

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
OSCAR L. HAMPTON, III,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 23-3338 (DLF)
)	
JULIE SU,)	
Acting Secretary of Labor,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S MOTION FOR PARTIAL DISMISSAL OF THE AMENDED
COMPLAINT AND MEMORANDUM IN SUPPORT**

TABLE OF CONTENTS

INTRODUCTION 1

FACTUAL ALLEGATIONS 1

STANDARD OF REVIEW 5

ARGUMENT 6

 I. Plaintiff Does Not Sufficiently Allege a Claim for Discrimination on the Basis of Sex..... 6

 II. Plaintiff Failed to Exhaust His Administrative Remedies on the Basis of Color. 7

 III. Plaintiff’s Hostile Work Environment Allegations Should Be Dismissed for Failure to State a Claim for Relief. 9

 IV. Plaintiff’s Disparate Treatment Allegations Based on His 2022 Compensation Are Insufficient to State a Claim for Relief..... 12

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

Allen v. Johnson,

795 F.3d 34 (D.C. Cir. 2015)..... 13

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)..... 5

Baloch v. Kempthorne, 550 F.3d 1191, 1196 (D.C. Cir. 2008)..... 13

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)..... 6

Bowden v. United States, 106 F.3d 433, 437 (D.C. Cir. 1997)..... 8

Brown v. Marsh, 777 F.2d 8, 13 (D.C. Cir. 1985) 9

Colbert v. Potter, 471 F.3d 158, 167 (D.C. Cir. 2006)..... 8

EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315-16 (4th Cir. 2008)..... 10

Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) 10

Holbrook v. Reno,

196 F.3d 255 (D.C. Cir. 1999)..... 13

Horsey v. Dep’t of State, 170 F. Supp. 3d 256, 263 (D.D.C. 2016) 6

In re James, 444 F.3d 643, 647 (D.C. Cir. 2006) 8

Koch v. Schapiro, 699 F. Supp. 2d 3, 12 (D.D.C. 2010) 8

McRae v. Librarian of Congress, 843 F.2d 1494, 1496 (D.C. Cir. 1988) 9

Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 (2002) 10

Ndondji v. Interpark Holdings, Inc.,

768 F. Supp. 2d 263 (D.D.C. 2011)..... 6

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir. 1995)..... 13

Nurriddin, 818 F.3d 751, 756 (D.C. Cir. 2016)..... 6

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)..... 10

Pearsall v. Holder, 610 F. Supp. 2d 87, 95 (D.D.C. 2009) 8

Silver v. Leavitt, Civ.A. 05-0968 JDB, 2006 WL 626928, at *9 (D.D.C. Mar. 13, 2006) 8

Steele v. Schafer, 535 F.3d 689, 693 (D.C. Cir. 2008) 9

Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 510 n.2 (2002)..... 6

Townsend v. United States, 236 F. Supp. 3d 280, 311 (D.D.C. 2017)..... 10

Wasserman v. Ahuja, No. Civ. A. No. 21-0026 (ABJ), 2023 WL 157319, at *10 (D.D.C. Jan. 11, 2023)..... 10

Statutes

42 U.S.C. § 2000e-16(a) 13

42 U.S.C. § 2000e-16(c) 9

Other Authorities

29 C.F.R. § 1614.407 9

Fed. R. Civ. P. 12(b)(6)..... 5

Defendant Julie Su, named in her official capacity as the Acting Secretary of Labor, respectfully moves to dismiss in part the First Amended Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6).

Plaintiff is a former employee of the Department of Labor (the “Department”), who claims that he was terminated following the Department’s investigations into his own misconduct, allegedly in violation of Title VII of the Civil Rights Act (“Title VII”). *See generally* First Amended Complaint, ECF No. 9 (“Am. Compl.”). As discussed herein, the Court should reject Plaintiff’s claims of discrimination and retaliation on the following grounds: (1) the Amended Complaint fails to support Plaintiff’s claims of sex discrimination; (2) Plaintiff’s color discrimination claims are not exhausted and must therefore be dismissed; (3) the Complaint does not sufficiently plead a hostile work environment claim; and (4) Plaintiff’s race discrimination claim based on his 2022 compensation does not state a plausible claim of disparate treatment.

FACTUAL ALLEGATIONS

Plaintiff is a Black, male, former employee of the Department of Labor (the “Department”). Am. Compl. ¶¶ 1, 2. Until his alleged termination from the Department, Plaintiff was serving as Regional Solicitor in the Office of the Solicitor of Labor, a senior executive service management position responsible for overseeing the Department’s civil trial litigation in the District of Columbia, Delaware, Maryland, Pennsylvania, Virginia, and West Virginia. *See id.* ¶¶ 14–15; 20–30 (describing Plaintiff’s career at the Department). Plaintiff’s departure from the Department followed the Department’s extensive investigations into complaints lodged against Plaintiff for misconduct against his fellow employees and “other alleged misconduct.” *Id.* ¶¶ 75–76, 112.

Plaintiff alleges that he was terminated from his position at the Department on September 12, 2023.¹ *See id.* ¶ 114.

Stanley Keen, Plaintiff’s first-line supervisor beginning in March 2021, was the Deputy Solicitor for Regional Enforcement who reported directly to the Department’s Solicitor of Labor, Seema Nanda. *Id.* ¶¶ 43–45. The Amended Complaint asserts that Plaintiff repeatedly complained, at nonspecific times, to Mr. Keen and others about “harassment and discrimination against himself and other Black attorneys at [the Department].” *Id.* ¶¶ 38–42.

In August 2021, Mr. Keen received the results of the Office of Management and Budget’s 2020 nationwide survey of federal employees, the Federal Employee Viewpoint Survey (“Viewpoint Survey”), in which employees anonymously respond to various questions, including whether employees feel they can “disclose a suspected violation of any law, rule[], or regulation without fear of reprisal.” *Id.* ¶¶ 62–64. On this question, the Philadelphia region—the region where Plaintiff served as the senior executive service management official—had the second highest negative response. *Id.* ¶ 65. Mr. Keen was “concerned” by these responses and how they reflected on Plaintiff’s leadership of the Philadelphia region. *Id.* ¶ 66. According to Plaintiff, these responses are not properly attributable to Plaintiff’s conduct. *See id.* ¶¶ 66–72 (blaming, in part, the Trump Administration for employees’ fear of reprisal). In discussing the Viewpoint Survey results with Plaintiff, Mr. Keen determined that Plaintiff “fail[ed] . . . to recognize the fear of retaliation or reprisal” expressed by Plaintiff’s subordinates in the Viewpoint Survey. *Id.* ¶ 73.

“In or around August or September 2021”—around the same time Mr. Keen discussed with Plaintiff the Viewpoint Survey results for the Philadelphia region—Plaintiff allegedly complained

¹ For purposes of this Motion only, Defendant assumes the truth of Plaintiff’s allegations set forth in the First Amended Complaint. Defendant reserves the right to test the cause and terms of Plaintiff’s departure from the Department in discovery.

to Mr. Keen and Ms. Nanda about “systematic discrimination” at the Department. *Id.* ¶ 42. In October 2021, after the results of the Viewpoint Survey were circulated, one of Plaintiff’s White subordinates, Judson Dean, raised complaints about Plaintiff to Mr. Keen. *Id.* ¶¶ 53–59. On October 12, 2021, Ms. Nanda also received an anonymous letter from an attorney in Plaintiff’s region, which made allegations about Plaintiff similar to those made by Mr. Dean. *Id.* ¶ 60. The letter allegedly mirrored the substance and language of a prior complaint raised against Plaintiff in 2018. *Id.* Ms. Nanda provided this letter to Mr. Keen. *Id.*

Following the Viewpoint Survey results and the complaints received by Mr. Keen and Ms. Nanda, the Department investigated Plaintiff between December 2021 and March 2023, on issues including “whether [Plaintiff] created a hostile work environment, undermined [the Department’s] mission, [and] created a fear of retaliation.” *Id.* ¶¶ 75–76. It also investigated Plaintiff’s criticisms of the Department’s Honors Attorney program and “whether [Plaintiff was] the reason attorneys [were] leaving” his office. *Id.* ¶ 76. This investigation did not reveal racial bias by White attorneys in Plaintiff’s region. *Id.* ¶ 82. To the contrary: this investigation concluded that as a manager, Plaintiff was “rude, unprofessional, condescending, professionally abrasive, negative, bombastic, overbearing, intimidating, hostile, disrespectful, quick to dismiss, belittling, demoralizing, gruff, aggressive, confrontational, and harassing.” *Id.* ¶ 96. Furthermore, the Department also investigated Plaintiff for “other alleged misconduct,” which misconduct is not identified in the Complaint.² *See id.* ¶ 112.

On November 4, 2022, while these investigations were pending, an attorney under Plaintiff’s supervision filed a complaint with the Department alleging Plaintiff had engaged in

² Defendant assumes for purposes of this motion only that the investigation into Plaintiff’s “other alleged misconduct” also occurred during the December 2021 to March 2023 period. Defendant reserves the right to probe in discovery the timing of Defendant’s investigation into Plaintiff’s “other alleged misconduct.”

reprisal. *Id.* ¶ 105. After the November 4, 2022 complaint, the Department issued a “Notice of Detail and No Contact Order” to Plaintiff that “remov[ed] him from his position as” Regional Solicitor and detailed him to “an unspecified position in [the Department’s] headquarters in Washington, D.C.” *Id.* ¶¶ 98–110; *see id.* ¶ 103 (alleging loss of the “prestige” of his position). Mr. Keen’s stated reason for the detail assignment and no contact order was that Plaintiff had retaliated against one of his subordinates. *Id.* ¶ 104. Plaintiff disputes this subordinate attorney’s characterization of events. *Id.* at ¶¶ 104–08. The Amended Complaint further alleges that—presumably in or around November 2022—the Department reduced his 2022 bonus but made no such adjustment to White regional solicitors’ bonuses. *Id.* ¶ 97.

On June 21, 2023, after receiving yet more “allegations of retaliation and retribution” from another of Plaintiff’s subordinate attorneys, the Department issued an updated Notice of Detail and No Contact Order to Plaintiff. *Id.* ¶ 111. The June 2023 notice further placed Plaintiff on administrative leave from June 22, 2023, to June 23, 2023. *Id.* After Plaintiff returned from administrative leave, the Department issued Plaintiff a Notice of Proposed Removal, proposing his “removal from federal service due to the results of the investigations” and “other alleged misconduct.” *Id.* ¶ 112. According to the Complaint, the Notice of Proposed Removal contained “allegations against [Plaintiff] that were false and pretext for discrimination.” *Id.* ¶ 113–114. The Amended Complaint asserts that the Department terminated Plaintiff’s employment on September 12, 2023. *Id.* ¶ 114.

ADMINISTRATIVE PROCEEDINGS

Plaintiff initiated EEO contact on December 21, 2022, and filed a formal complaint of discrimination on February 2, 2023. *See* Am. Compl. ¶¶ 11–12; Ex. A, Administrative Review Board Case No. 2023-0020, Final Agency Decision at 1 (Oct. 25, 2023) (“October 2023 FAD”). Plaintiff initiated another formal complaint of discrimination on September 14, 2023. *See* Am.

Compl. ¶¶ 11–12 (indicating that Plaintiff’s September 2023 administrative complaint was pending at the time Plaintiff filed the original complaint in this Court); Ex. B, Administrative Review Board Case No. 2023-0052 (Oct. 13, 2023 Letter of Acceptance) at 3 (outlining Plaintiff’s non-removal claims accepted for investigation); Ex. C, Administrative Review Board Case No. 2023-0053, Letter of Acceptance (Oct. 13, 2023) (outlining Plaintiff’s removal-related claims accepted for investigation and explaining the legal basis for administrative bifurcation).

Plaintiff initiated the instant litigation on November 8, 2023, and with the Court’s leave, amended the original complaint on March 20, 2024. *See* ECF Nos. 8 & 9; Min. Order (Jan. 17, 2024). The Amended Complaint alleges one count of discrimination based on Plaintiff’s race “and/or” sex and one count of retaliation in violation of Title VII. Am. Compl. ¶¶ 119–131. Plaintiff seeks relief including reinstatement to his position as a Regional Solicitor, compensatory and consequential damages, attorney’s fees, and certain injunctive relief.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests whether a complaint has successfully “state[d] a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible only when a plaintiff pleads factual content that enables the Court to “draw [a] reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. While detailed factual allegations are not necessary to withstand a Rule 12(b)(6) challenge, a plaintiff must nonetheless provide “more than labels or conclusions” or a “formulaic” recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555–56. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. Instead, plaintiffs must

“nudge[] their claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570.

When ruling on a motion to dismiss under Rule 12(b)(6), the Court may consider “the facts alleged in the complaint, documents . . . incorporated by reference in the complaint . . . or documents upon which the plaintiff’s complaint necessarily relies even if the document is produced not by the plaintiff in the complaint but by the defendant in a motion to dismiss.” *Hinton v. Corr. Corp. of Am.*, 624 F. Supp. 2d 45, 46 (D.D.C. 2009); *see also Slate v. Pub. Defender Serv.*, 31 F. Supp. 3d 277, 280 (D.D.C. 2014) (“Courts have considered documents attached to motions to dismiss and opposition papers without converting the motion into one for summary judgment when the documents were referenced in the Complaint and were central to the plaintiff’s claims.”).

This standard applies equally in employment cases. *Horsev v. Dep’t of State*, 170 F. Supp. 3d 256, 263 (D.D.C. 2016). Although a plaintiff need not specifically plead the facts supporting a *prima facie* case, the Court is to rely on the factual allegations in the Complaint as pled and, along with the reasonable inferences drawn therein, reach appropriate legal conclusions based on those facts. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510 n.2 (2002). Any legal conclusions couched as factual allegations should be ignored. *See Nurridin v. Bolden*, 818 F.3d 751, 756 (D.C. Cir. 2016) (“We need not, however ‘accept inferences drawn by [a] plaintiff[] if such inferences are unsupported by the facts set out in the complaint.’ Nor must we accept legal conclusions couched as factual allegations.”) (alterations in original; citation omitted; quoting *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)).

ARGUMENT

I. Plaintiff Does Not Sufficiently Allege a Claim for Discrimination on the Basis of Sex.

The Court should dismiss Plaintiff’s claims of sex discrimination, which find no support in the Amended Complaint. “To state a claim for sex discrimination under Title VII, Plaintiff must allege that: ‘(1) he is a member of a protected class, (2) he suffered an adverse employment action,

and (3) the unfavorable action gives rise to an inference of discrimination (that is, an inference that his employer took the action because of his membership in the protected class).’ *Redmon v. YMCA of Metro. Wash.*, 417 F. Supp. 3d 99, 102 (D.D.C. 2019) (quoting *Forkkio v. Powell*, 306 F.3d 1127, 1130 (D.C. Cir. 2002)). Although the Amended Complaint makes passing reference to Plaintiff’s sex as a basis for his Title VII claims, *see* Am. Compl. ¶¶ 8, 120, Plaintiff does not provide any factual support showing that Plaintiff suffered any adverse employment action because he is male. *See generally id.* The Amended Complaint focuses on the Department’s alleged discrimination against Black employees, including Mr. Hampton, as opposed to White employees. *See, e.g., id.* ¶¶ 123–124 (alleging that Defendant “has a known history of granting preferential treatment to White employees and treating Black employees worse” and that Defendant “did not subject White employees” to similar discriminatory treatment). “There are no allegations of any individual referencing [Plaintiff’s] sex or making any indirect comment referring to his sex. Nor does the complaint contain any allegations suggesting [Plaintiff] was treated differently because of his sex. As a result, [Plaintiff] does not state any claim rooted in sex discrimination.” *Montgomery v. McDonough*, 682 F. Supp. 3d 1, 11 (D.D.C. 2023) *citing Spence v. Dep’t of Veterans Affs.*, No. 19-cv-1947, 2022 WL 3354726, at *6 (D.D.C. Aug. 12, 2022) (dismissing sex discrimination claim because Plaintiff did not allege any facts supporting an inference that she suffered adverse actions based on her sex).

Because the Amended Complaint entirely fails to provide any factual matter to support any inference of sex discrimination against Plaintiff, the Court should dismiss Plaintiff’s Title VII claims to the extent they rely on his sex as a basis for relief.

II. Plaintiff Failed to Exhaust His Administrative Remedies on the Basis of Color.

The Amended Complaint purports to seek relief based on alleged discrimination based both on his race and his color. *See* Am. Compl. ¶ 8. However, Count I of the Complaint refers to “race,”

not “color” discrimination. *See id.* ¶¶ 119–24. To the extent the Complaint can be read as asserting a separate claim of discrimination on the basis of Plaintiff’s color (as opposed to his race), any such claims should be dismissed for failure to exhaust administrative remedies. Failure to exhaust administrative remedies in employment litigation is an affirmative defense, not a jurisdictional requirement. *See Koch v. Schapiro*, 699 F. Supp. 2d 3, 12 (D.D.C. 2010); *Pearsall v. Holder*, 610 F. Supp. 2d 87, 95 (D.D.C. 2009). The D.C. Circuit has repeatedly recognized that the exhaustion defense “is similar to a statute of limitations.” *In re James*, 444 F.3d 643, 647 (D.C. Cir. 2006); *see also Colbert v. Potter*, 471 F.3d 158, 167 (D.C. Cir. 2006) (same); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997) (same)). Exhaustion requirements are properly viewed as affirmative defenses, and “the defendant bears the burden of pleading and proving” the defense. *Bowden*, 106 F.3d at 437; *see also Koch*, 699 F. Supp. 2d at 12. The exhaustion requirement is not a mere legal pleasantry—rather, it is a natural outgrowth of fidelity to the principle of separation of powers, and it constitutes an indispensable prerequisite to a lawsuit in federal court.” *Silver v. Leavitt*, Civ. A. No. 05-0968 (JDB), 2006 WL 626928, at *9 (D.D.C. Mar. 13, 2006). “Because timely exhaustion of administrative remedies is a prerequisite to a[n] action against the federal government, a court may not consider a discrimination claim that has not been exhausted.” *Steele v. Schafer*, 535 F.3d 689, 693 (D.C. Cir. 2008); *see* 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.407. The exhaustion requirement is not meant as a “procedural roadblock” but instead “is intended to give the agency the opportunity to right any wrong it may have committed.” *McRae v. Libr. of Cong.*, 843 F.2d 1494, 1496 (D.C. Cir. 1988). Therefore, “[a]

Plaintiff who fails to comply, to the letter, with administrative deadlines ordinarily will be denied a judicial audience.” *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985).

Here, Plaintiff clearly has not exhausted a claim of discrimination on the basis of his color. *See* Ex. A (October 2023 FAD) at 1 (identifying race, sex, and reprisal as the bases of the Plaintiff’s first administrative charge); Ex. B (October 13, 2023 Letter of Acceptance) at 3 (same); Ex. C (October 13, 2023 Letter of Acceptance) at 3 (same). Moreover, “[a]lthough not defined in the statute, Title VII claims based on color have been interpreted by the courts as relating to the complexion of one’s skin.” *Rodriguez v. Wash. Metro. Area Transit Auth.*, Civ. A. No. 19-3710 (JEB), 2021 U.S. Dist. LEXIS 158313, at *12-13 (D.D.C. Aug. 23, 2021) (citing *Howard v. D.C. Pub. Sch.*, 501 F. Supp. 2d 116, 121 n.15 (D.D.C. 2007) (collecting cases)). To the extent that courts have analyzed claims of color discrimination separate from race-based claims, they have looked to whether the “particular hue of the plaintiff’s skin is the cause of the discrimination, such as in the case where a dark-colored African-American individual is discriminated against in favor of a light-colored African-American individual.” *Id.*

In this case, because Plaintiff has not raised color discrimination as a basis for relief in the prior administrative proceedings, Plaintiff does not now get the first bite at the apple in this judicial proceeding. Plaintiff’s color discrimination claim, to the extent the Amended Complaint raises such a claim, should therefore be dismissed.

III. Plaintiff’s Hostile Work Environment Allegations Should Be Dismissed for Failure to State a Claim for Relief.

To the extent Plaintiff seeks relief based on a hostile work environment theory, *see e.g.*, Am. Compl. ¶ 40 (alleging that Plaintiff complained about “harassment” of Black Department employees, including himself); *id.* ¶ 42 (alleging that Plaintiff complained about “systemic discrimination” against Black employees and that the Department allegedly failed to correct the

alleged “harassment or discrimination”); such claims should be dismissed pursuant to Rule 12(b)(6). A plaintiff alleging that he has been subjected to a hostile work environment must allege that he was subjected to discriminatory intimidation, ridicule, and insult that was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Townsend v. United States*, 236 F. Supp. 3d 280, 311 (D.D.C. 2017) (citing *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013)); *see also Wasserman v. Ahuja*, Civ. A. No. 21-0026 (ABJ), 2023 WL 157319, at *10 (D.D.C. Jan. 11, 2023). The “crucial” requirement for any such claim is that the behavior complained of be “so objectively offensive as to alter the conditions of the victim’s employment.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Complaints about offhand comments, rude treatment, callous behavior, or routine difference of opinion and personality conflicts will not amount to a hostile work environment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315–16 (4th Cir. 2008). Hostile work environment claims are subject to Title VII’s administrative exhaustion requirement under Title VII. *See Morgan*, 536 U.S. at 115.

First, any hostile work environment claim that is beyond the scope of the Plaintiff’s December 2022 EEO complaint must be dismissed, because Plaintiff has failed to administratively exhaust any such allegations. *See* Ex. B (October 13, 2023 Letter of Acceptance) at 3 (accepting for investigation Plaintiff’s discrimination charge based on the June 2023 Notice of Detail and No Contact Order, and which contains no assertion of a hostile work environment); Ex. C (October 13, 2023 Letter of Acceptance) at 3 (accepting for investigation Plaintiff’s discrimination charge based on Plaintiff’s removal from federal service in September 2023, and which contains no assertion of a hostile work environment).

Second, even if Plaintiff's hostile work environment claims were administratively exhausted, the Amended Complaint does not state a plausible claim that Plaintiff was subjected to such severe or pervasive intimidation, ridicule, or insult on the basis of his race, color, or sex, creating an abusive work environment that altered the conditions of his employment. *Baloch*, 550 F.3d at 1201; *see also Fields v. Vilsack*, 207 F. Supp. 3d 80, 92 (D.D.C. 2016) ("plaintiff asserting a claim based on a hostile work environment faces a high hurdle"). "Simply experiencing even several adverse and allegedly discriminatory work-related actions by supervisors' acting within the scope of their official duties—however objectionable that might be, and however actionable under discrete disparate treatment theories—does not necessarily mean that the employee was subjected to a hostile work environment." *Bain v. Off. of the Att'y Gen.*, 648 F. Supp. 3d 19, 60 (D.D.C. 2022) (internal quotation marks and citation omitted). "To preserve the distinction between discrete disparate treatment claims and hostile work environment claims, court have often cautioned that '[u]se of the same discrete acts, upon which [a] plaintiff bases his discrimination and retaliation claims, to support a hostile work environment claim is disfavored.'" *Id.* (quoting *Townsend v. United States*, 236 F. Supp. 3d 280, 312 (D.D.C. 2017)).

Plaintiff chiefly complains about the Department's decisions, supposedly between December 2021 and September 2023, to investigate him after learning of the Viewpoint Survey results for his region, to discipline him after he was accused of engaging in retaliatory conduct against other employees during and after the Department's investigations, and subsequently, to remove him from federal service. *See* Am. Compl. ¶¶ 60–76, 97–114. While these alleged discrete events may undergird his claim that he was treated differently from other employees due to his race, they "say[] nothing to support a hostile work environment claim independent from [Plaintiff's] allegations regarding h[is] discrete claims of discrimination and retaliation." *Bain*, 648

F. Supp. 3d at 61. Furthermore, these actions taken against Plaintiff do not themselves rise to the level of “intimidation, ridicule, or insult” necessary to state a hostile work environment claim. *See Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993). Instead, the investigation into Plaintiff’s alleged misconduct, and the disciplinary actions that followed, are the type of supervisory actions that are typically insufficient to state a hostile work environment claim. *See Aldrich v. Burwell*, 197 F. Supp. 3d 124, 138 (D.D.C. 2016).

Plaintiff also alludes, in a generalized manner, to claims that other Black attorneys at the Department were allegedly subjected to racial bias in a variety of ways. *See, e.g.*, Am. Compl. ¶¶ 39, 47 (alleging that “Black attorneys” were subjected to more scrutiny and criticism than White attorneys); *id.* ¶¶ 85–91 (describing a March 2023 discrimination complaint allegedly made by a Black attorney in the Philadelphia region). However, “conduct directed at others rather than at plaintiff . . . is less indicative of a hostile work environment.” *Lester v. Natsios*, 290 F.Supp.2d 11, 31 (D.D.C. 2003); *see also Nuriddin v. Golden*, 382 F. Supp. 2d 79, 108 (D.D.C. 2005) (“When racial statements are not made directly to a plaintiff, generally a hostile environment cannot be established.”). The Court should therefore dismiss these allegations as insufficient to support a hostile work environment claim.

IV. Plaintiff’s Disparate Treatment Allegations Based on His 2022 Compensation Are Insufficient to State a Claim for Relief.

Plaintiff’s discrimination claims based on his 2022 compensation should be dismissed because Plaintiff fails to plead facts making it plausible that the alleged decrease in Plaintiff’s pay was due to his protected status. Title VII provides that “[a]ll personnel actions affecting employees . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-16(a). “Under Title VII [] . . . the two essential elements of a discrimination claim are that: (i) the plaintiff suffered an adverse employment action (ii) because

of the plaintiff's race, color, religion, sex, national origin, age, or disability.” *Baloch v. Kempthorne*, 550 F.3d 1191, 1196 (D.C. Cir. 2008). A plaintiff can establish an inference of discrimination by showing that: (1) he was similarly situated to an employee who was not a member of a protected class (a comparator), and (2) he was treated differently than the similarly situated employee. *Allen v. Johnson*, 795 F.3d 34, 40 (D.C. Cir. 2015); *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999).

Here, Plaintiff claims that his 2022 bonus and pay were reduced compared to White regional solicitors. Am. Compl. ¶ 97. This allegation is based on the conclusory assertion that Plaintiff's “performance and accomplishments . . . warranted the same bonus as the other [r]egional [s]olicitors, if not a higher bonus.” *Id.* But Plaintiff does not allege that all aspects of his employment were “nearly identical” to these comparators, beyond identifying himself as a fellow regional solicitor. *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) (a plaintiff alleging disparate treatment must show that all “relevant aspects of her employment situation were nearly identical to those of the other employees who did not suffer similar adverse employment actions”); *see Burley v. Nat’l Passenger Rail Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015) (“Factors that bear on whether someone is an appropriate comparator include the similarity of the plaintiff's and the putative comparator's jobs and job duties, whether they were disciplined by the same supervisor, and, in cases involving discipline, the similarity of their offenses.”). Plaintiff's threadbare claim of disparate treatment based on his 2022 compensation should therefore be dismissed.

CONCLUSION

For the reasons discussed above, Defendant respectfully requests that the Court grant this Motion and enter an order consistent with the Proposed Order submitted herewith.

Dated: June 10, 2024
Washington, DC

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: /s/ Tabitha Bartholomew
TABITHA BARTHOLOMEW
D.C. Bar No. 1044448
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2529
Tabitha.Bartholomew@usdoj.gov

Attorneys for the United States of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
OSCAR L. HAMPTON, III,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 23-3338 (DLF)
)	
JULIE SU,)	
Acting Secretary of Labor,)	
)	
Defendant.)	
_____)	

[PROPOSED] ORDER

UPON CONSIDERATION of Defendant’s motion to partially dismiss the first amended complaint, and the entire record herein, it is hereby

ORDERED that Defendant’s motion is GRANTED;

ORDERED that Count I of the First Amended Complaint is DISMISSED as to Plaintiff’s claims of discrimination on the basis of his sex and color;

ORDERED that Count I of the First Amended Complaint is DISMISSED as to Plaintiff’s claims of race discrimination arising from his 2022 compensation; and it is further

ORDERED that Plaintiff’s hostile work environment claims are DISMISSED.

SO ORDERED.

Date: _____

United States District Judge

EXHIBIT A

Oscar L. Hampton III

v.

Julie Su,
Acting Secretary,
U. S. Department of Labor,
Agency

ARB Case No. 2023-0020; CRC Case No. 23-03-040

DATE ISSUED: October 25, 2023

FINAL AGENCY DECISION

I. Statement of Claims

Complainant was a Regional Solicitor, a Senior Executive Service (SES) position, with the Department of Labor's (DOL) Office of the Solicitor (SOL). Complainant alleged that he was subjected to unlawful disparate treatment and/or a hostile work environment based on his race (black), sex (male), and/or in reprisal for prior EEO activity.

II. Procedural History

On December 21, 2022, Complainant initiated contact with an EEO Counselor.¹ On February 2, 2023, Complainant filed a formal complaint of discrimination with the Civil Rights Center (CRC).² Because of a potential conflict of interest, the CRC transferred the complaint to the Administrative Review Board (ARB) for processing on March 7, 2023.³

On March 15, 2023, the ARB issued an Acceptance Letter, which listed five claims accepted for investigation based on the February 2, 2023, formal complaint in this matter.⁴ The ARB accepted the following issues for investigation:

Whether the DOL's Office of the Solicitor (SOL) subjected you to unlawful disparate treatment and/or a hostile work environment

¹ Report of Investigation (ROI) at 8, 21.

² ROI at 1.

³ ROI at 7.

⁴ ROI at 47.

based on your race (black), sex (male), and/or in reprisal for protected activity when:

1. On November 10, 2022, DOL issued you a “Notice of Detail and No Contact Order” removing you from your duties as Regional Solicitor and detailing you “to a position of unclassified duties with the SOL Front Office, effective immediately.”
2. On December 1, 2022, DOL gave you a negative performance review.
3. In December 2022, DOL denied you a full bonus and raise.
4. In or around December 2022, DOL proposed your removal from federal service.
5. DOL has subjected you to an ongoing pattern of discriminatory disparate treatment, including:
 - a. Stereotyped criticism, increased scrutiny, and repeatedly holding you to different standards than Caucasian attorneys: while DOL awards Caucasian attorneys for showing skills like trial advocacy, leadership, and obtaining victories for DOL, DOL penalizes you and Black attorneys for the same traits, labeling them with negative stereotypes such as aggressive, confrontational, angry, and overbearing.
 - b. Stereotyped criticism, increased scrutiny, and repeatedly holding you to different standards than Caucasian managers when you act in your managerial capacity, including assessing performance, making decisions about cases, work assignments, discipline and promotions.
 - c. Biased, discriminatory assumptions that when there are workplace disputes, Caucasian employees are believed, and the Black employees, including you, are lacking credibility, at fault, and/or have engaged in misconduct.
 - d. Subjecting you to administrative investigations (conducted by DOL’s OASAM/OHR/DELMR) regarding discriminatory allegations made by Caucasian staff, including in November 2022 and January 2023.⁵

ARB accepted Claims 1-4 as claims of disparate treatment on all bases alleged.⁶
ARB accepted subparagraphs (a)-(d) of Claim 5 as claims of disparate treatment on

⁵ ROI at 48-49.

⁶ ROI at 49.

all bases alleged if the action alleged in the particular subparagraph occurred within 45 days of Complainant's initial contact with an EEO Counselor on December 21, 2022.⁷ In addition, ARB accepted Claim 5 as an allegation of hostile work environment on all bases alleged.⁸

The complaint was investigated, and the ARB issued its Report of Investigation (ROI) to Complainant on July 31, 2023. In the ROI cover letter, I advised Complainant of his right to either request a hearing with the EEOC or an immediate final decision from the Department of Labor. Complainant did not respond. Accordingly, the ARB is issuing this final decision.⁹

After a careful review of the investigative report, the record, Complainant's arguments and the relevant law, I find that Complainant has failed to prove disparate treatment, retaliation, or harassment.

III. Statement of Facts

A. Background

Complainant was a Regional Solicitor (RSOL), SES, with SOL. Complainant's first line supervisor was S1, the Deputy Solicitor for Regional Enforcement, and Complainant's second line supervisor was S2, the Solicitor of Labor. Complainant stated that his race is Black and his sex is male.¹⁰ He has engaged in prior EEO activity, which involved S1 and S2.¹¹ Complainant was RSOL for Region III, which has offices in Philadelphia, Pennsylvania and Arlington, Virginia, since 2014.¹²

S1 identifies as a Caucasian male.¹³ S1 has occupied his position since on or about March 3, 2021.¹⁴ He was in an acting capacity until October 1, 2021, at which

⁷ ROI at 49. EEOC regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

⁸ ROI at 49.

⁹ 29 C.F.R. § 1614.110(b).

¹⁰ ROI at 2.

¹¹ ROI at 4, 5.

¹² ROI at 222.

¹³ ROI at 311.

¹⁴ ROI at 309.

point he officially became the Deputy Solicitor for Regional Enforcement.¹⁵ S1 did not indicate when he became aware of Complainant's race, gender, or EEO activity.

S2 identified as an Asian Indian female.¹⁶ S2 was not sure when she became aware of Complainant's race and gender, but states she first met him via a Zoom meeting in July 2021, shortly after she started her job.¹⁷ S2 knew of prior EEO complaints from Complainant shortly after she began in her role in 2021.¹⁸ S1 and S2 and are part of SOL's Front Office (FO).¹⁹

The events relevant to this case began in 2020 and end in June 2023. Complainant's testimony covers that entire timeline, including some events that occurred prior to 2020. S1's affidavit provided a very detailed timeline of many of the events at issue in Complainant's complaint, covering early 2021 through June 2023. S2's affidavit provides additional testimony for the time period from late 2021 through June 2023. A timeline of relevant events is included here as background.

1. Timeline of Events

In 2020, the Agency conducted an audit of Complainant's government travel card (GTC).²⁰ That audit prompted an investigation by the Office of Inspector General (OIG), which revealed "approximately \$36,000 in questionable transactions for the period of August 2016 to March 2020."²¹ Due to ambiguities in the OIG investigation, an investigation into Complainant's GTC usage was initiated by SOL, to be conducted by the Office of the Assistant Secretary for Administration and Management (OASAM).²²

In February or early March 2021, S1 first learned of OASAM's investigation into Complainant's GTC usage when he became Acting Deputy Solicitor for Regional Enforcement.²³

¹⁵ ROI at 309.

¹⁶ ROI at 936.

¹⁷ ROI at 937.

¹⁸ ROI at 937.

¹⁹ ROI at 312.

²⁰ ROI at 509.

²¹ ROI at 509.

²² ROI at 313.

²³ ROI at 313.

On August 23, 2021, the Federal Employee Viewpoint Survey (FEVS) results for the regional offices became available to the FO and were distributed to each region.²⁴ The results for Complainant's region in the areas of senior leadership and fear of reprisal were concerning to the FO.²⁵

In September 2021, Region III filed a lawsuit against a federal contractor (the OFCCP lawsuit).²⁶ Other regions were preparing to file similar lawsuits against the same contractor, but given budget limitations, only one expert witness could be selected for the regions to rely upon in their suits.²⁷ Region III was the first region to file its suit, and thus, needed the expert sooner than other regions. S1 instructed Complainant to work with the other RSOLs to select the expert.²⁸ Complainant complained to S1 about the requirement to collaborate on selecting an expert, and as part of that conversation told S1 that SOL was a hostile work environment to Black attorneys.²⁹ S1 stated he found Complainant's reference to "hostile work environment to be largely occasioned by my directing him to do something he did not want to do and I felt like I needed to follow the Department's Harassment Policy."³⁰ S1 alerted Complainant to his rights under that policy.³¹ On September 29, 2021, Complainant responded with an e-mail stating that his comments were private, not related to him specifically, and "I don't need to be rescued by anyone."³²

On October 1, 2021, S1 officially became Deputy Solicitor for Regional Enforcement.³³ On that same day, S1 received an e-mail from A1, an attorney in Region III, stating that, if the FEVS results were "disconcerting enough that they prompt some inquiry", "I and some other long-time RSOL attorneys would be happy to speak to you."³⁴ That evening, S1 had a phone call with A1, and took contemporaneous notes, which he memorialized in an e-mail to himself.³⁵ The crux

²⁴ ROI at 313.

²⁵ ROI at 313.

²⁶ ROI at 313.

²⁷ ROI at 313.

²⁸ ROI at 313.

²⁹ ROI at 313.

³⁰ ROI at 313.

³¹ ROI at 313.

³² ROI at 452.

³³ ROI at 313.

³⁴ ROI at 454.

³⁵ ROI at 456.

of A1's complaints were that Complainant's region was a "toxic and dysfunctional workplace" and that Complainant was a "classic workplace narcissist boss."³⁶ A1 stated that Complainant can be unethical and pressure attorneys, which results in either their giving into the pressure or risk getting removed from a case.³⁷ A1 detailed the departure of several attorneys from Region III, all of which he blamed on Complainant's management.³⁸ He also described Complainant as "so sexist" and said Complainant described women as "hot."³⁹ A1 asked S1 what was stopping the FO from speaking with every attorney in the region.⁴⁰

A1 spoke with S1 several times more times in October 2021 to discuss various problems expressed by Complainant's staff. S1 memorialized the calls with A1 in e-mails to himself, which were included as attachments to his affidavit.⁴¹

On October 4, 2021, the FO directed all divisions and regions to develop an Action Plan in response to their FEVS results.⁴²

On October 29, 2021, S2 shared an anonymous letter she received with S1.⁴³ It stated:

I currently work for the Solicitor's Office, but decline to give my name out of fear of retribution. All I can tell you is that I am an attorney who currently works for, or used to work in, the Philadelphia region.

You recently said at a meeting I attended that you were concerned about the exit of so many attorneys from the Solicitor's Office. With regards to the many attorneys that have left the Arlington or Philadelphia offices, I can tell you why: [Complainant].

[Complainant]'s appointment as the Regional Solicitor of the Philadelphia region has been a catastrophe for the attorneys, and often the administrative staff, that have reported to him. He is rude, imperious, overbearing, and demeaning. He is one of the most toxic personalities I have ever met. He interprets any disagreement with

³⁶ ROI at 456.

³⁷ ROI at 456.

³⁸ ROI at 456.

³⁹ ROI at 456.

⁴⁰ ROI at 458.

⁴¹ ROI at 454-468.

⁴² ROI at 315, 460-461.

⁴³ ROI at 315.

him as insubordination, and any unwillingness to approach litigation with as an aggressive approach as his as weakness. His appointment to Regional Solicitor has led to the retirement, transfer, or resignation of so many excellent attorneys from the Solicitor's Office who could have formed a core group of staff in the future.

Many attorneys have complained about his behavior before, but to no avail. The front office simply chooses to ignore his outrageous behavior and permit his staff to suffer. When I first joined the Solicitor's Office I was impressed by the camaraderie of the Solicitor's Office and the respect it held for its attorneys and administrative staff. That belief has been shaken by [Complainant]'s appointment and tenure.

I must be frank and say that I doubt the Front Office will take any action, but at least it cannot say that it does not know about the problem.⁴⁴

On November 19, 2021, S1 met with Complainant and his managers about their proposed Action Plan for the FEVS results.⁴⁵ Thereafter, on November 21, 2021, S1 sent his comments on the meeting to Complainant and his managers, which noted that the FO was concerned about the negative response to the question "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal" and low scores on questions related to senior leadership.⁴⁶

In November 2021, S1 and S2 determined that an investigation into Complainant's management practices was necessary in light of the conversations with A1, the anonymous letter, the poor FEVS results in Complainant's region, and Complainant's response to the FEVS results (the management investigation).⁴⁷ On December 3, 2021, Complainant was informed of the management investigation.⁴⁸

On December 16, 2021, S1 approved the Philadelphia Region Action Plan in response to the FEVS.⁴⁹

⁴⁴ ROI at 472.

⁴⁵ ROI at 316.

⁴⁶ ROI at 480.

⁴⁷ ROI at 316-317.

⁴⁸ ROI at 483-485.

⁴⁹ ROI at 318.

On February 4, 2022, A2 e-mailed S1 in response to a request that SOL staff complete a survey called the PULSE survey asking for their opinion.⁵⁰ In his e-mail, A2 stated, “from someone who worked in the Philadelphia region and has had to watch the carnage unfold in that region under its current leadership over the past decade, to have someone tell me that our voice matters rings hollow.”⁵¹

On February 14, 2022, S1 and A2 spoke on the phone.⁵² A2 stated that Complainant was a bully and wants to discipline people for disagreeing with him.⁵³ A2 transferred out of Complainant’s region because of Complainant, and A2 believed that another attorney in Philadelphia would retire soon because of Complainant’s behavior.⁵⁴

On February 16, 2022, Complainant e-mailed S1 to complain about the instruction to work with other regions in selecting an expert for the OFCCP lawsuit.⁵⁵ In the lengthy e-mail, Complainant stated that having to agree on an expert was an “unprecedented usurpation of the authority of a RSOL,” argued that he handled cases differently from other Regional Solicitors, and stated that “there has been a great deal of scrutiny regarding how I have conducted myself.”⁵⁶ He implied the scrutiny was due to “in-affinity preference.”⁵⁷

On February 28, 2022, S1 spoke with A1 again.⁵⁸ A1 expressed concern about the anonymity of a survey sent to Region III staff as part of the FEVS Action Plan.⁵⁹ After the call, S1 contacted the Deputy Regional Solicitor, an individual who reported directly to Complainant, to emphasize the importance of anonymity with the survey.⁶⁰

⁵⁰ ROI at 319, 555.

⁵¹ ROI at 555.

⁵² ROI at 319.

⁵³ ROI at 557.

⁵⁴ ROI at 557.

⁵⁵ ROI at 558.

⁵⁶ ROI at 561.

⁵⁷ ROI at 561.

⁵⁸ ROI at 320.

⁵⁹ ROI at 320.

⁶⁰ ROI at 320.

In March 2022, S1 spoke with A1 again about the regional survey.⁶¹ A1 reported that Complainant was dismissive of concerns expressed by an attorney during a staff meeting about the anonymity of the survey, and that after the meeting, the attorney's managers were unusually scrutinizing her work.⁶²

On March 8, 2022, Complainant complained to S1 that employee requests for transfers were being discussed with the receiving office without first being vetted through Complainant.⁶³ He also complained about the Honors Attorney program.⁶⁴ S1 stated that it is common for managers losing employees to another office to complain that they do not know about a transfer first.⁶⁵

On March 12, 2022, S2 sent the results of the investigation into Complainant's GTC to S1.⁶⁶ Around this same time, in March 2022, a recommending official (RO) from outside SOL was selected to review the results of both the GTC investigation and the management investigation when it was completed.⁶⁷

During April and May 2022, a new Deputy Regional Solicitor for Complainant's region was selected and announced. Although S1 and the outgoing Deputy Regional Solicitor participated in the interviews, Complainant did not consult them when he recommended a candidate to S2.⁶⁸ After S2 approved Complainant's selection, Complainant announced it via e-mail to SOL and included a line in his e-mail stating that the former Regional Solicitor had refused to hire the newly promoted Deputy Regional Solicitor to a permanent position when she was a temporary employee.⁶⁹ This e-mail prompted complaints, and a letter from the former Regional Solicitor to S2 requesting a correction to what the former Regional Solicitor characterized as an inaccurate statement.⁷⁰

⁶¹ ROI at 320.

⁶² ROI at 320.

⁶³ ROI at 320.

⁶⁴ ROI at 320.

⁶⁵ ROI at 320.

⁶⁶ ROI at 320.

⁶⁷ ROI at 321.

⁶⁸ ROI at 321.

⁶⁹ ROI at 322, 577.

⁷⁰ ROI at 322, 579-580.

On May 26, 2022, Complainant provided an update on his region's FEVS Action Plan, which included the results of an internal survey.⁷¹ The results indicated that approximately 12 employees provided an identical statement in response to the survey:

We are summarizing our concerns about the office in this manner because we want to ensure that we remain anonymous. This response is directed toward SOL Region III's "senior management," in particular the Regional Solicitor, and to a lesser extent the Deputy Regional Solicitor and Associate Regional Solicitor. The results of the FEVS are accurate and representative not only of those who responded, but of the majority of non-management attorneys in the office, including us. We are providing this honest assessment of managers, despite our fear of retaliation, because we believe that this office would be greatly improved if senior management took these suggestions seriously and made appropriate changes. Staff attorneys are committed to the mission, but senior management has unfairly accused us of disloyalty when we have engaged in the following activities: Advocated for work-life balance when faced with overwhelming and unreasonable workloads; Expressed concerns about program counsel's demeaning, hostile and abusive conduct; Engaged in active debate with senior management about legal issues of reasonable dispute; Expressed honest and valid ethical concerns; Expressed honest and valid concerns about legal and factual weaknesses of cases. We are all dedicated to the mission, including those of us who voice these valid concerns and want this office to do better. The Regional Solicitor has unjustly criticized attorneys because they were hired through the Honors Program or attended prestigious law schools. The Regional Solicitor also openly speaks in a derogatory manner about certain attorneys to other attorneys, particularly after attorneys quit or transfer because of the conditions created by senior management. [...] There has been a tragic amount of turnover over the past few years. More than 15 excellent, hard-working, ethical, and committed attorneys have left the office because of the above problems and because they eventually became too beaten down and unhappy to stay. In this way, senior management has actually undermined the mission of SOL by forcing out so many talented and dedicated attorneys.[...⁷²]

On May 27, 2022, S1 conducted Complainant's midyear review.⁷³

⁷¹ ROI at 322.

⁷² ROI at 322-323.

⁷³ ROI at 323.

On June 2, 2022, S1 e-mailed Complainant about the joint statement in the internal survey.⁷⁴ S1 testified that he was very alarmed by the statement, specifically as it related to fear of retaliation.⁷⁵ S1 specifically asked Complainant what his talking points were when he met with staff to discuss the survey, his plan for finding a neutral third party to meet with staff, and why he would recommend an open forum when there was so much fear of retribution expressed by staff.⁷⁶

On June 6, 2022, Complainant responded to S1's e-mail about the survey. In the e-mail Complainant states that he does not want S1 involved with resolving the concerns about retaliation in his office because S1 threatened Complainant with removal and other penalties when he "interrupted [his] planned Thanksgiving vacation to tell [him] that an investigation would be conducted."⁷⁷ S1 testified that he believed Complainant was referring to the December 3, 2021 meeting where Complainant was informed of the management investigation, and that Complainant was not on Thanksgiving vacation – or else S1 had not been informed about the vacation.⁷⁸

On June 15, 2022, S1 e-mailed Complainant, responding that he "seeks to clarify whether and how you (and your team) responded, or intend to respond, to anonymous statements expressing fear of retaliation" and expressing that the FO was concerned about the fears of retaliation, not the truth of all the statements in the joint statement.⁷⁹ S1 also told Complainant that despite his objections, S1 would meet with staff separately from Complainant, and that he planned to do so in other regions as well, and that Complainant's response was "disrespectful to me and my authority."⁸⁰

On August 17, 2022, the head of the Office of Public Affairs e-mailed S1 to complain that Complainant and his staff were mistreating her employees.⁸¹ S1 testified that the Office of Public Affairs complained about the problem in the past, too.⁸²

⁷⁴ ROI at 324.

⁷⁵ ROI at 324.

⁷⁶ ROI at 324.

⁷⁷ ROI at 324.

⁷⁸ ROI at 324.

⁷⁹ ROI at 325.

⁸⁰ ROI at 327.

⁸¹ ROI at 327.

⁸² ROI at 327.

On August 29, 2022, S1, S2, and another Deputy Solicitor in the FO received an anonymous letter from a Philadelphia staff attorney alleging “wasteful, unethical, abusive and retaliatory conduct.”⁸³ The letter was dated August 9, 2022.⁸⁴

On October 12, 2022, S1 spoke with A3, a Hispanic attorney, who alleged that Complainant was retaliating against her for participating in the management investigation.⁸⁵ She said Complainant had asked her in February if she had talked to investigators and she told him that he knew she could not answer that question.⁸⁶ Complainant then told her “you let me know where you stand” and left her office, but returned a few minutes later to say he wasn’t threatening her.⁸⁷ A3 said that after that interaction, Complainant cancelled a meeting with her and told someone else it was because he needed to keep his job. A3 also told S1 that she recently received an e-mail telling her that she had an inappropriate tone in a response to an instruction. A3 said the e-mail was inaccurate, and that she felt the reference to “tone” was sexist.⁸⁸ S1 asked A3 if she wanted to file a formal complaint of retaliation, and A3 said she would let him know.⁸⁹

On October 14, 2022, the RO sent Complainant a Notice of Proposed Removal (NOPR), containing three charges: Use of GTC for Unauthorized Purposes, Failure to Make Timely Payments on GTC and Conduct Unbecoming.⁹⁰

On October 17, 2022, S1 spoke by phone with A4, who wanted to transfer out of Complainant’s region.⁹¹ A4 said that Complainant retaliates against employees, and that she was transferring because she could not stay in Region III anymore.⁹²

On October 26, 2022, A3 reached out to S1 again and told him she had a job offer. S1 spoke with her and told her that he was going to make a referral of her

⁸³ ROI at 327, 649-51.

⁸⁴ ROI at 649.

⁸⁵ ROI at 328, 965.

⁸⁶ ROI at 328.

⁸⁷ ROI at 328.

⁸⁸ ROI at 329.

⁸⁹ ROI at 329.

⁹⁰ ROI at 677.

⁹¹ ROI at 329.

⁹² ROI at 329.

retaliation claim to the Workplace Equality Compliance Officer (WECO).⁹³ S1's e-mail to the WECO included alerting the WECO of the management investigation and told the WECO that SOL would like to try to keep A3 as an employee.⁹⁴

On November 2, 2022, S1 and S2 had a meeting with Complainant, with a representative from HR in attendance.⁹⁵ During that meeting, S1 told Complainant that the investigation into his management conduct was ongoing, and that S1 and S2 had received complaints from Complainant's staff that had been referred to the investigators. S1 then told Complainant that he "must avoid any appearance of reprisal against employees, and that reprisal could serve as an independent basis for remedial action. Reprisal does not have to be intentional, nor does it have to result in altering terms and conditions of employment, but rather can be as simple as a supervisor's words that potentially send a chilling effect on the participation in or use of the complaint process to be considered illegal."⁹⁶ S1 and S2 instructed Complainant that he must consult with S1 before taking any conduct or performance related actions and before he "interfere[d] with or express[ed] any interest in the [management] investigation."⁹⁷

On November 7, 2022, the WECO e-mailed S1 and recommended providing interim relief to A3 because of her allegations that Complainant retaliated against her for engaging in protected activity.⁹⁸ An investigation into A3's allegations commenced (the harassing conduct investigation).

On November 10, 2022, S1 issued a Notice of Detail and No Contact Order (DNCO) to Complainant.⁹⁹

On November 14, 2022, S1 and S2 travelled to Philadelphia to inform staff and managers that Complainant had been detailed to the FO. They prepared talking points that focused on Complainant's work on the *East Penn* litigation and avoided making any connection between Complainant's detail and the ongoing investigations. After meeting with the staff and managers, several attorneys met with S1 and S2 and expressed fears of retaliation, and complained about excessive workloads, bullying behavior, and the loss of many good attorneys in the office.¹⁰⁰

⁹³ ROI at 330.

⁹⁴ ROI at 331.

⁹⁵ ROI at 333.

⁹⁶ ROI at 331.

⁹⁷ ROI at 778.

⁹⁸ ROI at 781.

⁹⁹ ROI at 784-785.

¹⁰⁰ ROI at 335.

On December 1, 2022, S1 met with Complainant to conduct his performance appraisal. Complainant did not turn on his camera and did not speak much. The meeting lasted four minutes.¹⁰¹

On December 7, 2022, Complainant e-mailed S1 to dispute his performance review. S1 provided Complainant with information on the procedures to seek review with the Performance Review Board.¹⁰²

On February 10, 2023, the NOPR was rescinded. Employee relations advised the RO to rescind the NOPR in light of the more recent allegations of misconduct and because past practice was to reissue discipline notices based on all substantiated instances of misconduct.¹⁰³

On May 25, 2023, the Director of the CRC issued a memorandum on the harassing conduct investigation.¹⁰⁴ The Director found that “it is reasonable to conclude that [Complainant] violated the Harassing Conduct Policy and Procedures.”¹⁰⁵ Specifically, she stated that “it is reasonable to conclude that retaliatory harassing conduct occurred.”¹⁰⁶

In June 2023, another attorney alleged that Complainant harassed her.¹⁰⁷ After reviewing the allegation, the WECO recommended interim relief in accordance with the Agency’s harassing conduct policy and commenced a harassing conduct investigation into the allegations.¹⁰⁸

On June 21, 2023, due to the additional harassment complaint, the terms of the DNCO were updated to remove Complainant from the *East Penn* litigation and prohibit him from entering SOL offices without prior approval from S1.¹⁰⁹

¹⁰¹ ROI at 336.

¹⁰² ROI at 336.

¹⁰³ ROI at 292, 336.

¹⁰⁴ ROI at 877.

¹⁰⁵ ROI at 878.

¹⁰⁶ ROI at 878.

¹⁰⁷ ROI at 885-887.

¹⁰⁸ ROI at 888.

¹⁰⁹ ROI at 890.

In total, in a timeline that began with February 2021 and ended with June 21, 2023,¹¹⁰ S1 outlined the departure or transfer of at least 14 employees from Complainant's region.¹¹¹

B. Administrative Investigations

The timeline above details several administrative investigations into Complainant. In total, four investigations are relevant to Complainant's complaint. Two of those investigations – the GTC investigation and the management investigation – are relevant to several of Complainant's claims and are discussed in more detail below.

1. Government Travel Card Investigation

The GTC is issued to employees who regularly travel for their work and is issued by Citibank.¹¹² Citibank's Cardholder Services Agreement outlines that employees are subject to limited credit, restrictions on the use of the card consistent with the contract between Citibank and the Government Services Administration, restrictions on the use of the card consistent with Agency policy, and that payments are due "in full, upon receipt of the statement, and payment must be received [...] no later than 25 calendar days from the closing date on the statement."¹¹³ The Cardholder Services Agreement also outlines procedures for collecting payment when a payment is not made by the due date.¹¹⁴

DOL has additional policies on use of the GTC. Relevant to this case is Department of Labor Manual Series (DLMS) 2-1600, 1-15.47, "ATM Services."¹¹⁵ ATM Services permits employees to use an ATM for cash advances "for authorized travel" and allows for reimbursement for both the amount of the advance and the service charge "under certain circumstances [...] provided the amounts drawn reflect reasonable cash requirements for official travel."¹¹⁶ Reimbursement for cash advances is "limited to the actual amount of service fee charged on advances not

¹¹⁰ ROI at 313-340.

¹¹¹ In March 2022, two attorneys left or requested to transfer out of Region III. One left in April 2022 and one more left in June 2022. 10 attorneys left the region between October 2022 and June 2023. ROI at 320, 321, 324.

¹¹² ROI at 513, 1079 (Citibank Cardholder Services Agreement).

¹¹³ ROI at 1079.

¹¹⁴ ROI at 1080.

¹¹⁵ ROI at 1102.

¹¹⁶ ROI at 1102.

exceeding \$50 times the number of days in travel status.”¹¹⁷ ATM Services also specifies that cash advances require that expenses actually have been incurred, audits may occur, and receipts may be requested.¹¹⁸

In addition to policies about use of the GTC, DOL and the Federal Government have policies related to government travel. Among those policies are a requirement to obtain a travel authorization and to document travel expenses.¹¹⁹ Government travelers are required to “exercise the same care in incurring expenses that a prudent person would exercise if traveling on personal business.”¹²⁰

S1 testified that he first learned of the investigation into Complainant’s GTC usage in February 2021 at a meeting leading up to his transfer into his current position.¹²¹ According to S1, the Office of Inspector General began investigating Complainant’s GTC use after referral by OASAM after a “routine travel card audit” that occurred during the pandemic.¹²² OIG then referred the matter to SOL for further action, and SOL determined that OASAM should investigate further.¹²³ OASAM looked for additional information and explanation for the questionable transactions, whether e-mail or phone records contain relevant information, whether the earlier investigation looked at Complainant’s authorized travel documentation, and whether underlying documents referenced in the OIG report were available.¹²⁴

OASAM issued a Report of Supplemental Investigation (RSI) into Complainant’s GTC usage.¹²⁵ The RSI found that several matters could not be resolved due to “record keeping limitations”, but largely corroborated OIG’s findings.¹²⁶ The initial OIG investigation found approximately \$36,000 in “questionable transactions” from August 2016 to March 2020.¹²⁷ The OIG investigation divided the GTC misuse into two categories: (1) excess cash advances “taken well in advance of travel or with no apparent connection to approved travel;”

¹¹⁷ ROI at 1102.

¹¹⁸ ROI at 1102.

¹¹⁹ ROI at 223-224.

¹²⁰ ROI at 511-512.

¹²¹ ROI at 313.

¹²² ROI at 313.

¹²³ ROI at 223, 313.

¹²⁴ ROI at 510.

¹²⁵ ROI at 509.

¹²⁶ ROI at 511.

¹²⁷ ROI at 509.

and (2) GTC purchases that “appeared to be for items not authorized or that could not have been authorized.”¹²⁸ The OIG report also found that the card issuer, Citibank, had to attempt to collect past due balances from Complainant in 2016 and 2019, including instituting salary offset and setting up a payment plan for Complainant to pay back \$5,500.¹²⁹

When Complainant’s balance was past due in 2019, a DOL employee attempted to contact him multiple times.¹³⁰ In his interview with OIG, Complainant described the employee as “low level” and stated that it would be “inappropriate” to respond to the employee about his GTC. He stated, “I don’t know what authority he had to do anything that he had to do particularly talk to my subordinate.”¹³¹ In the subsequent NOPR, Complainant’s answers to the OIG investigators underlie the “Conduct Unbecoming” charge.¹³²

2. Management Investigation

In November 2021, S1, in concert with S2, decided that an investigation into Complainant’s management practices was necessary (the management investigation).¹³³ S1 testified that because OASAM was already investigating Complainant for the GTC abuse allegations, S1 and S2 decided that OASAM should also handle a separate management investigation.¹³⁴

On December 3, 2021, S1, with a witness present, informed Complainant of the management investigation via a Teams meeting.¹³⁵ During that meeting, S1 read from prepared notes, informing Complainant of the investigation.¹³⁶ S1 told Complainant that SOL received “allegations of misconduct” by Complainant and

¹²⁸ ROI at 509.

¹²⁹ ROI at 509.

¹³⁰ ROI at 509.

¹³¹ ROI at 510.

¹³² ROI at 247.

¹³³ ROI at 316-317.

¹³⁴ ROI at 317. This investigation is a separate investigation from the two harassing conduct investigations discussed in the timeline above. The management investigation and the harassing conduct investigation prompted by A3’s complaints are both central to several of Complainant’s claims. The harassing conduct investigation that began in June 2023 occurred after Complainant filed his complaint and shortly before the ROI was issued.

¹³⁵ ROI at 317.

¹³⁶ ROI at 483.

that SOL had a duty to investigate the allegations.¹³⁷ When asked, S1 told Complainant they were allegations of “harassment and mismanagement.”¹³⁸ S1 told Complainant that the investigation would be conducted by OASAM, specifically the OHR Administrative Investigations Branch Chief.¹³⁹ S1 explained that Complainant’s staff, as well as Complainant, would be interviewed during the investigation.¹⁴⁰ He also told Complainant that he “should not and must avoid any appearance of reprisal.”¹⁴¹ S1 also told Complainant that information about harassment complaints may only be shared on a “need to know” basis, in response to Complainant’s request to see the allegations.¹⁴²

S1 testified that several events, including his conversations with A1, the October 2021 anonymous letter, and the FEVS results and Complainant’s response to them, made an investigation necessary. In August 2021, the FEVS results became available and the FO was particularly concerned about the results relating to senior leadership and fear of reprisal in Complainant’s region.¹⁴³ On October 1, 2021, A1 reached out to S1 to discuss the “dismal” results of the FEVS for the region.¹⁴⁴ He told S1 that “we work in a toxic and dysfunctional workplace, and there is not a single non-management employee, and many in management, who would disagree.”¹⁴⁵ A1 described Complainant as manipulative and bullying, and described him pressuring attorneys to do unethical things.¹⁴⁶ In the conversation, A1 described how Complainant took disagreement as a racial issue, and described Complainant as “so sexist.”¹⁴⁷ A1 described Complainant calling female attorneys “hot” and saying other things about their appearance.¹⁴⁸ When S1 asked A1 what he would like S1 to do with the information he provided, A1 suggested that the FO speak to everyone in the region, including former employees.¹⁴⁹ Shortly thereafter, on October 9, 2021, S1 again spoke with A1, who shared that a female attorney in

¹³⁷ ROI at 483.

¹³⁸ ROI at 483.

¹³⁹ ROI at 483.

¹⁴⁰ ROI at 483.

¹⁴¹ ROI at 483.

¹⁴² ROI at 485.

¹⁴³ ROI at 313.

¹⁴⁴ ROI at 314.

¹⁴⁵ ROI at 314.

¹⁴⁶ ROI at 314.

¹⁴⁷ ROI at 314.

¹⁴⁸ ROI at 314.

¹⁴⁹ ROI at 314.

his office recently began seeing a therapist because of how she was being treated and that she was considering leaving and her departure “would be a sad loss.”¹⁵⁰ Shortly after that, S2 received the first anonymous complaint letter about Complainant’s behavior.¹⁵¹ The management investigation was commenced shortly thereafter.

C. Performance Review, Bonus and Raise

Complainant’s Executive Performance Plan for fiscal year 2022 covered the period from October 1, 2021 to September 30, 2022.¹⁵² All regional solicitors had a common template for their performance plans for the year.¹⁵³ It contained five critical elements: Leading Change, Leading People, Business Acumen, Building Coalitions, and Results Driven.¹⁵⁴ For each critical element, there are five possible ratings: Outstanding, Exceeds Fully Successful, Fully Successful, Minimally Successful, and Unsatisfactory.¹⁵⁵ The overall rating for the period is calculated by assigning points for each critical element, weighting them according to a pre-determined contribution to the overall rating, and adding up the total to assign a final rating.¹⁵⁶

Complainant received Outstanding in two critical elements: Leading Change and Results Driven.¹⁵⁷ Complainant received Exceeds Fully Successful in Business Acumen, Fully Successful in Building Coalitions and Minimally Successful in Leading People.¹⁵⁸ Overall, Complainant was rated Fully Successful for the performance period.¹⁵⁹ Employees who are dissatisfied with their rating may appeal their rating to the Performance Review Board, which is what Complainant did.¹⁶⁰ His rating was not changed.¹⁶¹

¹⁵⁰ ROI at 315.

¹⁵¹ ROI at 472.

¹⁵² ROI at 212.

¹⁵³ ROI at 353.

¹⁵⁴ ROI at 212.

¹⁵⁵ ROI at 213.

¹⁵⁶ ROI at 212.

¹⁵⁷ ROI at 212.

¹⁵⁸ ROI at 212.

¹⁵⁹ ROI at 212.

¹⁶⁰ ROI at 149-150.

¹⁶¹ ROI at 150.

After receiving his performance rating, Complainant expressed dissatisfaction to S1.¹⁶² In his affidavit, Complainant argued that he should have received “Outstanding” on Leading People and Building Coalitions because he leads the entire region and not just staff, his regional clients were always happy with his performance, and his office conducts more trials and recovered more than other regions.¹⁶³ Complainant also argued that the FEVS was added to his performance plan at his mid-term review.¹⁶⁴ Complainant argued that his rating was driven by racial animus, and alleged that at least eight lawyers in his region “openly describe the allegations or other negative actions taken against me as racially motivated.”¹⁶⁵ Complainant did not provide names of these eight people.

S1 testified that he gave Complainant credit for his accomplishments and the Complainant should not have been rated higher.¹⁶⁶ He cited, as examples, Complainant’s refusal to cooperate with other regions to select an expert for the OFCCP lawsuit and Complainant’s handling of hiring a new Regional Deputy Solicitor as examples of Complainant’s failure to perform well enough to earn higher ratings.¹⁶⁷ S1 also cited the numerous complaints from employees in Complainant’s office and the complaint from the Office of Public Affairs.¹⁶⁸

S1 testified that all Regional Solicitors were asked to put together a response to their FEVS results. He specified that employees were rated on their reactions to the FEVS, not the results of the FEVS.¹⁶⁹ He further testified that when the performance plans were being established, each Regional Solicitor was instructed to take the common template (which included language about developing meaningful action plans in response to FEVS results) and enter it into the fillable form for their performance plan.¹⁷⁰ According to S1, Complainant did not do so, and S1 had to instruct his assistant to put the language back into the plan before Complainant signed his plan when it was established.¹⁷¹

¹⁶² ROI at 336.

¹⁶³ ROI at 146.

¹⁶⁴ ROI at 146.

¹⁶⁵ ROI at 145.

¹⁶⁶ ROI at 350.

¹⁶⁷ ROI at 350-351.

¹⁶⁸ ROI at 350-351.

¹⁶⁹ ROI at 353.

¹⁷⁰ ROI at 353.

¹⁷¹ ROI at 353.

S1 asked each Regional Solicitor to submit their Action Plan and have a meeting to address the FEVS.¹⁷² During the meeting about Complainant's Action Plan, S1 was concerned about Complainant's response to staff concerns about the fear of retaliation expressed by staff in the region.¹⁷³ Complainant spent a significant portion of the meeting "discounting the significance of FEVS."¹⁷⁴ Complainant suggested that he officiate an open forum with staff about their concerns, and S1 suggested that someone else officiate so that staff could be more open.¹⁷⁵ S1 offered to help arrange that.¹⁷⁶

After meeting with Complainant about the plan for his region, S1 followed up with written feedback.¹⁷⁷ S1's feedback emphasized various items relating to employee satisfaction, including lack of support for work/life programs, Complainant's region's poor performance on relationships with "senior leadership," which included questions on items like integrity, respect, generating motivation, and trust.¹⁷⁸ S1 stated in his response that Complainant's region trailed "often significantly" on these items and that "these are serious comparative weaknesses."¹⁷⁹ S1 further stated "the Front Office was particularly disturbed by the general negative response to 'I can disclose a suspected violation of any law, rule or regulation without fear of reprisal.'"¹⁸⁰

S2's testimony about Complainant's performance rating largely corroborated S1's testimony. She testified that she did not believe Complainant's response to his rating warranted a change in rating.¹⁸¹ She further stated that to receive a higher rating, Complainant needed to work on his management style, treating employees fairly, and avoiding retaliation.¹⁸² She testified that Complainant's race, sex, and prior EEO activity were "absolutely not" factors in Complainant's rating.¹⁸³ She stated that Complainant's leadership style was the subject of repeated complaints,

¹⁷² ROI at 460-461.

¹⁷³ ROI at 316.

¹⁷⁴ ROI at 316.

¹⁷⁵ ROI at 316.

¹⁷⁶ ROI at 316.

¹⁷⁷ ROI at 480.

¹⁷⁸ ROI at 480.

¹⁷⁹ ROI at 480.

¹⁸⁰ ROI at 480.

¹⁸¹ ROI at 952.

¹⁸² ROI at 953.

¹⁸³ ROI at 953, 954.

to the point where staff “were feeling fearful and intimidated” and that given those concerns, his performance was not good enough in those areas.¹⁸⁴

S2 testified that Complainant did not receive the highest possible bonus for his 2022 performance review.¹⁸⁵ She explained that bonuses are based on a formula, depending on performance rating.¹⁸⁶ S2 further testified that the Performance Review Board reviews SES performance ratings and bonuses.¹⁸⁷ She testified that Complainant’s race, sex, and prior EEO activity had nothing to do with his bonus, which was based on his performance rating.¹⁸⁸ S2 also testified that many other SES employees did not receive the highest possible bonus because they did not receive the highest possible performance rating.¹⁸⁹ She also stated that no other SES employees supervised by S1 had the same performance issues that Complainant had.¹⁹⁰

S2 provided comparator information for three other SES employees. For each of them, she provided a performance review.¹⁹¹ None of the comparators received the same “Fully Successful” rating as Complainant. Two received “Outstanding” while one received “Exceeds Fully Successful.”¹⁹²

D. Notice of Detail and No Contact Order

S1 described in detail the events that led up to the issuance of the DNCO. In August 2021, the FEVS results became available, and they showed that Complainant’s region had “unimpressive” results.¹⁹³ S1 stated that the Front Office was particularly concerned with the results relating to fear of reprisal with senior leadership.¹⁹⁴ When the internal survey from Complainant’s region was released, showing that employees had banded together to provide a common response, S1 testified that he had never encountered something similar in his career, and that

¹⁸⁴ ROI at 953.

¹⁸⁵ ROI at 957.

¹⁸⁶ ROI at 957.

¹⁸⁷ ROI at 958.

¹⁸⁸ ROI at 958.

¹⁸⁹ ROI at 960.

¹⁹⁰ ROI at 960.

¹⁹¹ ROI at 1003-1035.

¹⁹² ROI at 1003, 1015, 1026.

¹⁹³ ROI at 313.

¹⁹⁴ ROI at 313.

his concern was that so many employees were fearful of retribution or retaliation that they felt they must answer the survey in that manner.¹⁹⁵

S2 stated that the DNCO was issued because “of concerns related to his management of the Regional Office and in particular, concerns of fear and retaliation expressed by multiple staff members.”¹⁹⁶ S2 explained that the No Contact Order “was issued at the recommendation of human resources” because of credible allegations of retaliation, harassment, and fear in the workplace.¹⁹⁷ A representative from HR met with Complainant’s staff without Complainant in attendance and immediately thereafter, asked to meet with S1 and S2. During that meeting, the HR representative relayed that he had “never seen such a toxic or fearful environment” during his years of federal service, and he recommended that Complainant be immediately reassigned from his position in order to protect the employees and SOL.¹⁹⁸ S2 testified that Complainant was “placed on his detail because of the credible fears expressed by employees, not because of his race, sex, or any EEO activity.”¹⁹⁹

S1 issued Complainant the DNCO.²⁰⁰ The DNCO informed Complainant that he was detailed, immediately, to a position of unclassified duties in the Front Office of SOL.²⁰¹ The DNCO further instructed Complainant to work remotely, request permission before entering DOL facilities, and prohibited him from contacting employees in Region III.²⁰² The DNCO stated that during prior meetings with S1 and S2, they had discussed the ongoing investigation by the OASAM into allegations of misconduct.²⁰³ The meeting on November 2, 2022, informed Complainant about new allegations of misconduct, involving allegations of retaliation and retribution.²⁰⁴ The DNCO informed Complainant that SOL had determined it was in their best interest to detail him pending the conclusion of

¹⁹⁵ ROI at 324.

¹⁹⁶ ROI at 283.

¹⁹⁷ ROI at 285.

¹⁹⁸ ROI at 285.

¹⁹⁹ ROI at 943.

²⁰⁰ ROI at 260.

²⁰¹ ROI at 260.

²⁰² ROI at 260-261.

²⁰³ ROI at 260.

²⁰⁴ ROI at 260.

OASAM's investigation.²⁰⁵ The DNCO advised Complainant that it was not a disciplinary action.²⁰⁶

S2 testified that there were new allegations of misconduct against Complainant that led to the DNCO. Specifically, A3 alleged that Complainant retaliated against her for participating in the management investigation.²⁰⁷ A3 alleged that Complainant asked if she had spoken to the investigator.²⁰⁸ A3 told Complainant he should not ask her that question and he told her "you let me know where you stand."²⁰⁹ Later, he followed up with A3 saying he did not mean to intimidate her, which she found threatening.²¹⁰ Shortly after that, management disciplined A3, which A3 thought was in retaliation for participating in the investigation.²¹¹

S2 testified that the DNCO still allowed Complainant to work on one high profile case, the *East Penn* litigation.²¹² Complainant continued to work on *East Penn* because the Deputy Regional Solicitor reported that Complainant had excellent relationships with the other attorneys working on that case, and Complainant was first chair of that trial.²¹³

S2 testified that Complainant's responsibilities during the DNCO were to take assignments from the Front Office and continue to work on the *East Penn* litigation.²¹⁴ S2 testified Complainant never took Front Office assignments because he refused them, and claimed all his time was taken by the *East Penn* litigation.²¹⁵

²⁰⁵ ROI at 260.

²⁰⁶ ROI at 261.

²⁰⁷ ROI at 942.

²⁰⁸ ROI at 328, 942.

²⁰⁹ ROI at 328, 942.

²¹⁰ ROI at 328-329, 942.

²¹¹ ROI at 328-329, 942.

²¹² ROI at 942.

²¹³ ROI at 942.

²¹⁴ ROI at 940.

²¹⁵ ROI at 940.

E. Notice of Proposed Removal

On October 14, 2022, the Agency issued a NOPR to Complainant.²¹⁶ The NOPR contained three charges: Use of Government Travel Card (GTC) for Unauthorized Purposes, Failure to Make Timely Payments on GTC, and Conduct Unbecoming.

1. Use of GTC for Unauthorized Purposes

This charge contained 132 specifications.²¹⁷ 95 of those specifications were instances of using the GTC to withdraw cash, in violation of DLMS 2-1600, General Travel Regulations.²¹⁸ 37 of the specifications were for using the GTC for unauthorized expenses in violation of DLMS 2-1600, General Travel Regulations.²¹⁹ These cash advances were often taken in the amounts of \$400 or \$500, over multiple transactions.²²⁰ They totaled thousands of dollars. The remaining specifications were for gas or other smaller purchases. Each specification in Charge 1 detailed when Complainant's next authorized travel date was. Many of the dates were not in close proximity to the cash advance, and the withdrawals exceeded the \$50 per day policy. The NOPR noted that because Complainant did not put the cash advance fees on his reimbursements, the practice did not come to management's attention.²²¹

2. Failure to Make Timely Payments on GTC

This charge contained 50 specifications for violating the Government Travel Regulations, DLMS 2-1600, 1-15.43(2) and 1-15.44 and the GTC cardholder agreement.²²²

3. Conduct Unbecoming

²¹⁶ ROI at 222.

²¹⁷ ROI at 224-238.

²¹⁸ ROI at 223.

²¹⁹ ROI at 224.

²²⁰ ROI at 224-235.

²²¹ ROI at 249.

²²² ROI at 238.

This charge contained two specifications for interviews with the OIG wherein Complainant was “combative and less than fully cooperative” and those responses detracted from his “character and/or reputation as a Supervisor.”²²³

In recommending the punishment of removal, the RO found that Complainant’s misconduct was repeated over an extensive period of time and that his position as an SES required a higher standard of conduct than other federal employees.²²⁴ The RO also found that Complainant attempted to obfuscate the misconduct when questioned by OIG.²²⁵ The RO noted that the OIG referred Complainant’s misconduct to the U.S. Attorney’s Office.²²⁶

On February 10, 2023, the NOPR was rescinded.²²⁷ The e-mail advising Complainant of the rescission stated that it “does not preclude the Department from taking action based on the misconduct detailed in the Notice and/or other misconduct.”²²⁸ On the same day, S1 advised Complainant that he was to remain in his detail and that the DNCO remained in full effect.²²⁹

1. Complainant’s Response

Complainant submitted a written response, through his attorney, to the NOPR. In it, he disputed all charges, and additionally stated that the NOPR was discriminatory and retaliatory.²³⁰ The Complainant also alleged that the OIG investigation was retaliatory.²³¹ The substance of Complainant’s response emphasized that there was no loss to the government from Complainant’s actions and that Complainant made full repayment. Complainant argued that he did not fail to pay his card on time and that his card was never cancelled.²³² He also claimed that he did not violate agency policies.²³³

²²³ ROI at 247.

²²⁴ ROI at 249.

²²⁵ ROI at 251.

²²⁶ ROI at 252-253.

²²⁷ ROI at 292-93.

²²⁸ ROI at 293.

²²⁹ ROI at 294.

²³⁰ ROI at 265.

²³¹ ROI at 265.

²³² ROI at 272.

²³³ ROI at 265.

Complainant argued that he complied with Agency policies that required him to get advanced authorization for his travel.²³⁴ He also stated that the limit on his GTC was increased from \$5,000 to \$9,000, which showed that the Agency “knew of and approved of his travel expenses.”²³⁵

In disputing the first charge, Complainant argued that some places he traveled to did not have ample ATM access and that he preferred to pay for things like cab fares with cash.²³⁶ He argued that Agency policy permitted cash withdrawals, that the \$50 per day cap the NOPR cites was not absolute, and that he was only reimbursed for authorized expenses.²³⁷ He also argued that the Agency knew about his cash ATM withdrawals for years and should not now ask him to justify his withdrawals after the fact.²³⁸ He further stated that the NOPR did not take into account travel that was cancelled, particularly travel during the COVID-19 pandemic that was cancelled late because the federal judges overseeing the relevant hearings were late providing notice.²³⁹

His response to the NOPR also contested the proposed penalty and raised the affirmative defense of discrimination. In addition to his complaints of race discrimination, which are outlined in more detail below, he alleges that the OIG investigation was retaliatory.²⁴⁰

F. Complainant’s Complaints of Discrimination

In his complaint, response to the NOPR, and throughout his affidavit, Complainant states that he engaged in protected activity by highlighting race discrimination at DOL. Specifically, he has alleged that the Agency fails to hire Black attorneys, fails to support and promote Black attorneys, and that the Honors Attorney Program disproportionately recruits Caucasian attorneys.²⁴¹ He further alleges that White attorneys are praised for skills like trial advocacy and leadership, while Black attorneys are criticized for the same.²⁴² He states his

²³⁴ ROI at 267.

²³⁵ ROI at 268.

²³⁶ ROI at 268.

²³⁷ ROI at 267, 269.

²³⁸ ROI at 269.

²³⁹ ROI at 270.

²⁴⁰ ROI at 289.

²⁴¹ ROI at 283.

²⁴² ROI at 283.

physical appearance, as a tall Black man, has been repeatedly labeled as aggressive, confrontational, angry and overbearing.²⁴³

Complainant argued in his response to the NOPR that the OIG investigation itself was retaliatory. He stated that in May 2020, during the prior administration, the former Secretary of Labor, Eugene Scalia, pushed Complainant to settle a case alleging racism by a federal contractor.²⁴⁴ Complainant stated that the internal evaluation found \$50 million in damages and the former Secretary wanted to settle for \$3 million.²⁴⁵ According to Complainant, the former Secretary and S1 were aware of Complainant's objections to the settlement at the time. Immediately thereafter, in July 2020, he alleges the OIG investigation was initiated.²⁴⁶

Complainant raised his complaints about race discrimination to S1 on multiple occasions. He also raised his complaints to S2. According to Complainant, his protected activity includes:

1. August 2021 complaints to S2 about the lack of diversity at DOL, and requests to S2 and S1 for data about the same.
2. September 2021 complaints to S1 and S2 about discrimination against Black attorneys and/or managers at DOL.
3. March 2022 complaints to S2 and S1 that DOL was refusing to assign honors attorneys to work in his region because Complainant is Black.
4. May 2022 complaint to S1 about discrimination against a Black attorney, A5.
5. June 6, 2022 complaint to S1 about racism in the Honors Program (overseen by S1).
6. Late August/early September 2022: Public complaint to S2 and S1 about diversity on a Microsoft Teams call.²⁴⁷

Complainant alleges the following additional protected activity, but does not specify dates or times:

1. Complaints that DOL fails to hire Black attorneys, fails to promote them to managerial positions, and also fails to support them in their employment, ultimately resulting in ending or damaging their careers with DOL.
2. Complaints about DOL's practice of subjecting Black attorneys to investigations based on specious allegations of misconduct.

²⁴³ ROI at 283.

²⁴⁴ ROI at 289.

²⁴⁵ ROI at 290.

²⁴⁶ ROI at 290, 223.

²⁴⁷ ROI at 4.

3. Complaints that DOL's Honors Attorney Program disproportionately recruits Caucasian attorneys, and provides them with professional advancement opportunities not available to Black attorneys in DOL.
4. Complaints that DOL repeatedly holds himself and other Black attorneys to different standards than Caucasian attorneys: while DOL awards Caucasian attorneys for showing skills like trial advocacy, leadership, and obtaining victories for DOL, DOL penalizes Black attorneys for the same traits, labeling them with negative stereotypes such as aggressive, confrontational, angry, and overbearing.²⁴⁸

Complainant also wrote a letter to Secretary Marty Walsh on November 16, 2022, shortly after the NOPR was issued. In his letter, Complainant alleged that his protected activity, particularly his requests for data and complaints about lack of Black attorneys and Black managers at SOL, led DOL to issue the NOPR.²⁴⁹

S2 testified that when she first met Complainant, he expressed concerns about lack of diversity in SOL.²⁵⁰ S2 also testified that she took Complainant's concerns about how he was treated by his colleagues and concerns about diversity in SOL seriously.²⁵¹ In her affidavit, she explains that she made sure to celebrate Complainant's victories in court within SOL, and that she took his concerns about programs like the Honors Attorney Program seriously.²⁵²

IV. Legal Analysis

In his complaint of discrimination, Complainant has alleged that SOL subjected him to unlawful disparate treatment and a hostile work environment based on his race, sex and/or in reprisal for prior EEO activity when:

1. *On November 10, 2022, DOL issued Complainant a "Notice of Detail and No Contact Order" removing Complainant from his duties as Regional Solicitor and detailing Complainant to "to a position of unclassified duties with the SOL Front Office, effective immediately."*
2. *On December 1, 2022, DOL gave Complainant a negative performance review.*
3. *In December 2022, DOL denied Complainant a full bonus and raise.*

²⁴⁸ ROI at 5.

²⁴⁹ ROI at 1040. The letter also requested a litigation hold.

²⁵⁰ ROI at 962.

²⁵¹ ROI at 962.

²⁵² ROI at 964-65.

4. *In or around December 2022, DOL proposed Complainant's removal from federal service.*
5. *DOL has subjected Complainant to an ongoing pattern of discriminatory disparate treatment, including:*
 - a. *Stereotyped criticism, increased scrutiny, and repeatedly holding Complainant to different standards than Caucasian attorneys: while DOL awards Caucasian attorneys for showing skills like trial advocacy, leadership, and obtaining victories for DOL, DOL penalizes Complainant and Black attorneys for the same traits, labeling them with negative stereotypes such as aggressive, confrontational, angry, and overbearing.*
 - b. *Stereotyped criticism, increased scrutiny, and repeatedly holding Complainant to different standards than Caucasian managers when Complainant acts in his managerial capacity, including assessing performance, making decisions about cases, work assignments, discipline, and promotions.*
 - c. *Biased, discriminatory assumptions that when there are workplace disputes, Caucasian employees are believed, and the Black employees, including Complainant, are lacking credibility, at fault, and/or have engaged in misconduct.*
 - d. *Subjecting Complainant to administrative investigations (conducted by DOL's OASAM/OHR/DELMR) regarding discriminatory allegations made by Caucasian staff, including in November 2022 and January 2023.*²⁵³

Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.*, makes it an unlawful employment practice to engage in discrimination based on race and sex, among other bases. Title VII also makes it unlawful to retaliate against an employee for filing a charge of discrimination; participating in a proceeding regarding discrimination; or otherwise opposing discrimination made unlawful by civil rights statutes.²⁵⁴ EEO regulations at 29 C.F.R. § 1614 also prohibit retaliation for engaging in EEO activity.

A. Unlawful Disparate Treatment

1. Prima Facie Case

In the absence of direct evidence of unlawful discrimination, the traditional analytical framework for evaluating the merits of Complainant's allegations of

²⁵³ ROI at 48-49.

²⁵⁴ *Nelson v. Dep't of the Army*, E.E.O.C. Appeal No. 0120090598, 2011 WL 3647305, at *5 (Aug. 10, 2011).

disparate treatment, which I employ here, is based on *McDonnell Douglas Corp. v. Green*.²⁵⁵ Under that approach, a complainant 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.²⁵⁶

To establish a *prima facie* claim of disparate treatment discrimination, Complainant must show: (1) that he is a member of one or more protected groups (e.g., race); (2) that he was treated less favorably than other similarly situated employees who are not members of his protected groups; and (3) that a nexus exists between the disparate treatment and Complainant's protected characteristics.²⁵⁷

To establish a *prima facie* case of reprisal discrimination, Complainant must show that: (1) he previously engaged in protected activity or opposed unlawful discrimination as identified in 29 C.F.R. § 1614.101(b); (2) the agency was aware of the protected activity; (3) he was subsequently subjected to an adverse employment action by the agency which is harmful to the point that it could well dissuade a reasonable worker from making or supporting a charge of discrimination; and (4) a nexus exists between the protected activity and the adverse treatment at issue in this complaint.²⁵⁸

Under Title VII, once a complainant has established a *prima facie* case, the agency must articulate a legitimate, non-discriminatory reason for its actions.²⁵⁹ If the agency is successful, then the complainant must prove by a preponderance of the evidence that the legitimate reason proffered by the agency was a pretext for discrimination.²⁶⁰

This established 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.²⁶¹ Where the agency has articulated a legitimate, non-

²⁵⁵ 411 U.S. 792 (1973).

²⁵⁶ *Id.* at 802.

²⁵⁷ *Irby v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 01991479, 2001 WL 1103840, at *2 (Sep. 14, 2001).

²⁵⁸ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Clay v. Dep't of Treasury*, E.E.O.C. Appeal No. 01A35231, 2005 WL 229766, at *4-5 (Jan. 25, 2005); *Talley v. Dep't of Treasury*, E.E.O.C. Appeal No. 01A3500, 2004 WL 1719232, at * 7 (July 20, 2004).

²⁵⁹ *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

²⁶⁰ *Texas Dep't of Cmty. Affairs*, 450 U.S. at 256.

²⁶¹ *Lukacs v. Dep't of Health and Human Servs.*, E.E.O.C. Appeal Nos. 01A42055, 01A42142, 01A42145, 01A42227, 2005 WL 1073706, *2 (Apr. 27, 2005).

discriminatory 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.²⁶²

Strictly for the purposes of this analysis, and in the interest of brevity, we assume without deciding that Complainant has made a *prima facie* case of discrimination based on race, sex, and reprisal. As a result, the evidentiary burden shifts to the Agency to articulate legitimate, non-discriminatory, non-retaliatory reasons for its actions regarding these claims.

2. Agency's Legitimate, Non-discriminatory, Non-retaliatory Explanations

The Supreme Court has made it clear that when management articulates legitimate, non-discriminatory reasons for its actions, it is not required to prove that it was actually motivated by the proffered reasons.²⁶³ Instead, all that is required is that management articulate some reason for its action that does not implicate any protected bases.²⁶⁴

1. Claim 1: *On November 10, 2022, DOL issued Complainant a "Notice of Detail and No Contact Order" removing Complainant from his duties as Regional Solicitor and detailing Complainant to "to a position of unclassified duties with the SOL Front Office, effective immediately."*

Here, the Agency's reasons for the DNCO are set out in S1 and S2's affidavits. S1 details at length that SOL received repeated complaints about Complainant's management practices. S1 also detailed poor results in questions related to reprisal in the FEVS for Complainant's region. S1 also describes learning about a complaint of retaliation from A3, who credibly stated she was retaliated against. S2 described in her affidavit a desire to protect SOL and agency employees in deciding to issue the DNCO. E-mails, FEVS results, and notes from conversations confirm the details of both S1's and S2's testimonies.

S2 testified she did not recall Complainant saying he was subject to disparate treatment because of his race, sex or prior EEO activity until he was placed on detail.²⁶⁵ She further explained that the detail was the best option given the

²⁶² *Id.* (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983)).

²⁶³ *Burdine*, 450 U.S. at 254-55.

²⁶⁴ *Id.*

²⁶⁵ ROI at 962.

numerous complaints about his management style, including allegations that he threatened a Hispanic attorney, A3, and disciplined her for participating in the management investigation.²⁶⁶ She also testified that Complainant complained that other Regional Solicitors did not give him the respect he deserved, but that he did not raise concerns about how he was treated by his superiors until he was placed on detail in November 2022.²⁶⁷

The Agency has a need to protect its employees from harassment. It is required by law to keep the workplace free from harassment and retaliation. Complainant was instructed when the management investigation began to avoid any appearance of retaliation. He received repeated instructions to avoid retaliation or the appearance of it. The record evidence shows that he ignored the instructions and instead behaved in a way that a staff attorney thought was threatening.²⁶⁸ The Agency's duty to protect its employees is well-established,²⁶⁹ and thus, I find that it has met its burden to show that its actions were legitimate, non-discriminatory, and non-retaliatory.

2. Claim 2: *On December 1, 2022, DOL gave Complainant a negative performance review.*

S1 explained in his affidavit how Complainant's performance was rated for the relevant time period. Importantly, while Complainant alleges he was given a negative performance review, he in fact received a rating of "Fully Successful." Where Complainant was less than "Fully Successful" on his performance review was in one category, Leading People, where he received "minimally successful." As to that category, S1 provided ample evidence supporting that rating. He articulated genuine concerns about Complainant's ability to perform this aspect of his job, citing, among other things, poor rating in the FEVS, allegations of retaliation by Complainant's staff and other behaviors that are generally frowned upon, or are an outright liability, in a manager. S2 noted that "fear of retaliation" is "something that we are always concerned about in our external work in enforcing our labor and employment laws."²⁷⁰ The record corroborates S1 and S2's testimony. There are

²⁶⁶ ROI at 962-963.

²⁶⁷ ROI at 963.

²⁶⁸ ROI at 328.

²⁶⁹ "Federal Agencies are legally obligated to establish and maintain effective anti-harassment programs." *Rosamaria F. v. Dep't of the Navy*, EEOC Appeal No. 0120181068, 2020 WL 949668, at *7 (Feb. 14, 2020). "An agency must take reasonable care to protect its employees from discriminatory harassment." *Caroline B. v. Dep't of Veterans Affs.*, EEOC No. 2020000978, 2021 WL 4477098, at *8 (Sept. 16, 2021).

²⁷⁰ ROI at 951.

several complaints from staff about Complainant's treatment and results of the FEVS show that Complainant's region performed poorly on areas of leadership.

S1 also rated Complainant less than "Outstanding" in Building Coalitions and cited a specific example of Complainant's failure to cooperate in selecting the expert for the OFCCP lawsuit. A review of the record corroborates S1's testimony on this as well. E-mails in the record show Complainant essentially insulting his colleagues when they disagreed with him about which expert to select.

It is certainly the Agency's prerogative to expect employees in management positions such as Complainant's to treat employees with respect, follow agency policy and the law prohibiting retaliation and harassment, and follow best practices for managing employees. I find that the Agency provided ample support of its ratings of Complainant's performance, and thus, met its burden to articulate legitimate, non-discriminatory, non-retaliatory reasons for its actions.

3. Claim 3: *In December 2022, DOL denied Complainant a full bonus and raise.*

Here again the Agency articulates legitimate, non-discriminatory, non-retaliatory reasons for its actions. S1 explained that bonuses are allocated based on budget and performance rating. S2 corroborated this testimony, stating that to receive the highest bonus, an SES employee must receive a perfect scoring on their performance appraisal. Bonuses are calculated on a formula based on the performance rating, and are not left to discretion. Complainant, having received a "Fully Successful" rating, received a bonus commensurate with that rating. As to his salary, again, S1 explained that Complainant received an appropriate increase commensurate with his performance rating. There is no evidence in the record that Complainant was denied a bonus or a raise. Complainant, instead, is alleging that his prior ratings – Outstanding – should be granted to him again, and his bonus should reflect that. However, as discussed above in Claim 2, the Agency provided legitimate, non-discriminatory reasons for his performance rating. As that rating is the basis for his bonus and raise, I find that the Agency met its burden to articulate legitimate, non-discriminatory, non-retaliatory reasons for its actions.

4. Claim 4: *In or around December 2022, DOL proposed Complainant's removal from federal service.*

The NOPR was issued for Complainant's failure to adhere to Agency policy for the use of the GTC, including taking thousands of dollars of cash advances. The three charges it contained all related to the issue – Complainant's use of his GTC that was not consistent with Agency travel policy, the Cardholder Agreement, and the Federal Travel Regulations. The NOPR further faulted Complainant for his combative interview and evasive responses when he was interviewed by OIG about

his travel expenses. The RO recommended removal in the NOPR, citing Complainant's senior position of trust within the Agency and the extended period of misconduct. Requiring employees to abide by policy when they travel and be prudent users of government resources is a well-established prerogative of the Agency. Complainant's conduct with his GTC was so unusual as to not only prompt an OIG investigation, but also a referral to the U.S. Attorney's office.²⁷¹ While charges were not pressed against Complainant, the referral in and of itself offers evidence of the seriousness of Complainant's misuse of his GTC. The Agency is obligated to manage its resources well, and that includes holding employees accountable when they demonstrate disregard for policies designed to protect against waste and ensure accountability. Accordingly, I find that the Agency met its burden to articulate legitimate, non-discriminatory, non-retaliatory reasons for its actions.

5. *Claim 5: DOL has subjected Complainant to an ongoing pattern of discriminatory disparate treatment including:*
 - a. *Stereotyped criticism, increased scrutiny, and repeatedly holding Complainant to different standards than Caucasian attorneys: while DOL awards Caucasian attorneys for showing skills like trial advocacy, leadership, and obtaining victories for DOL, DOL penalizes Complainant and Black attorneys for the same traits, labeling them with negative stereotypes such as aggressive, confrontational, angry, and overbearing.*
 - b. *Stereotyped criticism, increased scrutiny, and repeatedly holding Complainant to different standards than Caucasian managers when Complainant acts in his managerial capacity, including assessing performance, making decisions about cases, work assignments, discipline and promotions.*
 - c. *Biased, discriminatory assumptions that when there are workplace disputes, Caucasian employees are believed, and the Black employees, including Complainant, are lacking credibility, at fault, and/or have engaged in misconduct.*
 - d. *Subjecting Complainant to administrative investigations (conducted by DOL's OASAM/OHR/DELMR) regarding discriminatory allegations made by Caucasian staff, including in November 2022 and January 2023.*²⁷²

Several of the events Complainant outlines in this claim are untimely and occurred prior to the 45-day deadline for making EEO contact. The untimely events are discussed below, in the hostile work environment claim, where appropriate. For example, Complainant alleges that the GTC investigation was itself retaliatory, but

²⁷¹ ROI at 252-253.

²⁷² ROI at 48-49.

the events he said led to the retaliation happened in 2020, and the investigation by OIG happened in 2020. Complainant made EEO contact in late 2021, well past the 45-day deadline for those events.

As to the events in this allegation that are timely, Complainant alleges, repeatedly, in his affidavit and in e-mails and meetings with his colleagues and supervisors that management within SOL is racially biased and treat him negatively because of his race. To support his argument, he cites the Honors Attorney program, which he complained about to S1 and S2, as an example of how the agency discriminates against Black employees. He also cites his status as one of the few Black managers and Black attorneys within SOL. He also says his management is subject to increased scrutiny because of his race.

S1 and S2, however, cite specific events and provide specific evidence to support their responses and management of Complainant. As one example, Complainant alleges that SOL refused to release diversity statistics and that S2 was angry when he asked about the statistics in a meeting with other people. S2, on the other hand, states that she took diversity seriously, but needed to work with attorneys within SOL to protect privacy before she released information publicly. S2 eventually released the information.²⁷³

Complainant alleges that he was labeled as angry and confrontational because of his race, gender, and protected activity. S1 testified, and the record corroborates, that often Complainant failed to work well with others or take direction. Complainant, for example, was rude to employees in Public Affairs and his behavior prompted complaints to S1.²⁷⁴ He argued with S1 about whether or not Complainant's management authority was being respected by S1 when S1 instructed him, due to budget considerations, to work with his colleagues to select an expert for the OFCCP lawsuit. The record is replete with evidence of members of Complainant's staff approaching S1 with complaints about Complainant. These employees stated they were afraid of Complainant, that he bullied them, that he penalized employees who disagreed with them, and that he engaged in poor management and ethical lapses.

S1 and S2 both testified that they initiated the management investigation because of the complaints from employees, and the record confirms that employees complained about Complainant's conduct regularly, via several different avenues. S2 stated that one of the reasons that OASAM was selected to investigate Complainant's leadership practices was because of his allegations that his staff's

²⁷³ ROI at 964.

²⁷⁴ ROI at 327.

responses were racially biased.²⁷⁵ She further testified that the investigation began in Fall 2021, and that action was only taken against Complainant when “the level of fear and retaliation proved too extreme” and there was a credible allegation of harassment and retaliation by a woman of color that Complainant supervised.²⁷⁶

Accordingly, I find that management articulated legitimate, non-discriminatory, non-retaliatory reasons for its actions.

3. *Pretext*

Management has articulated legitimate, non-discriminatory, non-retaliatory reasons for its actions concerning Complainant. Thus, the burden shifts to Complainant to prove that management’s articulated reasons are not the true reasons for the employment decision, but rather that management’s asserted rationale is a pretext for discrimination.²⁷⁷ Complainant can satisfy this burden either “directly by persuading the [factfinder] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”²⁷⁸ The Commission has held that mere allegations are insufficient to show pretext for discrimination.²⁷⁹

All evidence is evaluated in the pretext analysis to determine whether Complainant has produced sufficient evidence to show management’s stated reasons for its action are untrue.²⁸⁰ It is well-settled that the Commission has adopted this analysis, holding that the burden of persuading the Commission that an agency’s actions constitute unlawful discrimination rests at all times with Complainant.²⁸¹

1. Claim 1: *On November 10, 2022, DOL issued Complainant a “Notice of Detail and No Contact Order” removing Complainant from his duties as Regional Solicitor and detailing Complainant to*

²⁷⁵ ROI at 965.

²⁷⁶ ROI at 967.

²⁷⁷ *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804.

²⁷⁸ *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-05).

²⁷⁹ *Belia B. v. U.S. Postal Serv.*, E.E.O.C. No. 2019003523, 2020 WL 5994602, at *5 (Sept. 9, 2020).

²⁸⁰ *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Aikens*, 460 U.S. at 714-15.

²⁸¹ *See, e.g., Conley v. Dep’t of Navy*, E.E.O.C. Appeal No. 01991702, 2001 WL 1478978, at *5 (Nov. 8, 2001); *Raju v. Dep’t of Veterans Affairs*, E.E.O.C. Appeal No. 01986574, 2001 WL 1386629, at *8 (Nov. 2, 2001).

“to a position of unclassified duties with the SOL Front Office, effective immediately.”

Complainant alleges that during the detail he “essentially was demoted to a staff attorney,” and required to sign in and out, among other restrictions.²⁸² He alleges he was not given a reason for the DNCO.²⁸³ He called the allegations “classic examples of racist stereotypical troupes [sic]” and that no concrete actions have been alleged, “all of it based on the sensitivities of my white employees.”²⁸⁴

Complainant alleges several other senior SOL employees, all of them white, have had several EEO complaints filed against them, also have low FEVS results and have serious attrition and morale problems.²⁸⁵ He says that none of those white managers have been subject to a DNCO.²⁸⁶ In his affidavit, Complainant alleges that two comparators were treated differently than he, C1 and C2. In her affidavit, S2 disputed that. S2 specifically said she was unaware of any misconduct by C2, and that C1 had left the department before S2 began her job.²⁸⁷ She stated that both comparators were white females, and that S2 was unaware of any misconduct that would warrant placing either on a DNCO.²⁸⁸ She further testified that she was unaware of any other SES employee within SOL engaging in alleged misconduct that would warrant placing them on a DNCO.²⁸⁹

Complainant states that “no one has alleged that I took any action, unlawful or otherwise, against any employee based on their protected status.”²⁹⁰ He also states that “no one has alleged” that he created a hostile work environment, sexually harassed anyone or retaliated against anyone based on “legally recognized protected activity.”²⁹¹ He alleges that “the anonymous complaint investigation, subsequent allegations and investigations are rife with unlawful animus and retaliatory acts.”²⁹² He states the initial investigation took 18 months, attempted to pursue witnesses from 5 years ago, included old allegations and “contained no

²⁸² ROI at 121.

²⁸³ ROI at 122.

²⁸⁴ ROI at 123.

²⁸⁵ ROI at 123.

²⁸⁶ ROI at 123.

²⁸⁷ ROI at 944.

²⁸⁸ ROI at 944.

²⁸⁹ ROI at 945.

²⁹⁰ ROI at 123.

²⁹¹ ROI at 123.

²⁹² ROI at 124.

actual allegations of any specific act related to an actual action based on an employee's protected class or protected activity.”²⁹³ He further alleges that most allegations were subjects of prior complaints, and were resolved in the past and that the only difference is that now S1, S2, and another Deputy Solicitor in the FO are in their roles.²⁹⁴ He also states that “it appears that the action was taken because two white females alleged that I retaliated against them” and that the DNCO “was based on the most pernicious stereotypes of Black males.”²⁹⁵ He states that he has a 36-year record of exemplary performance and no prior disciplinary actions.²⁹⁶ He also notes that the DNCO separated him from his white staff, but still allowed him to work with a Black woman on a daily basis.²⁹⁷ He further states that all the Black managers in his region are under investigation for similar conduct, but none of the white managers.²⁹⁸

Complainant fails to show that the Agency's reasons were pretext for discrimination. His response fails to address substantively the reasons for the DNCO and instead alleges a variety of motives for the DNCO without providing evidence in support of them.

As discussed above, repeated allegations of retaliation and mismanagement were made against Complainant. When A3 contacted S1 with specific, detailed allegations of retaliation, S1 contacted the agency WECO, in accordance with the Agency's harassment policy. The WECO advised that A3 should be provided interim relief. An investigation into A3's complaint was commenced.

Simultaneously, an HR representative traveled to Complainant's region to speak with the staff. That meeting so alarmed the HR representative that he requested to immediately speak with S1 and S2, and told them he had never experienced such a culture of fear in his career.²⁹⁹ The DNCO was issued thereafter to protect employees and the Agency from serious allegations of Complainant's misconduct.

Complainant alleges that the investigation and other allegations are a result of racism but fails to offer evidence that the Agency's conduct was anything but driven by a desire to follow the law and protect itself from liability and its

²⁹³ ROI at 124.

²⁹⁴ ROI at 124.

²⁹⁵ ROI at 124.

²⁹⁶ ROI at 124.

²⁹⁷ ROI at 124.

²⁹⁸ ROI at 124.

²⁹⁹ ROI at 962-963.

employees from harassment. Complainant instead alleges that new management led to a rehashing of old complaints, that leadership was “unwilling” to recognize Complainant’s success, that the DNCO is full of “racist tropes” and that Black attorneys in his region complained about racism they experienced from white attorneys.³⁰⁰ His affidavit, though, fails to offer evidence in support of these claims. Some of Complainant’s allegations are directly refuted by the record. For example, while Complainant alleges that the DNCO is a result of old complaints, it was in fact prompted by new complaints of retaliation.

The clear weight of the evidence shows that the Agency issued the DNCO out of concern that Complainant’s behavior, specifically as it related to retaliatory conduct, had become a liability and to protect Complainant’s staff. This was after Complainant was warned, repeatedly, not to retaliate against his employees. Complainant has offered nothing but mere allegations to undermine those reasons. Accordingly, I find Complainant has failed to show that the Agency’s reasons are pretext for discrimination for this claim.

2. Claim 2: *On December 1, 2022, DOL gave Complainant a negative performance review.*

Complainant claims that he was unfairly marked down for his performance, and that he “led the entire region, not just his staff,” delivered impressive litigation results and his regional clients provide positive feedback on his work.³⁰¹ He also claims that the FEVS portion of his performance plan was added at his mid-year review. Complainant further alleges that he was rated lower than other comparable employees. Complainant’s arguments fail to carry his burden to show the agency’s reasons for its actions were pretext.

While Complainant argues with the way he was rated, he fails to provide evidence that his performance in the area of “Leading People” was adequate. He alleges that 10 or 11 staff attorneys formed a “resistance” that was racially motivated, but does not provide evidence that this resistance actually existed or was race based. To the extent the record shows there were attorneys in his office who made complaints, the complaints were based on Complainant’s treatment of them, contained no mention of Complainant’s race, sex or EEO conduct, and often included specific examples of Complainant’s treatment.

Complainant further fails to provide evidence that his performance in the area of “Building Coalitions” warranted a higher rating. The uncontroverted record evidence shows that Complainant failed to treat his colleagues with respect, even when repeatedly directed to work with them.

³⁰⁰ ROI at 125.

³⁰¹ ROI at 147.

Complainant also fails to offer other evidence to undermine the Agency's legitimate, non-discriminatory reasons for his rating. While Complainant states that he is treated worse than other managers, S2 testified that no other RSOLs had Complainant's performance problems or faced his allegations of retaliation. S1 testified similarly. Complainant says other RSOLs received better ratings than he but had similar numbers of complaints, however, this assertion is contradicted by the testimony of S1 and S2.

Complainant's assertion that the FEVS results were added to his performance review mid-year is contradicted by S1 and S2's testimony and the record evidence, which shows that all RSOLs were asked to develop and implement Action Plans in response to FEVS results. Complainant focuses on how the FEVS results related to senior leadership are wrong because the sample was too small or the term senior leadership was ill-defined, but S1 testified that the numbers themselves were not what prompted concern. S1 was instead troubled by Complainant's response to concerns about retaliation in the office and Complainant's repeated refusal to engage with the issue, despite multiple meetings, e-mails, and work assignments. Complainant argues that S1 ignored the opinions of his regional clients, which showed positive reviews of Complainant, but Complainant's job requires more than keeping regional clients happy. His performance review nonetheless acknowledges his success in this area.

While Complainant alleges that his protected classes led to his lower performance rating, a review of the performance reviews of three other SES employees, C3, C4 and C5, refutes Complainant's allegations. S2 testified that the other employees did not have Complainant's performance or misconduct problems.³⁰² Complainant has offered no evidence to refute S1 and S2's testimony other than his assertions.

Complainant repeatedly alleges bias but fails to provide evidence of bias to support his allegations. Here again the clear weight of the evidence shows that the Agency assessed Complainant's performance based on its legitimate reasons related to management. Complainant has failed to meet his burden to show that the Agency's legitimate, non-discriminatory, non-retaliatory reasons are pretext for discrimination for this claim.

3. Claim 3: *In December 2022, DOL denied Complainant a full bonus and raise.*

Complainant also fails to show how the Agency's explanations for his bonus and raise were pretext for discrimination. As discussed above, the Agency provided ample support for its ratings of Complainant, and Complainant's attempt to show

³⁰² ROI at 960.

that the Agency's reasons are pretext failed. As Complainant's bonus and raise are based on his performance evaluation, and allocated by a formula, there is no evidence he can provide to undermine the Agency's legitimate reasons, unless he can show a deviation from that formula, which he does not allege, or that the rating itself was biased. As discussed above, he has failed to show the rating itself was biased. He argues, instead, that he is owed the maximum bonus and raise. However, as discussed above, the Agency provided legitimate reasons for its performance rating that Complainant fails to undermine. Accordingly, Complainant has failed to meet his burden to show that the Agency's legitimate, non-discriminatory, non-retaliatory reasons are pretext for discrimination for this claim.

4. Claim 4: *In or around December 2022, DOL proposed Complainant's removal from federal service.*

Complainant's response to the NOPR and his affidavit fail to provide evidence that the Agency's reasons for the NOPR were pretext for discrimination. While Complainant's response to the NOPR focuses on the OIG report's finding that there was no loss to the government because of his actions, he fails to show that the Agency had ulterior motives or was otherwise not genuinely alarmed by his failure to abide by the reasonably prudent person standard laid out by the travel rules, and by the specific limitations on the use of cash advances.

The RO in the NOPR discussed at length Complainant's position of authority in the Agency, Complainant's public facing role, and the steps Complainant took to avoid review of his GTC practices. While the NOPR was eventually rescinded (because of a new misconduct investigation), Complainant alleges that the OASAM investigation into his GTC usage was a result of retaliation for his complaints of discrimination.³⁰³ He states that the OIG investigation was closed, and that the new leadership in SOL revived the allegations.³⁰⁴ He also argues that the conduct at issue resulted in full repayment to the government.³⁰⁵

Complainant's allegations are contradicted by the record. S1 testified that the OIG investigation was closed, but that OIG referred it to SOL with instructions to report to OIG on any discipline.³⁰⁶ When SOL received it, they found gaps, which the RSI attempted to fill. Both S1 and S2 were not employed in their positions when the GTC investigation began. S1 and S2 were also separated from the decision-making process for discipline because they wanted an independent recommending

³⁰³ ROI at 118.

³⁰⁴ ROI at 118.

³⁰⁵ ROI at 118.

³⁰⁶ ROI at 313.

official.³⁰⁷ Complainant's contradicted or unsupported assertions are insufficient to meet his burden. Accordingly, he has failed to show that management's legitimate, non-discriminatory reasons were pretext for discrimination.

5. Claim 5: *DOL has subjected Complainant to an ongoing pattern of discriminatory disparate treatment, including:*
 - a. *Stereotyped criticism, increased scrutiny, and repeatedly holding you to different standards than Caucasian attorneys: while DOL awards Caucasian attorneys for showing skills like trial advocacy, leadership, and obtaining victories for DOL, DOL penalizes Complainant and Black attorneys for the same traits, labeling them with negative stereotypes such as aggressive, confrontational, angry, and overbearing.*
 - b. *Stereotyped criticism, increased scrutiny, and repeatedly holding you to different standards than Caucasian managers when Complainant acts in his managerial capacity, including assessing performance, making decisions about cases, work assignments, discipline and promotions.*
 - c. *Biased, discriminatory assumptions that when there are workplace disputes, Caucasian employees are believed, and the Black employees, including Complainant, are lacking credibility, at fault, and/or have engaged in misconduct.*
 - d. *Subjecting Complainant to administrative investigations (conducted by DOL's OASAM/OHR/DELMR) regarding discriminatory allegations made by Caucasian staff, including in November 2022 and January 2023.*³⁰⁸

Complainant claims, repeatedly, that the actions management took against him are based on his race, sex, and his repeated complaints about the lack of diversity in SOL. The record shows several instances where Complainant alleges that stereotypes or racism are why he is being subject to scrutiny or asked to do something. A thorough review of the record, shows, however, that Complainant was often rude, combative, or uncooperative. For example, in the e-mail discussion about which expert to choose for the OFCCP lawsuit, Complainant makes comments about his litigation style and implies that the other RSOLs are worse litigators than he is when his preferred expert witness is not chosen. Their comparative litigation skills were not relevant to a discussion over whether a particular expert witness was a better choice. There is nothing in the record supporting that management was taking its actions based on Complainant's protected classes.

³⁰⁷ ROI at 321.

³⁰⁸ ROI at 48-49.

In response to Complainant's allegation that he was subject to "biased, discriminatory assumptions" in disputes, perceived as lacking credibility, and that management acted upon accusations against him without substantiation, S2 stated Complainant complained to her that the FEVS was racially biased and that he thought alternative management styles, including those by people of color, were not accounted for.³⁰⁹ Complainant also complained to S2 about the preferential treatment of the honors attorney program.³¹⁰ S2 also stated she reached out to a Black Associate Solicitor to provide support at Complainant's urging.³¹¹

Managers are well within their rights to, among other things, direct an employee to work with their colleagues and direct them to follow agency policy and not retaliate. The record shows that numerous employees complained about Complainant's management and alleged retaliation and harassment. Complainant alleges the increased scrutiny he faced was because of his protected classes, but the record contradicts that. Management made the choices they did because his treatment of his employees was a problem. Numerous complaints were documented via e-mail, and they are consistent – many of Complainant's employees reached out to S1 in confidence, and expressed fear of Complainant's behavior and told very similar stories of bullying, favoritism, mismanagement and, importantly, of fear of retaliation for complaining about Complainant.

Complainant fails to offer any evidence to support his assertion that white employees are held to different standards than he is. In fact, the record evidence shows this assertion is not true – his performance standards, for example, were identical to other RSOLs. While Complainant alleges he has been labeled with racist stereotypes, he offers no support for that allegation other than his assertions. The Commission has long found that unsubstantiated assertions are insufficient as a matter of law to establish that the agency's explanation for its conduct is pretextual or that discrimination occurred.³¹²

In sum, for the allegations above, Complainant did not offer evidence beyond his assertions to demonstrate that his protected characteristics were factors with respect to this claim. He claims, repeatedly, that other Black managers and employees have been targeted by SOL in the past. However, testimony from S1 and S2 refutes that claim and Complainant fails to provide specifics in order to show those refutations are pretextual. The clear weight of the evidence shows that management was dealing with an employee causing serious problems that created

³⁰⁹ ROI at 968.

³¹⁰ ROI at 968.

³¹¹ ROI at 964, 968.

³¹² See *Hipolito P. v. Dep't of Veterans Affairs*, E.E.O.C. Appeal No. 2019001991, 2019 WL 1988313, at *3 (Apr. 26, 2019).

liability for the agency. Complainant's allegations do not provide evidence that management's asserted rationale was pretextual or that discrimination occurred based on Complainant's protected characteristics. Complainant has therefore failed to meet his burden of proof with respect to this claim. As such, I find that Complainant has failed to prove that he has been subjected to unlawful disparate treatment as he has alleged based on his race, gender, and/or prior EEO activity.

B. Hostile Work Environment

DOL has subjected you to an ongoing pattern of discriminatory disparate treatment, including:

- a. Stereotyped criticism, increased scrutiny, and repeatedly holding you to different standards than Caucasian attorneys: while DOL awards Caucasian attorneys for showing skills like trial advocacy, leadership, and obtaining victories for DOL, DOL penalizes you and Black attorneys for the same traits, labeling them with negative stereotypes such as aggressive, confrontational, angry, and overbearing.*
- b. Stereotyped criticism, increased scrutiny, and repeatedly holding you to different standards than Caucasian managers when you act in your managerial capacity, including assessing performance, making decisions about cases, work assignments, discipline and promotions.*
- c. Biased, discriminatory assumptions that when there are workplace disputes, Caucasian employees are believed, and the Black employees, including you, are lacking credibility, at fault, and/or have engaged in misconduct.*
- d. Subjecting Complainant to administrative investigations (conducted by DOL's OASAM/OHR/DELMR) regarding discriminatory allegations made by Caucasian staff, including in November 2022 and January 2023.*

Complainant alleges that he was subjected to a hostile work environment on the basis of race, sex and/or reprisal for prior EEO activity. Although his claim of "ongoing disparate treatment" did not specifically allege hostile work environment, I accepted his claim on that basis.

Harassment directed at an individual on these bases violates Title VII.³¹³ To establish a case of harassment based on a hostile work environment, a complainant must show that: (1) they belong to a protected class or classes; (2) they were subject

³¹³ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Heath v. Gen. Servs. Admin.*, E.E.O.C. Appeal No. 01963035, 1998 WL 546817, at *4 (Aug. 17, 1998).

to unwelcome verbal or physical conduct; (3) the conduct complained of was based on one or more of their protected categories; (4) the conduct unreasonably interfered with their work performance or created an intimidating, hostile, or offensive work environment, and (5) there is a basis for imputing liability to the employer.³¹⁴

To satisfy the fourth prong of the hostile work environment analysis, courts have long held that the conduct at issue must be sufficiently “severe or pervasive” to create an objectively hostile work environment—an environment that “a reasonable person would find hostile or abusive.”³¹⁵

Complainant fails to show he was subjected to a hostile work environment. He fails to both establish that the complained of conduct was based on one or more of his protected categories and he fails to show that the conduct created a hostile work environment.

While Complainant characterizes many of his supervisors’ actions as hostile, racist, and stereotyped, the record shows that his supervisors’ actions were attempts to manage him. For several of his allegations, including that the employees complaining of Complainant’s management were all white, the record does not support Complainant’s allegation. One of the attorneys who complained of retaliation was Hispanic. The group of attorneys who banded together to provide common survey responses were not identified by race or otherwise.

Complainant alleges in part that the treatment of him was based on racist stereotypes. However, Complainant’s conduct described in the record, and supported by the evidence, is that of a manager who does not respect his supervisor, does not take feedback, and does not treat his staff with respect. As discussed above, in the disparate treatment section, directing a subordinate employee to follow instructions is consistent with managers doing their jobs. All of Complainant’s supervisors deny discriminating against Complainant because of his race, gender, or EEO activity.

Furthermore, Complainant has failed to allege facts of harassment that was sufficiently severe to rise to the level of a hostile work environment. The conduct that Complainant alleges as harassing was typical management of a subordinate

³¹⁴ *McCleod v. Soc. Sec. Admin.*, E.E.O.C. Appeal No. 01963810, 1999 WL 643307, *3 (Aug. 5, 1999).

³¹⁵ *Harris*, 510 U.S. at 21-22; *see also Smith v. Dep’t of Veterans Affairs*, E.E.O.C. Appeal No. 01A40925, 2005 WL 2492808, at *4 (Sept. 28, 2005) (noting that a hostile environment claim generally requires a showing of a pattern of offensive conduct); *Munchbach v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 01A11681, 2002 WL 1461210, at *2 (June 18, 2002) (“[C]laims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim.”).

and teams of staff. An objectively reasonable person would not consider themselves harassed when their supervisor provides feedback to them and directs them to work with their colleagues. The Commission has found that conduct similar to and more severe than that complained of in this case, even if true, is not sufficiently severe or pervasive to constitute a legally actionable hostile work environment.³¹⁶

Complainant's allegations, without more, would not be sufficient to establish Complainant was subjected to a hostile work environment. Harassing conduct must be consistent and severe to warrant relief.³¹⁷

For the reasons outlined above, I find that Complainant's working conditions neither so severe nor pervasive as to render the environment so intolerable that the conditions of Complainant's employment were altered. Although Complainant may disagree with management's actions, he has failed to set forth any facts to satisfy his burden of proof in connection with his allegations of a hostile work environment. Accordingly, Complainant has failed to prove his claim that management subjected him to a discriminatory hostile work environment.

V. Conclusion and Statement of Relief

Complainant failed to establish that he was subjected to disparate treatment or a hostile environment based on his race, sex, and/or reprisal for prior EEO activity. Because the complaint is without merit, no relief is granted.

VI. Statement of Notice and Rights

If you are not satisfied with this decision, your appeal rights are as follows:

You may file a notice of appeal with the Equal Employment Opportunity Commission (EEOC), at any time up to thirty (30) calendar days after your receipt of this decision. You may file your appeal online by using the EEOC Public Portal at <https://publicportal.eeoc.gov/Portal/Login.aspx>, by facsimile (faxes over 10 pages will not be accepted) to (202) 663-7022, or by mail to:

³¹⁶ *Reece v. U.S. Postal Serv.*, EEOC Appeal No. 0120091011, 2009 WL 509567, at *1-3 (Feb. 20, 2009) (no actionable harassment where complainant was issued a disciplinary suspension, was denied FMLA leave, and was followed); *James v. U.S. Postal Serv.*, EEOC Appeal No. 0120062236, 2007 WL 2693689, at *1-2 (Sept. 7, 2007) (finding no actionable harassment where complainant was issued unsatisfactory performance evaluations and was berated by a supervisor, culminating in termination).

³¹⁷ *King v. Hillen*, 21 F.3d 1572 (Fed. Cir. 1994); *Harris Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993) (a pattern of offensive conduct is required to prevail on a hostile work environment claim).

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D.C. 20013

You may also hand-deliver an appeal to:

Director, Office of Federal Operations,
Equal Employment Opportunity Commission,
131 M Street, NE, Suite 5SW12G,
Washington, DC 20507

Any statement in support of the appeal must be submitted to the Office of Federal Operations and to this office within thirty (30) calendar days of your filing of the notice of appeal. The regulations at 29 C.F.R. § 1614.403(a) encourage the use of EEOC Form 573 in presenting an appeal to the EEOC, and a copy of this form is enclosed.

If you elect not to appeal to the Commission, you may file a civil action in an appropriate U.S. District Court within ninety (90) calendar days of your receipt of this decision. If you file an appeal with the Commission, you may still file a civil action in the appropriate U.S. District Court within ninety (90) calendar days of your receipt of the Commission's final decision on your appeal. A civil action may also be filed any time after one hundred and eighty (180) days from the date of filing your appeal with the Commission, if the Commission's Office of Federal Operations has not issued a final decision.

You are also advised that if you file a civil action, you must name the appropriate Department Head as the defendant. Department means the national organization, and not just the local office, facility or department in which you may work. Do not just name the Agency or department. In your case, you must name Julie Su, Acting Secretary of Labor, as the defendant. You must also state the official title of the department head. Failure to provide the name or official title of the agency head or department head may result in dismissal of your case.



Susan Harthill
Chief Administrative Appeals Judge
Administrative Review Board

EXHIBIT B

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



October 13, 2023

Oscar L. Hampton III
c/o Michal Shinnar
Joseph Greenwald & Laake, PA
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
Via e-mail: mshinnar@jgllaw.com

Re: Complaint of Oscar L. Hampton III
ARB Case No. 2023-0052
CRC Case No. 23-11-119-A

Dear Mr. Hampton:

The Civil Rights Center (CRC) received your formal complaint on September 14, 2023. Because of a potential conflict of interest, CRC transferred your complaint to the Administrative Review Board (ARB) for handling. I have been delegated authority under the Department of Labor's (DOL or agency) Equal Employment Opportunity (EEO) program to make decisions in matters where the official normally responsible for issuing final decisions has a potential conflict of interest.¹ Due to the conflict of interest in your case, the Board has reviewed your formal complaint and accepted one claim, as discussed in the "Accepted Claims" section of this letter.

You raised an additional complaint (removal from federal service) that has been identified as a complaint under the federal sector EEO process that is related to or stems from actions appealable to the Merit Systems Protection Board (MSPB). That complaint has been bifurcated from the current case and reassigned to ARB Case No. 2023-0053. The acceptance letter for that claim is being transmitted to you at the same time as this letter.

¹ Secretary's Order 01-2004 – Delegation of Authorities and Assignment of Responsibilities for the Department of Labor's Internal Equal Employment Opportunity Programs (April 15, 2004).

Background – Available Claims

Complainants may allege both the type of discrimination they are suffering, also known as the claim, and the protected class that is the reason for the discrimination, also known as the basis. For example, disparate treatment claims allege differences in treatment based on membership in a protected class, such as race, national origin, sex, or religion.

Disparate treatment claims require an adverse action, which is an injury or harm to a term, condition, or privilege of employment for which there is a remedy.² Examples of an adverse action include termination, failure to promote, denial of transfer, refusal to hire or an alleged lowering of an annual performance evaluation, or some other action at work that is materially adverse to you.³ Hostile work environment claims are different from claims involving only discrete acts, as they involve repeated conduct, typically occurring over a period of time, which becomes the basis for the hostile work environment claim.⁴ Parties alleging reprisal as a basis can allege disparate treatment or hostile work environment claims, but in contrast to other types of discrimination, parties can allege any discrimination that is reasonably likely to deter the employee from engaging in protected EEO activity and must show that a reasonable worker might be dissuaded from making or supporting a charge of discrimination because of the agency's action.⁵

In order for the ARB to accept a claim, you must have initiated contact with an EEO Counselor in a timely manner. Below you will find more information on your claim.

² *Bill A. v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 2020002312, 2020 WL 5657334, *1-2 (Aug. 27, 2020); *Diaz v. Dep't of the Air Force*, E.E.O.C. Request No. 05931049, 1994 WL 739653, *2 (Apr. 21, 1994); *see also Morgan v. Nat'l R.R. Passenger Corp.*, 536 U. S. 101, 114, 116 (2002).

³ *Id.* at 114.

⁴ *Id.* at 117.

⁵ *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 67-68 (2006).

Accepted Claims

Whether the DOL’s Office of the Solicitor (SOL) subjected you to unlawful disparate treatment based on your race (Black), sex (male), and/or in reprisal for protected activity when:

- 1. On June 21, 2023, DOL issued you a “Notice of Detail and No Contact Order – Updated Requirements,” updating the requirements of the Nov. 10, 2022 Notice of Detail and No Contact Order, sent by Stanley Keen, the DOL Deputy Solicitor for Regional Enforcement. The Updated Order:**
 - a. Placed you on administrative leave;**
 - b. “[P]rohibited [you] from talking, contacting, engaging and/or communicating (written or verbal) to any SOL employee from the Philadelphia and/or Arlington office;”**
 - c. Prohibited you from entering any SOL offices without receiving advanced approval from Mr. Keen;**
 - d. Removed you from handling matters relating to the *East Penn* case, for which you had just won the largest jury victory in DOL’s history.**

EEOC regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.⁶ The time limit is counted from the day after the action, through the last day. As the 45-day time limit for your claim falls on a Saturday, and August 7, 2023 is the next business day, EEO contact in your case is timely, even though it is 47 days after the date of the matter at issue in your complaint.⁷

Your claim will be accepted as a claim of disparate treatment on all bases alleged.

If you disagree with this description of the claims accepted for investigation, please inform this office within fifteen (15) calendar days of your receipt of this letter.

⁶ *Mara v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120092086, 2009 WL 2985891, at *1 (Sep. 10, 2009).

⁷ 29 C.F.R. § 1614.604(d).

Investigation Timeline

According to EEO regulations, the agency must complete its investigation within 180 calendar days of the filing date of your complaint (September 14, 2023). You and the agency may also agree to extend the investigative period for no more than an additional 90 days. Your investigation will be completed on or by **Tuesday, March 12, 2023**. You have the right to request a hearing before an EEOC AJ at any time after 180 days from the date you filed your original complaint. Your request should be directed to the EEOC's Philadelphia District Office at 801 Market Street, Suite 1000 Philadelphia, PA 19107-3126. Alternatively, you may file a hearing request by using the EEOC Public Portal at <https://publicportal.eeoc.gov/Portal/Login.aspx>. After your request is received by the EEOC, an AJ will be responsible for issuing a decision. The AJ has authority to review the administrative record and the representations of the parties to determine if or how the record needs to be developed further, which may include the scheduling of a hearing.

Please note that EEO complainants may instead elect a final agency decision from ARB after the investigation is completed. Upon completion of the investigation, you will receive the Report of Investigation, as well as a letter explaining your options. In addition, at any point before or after the investigation, EEO complainants may instead elect to request mediation of their complaints through the Department of Labor's alternative dispute resolution (ADR) process. If you would like to elect ADR, please contact my staff at (202) 693-6200 or at Contact-ARB@dol.gov.

Your Role in the Investigation and Legal Standards

It is your responsibility to cooperate with the EEO Investigator in the presentation of your affidavit. Without your statement, made under oath or affirmation, concerning the alleged discriminatory actions about which you filed your complaint, it is difficult to proceed with the investigation. You have the responsibility to provide your completed affidavit within the timeframe specified by the EEO Investigator. Pursuant to EEOC regulation 29 C.F.R. § 1614.107(a)(7), if you fail to provide requested information in the time specified by the EEO Investigator, your EEO complaint may be dismissed for failure to cooperate.

As the complainant, you are responsible for providing enough evidence to raise the inference of discrimination when the investigator contacts you to present a sworn statement. To raise an inference of discrimination, a complainant must establish a claim that is legally sufficient at first glance, which is sometimes called a *prima facie* case. What is legally sufficient depends on the type of claim you are bringing. Below you will find a description of what you will need to demonstrate in your affidavit, so that your claim is legally sufficient.

To establish a *prima facie* claim of unlawful disparate treatment based on sex and/or race, you must show that: (1) you are a member of a protected class (race and sex); and (2) you were treated less favorably in regards to the terms, conditions or privileges of employment than other similarly situated employees who are not members of your protected class(es).⁸ A lack of comparative evidence is not necessarily fatal to your claim, if you can show you were discriminated against in some other way.⁹ You may also set forth additional evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn.¹⁰

To establish a claim of reprisal discrimination, you must show: (1) you were previously engaged in protected activity, participated in the EEO process or opposed unlawful discrimination in accordance 29 C.F.R. § 1614.101(b); (2) the agency was aware of the protected activity; (3) you were subsequently subjected to an adverse employment action by the agency that is harmful to the point that it could well dissuade a reasonable worker from making or supporting a charge of discrimination; and (4) that the agency took the action(s) at issue at such time or in such manner as to suggest a causal connection between your protected activity and the action(s) at issue in this complaint.¹¹

For any of the above claims, if you establish a *prima facie* case through circumstantial evidence, then the burden of production shifts to the agency to articulate some legitimate, nondiscriminatory reason for its challenged action. If the agency is able to do this, it will prevail unless you are able to prove, by a preponderance of the evidence, that the legitimate reason articulated by the agency was not the true reason, but was a pretext for discrimination.

⁸ *Irby v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 01991479, 2001 WL 1103840, at *2 (Sep. 14, 2001).

⁹ *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576 (1978); *see also* Enforcement Guidance on *O'Connor v. Consolidated Coin Caters Corp.*, EEOC Notice No. 915.002, n.4 (Sept. 18, 1996).

¹⁰ *Furnco Constr. Co.*, 438 U.S. at 576.

¹¹ *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Clay v. Dep't of Treasury*, E.E.O.C. Appeal No. 01A35231, 2005 WL 229766, at *4-5 (Jan. 25, 2005); *Talley v. Dep't of Treasury*, E.E.O.C. Appeal No. 01A3500, 2004 WL 1719232, at * 7 (July 20, 2004).

An EEO investigator assigned by the National Equal Employment Opportunity Investigative Services Office (NEEOISO) will be contacting you in the near future to begin the investigation. If you have any questions, please contact my staff at (202) 693-6200 or at Contact-ARB@dol.gov.

Sincerely,



SUSAN HARTHILL
Chair and Chief Judge
Administrative Review Board

cc: Thomas Hicks via e-mail
SOL Workplace Equality Compliance Officer

Brandi A. Peters via e-mail
Counsel for Employment Law, MALS

Investigator Sent via ELFS
NEEOISO

Oscar L. Hampton III via e-mail
8405 Henry Way
Glenside, PA 19038
olhamptoniii@gmail.com

EXHIBIT C

U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



October 13, 2023

Oscar L. Hampton III
c/o Michal Shinnar
Joseph Greenwald & Laake, PA
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
Via e-mail: mshinnar@jgllaw.com

Re: Complaint of Oscar L. Hampton III
ARB Case No. 2023-0053
CRC Case No. 23-11-119-B

Dear Mr. Hampton:

The Civil Rights Center (CRC) received your formal complaint on September 14, 2023. Because of a potential conflict of interest, CRC transferred your complaint to the Administrative Review Board (ARB) for handling. I have been delegated authority under the Department of Labor's (DOL or agency) Equal Employment Opportunity (EEO) program to make decisions in matters where the official normally responsible for issuing final decisions has a potential conflict of interest.¹ Due to the conflict of interest in your case, the Board has reviewed your formal complaint and accepted one claim to investigate, as discussed in the "Accepted Claims" section of this letter.

Complaints of discrimination under the federal sector EEO process that are related to or stem from actions appealable to the Merit Systems Protection Board (MSPB), such as suspensions of more than fourteen (14) days, termination, or reductions-in-grade are considered to be mixed-case complaints. Regarding the instant complaint, a removal from federal service is appealable to the MSPB pursuant to 5 C.F.R. § 1201.3. Therefore, as you indicated that you would like to include a claim of removal in your complaint and that you would like to raise this allegation in the EEO process, this complaint is now considered to be a mixed-case claim. Your mixed-case

¹ Secretary's Order 01-2004 – Delegation of Authorities and Assignment of Responsibilities for the Department of Labor's Internal Equal Employment Opportunity Programs (April 15, 2004).

allegation will be processed separately from the other claim raised in your formal complaint.² Accordingly, as described in more detail below, your claim of removal will be processed separately and has been assigned a new case number with the ARB (2023-0053).

You raised an additional complaint, which does not relate to or stem from actions appealable to the MSPB. That complaint has also been accepted, and the acceptance letter for that complaint is being transmitted to you at the same time as this letter.

Background – Available Claims

Complainants may allege both the type of discrimination they are suffering, also known as the claim, and the protected class that is the reason for the discrimination, also known as the basis. For example, disparate treatment claims allege differences in treatment based on membership in a protected class, such as race, national origin, sex, or religion.

Disparate treatment claims require an adverse action, which is an injury or harm to a term, condition, or privilege of employment for which there is a remedy.³ Examples of an adverse action include termination, failure to promote, denial of transfer, refusal to hire or an alleged lowering of an annual performance evaluation, or some other action at work that is materially adverse to you.⁴ Parties alleging reprisal as a basis can allege disparate treatment or hostile work environment claims, but in contrast to other types of discrimination, parties can allege any discrimination that is reasonably likely to deter the employee from engaging in protected EEO activity and must show that a reasonable worker might be dissuaded from making or supporting a charge of discrimination because of the agency's action.⁵

In order for the ARB to accept a claim, you must have initiated contact with an EEO Counselor in a timely manner. Below you will find more information on the claim accepted for investigation and the information you must provide to prove the allegations in your complaint.

² See 29 C.F.R. § 1614.302.

³ *Bill A. v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 2020002312, 2020 WL 5657334, *1-2 (Aug. 27, 2020); *Diaz v. Dep't of the Air Force*, E.E.O.C. Request No. 05931049, 1994 WL 739653, *2 (Apr. 21, 1994); see also *Morgan v. Nat'l R.R. Passenger Corp.*, 536 U. S. 101, 114, 116 (2002).

⁴ *Id.* at 114.

⁵ *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 67-68 (2006).

Accepted Claim

After a review of your formal complaint and other documents in the file, the ARB accepts the following claim for investigation:

Whether the DOL's Office of the Solicitor (SOL) subjected you to unlawful disparate treatment based on your race (Black), sex (male), and/or in reprisal for protected activity when:

- 1. On September 12, 2023, DOL removed you from federal service.⁶**

EEOC regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.⁷ You made timely contact with the EEO counselor.

Your claim will be accepted as a claim of disparate treatment on all bases alleged.

If you disagree with this description of the claim accepted for investigation, please inform this office within fifteen (15) calendar days of your receipt of this letter.

Investigation Timeline

According to EEO regulations, the agency must complete its investigation within 180 calendar days of the filing date of your complaint (September 14, 2023). Your investigation will be completed on or by **Tuesday, March 12, 2024**. You and the agency may also agree to extend the investigative period for no more than an additional 90 days.

Upon completion of the investigation, the agency will provide you notice that a final decision will be issued within 45 days without a hearing.⁸ You may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final

⁶ The EEOC has held that when a proposal to take a personnel action results in the actual action occurring, the proposal is dismissed and merged into the alleged personnel action. *See Charles v. Dep't of the Treasury*, EEOC Request No. 05910190 (Feb. 25, 1991); *see also Magnuson v. Dep't of the Navy*, EEOC No. 0120101372 (Aug. 10, 2012). Thus, the June 23, 2023 proposed removal is dismissed, as it has merged with the September 12, 2023 removal.

⁷ *Mara v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 0120092086, 2009 WL 2985891, at *1 (Sep. 10, 2009).

⁸ 29 C.F.R. §1614.302(d)(1)(i).

decision.⁹ If a final decision is not issued within 120 days of the date of filing of the mixed case complaint (Friday, January 12, 2024), you may appeal the matter to the MSPB at any time thereafter.¹⁰ You also have the right to file a civil action, but may not do both.¹¹

An appeal to MSPB should be addressed as follows:

New York Field Office
Merit Systems Protection Board
26 Federal Plaza
Room 3137-A
New York, NY 10278-0022

The MSPB also accepts appeals online at www.mspb.gov. You must also certify to the MSPB that a copy of the appeal was sent to the agency.

Your Role in the Investigation and Legal Standards

It is your responsibility to cooperate with the EEO Investigator in the presentation of your affidavit. Without your statement, made under oath or affirmation, concerning the alleged discriminatory actions about which you filed your complaint, it is difficult to proceed with the investigation. You have the responsibility to provide your completed affidavit within the timeframe specified by the EEO Investigator. Pursuant to EEOC regulation 29 C.F.R. § 1614.107(a)(7), if you fail to provide requested information in the time specified by the EEO Investigator, your EEO complaint may be dismissed for failure to cooperate.

As the complainant, you are responsible for providing enough evidence to raise the inference of discrimination when the investigator contacts you to present a sworn statement. To raise an inference of discrimination, a complainant must establish a claim that is legally sufficient at first glance, which is sometimes called a *prima facie* case. What is legally sufficient depends on the type of claim you are bringing. Below you will find a description of what you will need to demonstrate in your affidavit, so that your claim is legally sufficient.

To establish a *prima facie* claim of unlawful disparate treatment based on sex and/or race, you must show that: (1) you are a member of a protected class (race and sex); and (2) you were treated less favorably in regards to the terms, conditions or

⁹ 5 C.F.R. § 1201.154(a).

¹⁰ 5 C.F.R. § 1201.154(b)(2).

¹¹ 29 C.F.R. § 1614.310(g).

privileges of employment than other similarly situated employees who are not members of your protected class(es).¹² A lack of comparative evidence is not necessarily fatal to your claim, if you can show you were discriminated against in some other way.¹³ You may also set forth additional evidence of acts from which, if otherwise unexplained, an inference of discrimination can be drawn.¹⁴

To establish a claim of reprisal discrimination, you must show: (1) you were previously engaged in protected activity, participated in the EEO process or opposed unlawful discrimination in accordance 29 C.F.R. § 1614.101(b); (2) the agency was aware of the protected activity; (3) you were subsequently subjected to an adverse employment action by the agency that is harmful to the point that it could well dissuade a reasonable worker from making or supporting a charge of discrimination; and (4) that the agency took the action(s) at issue at such time or in such manner as to suggest a causal connection between your protected activity and the action(s) at issue in this complaint.¹⁵

For any of the above claims, if you establish a *prima facie* case through circumstantial evidence, then the burden of production shifts to the agency to articulate some legitimate, nondiscriminatory reason for its challenged action. If the agency is able to do this, it will prevail unless you are able to prove, by a preponderance of the evidence, that the legitimate reason articulated by the agency was not the true reason but was a pretext for discrimination.

¹² *Irby v. U.S. Postal Serv.*, E.E.O.C. Appeal No. 01991479, 2001 WL 1103840, at *2 (Sep. 14, 2001).

¹³ *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576 (1978); *see also* Enforcement Guidance on *O'Connor v. Consolidated Coin Caters Corp.*, EEOC Notice No. 915.002, n.4 (Sept. 18, 1996).

¹⁴ *Furnco Constr. Co.*, 438 U.S. at 576.

¹⁵ *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Clay v. Dep't of Treasury*, E.E.O.C. Appeal No. 01A35231, 2005 WL 229766, at *4-5 (Jan. 25, 2005); *Talley v. Dep't of Treasury*, E.E.O.C. Appeal No. 01A3500, 2004 WL 1719232, at * 7 (July 20, 2004).

An EEO investigator assigned by the National Equal Employment Opportunity Investigative Services Office (NEEOISO) will be contacting you in the near future to begin the investigation. If you have any questions, please contact my staff at (202) 693-6200 or at Contact-ARB@dol.gov.

Sincerely,



SUSAN HARTHILL
Chair and Chief Judge
Administrative Review Board

cc: Thomas Hicks via e-mail
SOL Workplace Equality Compliance Officer

Brandi A. Peters via e-mail
Counsel for Employment Law, MALS

Investigator Sent via ELFS
NEEOISO

Oscar L. Hampton III via e-mail
8405 Henry Way
Glenside, PA 19038
olhamptoniii@gmail.com