



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

[REDACTED]
Dixie B.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 0120170175

Hearing No. 560-2014-00291X

Agency Nos. 2003-0657-2012104828,
2003-0657-2014102137

DECISION

On September 27, 2016, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 24, 2016, final decision concerning her consolidated equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission **AFFIRMS** in part and **REVERSES** and **REMANDS** in part the Agency's final decision.

ISSUES PRESENTED

The issues presented are: (1) whether the Agency failed to protect Complainant's confidential medical records in violation of the Rehabilitation Act; (2) whether the Agency made an impermissible medical inquiry in violation of the Rehabilitation Act; (3) whether the preponderance of the evidence in the record establishes that Complainant was subjected to disparate treatment or a hostile work environment based on race, disability, and/or reprisal; and

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.

(4) whether the preponderance of the evidence establishes that Complainant was denied a reasonable accommodation for her disability.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as a Medical Technician/Phlebotomist, GS-0645-04, at the Agency's St. Louis, Missouri VA Medical Center (VAMC) facility. Through November 2012, Complainant's first-line supervisor was a Health Technician Supervisor (S1). In November 2012, a new Health Technician Supervisor (S2) became her first-line supervisor. The Chief of the Pathology and Laboratory Service (S3) was Complainant's second-line supervisor.

Complainant is Caucasian, and she stated that she had engaged in prior protected EEO activity prior to the time of events giving rise to these two complaints. According to Complainant, she has chronic back pain with degenerative disc disease and major depression and anxiety with frequent panic attacks. Because Complainant is a veteran, she was treated at the St. Louis VAMC for these conditions. Complainant stated that her back condition causes urinary retention, so she requires catheterization. Complainant averred that sometimes she was admitted to the hospital for IV pain medication.

According to Complainant, she was not properly paid from March 2012 through May 2012. Specifically, Complainant alleged that she was incorrectly told that she could receive overtime pay or night differential and weekend premium pay, but not all three. Complainant stated that in June 2012 she was paid a portion of the back pay that she was due but that she was told that the remaining back pay would not be forthcoming because the schedules for those dates had been destroyed.

Complainant averred that from March 2012 through January 2013, S1 would not allow her to work overtime. According to Complainant, S1 reserved all available overtime for her friends and her sister. S1 stated that she posted overtime as it became available and that overtime was reserved on a first come, first served basis. According to S1, Complainant did work some overtime during the period in question.

Complainant alleged that in April 2012 S1 wrote her up for her sick leave usage. Complainant averred that she had been admitted to the hospital multiple times and that she provided medical documentation to substantiate her need for sick leave. According to S1, she issued Complainant a written warning because she observed a pattern of Complainant calling out sick on the Friday before a weekend off or on the Monday after a weekend off.

Complainant stated that from June 2012 through September 2012, she was frequently required to work alone and that S1 ignored her requests for assistance. S1 denied ignoring Complainant's requests. According to S1, Complainant requested to work on the night shift, and all phlebotomists on the night shift worked by themselves at times.

Complainant alleged that in September 2012 she told S1 that a coworker (C1) intimidated and threatened her, but that S1 took no action. According to the record, S1 investigated and verbally counseled C1 based on her finding that C1 had not intimidated or threatened her but had acted rudely toward Complainant.

Complainant averred that in or around September 2012 her coworkers accessed her medical records and discussed her medical information. According to Complainant, on September 26, 2012, she heard coworkers joking about her medical condition and that she was a disabled veteran treated at the VAMC. S1 denied knowledge of coworkers joking about Complainant's medical condition. The record contains a May 27, 2014, letter to Complainant from the St. Louis VAMC Privacy Officer (PO1), which states that, after an investigation, he determined that S1 and four of Complainant's coworkers viewed Complainant's VAMC medical records without proper authorization for doing so.

According to Complainant, in October 2012 her request to change the holiday rotation schedule was ignored by S1. S1 denied ignoring Complainant and stated that she told her that it was her responsibility to find coverage if she wanted additional days off during the holiday season.

Complainant stated that in November 2012 S1 sent an email falsely accusing Complainant of being late for work. According to S1, Complainant was in fact late for work on the date in question. Complainant averred that in November 2012 S1 accused her of making defamatory statements about S2. S1 denied accusing Complainant of making defamatory statements about S2.

Complainant alleged that in November 2012 and on January 3, 2013, S2 verbally counseled her. S2 denied counseling Complainant in November 2012 or on January 3, 2013. According to S2, the only time he verbally counseled Complainant was in July 2013.

Complainant stated that in February 2013, her father-in-law died but that the funeral arrangements were not announced and that her coworkers did not send her a card. According to Complainant, when her African-American coworkers lost a loved one, they received cards, and announcements would be made about the funeral services.

In March 2013, Complainant requested to be placed in a higher-graded Medical Lab Technician position under the special Veterans' Recruitment Appointment (VRA) authority. According to S3, the position in question required a bachelor's degree, which Complainant did not possess. The record indicates that Complainant has two associate's degrees but does not have a bachelor's degree.

According to Complainant, in April 2013 she noticed that a negative comment regarding her performance had been added to her fiscal year (FY) 2012 performance appraisal by S1 after Complainant had signed it. The Human Resources Manager (HR1) stated that S1 did add a comment to Complainant's appraisal after Complainant had signed it. S1 stated that she added the comment because she had discussed it with Complainant at the meeting where Complainant signed the appraisal.

According to HR1, the document was removed from Complainant's personnel file because she had not been given the opportunity to initial the change after having signed the appraisal.

Complainant alleged that in April 2013 a coworker approached S2 about donating leave to Complainant but was turned away. HR1 stated that Complainant was accepted into the leave donation program and denied that donors were turned away.

Complainant stated that in May 2013 she was denied the opportunity to work an alternate tour of duty, the day shift. According to S1 and S3, there was a shortage of phlebotomists on the day shift at this time. S1 and S3 stated that they did not allow Complainant to switch to the day shift because she was frequently absent.

Complainant averred that in May 2013 she contacted the VAMC's Executive Office Action Line but that she did not receive a response. The record contains copies of Executive Office Action Line records, which do not indicate that a call was received from Complainant during May 2013.

According to Complainant, in May 2013, she requested advanced sick leave, and her request was denied. HR1 stated that Complainant's request was denied because she appeared to plan to use the advanced sick leave for vacation purposes, which is not a reason for granting advanced sick leave.

Complainant alleged that in June 2013 she requested to move to the day shift as a reasonable accommodation, which was never approved. The record contains a June 19, 2013, memorandum from HR1, which requests additional medical documentation to substantiate her need for accommodation. The record contains a July 19, 2013, letter from Complainant to HR1, which states that the needed information could be found on her previously submitted Family and Medical Leave Act (FMLA) leave application. Complainant's May 1, 2013, FMLA application indicated that Complainant would need time off work to attend therapy and other medical appointments, but it did not discuss her need for a shift change. There is no evidence in the record that Complainant provided additional medical documentation with respect to her reasonable accommodation request.

According to Complainant, in 2013 she requested FMLA leave, but the Agency failed to timely approve her request. The record contains a May 7, 2013, memorandum approving Complainant to use FMLA leave from May 2013 through November 2013.

Complainant stated that in August 2013 a coworker (C2) yelled at her and intimidated her. According to Complainant, she reported the incident to management, but no action was taken. S3 stated that he investigated Complainant's allegation and counseled C2 for his rude behavior towards Complainant. S3 averred that his investigation did not reveal that C2 yelled at Complainant.

Complainant averred that on November 19, 2013, she left work early because she was not feeling well. According to Complainant, S2 gave her permission to leave early, but S2 later counseled her for leaving early.

According to S3, he investigated this allegation and determined that Complainant told a coworker that she was not feeling well but did not get permission from S2 to leave early. S3 stated that because Complainant was sick she was not counseled regarding her early departure.

The Pathology and Laboratory Service has a call-in line for employees to report any unscheduled absences. Complainant stated that on November 22, 2013, she left a confidential message on the call-in line, but a coworker retrieved the message. S3 stated that it is common knowledge that many employees have the code to retrieve messages on the call-in line. According to S3, there is no requirement to leave personal information in messages on the call-in line.

On November 26, 2013, S2 issued Complainant a performance evaluation for FY 2013 with a Fully Successful rating. S2 indicated that Complainant had trouble getting along with team members and identified communication as an area for improvement. According to Complainant, she had received Exceptional ratings in the past, and her performance had not declined. S3 stated that he concurred with S2's rating of Complainant as an accurate reflection of her performance. Complainant stated that she refused to sign the appraisal because she disagreed with the rating. According to Complainant, because she did not sign the appraisal, it was not submitted to HR, and she was therefore not eligible for monetary awards. S3 stated that he submitted Complainant's performance appraisal to HR. According to S3, he was not aware whether Complainant was eligible for a performance award.

According to Complainant, in November 2013, S3 accused her of misusing sick leave and told her that she needed to recertify her FMLA condition every 30 days. S3 stated that he believed that there had been a sick-out by employees on a particular day, so he requested medical documentation from all employees who called in sick that day. S3 averred that he subsequently discussed the situation with HR and decided not to follow through with the request for medical documentation from Complainant or to make her recertify her FMLA condition because she was approved for FMLA leave on the date in question.

Complainant stated that on December 13, 2013, she requested FMLA leave but was charged leave without pay (LWOP). S3 stated that Complainant did not have sufficient paid leave to cover her absence that day, so she was granted FMLA LWOP.

Complainant averred that on December 20, 2013, coworkers accused her of using the internet instead of collecting blood from patients and reported this allegation to S3. S3 stated that he did not remember this incident.

Complainant stated that in December 2013 S3 gave several coworkers gift certificates to the cafeteria as a reward for perfect attendance. According to Complainant, she was ineligible to receive a gift certificate because of her disability and her use of FMLA leave. S3 stated that he gave out small gift certificates to employees as a reward for "doing something good." According to S3, he did not give out any gift certificates in December 2013.

Procedural Background

On January 8, 2013, Complainant filed an EEO complaint (Agency No. 2003-0657-2012104828), which she subsequently amended, alleging that the Agency discriminated against her on the bases of race (Caucasian), disability (chronic back pain with degenerative disc disease and major depression and anxiety with frequent panic attacks), and reprisal for prior protected EEO activity when:

1. From March 26, 2012, through May 26, 2012, she was not compensated with back pay for missing wages;
2. In April 2012, she was written up for sick leave usage;
3. Beginning in May 2012, she was denied the opportunity to work overtime;
4. From June 2012 through September 2012, her requests for help were ignored, and she had to work her shift alone;
5. In September 2012, her supervisor took no action when she reported that she had been intimidated and threatened with assault by a coworker;
6. In or around September 2012, her coworkers accessed her medical records and discussed her medical information with other coworkers;
7. On September 26, 2012, she heard coworkers joking about her medical condition and that she was a disabled veteran;
8. In October 2012, her request to change the holiday rotation schedule was ignored;
9. In November 2012, her supervisor sent an email falsely accusing her of being late;
10. In November 2012, she was accused of making defaming statements regarding her supervisor;
11. In November 2012, Complainant was given a verbal counseling because coworkers accused her of being idle in the lab during morning lab collection time;
12. On January 3, 2013, she was issued a verbal counseling;
13. In February 2013, she did not receive a sympathy email from personnel to announce funeral services for her father-in-law;
14. In March 2013, she was denied acceptance into the Core Lab to work as a Lab Technician under the VRA;
15. In April 2013, she made a verbal complaint of harassment and submitted documents to HR managers, who took no action;
16. On April 12, 2013, she noted that negative comments and a new date had been added to her annual performance appraisal;
17. In April 2013, she was denied the opportunity to receive leave from a coworker;
18. In May 2013, she was denied the opportunity to work an alternate tour of duty;
19. In May 2013, her request for assistance from the Executive Office Action Line was ignored;
20. In May 2013, her request for advanced sick leave was denied;
21. In June 2013, her reasonable accommodation request to be transferred to the day shift was denied;
22. Beginning on July 19, 2013, the Agency has failed to approve her requested FMLA leave; and

23. In August 2013, she reported that a coworker confronted her in a threatening manner with his fist and yelled, "The specimen was not collected. How is that my fault?", and management took no action.

On April 9, 2014, Complainant filed an EEO complaint (Agency No. 2003-0657-2014102137) alleging that the Agency discriminated against her on the bases of race (Caucasian), disability (chronic back pain with degenerative disc disease and major depression and anxiety with frequent panic attacks), and reprisal for prior protected EEO activity when:

1. On November 19, 2013, she was accused of leaving the work area without notifying the Phlebotomist Team Leader first;
2. On November 22, 2013, her confidential leave request was breached by her supervisor, who assigned access codes to retrieve call-offs to a coworker;
3. On November 26, 2013, she was given a lower annual performance rating of Fully Successful;
4. In November 2013, S3 accused her of misusing her leave and required her to recertify her FMLA leave every 30 days;
5. On December 15, 2013, she requested FMLA leave but was charged LWOP;
6. On December 20, 2013, she was accused of refusing to collect blood from two patients and given a verbal counseling by her supervisor;
7. In December 2013, she was not considered for a performance bonus because her evaluation was not sent to HR; and
8. In December 2013, she did not qualify to receive a gift certificate from S3 because of her use of FMLA leave.

At the conclusion of the investigations, the Agency provided Complainant with copies of the reports of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing for both complaints, and the AJ assigned to the matters consolidated them. Complainant subsequently withdrew her hearing request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that her complaints were poorly investigated. According to Complainant, the EEO Investigator failed to interview relevant witnesses. Complainant argues that the Agency's final decision placed undue weight on S3's testimony, accepting it as true even for allegations regarding actions that occurred prior to him being hired by the Agency. Complainant contends that the final decision disregarded her testimony. Complainant requests a thorough review of the Agency's final decision.

In response to Complainant's appeal, the Agency contends that its final decision properly found that Complainant was not subjected to discrimination as alleged.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

As a preliminary matter, we address Complainant's contention on appeal that the Agency failed to conduct an adequate investigation. EEOC Regulation 29 C.F.R. § 1614.108(b) requires, inter alia, that the agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. Id.; EEO MD-110, at Chap. 6, § IV.B. An investigation must include "a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant's group as compared with the treatment of similarly situated employees...and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant." Id. at § IV.C. Also, an investigator must identify and obtain "all relevant evidence from all sources regardless of how it may affect the outcome." Id. at § VI.D. Upon review, the Commission finds that the investigation was adequate because it was impartial and, although not every potential witness was interviewed, the investigation was sufficiently thorough for the fact finder to address the ultimate issue of whether discrimination occurred.

We additionally note that Complainant withdrew her hearing request. A complainant is provided an opportunity to cure defects in an investigation, after reviewing the report of investigation by notifying the agency (in writing) of any perceived deficiencies in the investigation or by requesting a hearing before an EEOC AJ. See EEO MD-110, at Ch. 6, § XI and Ch. 7, § I. By choosing to withdraw her hearing request before an AJ, Complainant waived the opportunity to develop the record through discovery and to cross examine witnesses. See Tommy O. v. United States Postal Serv., EEOC Appeal No. 0120152090 (Jun. 8, 2017).

Accessing Confidential Medical Records

Complainant alleged that her coworkers accessed her VAMC patient medical records without a valid business-related reason for doing so. It is a per se violation of the Rehabilitation Act to access confidential employee medical records when the access is not shown to be job-related and consistent with business necessity. Specifically, 29 C.F.R. § 1630.14(c)(1) provides, in pertinent part, that: "Information obtained . . . regarding the medical condition or history of any employee shall . . . be treated as a confidential medical record."

By its terms, this requirement applies to confidential medical information obtained from “any employee,” and is not limited to individuals with disabilities. See Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (April 13, 2000). The record clearly establishes, without dispute, that S1 and four of her coworkers accessed Complainant’s confidential medical records and that PO1’s investigation determined that the access was neither job-related nor consistent with business necessity. See Melani F. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120142156 (June 23, 2016). Accordingly, we find that the Agency has violated the Rehabilitation Act and reverse the Agency’s final decision with respect to this claim.

Impermissible Medical Inquiry

In November 2013, S3 asked Complainant to provide medical documentation to substantiate her need for FMLA sick leave on the date of the alleged sick-out and to recertify her need for FMLA leave for her disabilities every month. Upon review, we find that the Agency should not have asked Complainant to provide additional medical documentation regarding these matters. The Commission has stated that there are situations when an employer cannot ask for documentation in response to a request for reasonable accommodation. It is when: (1) both the disability and the need for the reasonable accommodation are obvious; or (2) the individual has already provided the employer sufficient information to substantiate that she has a disability and needs the reasonable accommodation requested. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 8, (Oct. 17, 2002) (Reasonable Accommodation Enforcement Guidance).

In the case at hand, the record clearly shows that Complainant had provided sufficient information to substantiate her disabilities and need for leave as a reasonable accommodation for disability-related flare ups. The medical documentation previously provided to the Agency indicated that Complainant’s conditions were chronic and likely permanent. Under the circumstances of this case, there was a history of Complainant’s communication with the Agency regarding her medical condition and restrictions, and the Agency was fully apprised of the permanent nature of the disability and restrictions. Accordingly, it was incorrect to seek more documentation to continue accommodating Complainant’s restrictions. See, e.g., Natalie S. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120140815 (Jan. 26, 2018) (finding agency made impermissible medical inquiry where agency requested additional documentation despite knowledge of chronic and permanent nature of complainant’s disability); Heard v. Dep’t of Treasury, EEOC Appeal No. 0120110751 (Apr. 19, 2013) (finding that complainant did not have to submit additional medical documentation for accommodation of a parking spot when complainant’s doctor had informed the agency that complainant’s disability and restrictions were permanent). Therefore, we will reverse the Agency’s finding that Complainant was not subjected to an unlawful disability inquiry when the Agency requested additional medical documentation in November 2013.

However, in the instant case, S3 consulted HR after making the initial impermissible inquiry and subsequently informed Complainant that she did not need to provide the medical documentation for the day of the alleged sick-out or recertify her need for FMLA leave on a monthly basis.

S3 also made the inquiry because he suspected that Complainant and her coworkers had engaged in a sick-out. Although we note that S3 should have consulted HR before making the impermissible medical inquiry instead of afterwards, we decline to order the Agency to consider disciplinary action against S3 for making this impermissible inquiry because he reversed course and because Complainant was not required to provide the additional medical documentation.

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially 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 Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Complainant alleged that she was subjected to discrimination when she was denied the opportunity to work overtime. 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 Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). The Agency's legitimate, nondiscriminatory explanation is that S1 posted overtime opportunities on a first come, first served basis. Moreover, there is evidence in the record that Complainant worked some overtime during the period in question. Although Complainant contends that she was assigned minimal overtime compared to her coworkers, we find that Complainant has failed to establish by the preponderance of the evidence that the Agency's legitimate, nondiscriminatory reason is a pretext for discrimination.

Complainant alleged that she was discriminated against when she was required to work alone and her requests for assistance were ignored. According to S1, all phlebotomists periodically work alone, especially on the night shift, and the record indicates that Complainant requested to be reassigned to the night shift. Here, Complainant alleged that she was forced to work alone more than her coworkers. However, this does not refute the Agency's legitimate, nondiscriminatory explanation that Complainant requested to work on the night shift, and we find that she has not otherwise established that the Agency's legitimate, nondiscriminatory reason is pretextual.

Complainant alleged discrimination with respect to S1 not shifting the holiday schedule. The Agency's legitimate, nondiscriminatory reason for not shifting the holiday schedule is that Complainant was responsible for finding someone to cover her shift if she wanted additional holidays off.

Although Complainant contends that the holiday rotation schedule was unfair, we find that the preponderance of the evidence in the record does not establish that the Agency's proffered reason is a pretext designed to mask discriminatory or retaliatory animus.

Complainant alleged that she was subjected to discrimination when S1 reported that she arrived late to work. S1's legitimate, nondiscriminatory reason for doing so is that Complainant was late to work on the date in question. According to Complainant, she was not scheduled to work on this date. However, we find that Complainant has failed to establish by the preponderance of the evidence in the record that this legitimate, nondiscriminatory reason is pretext for discrimination or retaliation.

According to Complainant, she was discriminated against when she was not appointed to a higher-graded position under the VRA. The Agency's legitimate, nondiscriminatory reason for not moving Complainant to this position was that she did not possess the required educational credentials, a bachelor's degree. Complainant argued that she had two degrees, but the preponderance of the evidence in the record does not establish that she had the necessary bachelor's degree, Complainant has not otherwise established by the preponderance of the evidence in the record that the Agency's legitimate, nondiscriminatory reason is pretextual.

Complainant alleged that she was subjected to discrimination when a coworker was not permitted to donate leave to Complainant. We find that Complainant has failed to establish a prima facie case of disparate treatment with respect to this claim, as the preponderance of the evidence in the record does not establish that a coworker was not permitted to donate leave. The preponderance of the evidence establishes that Complainant was approved for the leave donation program and received some donated leave.

Complainant alleged that she was discriminated against when her request to change shifts was denied. The Agency's legitimate, nondiscriminatory reason for denying Complainant's request was that the day shift was understaffed at the time and that Complainant's frequent medical absences would have exacerbated the problem. Although Complainant contended that the night shift was also understaffed at this time, we find that Complainant has failed to establish that this legitimate, nondiscriminatory reason is pretextual. Because Complainant subsequently requested to change shifts as a reasonable accommodation, we will separately analyze her reasonable accommodation request below.

Complainant alleged discrimination when her request for advanced sick leave was denied. HR1 explained that Complainant's request for advanced sick leave was denied because she indicated that she planned to use the leave for vacation purposes, which is not a valid reason for requesting advanced sick leave. Here, Complainant has failed to establish by the preponderance of the record that the Agency's legitimate, nondiscriminatory reason is a pretext for discrimination based on race, disability, and/or reprisal.

Complainant alleged that she was subjected to discrimination when her FMLA request was not promptly approved. However, we find that Complainant has failed to establish a prima facie case of discrimination with respect to this claim because the preponderance of the evidence in the record establishes that her FMLA request was approved in May 2013.

Complainant alleged that she was discriminated against when she was issued a Fully Successful performance evaluation. The Agency's legitimate, nondiscriminatory reasons were that Complainant had difficulty getting along with all of her teammates and that her communication skills were an area for improvement. Although Complainant contends that her performance merited a higher rating, we find that the preponderance of the evidence in the record does not establish that these legitimate, nondiscriminatory reasons were pretextual.

Complainant alleged that she was subjected to discrimination when she requested FMLA leave but was charged LWOP. The Agency's legitimate, nondiscriminatory reason for charging Complainant LWOP is that she did not have sufficient paid leave to cover her absence. Complainant contends that a leave audit likely would show that she did have enough paid leave to cover her absence, but we find that she has not established by the preponderance of the evidence in the record that the Agency's proffered reason is a pretext for discrimination.

Complainant alleged that she was discriminated against when her performance evaluation was not forwarded to HR after she refused to sign it. We find that Complainant has failed to establish a prima facie case with respect to this claim because the preponderance of the evidence in the record establishes that her performance evaluation was sent to HR in accordance with Agency policy.

Finally, Complainant alleged that she was subjected to discrimination when she was not eligible for a gift certificate from S3 based on perfect attendance because of her use of FMLA leave. S3 stated that he occasionally gave out \$5 gift certificates to the canteen as a morale booster, including for perfect attendance. Complainant contends that S3 never gave her a gift certificate for perfect attendance because of her use of FMLA and that he never gave her a gift certificate for exceptional contributions because he did not like her. Upon review, although Complainant argues that she was discriminated against because she did not receive gift certificates for perfect attendance when she missed work due to her disability, it appears that S3 measured perfect attendance as accruing no absences, including the use of annual leave, sick leave, and/or FMLA leave. Therefore, Complainant has not established that she was denied a gift certificate based on her disability because employees without disabilities who used any type of leave were similarly not given gift certificates. We further find that the preponderance of the evidence in the record does not otherwise establish that the Agency's legitimate, nondiscriminatory reason is pretextual.

Hostile Work Environment

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or

had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser’s conduct should be evaluated from the objective viewpoint of a reasonable person in the victim’s circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

With the exception of the circumstances surrounding Complainant’s coworkers accessing her confidential medical records and the impermissible medical inquiry, there is no evident connection between the majority of the alleged instances of harassment and Complainant’s race, disability, or prior protected EEO activity. Many of the instances of harassment appear to constitute minor slights, such as not receiving a sympathy card from her coworkers when her father-in-law died. Regarding the alleged harassment by C1 and C2, the record reflects that Complainant’s supervisors investigated and determined that C1 and C2 had not intimidated or yelled at Complainant but had been rude to Complainant, which they dealt with by counseling the individuals. Other instances of harassment appear to constitute the ordinary exercise of supervisory authority, such as counseling Complainant for suspected sick leave abuse or reporting that Complainant arrived late. We therefore find that the alleged harassment was insufficiently severe or pervasive to constitute a hostile work environment. Accordingly, Complainant has failed to establish a prima facie case of harassment by the preponderance of the evidence in the record.

Denial of a Reasonable Accommodation

In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability; (2) she is a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See Reasonable Accommodation Enforcement Guidance. 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. 29 C.F.R. §§ 1630.2(o) and (p). “The term “qualified,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m).

Upon a complainant’s request for reasonable accommodation, an employer may require that documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. See Reasonable Accommodation Enforcement Guidance at Question 6. When an employee’s disability or need for an accommodation is not known or obvious, an employer may ask an employee for reasonable documentation about his or her disability, limitations, and accommodation requirements.

See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 7 (July 27, 2000).

Here, the Agency asked Complainant for additional medical documentation to substantiate her need to switch to the day shift as a reasonable accommodation. Complainant contended that the Agency already had medical documentation that justified her need to switch shifts because she had provided the Agency with medical documentation with her FMLA request. However, a May 1, 2013 FMLA application signed by Complainant's physician indicated that she would need time off work to attend therapy and doctor's appointments, but it did not address her need to switch shifts. Unlike Complainant's need for leave as a reasonable accommodation for flare ups of her disabilities, we find that her need for a shift change as a reasonable accommodation was not known or obvious. Therefore, the Agency's request for additional medical documentation was reasonable under the circumstances, and the preponderance of the evidence in the record does not establish that the Agency failed to reasonably accommodate Complainant.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM in part and REVERSE and REMAND in part the Agency's final decision because the preponderance of the evidence in the record establishes that the Agency failed to protect Complainant's confidential medical records and made an impermissible medical inquiry. We find that the preponderance of the evidence in the record does not otherwise establish that discrimination occurred.

ORDER

The Agency is ORDERED to take the following remedial actions:

1. Within ninety (90) calendar days of the date this decision is issued the Agency shall conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
2. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide a minimum of four hours of in-person or interactive EEO training regarding the confidentiality of medical information under the Rehabilitation Act and impermissible medical inquiries, to S3, and to S1 and the four additional coworkers found by PO1 to have accessed Complainant's medical records.
3. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider disciplinary action against all Agency employees found to have discriminated against Complainant by accessing her confidential medical records, including S1. The Agency shall report its decision to the Commission. If the Agency decides to take disciplinary

action, then it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.

4. Within thirty (30) calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its St. Louis, Missouri VA Medical Center (VAMC) 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 (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g).

The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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

March 26, 2019
Date