressed him in a rude manner;
7. On August 22, 2013, Complainant received a performance rating of three ("Acceptable") for the April 1, 2012, through March 31, 2013 rating period;
8. On August 22, 2013, Complainant was denied overtime for attending court on August 19, 2013;
9. On August 29, 2013, Complainant was confronted by the Sergeant in an angry manner about the grievance he filed;
10. On November 10, 2013, Complainant was issued a Notice of Proposed Suspension and was subsequently suspended for 14 days;
11. On January 2, 2014, Human Resources failed to further investigate the basis for Complainant's suspension;
12. On January 31, 2014, Complainant was notified that he would not be considered for a detail due to his suspension;
13. On March 28, 2014, Complainant was "contemptuously questioned" about a written report;
14. Since May 19, 2014, Complainant has been repeatedly denied assignment on mobile patrol;

15. On June 16, 2014, Complainant was investigated for allegedly switching posts with another police officer without supervisory approval<sup>2</sup>;
16. On various dates during May through June 2014, Complainant was not allowed enough time to file amendments to his EEO complaint; and
17. Complainant was assaulted by a coworker on or about January 4, 2013.<sup>3</sup>

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. Over Complainant's objections, the AJ assigned to the case granted the Agency's Motion for Summary Judgment and issued a decision without a hearing on January 29, 2018.

The AJ found that the alleged conduct in claims (1) – (4), (6), (9), (11), (13), and (16) did not either in isolation or cumulatively constitute sufficiently severe or pervasive conduct to establish a hostile work environment. With respect to claims (5), (7), (8), (10), (12), (14), and (15), the AJ found that Complainant failed to refute the Agency's legitimate, nondiscriminatory explanation for the challenged conduct. In terms of claim (5), the AJ observed that the Chief of Police stated that he determined that Complainant needed to submit for a Fit for Duty examination and have his authority to carry a weapon rescinded because he was concerned that Complainant considered a relatively benign interaction with another officer as a threat of egregious bodily harm. The Chief further explained that he believed Complainant could have a similar perception of a benign interaction with a member of the public and possibly use force in his own defense.

In terms of claim (7), the AJ stated that Complainant did not present evidence which proved that the Sergeant gave higher performance ratings to similarly situated coworkers who did not belong to the same protected groups as him. Additionally, the AJ observed that Complainant was issued the same performance rating at issue for the two prior Fiscal Years. With regard to claim (8), the AJ noted that the Agency asserted Complainant's request for overtime was denied because he was

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<sup>2</sup> Complainant and the Agency entered into a settlement agreement regarding discipline Complainant received following this incident. As a result, only the investigation regarding this incident will be addressed herein.

<sup>3</sup> Complainant raised additional claims regarding being issued a memorandum charging him with filing false claims against other officers; being issued a Memorandum of Activity indicating he was the subject of an investigation; a training instructor and Complainant's Supervisor making mocking comments toward Complainant; and Complainant becoming aware that management entered information in his Officer Performance Record which had nothing to do with his performance. These claims were dismissed pursuant to 29 C.F.R. § 1614.107(a)(2) on the grounds that Complainant failed to timely initiate contact with an EEO Counselor. Complainant has not challenged the dismissal of these claims on appeal; therefore, we will not address them further herein.

not in an official duty status. The AJ stated that Complainant was not on duty when he attended a court proceeding related to a personal criminal complaint he filed against a coworker. The AJ noted that Complainant was not acting in his official capacity as a police officer and he failed to obtain prior approval by senior leadership.

With respect to claim (10), the AJ stated that the Agency explained that Complainant was suspended for 14 days because he wore his uniform during a court proceeding related to the personal complaint he filed against a coworker when he was not on duty and was not representing the Agency. The AJ noted that Complainant argued that the Major favored two black officers but that the evidence showed that the Major suspended both black officers for 14 and 10 days, respectively, for various offenses. The AJ found that the Major treated the black officers in a manner similar to Complainant. Complainant also contended that two other black officers received more favorable treatment from the Major, but the AJ pointed out that Complainant did not demonstrate he was similarly situated to the two officers as one of these officers received discipline from the Captain and Complainant did not provide specific information concerning the other officer's alleged offenses.

As for claim (12), the Agency stated that Complainant was not considered for a detail because Agency policy dictated that an employee could not be granted a detail following a suspension. With regard to claim (14), the AJ stated that the Agency argued Complainant was the last officer to join the mobile patrol rotation, and if an officer was needed at a different static post, he was the first person that the Sergeant looked at to fill the post. According to the AJ, other officers who were not in Complainant's protected groups also were assigned to static posts rather than being assigned to mobile patrol. In terms of claim (17), the AJ characterized this matter as a one-time incident involving an altercation between Complainant and his coworker. The AJ reasoned that this was not the type of offensive conduct that creates an unreasonable interference in the workplace.

The AJ concluded that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that it subjected him to discrimination as alleged. The instant appeal followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the decision to order him to undergo a psychological exam was based on false information. Complainant states that the psychologist concluded he was not a threat and therefore Complainant argues that the Captain perceived a threat that was not present. Complainant maintains that he was on duty and on an Agency matter when he appeared in a Court proceeding. According to Complainant, there was no requirement that he receive approval before appearing in Court. Complainant argues that he was assaulted while on duty, yet the AJ found that this action was not an unreasonable interference with his work. Complainant states that the personnel actions against him lacked merit and were based on his protected classes. Complainant claims that even if the personnel actions had merit, the Agency treated black officers less harshly

than him for much more serious offenses. Accordingly, Complainant requests that the Commission reverse the final order.

In response, the Agency maintains that the incidents at issue are insufficient to demonstrate that Complainant was subjected to conduct so severe or offensive that it created a hostile work environment. As for Complainant being required to undergo a Fit for Duty Exam, the Agency states that the Chief's determination, which included having Complainant's authority to carry a weapon rescinded, was made in order to protect the safety of the public and other police officers, without any discriminatory intent.

With respect to Complainant's overtime claim, the Agency asserts that since Complainant was not on duty and was not acting in his official capacity as a police officer when he attended Court, there was no basis under which he could have been entitled to overtime. The Agency states that Complainant failed to show that similarly situated coworkers who were not in his protected classes were treated differently. As for Complainant's suspension, the Agency asserts that Complainant's argument that he was treated differently than black officers is without merit. The Agency states that the Major suspended other officers for failure to follow written procedures and misuse government property. In terms of the alleged assault, the Agency points out that the Magistrate Judge in Prince William County, Virginia, determined that Complainant was not assaulted.

### ANALYSIS AND FINDINGS

#### *Hostile Work Environment*

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he 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 his statutorily protected class; (4) the harassment affected a term or condition of employment and/or 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). 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 harassment 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.

Here, Complainant asserted that based on his protected classes, management officials subjected him to a hostile work environment. Complainant alleged numerous incidents of what he believed to be discriminatory and retaliatory harassment. Construing the evidence in the light most

favorable to Complainant, the Commission finds that the totality of the conduct at issue was insufficiently severe or pervasive to establish a hostile work environment.

Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, there is no persuasive evidence in the record that discriminatory or retaliatory animus played a role in any of the Agency's actions. For example, the incidents alleged in claims (1), (2), (4), (6), (9), and (13) appear to be simply personality conflicts and general workplace disputes with no evidence of discriminatory or retaliatory animus.

As for claim (3), Complainant asserted that he was issued a Letter of Warning for conduct unbecoming a federal police officer. Complainant had submitted a statement wherein he accused an officer of being a habitual drunkard. Agency management explained that Complainant received the Letter of Warning for initiating a complaint about another officer without any reasonable basis to support his opinion.

With regard to claim (5), management explained that Complainant needed to submit for a Fit for Duty examination and had his authority to carry a weapon rescinded because there were concerns that Complainant considered a relatively benign interaction with another officer as a threat of egregious bodily harm. Management officials were further concerned that Complainant could have a similar perception of a benign interaction with a member of the public and possibly use force in his own defense. In addition, management officials had concerns after Complainant filed complaints alleging various things about Police Officers and Supervisors; including indicating he felt threatened to go to the Pentagon Library because an Officer assigned to the library had given him an evil look while armed with a government-issued handgun.

As for claim (7), the Agency pointed out that Complainant received the same performance rating of "Fully Successful" that he received the prior two years. Further, the Sergeant noted several of Complainant's performance deficiencies including Complainant sending communications to senior leadership instead of working through his chain of command, Complainant misinterpreted Agency policies and procedures for "personal gain," and Complainant's failure to notify management about potential issues. The Sergeant noted that he met with officers monthly to discuss work performance and disciplinary issues that Complainant signed off on all of the reviews when these issues would have been discussed. With respect to claim (8), the record indicates that Complainant's request for overtime was denied because he was not in an official duty status. Complainant was not on duty when he attended a court proceeding related to a personal criminal complaint he filed against a coworker. Further, Complainant failed to obtain prior approval by senior leadership.

Regarding claim (10), the Agency stated that Complainant was suspended for 14 days because he wore his uniform during a court proceeding related to the personal complaint he filed against a coworker. The Agency noted that Complainant was not on duty and was not representing the Agency.

With regard to claim (11), Complainant claimed that Human Resources failed to further investigate the basis for his suspension. However, the record indicates that this claim against a Human Resources Specialist reflected Complainant's disappointment about the suspension not being rescinded. The Human Resources Specialist confirmed that he was not an investigator and his role was simply to ensure that the proposed disciplinary action was in accordance with Agency guidelines. The Human Resources Specialist confirmed that management followed the appropriate guidelines and that the suspension was consistent with actions taken against other employees for similar conduct. As for claim (12), the Agency asserted that Complainant was not considered for a detail because Agency policy dictated that an employee could not be granted a detail following a suspension.

With regard to claim (14), the Agency explained that Complainant was the last officer to join the mobile patrol rotation. Thus, the Agency stated that if an officer was needed at a different static post, he was the first person that the Sergeant looked at to fill the static post. Other officers were assigned to static posts instead of being assigned to the mobile patrol and assignments were made according to the needs of the Agency. In terms of claim (15), the Agency stated that Complainant and a co-worker were assigned the same post on the day in question, but different duties. They decided to share breaks which left Complainant's post unmanned. Complainant and the co-worker were both investigated for switching posts without supervisory approval as both officers failed to follow written instructions. The coworker (Black, over 40, and with no prior EEO activity) was treated the same as Complainant.

With respect to claim (17), management officials stated that they were not aware of the incident involving Complainant and a co-worker until after Complainant had filed a complaint with the Agency's Office of Professional Responsibility approximately six months after the incident occurred. The Office investigated the matter and Complainant's allegations were not substantiated. Subsequently, a Magistrate Judge in Prince William County, Virginia, determined that Complainant was not assaulted.

After reviewing the record and considering the arguments on appeal, the Commission finds that Complainant has not shown that he was subjected to a discriminatory or retaliatory hostile work environment. Furthermore, to the extent that Complainant is alleging disparate treatment with respect to his claims, the Commission finds that he has not shown that the Agency's reasons for its actions were a pretext for unlawful discrimination or reprisal. Accordingly, the Commission finds that Complainant has not established that he was subjected to discrimination, reprisal, or hostile work environment as to all claims alleged.

#### *Denial of Official Time*

Finally, as for claim (16), we note that although the Agency framed this as a discrimination claim, we have consistently held that an allegation pertaining to the denial of EEO official time states a separately processable claim alleging a violation of the EEOC regulations, without requiring a determination of whether discrimination motivated the Agency's action. See Edwards v. U.S. Postal Serv., EEOC Request No. 059605179 (Dec. 23, 1996). While the AJ's decision does not

indicate that this issue was addressed on the record; the Commission finds that there is sufficient evidence in the record for us to address the matter herein nonetheless.

EEOC's regulations provide complainants a reasonable amount of official time, if otherwise on duty, to prepare their EEO complaints and to responses to the Agency and the Commission's requests for information. The regulation found at 29 C.F.R. §1614.605(b) provides that "if the complainant is an employee of the agency, he or she shall have a reasonable amount of official lime, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information." The Commission has the authority to remedy a violation of 29 C.F.R. §1614.605 without a finding of discrimination. Therefore, in reviewing this claim, our focus is not on the motivation, but rather on the justification for why Complainant was denied official time. Edwards, supra.

Complainant alleged that he was denied enough official time to file amendments to his EEO complaint in May through June 2014. Complainant concedes that his requests were not denied; rather, he was granted official time in two-hour increments but that this was not sufficient. The Agency stated that Complainant was granted two hours of official time each time he requested official time to work on his EEO complaint. The record contains documentation from one such request on June 30, 2014, in which management immediately granted Complainant two hours of official time. Complainant claimed that on some days he was denied official time due to low manpower. Management explained that for a long time, it was not even tracking the amount of official time Complainant was using. On one occasion, however, management stated that the facility was short-staffed, so Complainant could not be granted a lot of time on that day, but he was granted more official time the next day. Management emphasized that Complainant was granted official time almost daily.

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. EEO MD-110, Chap. 6 § VII.C. Therefore, an agency may restrict the overall hours of official time afforded. Id. We find that the preponderance of the evidence in the record establishes that the Agency afforded Complainant reasonable amounts of official time to work on his pending EEO complaint and its subsequent amendments.

### CONCLUSION

The Agency's determination that no discrimination occurred is **AFFIRMED**.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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).

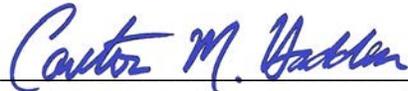
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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

August 7, 2019

Date