



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

[REDACTED]
Dominica H.,¹
Complainant,

v.

Don Wright,
Acting Secretary,
Department of Health and Human Services
(Health Resources and Services Administration),
Agency.

Appeal No. 0120150971

Hearing No. 531-2014-00019X

Agency No. HHS-HRSA-046-2013

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated November 25, 2014, finding no discrimination with regard to her complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we AFFIRM a portion of the Agency's final decision finding no discrimination and we REVERSE a portion of the Agency's final decision finding no discrimination.

BACKGROUND

In her complaint, Complainant alleged discrimination based on disability, sex (female), age (over 40), and in reprisal for prior EEO activity when she was subjected to harassment in that:

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

(1) Since April 1, 2011, her request for reasonable accommodation was denied as evidenced by the following:

- (a) On April 12, 2011, she was denied a copy of the Federal Occupational Health's physician report.
- (b) In May 2011, the Agency failed to provide her an update concerning her reasonable accommodation request.
- (c) In June 2011, she was provided the option of elevating her request to telework throughout Department of Health and Human Services, since Bureau of Clinician and Recruitment Services (BCRS) could not grant her accommodation request.
- (d) In August 2011, the Agency informed her that the Reasonable Accommodations Coordinator (RAC) had changed.
- (e) On December 23, 2011, she was informed by the RAC that she had 15 days to decide whether reassignment would work as a reasonable accommodation.
- (f) On May 23, 2012, the Agency was unresponsive to her request for a reasonable accommodation.

(2) Since April 13, 2011, her request to be transferred or reassigned was denied:

- (a) On April 13, 2011, she requested a transfer but it was ignored.
- (b) On March 23, 2012, she was denied a transfer out of her supervisor's (S1) office.

(3) Since April 13, 2011, she was excessively admonished, counseled, and disciplined:

- (a) On April 13, 2011, she was issued a Memorandum of Caution regarding not following the proper chain of command.
- (b) In October 2011, she was removed from the file room after informing S1 of a security breach.
- (c) On November 16, 2011, she was admonished by S1 for not following the chain of command and for not following proper procedures for procuring supplies.
- (d) On January 19, 2012, she was informed that she was required to move to be near S1's suite of offices.
- (e) On Monday, February 13, 2012, she was placed on administrative leave until February 14, 2012,² and was informed that she was required to be available during duty hours.
- (f) On Wednesday, February 15, 2012, she was sent an email by S1 to return to work that day. On February 21, 2012, S1 proposed a five-day suspension.
- (g) On February 28, 2012, S1 reviewed her email without following proper procedures.

² It appears that the Agency, in its decision, made a typographical error by indicating the alleged incident occurred until February 14, 2013. The parties agreed that it occurred until February 14, 2012.

- (h) On March 22, 2012, she was issued a Memorandum regarding computer use expectations.
 - (i) On March 27, 2012, she was issued a decision for a five-day suspension by the Deputy Associate Administrator.
 - (j) On April 6, 2012, S1 issued an email detailing "return to duty expectations."
- (4) In September 2011, she was asked to prove that she could engage in eight hours of measurable work other than reviewing and responding to emails.
- (5) On November 1, 2011, she was treated in a derogatory manner when S1 screamed and cussed at her.
- (6) In December 2011, she asked about the Voluntary Leave Transfer Program (VLTP), which was never offered to her, but was offered to other Agency employees.
- (7) Since January 2012, her request to telework was denied, reduced, altered, and scrutinized:
- (a) In January 2012, S1 instructed all of his staff to complete an episodic telework agreement for measurable work and that it would not be used for personal emergencies.
 - (b) On February 9, 2012, she requested to telework because she was not feeling well and was granted only four hours.
 - (c) On February 10, 2012, she asked to enter eight hours of leave into the Integrated Time and Attendance System for a day that she was approved to telework, she was yelled at, and she was escorted out of the building.
- (8) Beginning June 7, 2012, and culminating on September 12, 2012, the Agency took the following actions:
- (a) On June 7, 2012, she received a notice of proposed removal and was escorted off the property.
 - (b) On July 19, 2012, S1 rescinded the notice of proposed removal dated June 7, 2012.
 - (c) On July 19, 2012, S1 reissued the notice of proposed removal.
 - (d) On September 12, 2012, she was terminated from government service.
- (9) On Wednesday, February 15, 2012, S1 explained that her prior behavior was disruptive and instructed her not to go to EEO, NTEU (the National Treasury Employees Union), the nurse's station, or the Employee Assistance Program (EAP) office during working hours without telling him first.
- (10) On February 21, 2012, she was denied advanced sick leave.
- (11) In March 2012, S1 instructed other employees not to speak to her.

After completion of the investigation of the complaint, Complainant requested a hearing before an Equal Employment Opportunity Commission's Administrative Judge (AJ) on June 18, 2013. However, on November 8, 2013, Complainant withdrew the hearing request. On December 13, 2013, the AJ remanded the complaint back to the Agency for issuance of a final Agency decision. On November 25, 2014, the Agency issued its final Agency decision concluding that it asserted legitimate, nondiscriminatory reasons for its actions which Complainant failed to rebut.³ Therein, Complainant was provided with her right to file an appeal with the Merit Systems Protection Board (MSPB) as the complaint was a mixed case. On January 6, 2015, Complainant, instead, filed the instant appeal to the Commission concerning the Agency's final decision, except claim (8)(d), i.e., her September 12, 2012 removal. Meanwhile, on January 7, 2015, Complainant also filed an appeal with the MSPB. Complainant indicates that she did so to establish that the MSPB did not have jurisdiction over the claims brought before the Commission. On February 25, 2015, the parties filed a joint motion to dismiss the MSPB appeal, given that Complainant had indicated that she did not want to pursue an appeal of her removal. On March 3, 2015, the MSPB dismissed the appeal without prejudice.

In the instant appeal, Complainant requests the Commission issue a default judgement in her favor due to the Agency's failure to timely issue its final decision and due to the inadequately developed report of investigation of the complaint. Complainant's attorney also indicates and the record reflects that he stamped the instant appeal brief package via his office postage machine after 8 p.m. on March 19, 2015, i.e., the date of the deadline to file Complainant's appeal brief after two extensions to file the brief by the Commission, but the package was not picked up by the United States Postal Service until the following day, March 20, 2015. Under the foregoing circumstance, the attorney requests the Commission accept his one-day late appeal brief.

ANALYSIS AND FINDINGS

Initially, the record indicates that the Agency's final decision notified Complainant of her right to file an appeal to the MSPB and not to the Commission. However, since the MSPB dismissed Complainant's MSPB appeal without prejudice, Complainant's instant appeal is now properly before the Commission. In the instant appeal, Complainant specifically indicates that she is not appealing the Agency's final decision regarding claim (8)(d), i.e., her September 12, 2012 removal from employment at the Agency. Thus, we will not address the removal issue in this decision.

In the instant case, without deciding whether Complainant's appeal brief was timely filed, we will nevertheless consider the arguments therein in this decision. Regarding Complainant's

³ The record indicates that on March 11, 2013, the Agency dismissed two claims concerning her union representative's obtaining documents and her grievance for failure to state a claim and/or for raising the matter in a grievance pursuant to 29 C.F.R. §§ 1614.107(a)(1) and (4), respectively. Since Complainant does not contest this dismissal on appeal and because we see no error in the Agency's dismissal, we need not alter the Agency's dismissal.

request for a default judgment, we are not persuaded that the Agency's delay in issuing its final decision constitutes a basis for finding in her favor with respect to the issues raised herein. The Agency is reminded that it is required to issue a final Agency decision in a timely manner under the AJ's dismissal order. Despite Complainant's argument, after a review of the record, we find that the report of investigation is adequately developed, including adequate documentation, for the issuance of the final Agency decision.

Turning to the Agency's finding of no discrimination concerning the complaint, as this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Reasonable Accommodation:

The Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. To establish Complainant was denied a reasonable accommodation, she must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) ("Enforcement Guidance"). Under the Commission's regulations, an Agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o) and (p). Here, we will assume without deciding (for the purposes of this decision) that Complainant is an individual with a disability.

In claims (1) and (7), Complainant claimed that she was denied her request to telework as a reasonable accommodation. At the relevant time, Complainant was employed by the Agency as a Management Analyst, GS-0323-09, Bureau of Clinician and Recruitment Services (BCRS), Office of Business Operations (OBO), Health Resources and Services Administration (HRSA), in Rockville, Maryland. Complainant indicated that she suffered from severe depression, anxiety, Crohn's disease, diabetes, anemia, back problems, feet problems, nerve problems, and migraines; and her health was negatively and severely impacted from a near-fatal car accident in August 2010. Complainant stated that she could perform the essential functions of her job with or without an accommodation.

Regarding claim (1)(a), management denied they had any knowledge that Complainant requested the Federal Occupational Health's physician report via FOIA (Freedom of Information Act). On

appeal, Complainant contends that the Agency failed to include the Federal Occupational Health's physician report and the FOIA request in its report of the investigation. However, the investigator noted that despite his attempts to obtain the subject documents, the Agency indicated that it had no record Complainant made the subject request. The investigator further noted that although he requested Complainant provide him with a copy of the subject FOIA request, she never provided him with the document.

Regarding claim (1)(b), the record reflects that Complainant submitted her FMLA (Family and Medical Leave Act) form dated January 19, 2011, wherein her psychiatrist indicated that her psychotherapy began in January 2009, and recently she was diagnosed with recurrent major depression, anxiety disorder, and chronic insomnia. Therein, the psychiatrist recommended that Complainant be allowed flexibility in her work hours due to her medication regimen and be allowed to telecommute at least one day per week to help her manage anxiety and mood symptoms that could be exacerbated by her commute and work place environment.

S1 indicated that Complainant's request for flexible work hours was approved but telework was not approved because she could not perform the essential functions of her position duties at home even for one day per week. Specifically, S1 stated that as a Management Analyst, Complainant's functional role was that of a Records Management Specialist. S1 further stated that his office provided loans and scholarships to thousands of clinicians serving at many thousands of clinical sites throughout the United States and those paper-based records were meticulously kept in two onsite storage facilities. S1 stated that most of these records contained private and/or sensitive information and could not leave the building. S1 indicated that since Complainant's position duties included maintaining customer files, drafting inventory spreadsheets, file room management, customer service, and drafting congressional file reports, she could not perform her duties from home or from an offsite location.

In June 2011, in response to S1's denial of telework, Complainant suggested that she could scan files at home and then telework. S1 however indicated that telework would still not be a possible option because there were 300,000-500,000 estimated sheets of paper and the data was sensitive and under restricted access which could not leave the file room and could not be taken to her home as she suggested.

Regarding claim (1)(c), the Agency indicated that it made attempts to find Complainant alternative positions that could accommodate her telework request but she was reluctant or unwilling to agree to conditions which may have involved reassignment to another Agency position outside of HRSA.

Regarding claim (1)(d), S1 acknowledged that multiple employees held the RAC position during the period of Complainant's requests. The record indicates that after RAC #1 died, RAC #2 held that position until she was transferred to another position in July 2011. RAC #3 then held that position until she was transferred to another Agency in February 2013. Since then the Acting RAC #4 served in the position.

Complainant contends on appeal that the investigator failed to obtain an affidavit from RAC #3 who no longer worked for the Agency at the time of the investigation. We note that the investigator, however, noted that he attempted to interview RAC #3 on multiple occasions but was forced to provide interrogatories to her due to her uncooperativeness and when she provided him with her affidavit it was incomplete and non-responsive. The investigator further noted that he interviewed RAC #4 and he adequately supplemented RAC #3's responses.

We note that the EEO Counselor's report reflects that the EEO Counselor interviewed RAC #3, who was serving as a RAC at that time. During the interview, RAC #3 explained her involvement and interaction with Complainant concerning her reasonable accommodation requests and management officials' ultimate decision denying the telework request because her position was not portable.

Regarding claim (1)(e), S1 indicated that he was not aware of the 15-day time frame for Complainant's reassignment offer. The record indicates that Complainant did not accept the offer because the reassignment offered was not helpful to her situation. Complainant does not claim that she needed more time to make a sound decision concerning the reassignment.

Regarding claim (1)(f), Complainant indicated that on May 23, 2012, an identified Agency doctor renewed her request for a reasonable accommodation in the form of four hours of leave twice per week for medical appointments and up to two days of leave each month for flare ups of her conditions. Although Complainant claimed that the Agency failed to respond to this request initially, she acknowledged that the Agency eventually responded to her requests. Management and RAC #4 denied having any knowledge of this request.

Regarding claim (7)(a), S1 indicated that in January 2012, he instructed his staff, including Complainant, to complete an episodic telework agreement, which was a standard form used by the Agency to inform employees of the telework criteria, as requested by the Executive Office. S1 noted that the Executive Office requested all HRSA employees to complete the agreement and he too completed the same. Complainant does not contest this.

Regarding claims (7)(b) and (7)(c), S1 indicated that on February 9, 2012, Complainant initially told him she was sick and asked for four hours of telework. S1 stated that he then asked Complainant to provide him with a work plan for four hours telework but she failed to do so and her request was denied. Thus, stated S1, on February 10, 2012, he informed Complainant to request eight hours of leave for that day. S1 denied yelling at her. We find that Complainant's claim that she was escorted out of the building did not occur on February 10, 2012; rather it occurred on February 13, 2012, which is discussed in claim (3)(e), herein.

Based on the foregoing, we find that Complainant failed to show that the Agency denied her a reasonable accommodation for her claimed disabilities. Furthermore, Complainant does not claim that she was required to perform duties beyond her medical restrictions. Upon review, we find that Complainant failed to show that she could perform the essential functions of her Management Analyst position at home since her duties involved maintaining and managing

sensitive files in the file room and those files could not be moved out of the file room. After a review of the record, we find that although Complainant sought telework as a reasonable accommodation for her conditions, i.e., anxiety and mood symptoms, she provided no evidence as to how teleworking could effectively resolve her conditions.

On appeal, Complainant contends that the Agency failed to produce any evidence of an interactive process regarding her telework request as a reasonable accommodation. The record clearly reflects that as soon as Complainant requested telework in January 2011, the Agency engaged in an interactive process as reflected in her own January 31, 2011 email, described in claim (1), and S1's February 7, 2011 email denying the request due to her inability to perform the essential functions of her duty at home. Complainant thereafter unsuccessfully continued to request telework.

Complainant also contends on appeal that the investigator did not attempt to contact two critical witnesses, i.e., S1's Deputy and the File Room Project Manager. The record indicates that the File Room Project Manager reported to S1's Deputy who reported to S1. The record also indicates that Complainant reported to these individuals who had supervisory capacity, in addition to S1, concerning her work projects and her daily work assignments with the site file assignments. Complainant indicates that since she worked with these individuals in the file room, they could explain her duties and whether those could be performed at home. However, there is no evidence in the record to show that during the investigation, Complainant requested these individuals be interviewed as witnesses by the investigator; nor is there any evidence that she provided a rebuttal to the investigator's report concerning the purported deficiencies when she was given a chance to do so. We note that Complainant cannot for the first time contest this matter on appeal.

Therefore, we find that Complainant failed to show that the Agency denied her a reasonable accommodation for her claimed disabilities under claims (1) and (7).

Disparate Treatment:

To prevail in a disparate treatment claim such as in the instant case, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (November 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley v. Dep't of Veterans Affairs,

EEOC Request No. 05950842 (November 13, 1997); Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (December 14, 1995).

Regarding claim (2)(a), S1 indicated that Complainant requested an immediate transfer on April 13, 2011, because when she came back from her absence, no one in the office welcomed her back to the office whereas another employee whose wife had recently given birth congratulated him about their new baby. Complainant stated in her April 13, 2011 email that she “was totally ignored” and “a little concern for a member of a team would be nice.” Therein, Complainant requested “an immediate transfer.” S1 stated that he forwarded Complainant’s transfer request to upper managers but it was denied because there were no vacant, commensurate position at that time. S1 noted that Complainant had already been transferred on two other occasions before she was assigned to S1’s unit. Management acknowledged that Complainant repeatedly requested a transfer thereafter but it was denied because there was no available position to which she could be transferred. Complainant has not shown that the Agency’s reason for not transferring her was a pretext for discrimination.

In claim (2)(b), Complainant claimed that on March 23, 2012, she was denied a transfer out of S1’s office. On appeal, Complainant contends that the Agency failed to search and find a vacant position to which she could transfer as an accommodation at that time. We disagree that Complainant’s transfer request was made as an accommodation request for her claimed disability. The record indicates that in her March 23, 2012 email at 3:22 p.m., Complainant clearly notified S1 that this transfer request was “not about meeting my needs for reasonable accommodations” rather it was “about me being treated unfairly in BCRS and being retaliated against.” S1 indicated that Complainant’s transfer request was not granted at that time because there was no vacant position to which she could be transferred/reassigned. Complainant has not shown that the Agency’s reason for not transferring her was a pretext for discrimination.

Regarding claim (3)(a), S1 acknowledged that on April 13, 2011, he issued Complainant a Memorandum of Caution because instead of presenting her concerns about the office business to S1, she went directly to the Executive Officer and complained that no one at BCRS knew how to properly deal with “File Plans.” S1 previously counseled Complainant about following her chain of command on numerous occasions. Complainant does not dispute this. We find no discriminatory animus in the actions in claim 3(a).

Regarding claim (3)(b), S1 denied Complainant was removed from the file room in October 2011. S1 indicated during the relevant time, the entire building was under renovation and the entire file room was scheduled to be moved. S1 stated that building management, without S1’s knowledge, decided to move the file room on that day in October 2011, and Complainant informed S1 about what was going on in the file room which could be a possible security breach. S1 stated that he then asked everyone to leave the room to determine what was happening and for security purposes. S1 indicated that he then thanked Complainant for bringing the matter to his attention. Complainant does not dispute this. We find no discriminatory animus in the actions in claim 3(b).

Regarding claim (3)(c), S1 acknowledged counseling Complainant, once again, on November 16, 2011, for reporting directly to the Executive Office without speaking with him concerning the office procedures for procuring supplies. We find that Complainant has not shown this action was discriminatory.

Regarding claim (3)(d), Complainant claimed that on January 19, 2012, she was informed that she was required to move to be near S1's suite of offices. S1 indicated that at the relevant time, the building was undergoing renovations and management informed him that everyone needed to move out of the other wings to his suite. S1 stated that he initially instructed Complainant to move from the 8th floor to the 15th floor, where most of his group was located. S1 stated that Complainant resisted the move and she was thus ultimately permitted to remain on the 8th floor. S1 noted that Complainant was the only employee who refused to move with his entire unit and he asked the Executive Officer for her to stay on the 8th floor. We find that Complainant has failed to show the Agency action identified in claim (3)(d) was discriminatory.

Regarding the portion of claim (3)(f) concerning S1's February 15, 2012 email, S1 indicated that he merely notified Complainant that she was no longer on administrative leave and asked her to return to work. It is noted that the portion of claim (3)(f) concerning the February 21, 2012 proposed suspension is addressed below.

Regarding claim (4), Complainant claimed that in September 2011, she was asked to prove that she could engage in eight hours of measurable work other than reviewing and responding to emails. S1 indicated that at the relevant time, as Complainant continued to pursue her telework request, he tried to entertain her request and asked her to articulate how she could perform her duties at home, obtain authorization from her team leader, and discuss the work she could complete while teleworking. Complainant failed to do so. Simply engaging in the interactive process, as the Agency did here, does not constitute discrimination.

Regarding claim (5), S1 denied he screamed and cussed at her on November 1, 2011. S1 indicated that it was Complainant who screamed at him on several occasions. Complainant claimed that it was actually S1's deputy, and not S1, who screamed at her saying he was "tired of the bullshit" on that day. However, the Agency indicated that there was no record of the incident. We note that the record is devoid of S1's deputy's statement concerning the incident. Although the record reflects that Complainant, S1, and S1's deputy corresponded back and forth via emails, we see no message wherein which Complainant mentioned the subject incident. Nevertheless, even if we assume that S1's deputy indeed made the subject comment, Complainant does not indicate that the comment in fact concerned her; nor does she indicate that he made a similar comment other than on this single occasion. Furthermore, we find no indication that the remark, even if made, was motivated by discrimination as alleged.

Regarding claim (6), S1 indicated that Complainant applied for the VLTP and was approved on January 18, 2012. S1 also stated that Complainant was offered the VLTP on many other occasions. Complainant appears to be alleging that the Agency was simply not proactive in offering her VLTP; she is not alleging that she was actually denied VLTP. Even if she is alleging

that she was denied VLTP, she has not shown that she was denied VLTP. Furthermore, we find that Complainant has not shown that any Agency action in this claim was motivated by discrimination.

Regarding claim (8), we note that Complainant is not appealing her September 12, 2012 removal. The other incidents alleged in claim (8) were effectively merged into the actual removal which Complainant has asked not be part of this appeal. Therefore, we find that these claims are not independent claims which we will review in this decision. We will nevertheless consider the portion of claim (8) leading up to the actual removal as part of her harassment claim.

Regarding claim (9), S1 indicated that he merely informed Complainant to let him know of her whereabouts when she intended to leave her duty station because he often had trouble locating her during her duty hours and she was often gone for long periods of time. S1 stated that Complainant had a right to, and was not denied the opportunity to, go to the EEO office, the union office, the nurse's station, or the EAP office. We find that Complainant has failed to show by a preponderance of the evidence that she was restricted or improperly or discriminatorily discouraged from going to the Agency's EEO office, the union office, the nurse's station, or the EAP office.

Regarding claim (10), Complainant claimed that on February 21, 2012, she was denied advanced sick leave. S1 indicated that at the relevant time, Complainant requested "emergency" advanced sick leave and there was no such thing as "emergency" advance sick leave. S1 informed Complainant that she needed to follow the standard procedures for requesting advanced sick leave. S1 stated that he did not deny the requested leave. S1 noted that at the relevant time, Complainant already had an advanced sick leave balance and was trying to resolve the issue with the timekeeper. We find that Complainant has not shown that she followed proper procedures for requesting leave and we find that Complainant failed to show that similarly situated persons were treated differently. We find no evidence that the Agency's explanation for its actions regarding claim (10) was a pretext for discrimination.

Regarding claim (11), S1 denied he instructed other employees not to speak to Complainant at the relevant time. Complainant indicated that her coworker/friend told her that the coworker was given a written memorandum not to speak with her. Complainant admitted that she had never seen that written memorandum. The record is devoid of the subject memorandum. The identified coworker denied S1 ever instructed her not to speak to Complainant. Because we find no persuasive evidence that the incident in claim (11) ever occurred, we find no discrimination for this claim.

After a review of the record, we find that Complainant has failed to prove that the Agency's explanations concerning its actions in claims (2), (3)(a) - (d), a portion of (3)(f), (4) - (6), and (9) - (11) are a pretext for discrimination. Furthermore, we find that Complainant failed to show that there were any similarly situated employees not in her protected groups who were treated differently under similar circumstances. Regarding her claim of harassment, we find that

Complainant failed to establish that it was related to any protected basis of discrimination. Based on the foregoing, we find that Complainant has failed to show that the Agency's actions were motivated by discrimination as she alleged in claims (2), (3)(a) - (d), a portion of (3)(f), (4) - (6), and (9) - (11).

Reprisal:

Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Rehabilitation Act prohibit an employer from retaliating against an employee for engaging in protected activity. A Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 802 (1973)). Specifically, in reprisal, and in accordance with the burdens set forth in McDonnell Douglas and Coffman v. Dep't of Veterans Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such manner that a retaliatory motive may be inferred. See Clay v. Dep't of the Treasury, EEOC Appeal No. 01A35231 (Jan. 25, 2005).

Here, we find that Complainant has established a prima facie case of retaliation. The Commission has held that any action by an Agency manager that interferes with an employee's rights or has the effect of intimidating or chilling the exercise of those rights under the EEO statutes constitutes a *per se* violation. Binseel v. Dep't of the Army, EEOC Request No. 05970584 (October 8, 1998) (complainant was told that filing an EEO suit was the wrong way to go about getting a promotion); Yubuki v. Dep't of the Army, EEOC Request No. 05920778 (June 4, 1993); see Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEO process).

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. EEOC Compliance Manual, Section 8: Retaliation, No. 915.003, at 8-13 (May 20, 1998). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

We find that the Agency's actions under claims (3)(e) – (3)(j) which were based on Complainant's February 13, 2012 email, including her contacting the Executive Office, constituted retaliation. The record indicates that in her February 13, 2012 email to the HRSA Director/Administrator, Complainant wrote as follows:

[HRSA Director/Administrator]. I am writing you from the health unit here at HRSA. I need some help. Where do I turn. I am being so discriminated [against] in BCRS. I am sick. I was involved in a near fatal car accident. I have asked for reasonable accommodations and have been ignored for over a year. I thought HRSA was a family. Why am I being hurt so bad. Why can't I be afforded the same as others in my bureau. I am scared. I am so upset and this scares me. Help me please. The union and EEO and EAP don't answer. Please help me. Thank you.

The HRSA Director/Administrator, without responding, forwarded the email to a HRSA management who in turn forwarded it to the BCRS Associate Administrator who ultimately forwarded the email to S1. S1 indicated that after he received the forwarded email, he talked to Complainant about that email. S1 stated that Complainant became very upset. S1 then discussed the foregoing with the EEO office and senior management and it was collectively recommended that Complainant be placed on administrative leave due to her apparent condition and demeanor. S1 indicated that the Division of Workforce Management drafted the administrative leave memorandum which he issued to Complainant and she was escorted out of the building and sent home. Subsequently, on February 21, 2012, stated S1, he issued the proposed five-day suspension, dated February 16, 2012, to Complainant due to the foregoing email incident, including her prior disruptive behavior for not following his instructions. On March 27, 2012, Complainant was ultimately issued the five-day suspension for April 2 – 6, 2012.

S1 further indicated that after the email incident, he in tandem with the IT department reviewed Complainant's emails to see if she had sent out similar emails to other government officials other than the Director of HRSA. S1 found that Complainant had excessive misuse of her computer for personal use during business hours. Based on this finding, S1 issued Complainant the Memorandum on March 22, 2012, regarding her computer use expectation. In his April 6, 2012 email, S1 notified Complainant of return to duty expectations wherein which he made a reference to the March 22, 2012 Memorandum concerning her usage of the computer, along with other employment matters.

Upon review, we find that S1's actions against Complainant, i.e., concerning administrative leave, the 5-day suspension, reviewing her emails, the March 22, 2012 memorandum, and the return to duty expectations email, described above, under claims (3)(e) – (3)(j)⁴, constitute a violation of Title VII since his actions were likely to have a chilling effect and deter employees from full exercise of their EEO rights. 29 C.F.R. § 1614.101(b). Agencies have a continuing duty to promote the full realization of equal employment opportunity in its policies and practices in every aspect of personnel matters. 29 C.F.R. § 1614.102. Agencies must insure that its

⁴ Only a portion of claim 3(f).

managers promote and enforce a vigorous equal employment opportunity program. Pruette v. U.S. Postal Service, EEOC Appeal No. 01951567 (March 3, 1998). The Agency's actions involving Complainant in claims 3(e) – 3(j)⁵ all stemmed from Complainant's attempt, in part, to assert a claim of discrimination to the HRSA Director. Furthermore, Complainant was apparently pointing out that the EEO office had not helped her and were not answering her queries. This email by Complainant is certainly protected EEO activity and the Agency's actions thereafter in attempt to suppress or dissuade or punish such activity constitutes unlawful retaliation. After a review of the record, we do not find that the foregoing retaliatory actions on the part of the Agency were also motivated by the other bases alleged by Complainant.

Mixed Motive:

We note that where there is evidence that discrimination was one of multiple motivating factors for an employment action, that is, the employer acted on the bases of both lawful and unlawful reasons, such as a case is known as a "mixed motive" case. Once a complainant demonstrates that discrimination was a motivating factor in the employer's action, the burden shifts to the employer to prove, by clear and convincing evidence, that it would have made the same decision, even if it had not considered the discriminatory fact. See Price Waterhouse v. Hopkins, 490 U.S. 228, 249, 258 (1989); Tellez v. Dep't of the Army, EEOC Request No. 05A41133 (Mar. 18, 2005). If the employer is able to make this demonstration, complainant is not entitled to personal relief such as damages, reinstatement, hiring, promotion, or back pay. But in those circumstances complainant may be entitled to declaratory relief, injunctive relief, and attorney's fees or costs. See Walker v. Soc. Sec. Admin., EEOC Request No. 05980504 (Apr. 8, 1999). In this case, the Agency has not argued and has not shown by clear and convincing evidence that it would have taken the same actions even absent the retaliation we found in claims (3)(e) – (3)(j) (not including the portion of (3)(f) regarding the February 15, 2012 return to work email). Furthermore, the evidence indicates that retaliation was the key factor in all of these claims for which we find discrimination and that without the retaliatory motivation, the whole sequence of events would never have commenced.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination regarding claims (1), (2), (3)(a) - (d), a portion of (3)(f) (the February 15, 2012 return to work email), (4) – (7), and (9) – (11) is **AFFIRMED**. The Agency's final decision finding no discrimination regarding claims (3)(e) – (3)(j), except the portion of (3)(f) identified above, is **REVERSED**. The Agency shall comply with the relief in the following Order.

ORDER

The Agency shall take the following actions:

⁵ Only a portion of claim 3(f).

1. Within 60 days of the date this decision is issued, the Agency shall remove and expunge the March 22, 2012 memorandum regarding computer use expectation, the March 27, 2012 five-day suspension, and the April 6, 2012 email regarding return to duty expectations from all Agency official personnel files.
2. Within 60 days of the date this decision is issued, the Agency shall determine if Complainant is due any back pay as a result of the March 27, 2012 five-day suspension. Within 60 days from the date of that determination, the Agency shall pay that amount due Complainant. The Agency shall submit a copy of the final decision on back pay to the Compliance Officer at the address set forth herein.
3. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages incurred as a result of the Agency's discriminatory actions. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision on compensatory damages no later than 90 days after the date this decision is issued. The Agency shall pay Complainant the compensatory damages as determined by the Agency within 30 days from the date of the Agency's decision on compensatory damages. The Agency shall submit a copy of the final decision on compensatory damages to the Compliance Officer at the address set forth herein.
3. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to the responsible management officials regarding the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings under, the Federal equal employment opportunity laws.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the management officials identified as being responsible for the discrimination perpetrated against Complainant. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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

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

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

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


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

November 22, 2017

Date