



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

[REDACTED]  
Shondra S.,<sup>1</sup>  
Complainant,

v.

Janet L. Yellen,  
Secretary,  
Department of the Treasury  
(Internal Revenue Service),  
Agency.

Appeal No. 2019002568, 2020000299

Agency No. IRS-18-0472-F, IRS-19-0270-F

DECISION

On March 29, 2019, and September 25, 2019, Complainant filed two appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's February 25, 2019, and August 22, 2019, final decisions concerning her 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. As the appeals at issue concern related matters, we exercise our discretion, pursuant to 29 C.F.R. § 1614.606, to consolidate Complainant's two appeals for joint adjudication.<sup>2</sup> For the following reasons, the Commission MODIFIES the Agency's final decisions.

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

<sup>2</sup> In this decision, the report of investigation for Agency No. IRS-18-0472-F will be referred to as ROI 1, and the report of investigation for Agency No. IRS-19-0270-F will be referred to as ROI 2.

### ISSUES PRESENTED

The issues presented in both of Complainant's appeals are: (1) whether Complainant was denied a reasonable amount of official time; and (2) whether the preponderance of the evidence in the record establishes that she was subjected to discrimination based on sex (gender identity), disability, and/or reprisal.

### BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as a GS-0512-12 Internal Revenue Agent in the Agency's Small Business/Self-Employed (SBSE) Examination Division, Field Exam Gulf States Area in Little Rock, Arkansas. In May 2016, Complainant transferred to Little Rock from Tulsa, Oklahoma. From May 2016 through December 2017, Complainant's first-line supervisor was a Group Manager (GM) based in Little Rock (S1A), and her second-line supervisor was a Territory Manager (TM) based in Dallas, Texas (S2A). In January 2018, a new TM based in Houston, Texas (S2B) became Complainant's second-line supervisor. Between January 2018 and December 2018, Complainant had three different acting first-line supervisors: from January 2018 to April 2018, an Acting GM based in El Paso, Texas (S1B); from May 2018 to September 2018, an Acting GM based in Little Rock (S1C); and, from September 2018 to December 2018, an Acting GM based in Fayetteville, Arkansas (S1D). In December 2018, S1C became Complainant's first-line supervisor again when she was selected as the permanent GM. From the time of Complainant's transfer until June 1, 2018, her third-line supervisor was the Area Director based in Baton Rouge, Louisiana (S3A). After S3A's retirement, Complainant's third-line supervisor was the Acting Area Director based in Louisville, Kentucky (S3B).

Complainant is a transgender woman. Complainant averred that she was diagnosed with gender dysphoria in 2004, and she had several gender affirming surgeries. Complainant alleged that her disability, gender dysphoria, does not limit her outside of the workplace, but she stated that sometimes she has difficulty focusing on job responsibilities, completing work in a timely manner, and interacting with coworkers because of severe depression and anxiety. Complainant averred that the depression and anxiety are caused by the harassment, discrimination, and retaliation that she experiences in the workplace.

According to Complainant, the Agency was not aware that she was transgender when she was first hired in 2009.

Complainant alleged that the Agency first learned that she was transgender shortly after she started working when she attempted to sign up for health insurance coverage for her wife and was told that her wife could not be covered because of the Defense of Marriage Act. Complainant stated that she filed 10 EEO complaints between 2012 and 2018. According to Complainant, beginning in 2012, the Agency allowed her to telework full-time as a reasonable accommodation. According to the record, Complainant worked in California from the date of her 2009 hire until 2015, when she transferred to Tulsa. ROI 1 at 326; ROI 2 at 1130.

Complainant averred that, when she transferred from Tulsa to Little Rock in the spring of 2016, Little Rock management permitted her to send an email to members of her group and other Agency employees, which explained that she was transgender and referenced an essay discussing her experience attending her 40th high school reunion for an Arkansas Catholic boys' school. According to Complainant, she sent the email to instruct her coworkers to use female titles, pronouns, and honorifics when speaking with her or referring to her and to communicate that she would be using the women's restroom because she is a woman.

Complainant stated that, in May 2016, she met with State of Arkansas employees to discuss proposed state legislation that would restrict restroom access for transgender individuals. According to Complainant, the next day, she spoke with a group of security guards in the Little Rock Federal Building "in order to avoid a confrontation at the restroom door," which she stated she had experienced while working for the Agency in Tulsa. ROI 1 at 122. Complainant characterized the conversation with the security guards as generally friendly, but she stated that there were some inappropriate questions and comments, alleging that one security guard "asked me directly if I had a penis or vagina as that would tell him which restroom I could use." Id. Complainant stated that, after the conversation, she asked S1A to contact the General Services Administration (GSA) and request that the security guards receive diversity and inclusion training with a focus on transgender issues, but she stated that S1A told her that he did not have the authority to order training for the security guards. Id. Complainant averred that, the day after the discussion with the security guards, a supervisory security guard approached her and told her that none of the security guards should harass her or ask her about her genitalia again. According to S1A, Complainant told him that she was generally concerned about restroom access, but he stated that was unaware of an incident with the security guards. S1A stated that he arranged for diversity training for the Agency's two Revenue Agent groups based in Little Rock.

Complainant alleged that she contacted an Agency Safety Officer, who responded that the matter was "not [her] responsibility." Id. Complainant stated that she also contacted the union for assistance and was told that the current Arkansas chapter President (U1) "did not like queer people like me." Id.

Complainant stated that, on or about May 20, 2016, she was subjected to negative comments based on sex and gender identity as she entered the Little Rock Federal Building on two occasions. Complainant is over six feet tall, and she stated that, because of her height, voice, and appearance, she is often targeted for her gender identity. Complainant alleged that, on the street outside the Federal Building, construction workers working on the road subjected her to disparaging language, and one shouted, "Look at that tranny fag." ROI 1 at 126. Complainant stated that the second incident involved a landscaping truck with a trailer of equipment that was blocking the crosswalk as she returned to the Federal Building after lunch. Complainant averred that the landscaping crew subjected her to abusive language until the red light changed. Complainant reported both incidents to building security, but she stated that she was told both times that nothing could be done because the incidents did not occur on federal property. S1A stated that he reported the incidents to S2A and to the Treasury Inspector General for Tax Administration (TIGTA). S1A averred that he was told that, because the incidents did not take place on federal property, the Agency did not have any authority over the situation. According to Complainant, she stopped reporting similar incidents because she knew that the Agency and the GSA would not do anything about it.

According to Complainant, in May 2016, she overheard coworkers discussing transgender women, and one coworker (C1) stated that certain female Olympic athletes would have an advantage if they were "like [Complainant]." ROI 1 at 128. Complainant stated that she asked her coworkers to stop making inappropriate comments and informed S1A. S1A averred that he had a discussion with C1 avoiding potentially harassing comments. According to S1A, because Complainant had complained that C1's voice was loud and often distracted her while she was on the phone, he allowed Complainant to move to a different cubicle that was farther away from C1's cubicle. S1A stated that he also met with U1 and the incoming Arkansas chapter President (U2) to discuss the situation with Complainant and C1. Complainant averred that S1A told her that U1 suggested that Complainant should avoid the workplace and work from home to avoid similar comments. Complainant stated that S1A rejected U1's proposal.

S1A stated that U2, not U1, suggested that Complainant could telework if she was not comfortable in the office. According to S1A, he responded that he would allow Complainant to telework if she wanted to, but he made it clear to U2 that he would not force her to telework.

Complainant stated that, on or about June 13, 2016, U1 was walking past her cubicle, and she asked him why the union had not supported her when she had reported harassment. Complainant alleged that U1 started yelling at her that she was a horrible person and that she should "go to hell" because she was transgender. ROI 1 at 131. According to Complainant, she worried U1 might get physically violent towards her based on his body language, but she stated S1A and other employees restrained U1 before he could do so. Complainant stated that, after the incident, management told her that her only option would be to seek a restraining order against U1 because "management could not provide any other protection from [U1]'s hate of me." Id. S1A denied hearing U1 yelling or helping to restrain U1. According to S1A, Complainant reported the incident to her after it happened, and he reported it to S2A. S1A averred that, from what he could determine, both U1 and Complainant were responsible for the negative interaction. S1A stated that he told Complainant that there should not be future incidents with U1 because he was about to be out of the office for surgery and was scheduled to retire from the Agency shortly thereafter.

Complainant stated that she discovered that a taxpayer (TP1), who was a certified public accountant (CPA), had committed civil fraud by substantially understating his tax liabilities and by improperly preparing tax returns for others. According to Complainant, S1A approved an examination of TP1, who brought in another CPA as his representative (TPR1). Complainant stated that TPR1 refused to work with her because of his religious beliefs and insisted that Complainant was a man. According to Complainant, TPR1 knew that she was transgender because he had purchased an accounting firm from a deceased CPA who had refused to hire Complainant when she had applied for a job at the firm because she was transgender. S1A stated that TPR1 would not let Complainant come to his office because she had filed a discrimination lawsuit against the deceased former owner of the accounting firm. Complainant stated that S1A had to discuss TP1's failure to comply with an administrative summons and his treatment of Complainant with TP1 on multiple occasions. Complainant alleged that, when she interviewed TPR1 in the office with S1A, TPR1 loudly insulted her for being transgender, and S1A had to push TPR1 out of the office while he was yelling that Complainant was a horrible person because she was transgender.

S1A denied observing TPR1 insulting Complainant or having to “push” him out of the office, although S1A stated that he escorted TPR1 to the elevator. According to S1A, he joined Complainant, TP1, and TPR1 for an interview in the Agency’s offices. S1A averred that Complainant was very rude to TPR1 during the interview but denied that TPR1 insulted Complainant during the interview. Complainant alleged that TP1 and TPR1 both subjected her to “multiple transgender hate attacks” and accused her of being biased against TP1 because she was transgender. ROI 1 at 133. Complainant stated that TP1 stalked her online, including on or about June 1, 2017, when TP1 “liked” photos of Complainant’s daughters on her personal Facebook page, which she reported to S1A. S1A stated that he told Complainant that anyone could “like” a public post on her Facebook page and suggested that she block TP1 or adjust her privacy settings.

Complainant stated that she served a summons on TP1 at his workplace, a State of Arkansas office, on August 4, 2017. According to Complainant, when she was serving the summons, a State of Arkansas employee (A1) verbally abused Complainant by loudly and emphatically calling her “Sir” and drawing attention to the fact that Complainant is transgender. In an August 4, 2017, email, Complainant stated, “This is the first time I have experienced hate in public while on the job.” ROI 1 at 182. Complainant alleged that she later learned that TP1 falsely told S1A that Complainant caused an altercation when she served the summons and that Complainant had to be escorted out of the office by guards. S1A stated that TP1 denied being involved in the alleged incident or that he encouraged A1 to harass Complainant because she was transgender. On August 11, 2017, in response to an email from Complainant, an Anti-Harassment Specialist shared the Potential Dangerous Taxpayer (PDT) criteria with Complainant and S1A. The PDT criteria include assault, threats, and intimidation, and the Anti-Harassment Specialist stated that Complainant should contact TIGTA to report threatening behavior. Complainant sent an email to S1A on August 22, 2017, stating that she wanted to share some information and documents related to the August 4 incident with a State of Arkansas attorney. Complainant asked S1A if he had “[a]ny objections” and whether she should “discuss with Disclosure first.” ROI 1 at 205. S1A responded that he “would always advise to discuss with Disclosure first” and that he could discuss the matter with Complainant in the office. Id.

On August 28, 2017, Complainant sent an email to the Agency’s Disclosure mailbox. Complainant asked for permission to disclose TP1’s name and “other relevant details related to the examination” to file a discrimination complaint with the State of Arkansas regarding the August 4 incident.

On September 1, 2017, Complainant resubmitted her request to the Disclosure mailbox after not having received a response. On September 5, 2017, a Disclosure Specialist responded to Complainant, stating that Complainant could only provide limited information to the State of Arkansas. For example, the Disclosure Specialist averred that Complainant could state that she was on official Agency business but that she could not state that she was serving a summons related to an audit or state that she was a Revenue Agent. The Disclosure Specialist added that Federal Tax Information (FTI) and Personal Identifying Information (PII) must be protected and could not be disclosed unless an exception was met, and she noted that no exceptions appeared to apply.

S1A retired in December 2017. On December 27, 2017, S1A provided Complainant with an interim performance evaluation. S1A rated Complainant as "Exceeds Fully Successful" in Employee Satisfaction/Contribution, "Outstanding" in Customer Satisfaction/Knowledge, "Fully Successful" in Customer Satisfaction/Application, "Outstanding" in Business Results/Quality, and "Outstanding" in Business Results/Efficiency. The appraisal noted under Employee Satisfaction/Contribution that Complainant "generally" interacted in a courteous and professional manner with her coworkers and with taxpayers, and under Customer Satisfaction/Application, S1A stated that she "generally" demonstrated her ability to communicate effectively with taxpayers and their representatives. ROI 1 at 222-23.

According to Complainant, when S1B was announced as the Acting GM who would replace S1A, she contacted S1B to discuss her issues as a transgender employee. On December 21, 2017, Complainant emailed S1B a copy of her bio, which discussed her professional and educational background and noted that she was "nationally recognized as an activist for the transgender community." ROI 1 at 226. Complainant alleged that, while she was her acting supervisor, S1B "repeatedly" told her not to bring up her transgender issues because "management does not want to deal with" Complainant. ROI 1 at 142. Complainant averred that S1B advised her to "keep quiet about the transgender hate and just do [her] job." *Id.* S1B denied telling Complainant to stop bringing up transgender issues or telling her that management did not like it when she brought up transgender issues. According to S1B, she discussed Complainant's transgender status with her on two occasions. S1B stated that, on the first occasion, Complainant provided her bio, which mentioned her transgender activism. S1B averred that, in response, she told Complainant that she admired her activism. S1B stated that, on another occasion, Complainant mentioned that she had spoken out against a bathroom bill in Arkansas that did not become law.

According to S1B, she congratulated Complainant for her victory in defeating the bathroom bill.

Complainant stated that, in addition to telling Complainant to stop bringing up her concerns as a transgender employee, S1B was unprofessional and did not have enough knowledge of tax law and procedure. The record contains a February 12, 2018, email that S1B forwarded to the group, reminding employees to follow the chain of command and stating that employees should not contact Headquarters to ask questions about Area Office policies and guidance. Complainant responded to S1B, "This is an insulting email to those of us who have unique vital issues and management has no answers other than to talk to these specialists. I protest." ROI 1 at 232. On March 6, 2018, S1B sent an email to the group, encouraging the group to carefully review the case list, stating "It is very unpleasant to find out when you are ready to close your case that an error was made or that your request was not processed as you expected it." ROI 1 at 235. Complainant averred that, although S1B did not name anyone in the email, she sent the email about an error that S1B thought Complainant had made. Complainant alleged that S1B incorrectly attributed the error to her because S1B did not understand tax law and procedure regarding preparer penalty cases.

On March 6, 2018, Complainant responded to S1B, "I could add to your spiteful comment, but will refrain." *Id.* S1B stated that, on March 5, 2018, she noticed that some return preparer cases established by Complainant in September 2017 had never been entered into the system. According to S1B, the cases were about to be closed, and she sent the email to the group to remind everyone to check that their cases were reflected in their inventory reports. S1B noted that she did not reference Complainant by name or the cases she was working on in the email. On March 8, 2018, S1B emailed Complainant, asking Complainant to provide an updated form so that certain cases could be entered into the system and closed out. On March 9, 2018, S1B emailed Complainant, stating that Complainant had not issued the proper letter to the taxpayer and attaching a job aid containing the proper procedure. On March 9, 2018, Complainant responded to S1B, "Rather than gloat, what do you suggest I do?" ROI 1 at 238.

Complainant averred that in March 2018 she emailed S2B about her concerns with S1B and asked to be involved in selecting the next Acting GM. Complainant stated that S2B never responded to her email. The record contains a March 6, 2018, email from Complainant to S2B, which states, "As [S1B]'s 3 month experience with us is luckily ending soon, please better consider the competency, talent, and professionalism of the next AGM/GM

for us.” ROI 1 at 234. S2B stated that he did not respond to the email because it appeared to constitute a comment that Complainant wanted him to take into consideration when selecting S1B’s replacement rather than a request for a response about an ongoing issue. According to S2B, S1B was experienced, had excellent tax knowledge, and had acted as a supervisor on other occasions in the past.

According to Complainant, on March 21, 2018, a coworker (C2) called her “sir.” Complainant alleged that she told C2 that it was inappropriate to refer to her that way and that C2 responded that he had done so because of his military background. Complainant stated that she kept walking “to avoid further humiliation.” ROI 1 at 149. Complainant averred that she did not report the incident with C2 to anyone because S1B had told her to stop complaining about “transgender hate.” *Id.* S1B and S2B stated that they were unaware of an incident involving Complainant and C2.

On March 28, 2018, S1B issued Complainant her annual performance appraisal. Complainant alleged that the appraisal was negative and contained false and inaccurate comments. According to Complainant, S1B failed to comment on her substantial preparer penalty case closings or mention the transgender hate that she received related to TP1’s civil fraud case. Complainant averred that S1B should have added positive comments and given her a higher rating because of the size and complexity of TP1’s case and the transgender hate she received. Complainant stated that she had also forwarded recognition from the EEO Territory Manager about her contributions to Agency policy regarding transgender employees, but S1B did not mention this recognition in the appraisal. On March 30, 2018, Complainant forwarded a March 29, 2018, email from an Office of Equity, Diversity and Inclusion (EDI) employee to S1B. The email stated that the EDI employee thought about Complainant when she saw the Agency’s new gender identity guidance training and workplace transition plan checklist because she remembered working with Complainant when she had worked with her on her name change. Complainant stated to S1B that the email showed that her “direct activism on transgender employment issues resulted in new IRS policy” and asked, “Please credit me appropriately in my next evaluation and advise senior management.” ROI 1 at 243.

S1B rated Complainant 4.4, or “Exceeds Fully Successful,” and S1B noted that the rating was higher than the 4.2 annual performance appraisal rating that Complainant had received from S1A on March 14, 2017. S1B rated Complainant as “Exceeds Fully Successful” in Employee Satisfaction/Contribution, “Outstanding” in Customer

Satisfaction/Knowledge, "Fully Successful" in Customer Satisfaction/Application, "Outstanding" in Business Results/Quality, and "Outstanding" in Business Results/Efficiency, which were the same ratings S1A had provided for Complainant in December 2017 before retiring. According to S1B, S1A had supervised Complainant for most of the appraisal period, and she did not see a reason to adjust any of his ratings based on her experience with Complainant. S1B stated that Complainant "generally" interacted in a courteous and professional manner in the office and in the field and that she "generally" demonstrated her ability to communicate effectively with taxpayers and their representatives, noting that she had observed Complainant be "too harsh with a taxpayer in trying to get her to admit to certain actions." ROI 1 at 704-05. S2B stated that S1B's evaluation of Complainant's work was fair and objective.

On Friday, March 30, 2018, S1B emailed Complainant a case review she had conducted, noting that Complainant did not meet two of the criteria for a particular case. On Monday, April 2, 2018, Complainant responded at 8:33 a.m., "WTF?? I understood you would be reviewing this case on Thursday of this week!!! Do I need to file a union grievance today?" ROI 1 at 277. At 9:41 a.m. on April 26, 2018, S2B emailed Complainant, noting that she did not respond to S1B's email asking what Complainant meant by "WTF??" S2B directed Complainant to respond by what she meant by noon on April 26, 2018. Complainant did not respond to S2B's email. According to Complainant, she was unable to respond to S2B's email by the noon deadline because she was working in the field and did not have internet access. Complainant stated that she needed internet access to access her Agency email account.

On April 2, 2018, Complainant emailed S1B that she had been in the national news over the weekend when she was turned away from her church because she was transgender. Complainant stated, "I am severely depressed over the loss of my church community and under medical care." ROI 1 at 245. Later in the day on April 2, 2018, Complainant sent an email to S1B that she would be taking sick leave through April 4, 2018, due to severe psychological distress, but that she would try to attend a scheduled appointment with S1B if she felt better. On April 2, 2018, S1B responded that she hoped Complainant felt better soon and that she should not worry about their April 5, 2018, appointment if she was not feeling well.

In April 2018, Complainant requested that S2B reassign her to a different GM as a reasonable accommodation. On April 16, 2018, Complainant emailed a doctor's note to S1B in support of her need for reasonable

accommodation. The note attached to the email was signed by a physician in California on October 2, 2012, and the note stated that Complainant was suffering from untreated gender identity disorder, which manifested as severe depression and panic disorder. The doctor's note stated, "As the majority of [Complainant]'s distress originates in the workplace, I suggest [Complainant] be allowed to work from her home office as a reasonable accommodation." ROI 1 at 253. Complainant stated that her medical condition had not changed since the letter was written in 2012. S1B stated that she allowed Complainant to telework as much as she wanted while she was her acting supervisor. On April 17, 2018, S2B denied her request to be reassigned to a different supervisor as a reasonable accommodation. On April 17, 2018, Complainant responded to S2B, "You are not aware of the facts. Please process my reasonable accommodations request as per procedures." ROI 1 at 257. On April 18, 2018, Complainant emailed S2B and asked about the status of her reasonable accommodation request, noting that she had not yet heard from a Reasonable Accommodation Coordinator (RAC). S2B responded in an email, providing information about the Agency's reasonable accommodation procedures. Complainant responded that she had already requested a reasonable accommodation, noting, "It is your responsibility to take the issue from here." ROI 1 at 261. On April 23, 2018, Complainant emailed S2B again, asking what the status of her reasonable accommodation request was. S2B responded that S1B had provided Complainant with the proper procedure and asked her to submit her medical documentation to Federal Occupational Health (FOH). On April 23, 2018, Complainant responded to S2B that S1B and FOH had already reviewed her doctor's statement and asked when she would be contacted by a RAC.

Complainant stated that, when she learned that S1C would replace S1B in May 2018, she hoped that S1C would be a better supervisor because she was not biased against transgender people. On April 23, 2018, Complainant forwarded the doctor's note she had previously provided to S1B to S1C. On April 23, 2018, S1C responded, "I assume you have already gotten whatever permissions you need to work from home? I certainly don't have any problem with it. Do you need me to do anything?" ROI 1 at 361. On April 23, 2018, Complainant emailed S1C, "You and I are good," noting that her issues were with senior management. Id.

In April 2018, Complainant requested administrative time to prepare a response to her performance evaluation, and, on April 16, 2018, S1B told Complainant that she could take two hours of administrative time to respond. Complainant responded, copying S2B, that two hours was not reasonable because, in addition to writing up S1B's "improper adverse

management actions," she needed to "file with both EEOC" and the union. ROI 1 at 247. S2B responded that two hours was reasonable, and Complainant responded that S2B did not "know" Complainant and her circumstances and stated, "I protest both your lack of empathy and your failure to grant reasonable time for my protest improper management actions." ROI 1 at 248. On April 16, 2018, Complainant forwarded the email chain to an EEO counselor, copying S1B and S2B changing the subject line to "Adverse management actions due to my transgender status." Id. In the email, Complainant stated, "I need to file an EEO complaint against the two management officials copied on this email. Please promptly assign an EEO counselor." Id. On April 25, 2018, Complainant emailed the EEO Lead, noting that S2B would be in Little Rock the following week and asking whether it would be appropriate to discuss her EEO issues with S2B while he was in town. On April 25, 2018, the EEO Lead responded, "You have filed an EEO complaint - it is not appropriate for you and management to have any conversations about your complaint without your counselor being present. So in other words, no, it would not be appropriate to have any conversations next week at all." ROI 1 at 348.

On April 25, 2018, an EEO counselor emailed Complainant to set up an interview, noting that the interview would take approximately one hour to complete. On April 25, 2018, Complainant emailed S1B and S1C, requesting eight hours of administrative leave to prepare for and participate in the interview. At 12:07 p.m. on April 26, 2018, Complainant emailed S1B and S1C, "Please advise the status of my request yesterday for admin time. My EEO interview appointment remains pending." ROI 2 at 925. S1B forwarded the 12:07 p.m. email to S2B, asking how much time S2B thought was appropriate to prepare for the interview, and S1B subsequently responded to Complainant that she could use one hour of administrative time to prepare for the interview and one hour for the interview itself. On April 26, 2018, Complainant responded to S1B, S1C, and S2B that one hour to prepare was insufficient and that she would need at least five to six hours in addition to the one hour allotted for preparation. Complainant stated, "If this remains difficult, please both elevate and process as a request for reasonable accommodations under ADA." ROI 1 at 279.

S2B was in Little Rock on May 2, 2018, for a town hall meeting with the two groups based in Little Rock. Complainant stated that, after the town hall meeting, S2B confronted her in front of about 20 coworkers and demanded that she meet with him immediately. According to Complainant, she told him that, because she had contacted an EEO counselor, his request was inappropriate.

Complainant alleged that S2B told her that, in that case, she needed to meet with him with an EEO counselor present. According to Complainant, S2B's demand constituted reprisal because S2B knew that Complainant requested EEO counseling on April 16, 2018. S1C stated that, before the town hall, S2B had told her that he wanted to meet with Complainant after the meeting. S1C averred that, during the meeting, Complainant asked S2B a lot of questions about his background, as though she was trying to embarrass him. According to S1C, Complainant was sitting next to her during the town hall, and Complainant announced at the end of the meeting that she was leaving. S1C stated that, when she told Complainant that S2B wanted to meet with her, she said she could not talk to S2B because of an EEO complaint and that she would be taking sick leave for the remainder of the day. S1C averred that she did not observe S2B mention Complainant's EEO complaint or require Complainant to meet with him. S2B denied confronting, raising his voice, or demanding to meet with Complainant. According to S2B, he asked to meet with Complainant. S2B averred that Complainant refused to meet with him without an EEO counselor present. S2B stated that, because the meeting had ended, there were approximately six people present. According to S2B, Complainant became very loud and repeated that an EEO counselor had told her not to meet with S2B.

On May 8, 2018, Complainant emailed S1C, stating that S2B had created a hostile work environment for her based on her transgender status, asserting that S2B had caused her severe psychological distress and noting that she was involved in the EEO process. Complainant stated that she had "a long history of discrimination issues with IRS management" and "years of transgender workplace hate." ROI 1 at 284. In the email, Complainant asserted that S2B was not qualified and lacked adequate training to "handle sensitive transgender issues" and asked that S2B be removed from "any and all management actions regarding my employment" as a reasonable accommodation. Id. Complainant noted that she had already made two reasonable accommodation requests under S2B and had not yet heard from an RAC.

On May 22, 2018, Complainant requested two hours of administrative time to discuss her EEO complaint with her attorney. On May 23, 2018, S2B denied Complainant's request, noting that the EEO counselor had closed Complainant's pre-complaint EEO matter and that there were no pending EEO cases. Complainant proceeded to ask for administrative time as a reasonable accommodation, stating, "Due to the significant discrimination issues concerning my transgender status, I must have legal counsel assistance in filing a formal complaint within 15 business days, as allowed."

ROI 1 at 286. S2B responded by pointing out the reasonable accommodation procedure, but Complainant responded, "With all due respect, you are not following proper procedures for reasonable accommodations requests. I made the proper requests as you state and you have failed to respond in a timely manner, as prescribed. It is not necessary for me to file any forms, as you assert." ROI 1 at 285. S2B issued a memorandum to Complainant dated May 23, 2018, which summarized their recent emails about reasonable accommodations. In the memo, S2B stated, "In my review of all these responses I cannot determine clearly the basis or the accommodations requested. From the email chain I find no cause to accommodate, and no clear conditions being requested that will assist you in completing your job as a revenue agent." ROI 2 at 934. S2B stated that, because he had provided Complainant with information about the reasonable accommodation process and she had not clarified her need for accommodation, he would consider the matter closed. S2B reminded Complainant that, if she wanted to request a reasonable accommodation, she could use the form he had previously provided to her or contact an RAC.

On May 30, 2018, a Reasonable Accommodation Coordinator (RAC1) emailed Complainant, S1C, and S2B, stating that she would be handling Complainant's reasonable accommodation request, asking Complainant and her managers to complete some forms, and proposing that she have a teleconference with Complainant, S1C, and S2B in the next week. On May 30, 2018, Complainant responded, "[S2B] declined multiple reasonable accommodations requests in writing last week. Has this improper TM declination been waived, or do I need to file an immediate appeal? Please explain the actions of [S2B] since January from my [reasonable accommodation request] status viewpoint." ROI 1 at 293. Later that day, Complainant sent an email to S2B and copied S1C and RAC1, stating, "I hereby appeal all declinations by [S2B] of my multiple Reasonable Accommodation Requests." ROI 1 at 295. On May 31, 2018, RAC1 emailed Complainant, offering to refer Complainant to an EEO counselor and asking for a time to speak with Complainant and her managers about her reasonable accommodation requests.

On June 4, 2018, Complainant provided a completed reasonable accommodation form to RAC1 by email. In the email, Complainant stated that her disability, gender dysphoria, had not changed since she provided medical documentation in 2012. Complainant added that, if management "attempts to delay" the process by requiring medical documentation and FOH review, she would "assert an additional claim under my EEO complaint of hostile workplace environment against [S2B]." ROI 1 at 296.

On the June 4, 2018, form, Complainant indicated that the job functions affected by her disability were “Severe psychological distress over transgender hate.” ROI 1 at 747. Complainant stated that the accommodation she was requesting was, “Multiple requests over the last year, all related to transgender workplace hate by management and others. See prior correspondence to management on all requests.” *Id.* Complainant did not elaborate on her need for accommodation. Between June 4 and 11, 2018, Complainant sent multiple emails to RAC1, asking RAC1 why she was not responding. On Monday, June 11, 2018, RAC1 emailed Complainant, S1C, and S2B, apologizing for the delay. RAC1 asked Complainant to explain and clarify her request(s) for reasonable accommodation and requested a teleconference with Complainant and her managers during the afternoon of June 11, 2018, or another time during the week ending June 15, 2018.

On June 11, 2018, Complainant responded, “So, you are saying what? That [S2B] did not capture my requests for reasonable accommodations? If not, why did he decline? Are we now in the appeal process?” ROI 1 at 310. RAC1 responded that S2B had not denied any reasonable accommodation requests in writing through the Agency’s reasonable accommodation program. RAC1 stated that, although Complainant submitted the form, she still did not understand what Complainant was asking for. According to RAC1, on the form, Complainant requested the following: “Multiple requests over the last year, all related to transgender workplace hate by management and others.” ROI 1 at 309. RAC1 asked Complainant to provide a specific description of the reasonable accommodation(s) she was requesting. On June 11, 2018, Complainant emailed RAC1 and asked that she only contact her through her attorney. S2B stated that Complainant repeatedly refused to meet with RAC1 or to provide additional specific information about her requests for reasonable accommodations.

On June 12, 2018, Complainant observed an online training session about background checks. Complainant stated that, during her original 2009 background check, she had problems because of her transgender identity, such as having to provide her deadname.<sup>3</sup>

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<sup>3</sup> A “deadname” is a transgender individual’s previous name, and the practice of “deadnaming,” or referring to transgender people who have changed their name by the name they used before their transition, is widely considered insensitive, offensive, or damaging. See The Associated Press Stylebook, “gender, sex and sexual orientation” (56th ed. 2022), available at <https://apstylebook.com>. The Commission has held that persistent failure to use an employee’s correct name and pronouns may constitute unlawful sex-

When the presenter, a Revenue Agent based in El Paso (C3) invited questions at the end of the presentation, Complainant typed a question into the comment field, asking whether transgender employees needed to be concerned. According to Complainant, C3 responded to her question by discussing sexual orientation, and she responded in a comment that her question was not about sexual orientation. Although a union official attempted to respond to her question, Complainant stated that her question was not really answered, so she added a comment that, given the statements that transgender people are not fit for the military, she was concerned. C3 stated that he addressed Complainant's questions to the best of his ability. Complainant alleged that a Revenue Agent based in Portland, Oregon (C4) commented in the chat box that Complainant's comments had nothing to do with the meeting. Complainant stated that she logged out of the presentation and asked S1C if she saw C4's comment. When S1C stated that she had not seen the comment in question, Complainant logged back into the presentation. Complainant alleged that C3 intentionally "dumped" the presentation to prevent her from "capturing the hate." According to C3, he had no control over the settings of the online meeting software, and he denied intentionally destroying the comments or directing someone else to do so. S1C stated that she was unable to print out the chat from the presentation and that C3 told her that he also could not access the chat because the comments had not been saved. According to S1C, C3 told her that he was not prepared for Complainant's question about the impact of background checks on transgender employees and that he did not mean to offend her when he brought up sexual orientation in response. C4 stated that Complainant made several comments about being transgender, including referring to President Trump's statement that transgender people were not fit for government service, that were unrelated to the background check process. According to C4, she commented, "OMG, this has NOTHING to do with this." ROI 2 at 1440. On July 24, 2018, S2B emailed Complainant, stating that he had addressed her allegation that she was harassed during the webinar and that management was committed to addressing and investigating all claims of workplace harassment. Complainant responded, asking how S2B had addressed her allegations and what S2B would be doing to stop the harassment from happening in the future.

S2B stated that he investigated and that he determined that no harassment had occurred. S2B averred that he interviewed C4, who stated that she

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based harassment if such conduct is either severe or pervasive so as to create a hostile work environment. Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (April 1, 2015).

made the comment because Complainant's question was unrelated to the topic of the training. According to S2B, no corrective action was required because he did not find that C3 or C4 had engaged in wrongdoing or that their comments were inappropriate.

On June 21, 2018, Complainant copied S1C on an email about security concerns, stating that "TIGTA refuses to help and will no longer take complaints about trans hate from me. The local police will not do anything unless I am physically hurt. And IRS management is non-responsive to my security needs." ROI 2 at 249. S1C responded to Complainant that she should plan appointments in the office if she did not feel safe conducting an audit in the field. On June 25, 2018, S1C forwarded an email to the group containing safety tips for working in the field. On June 27, 2018, Complainant responded to S1C, noting that the tips were not helpful to her and that she had not received any response from management about her safety concerns. S1C replied that she had elevated Complainant's concerns, and Complainant replied, "Thanks, [S1C]. I know that is all you can do. My complaints are not with you, but the disconcerting lack of competence by management above you." ROI 2 at 258.

On July 24, 2018, Complainant emailed S2B, S1C, and S3B, and she attached a copy of the statement she submitted with her June 6, 2018, formal EEO complaint. Complainant stated that, since filing the EEO complaint, she had continued to experience negative treatment, including non-timely responses to her requests for administrative time and her requests for reasonable accommodation being denied. On July 25, 2018, Complainant emailed S1C and S2B, notifying them that she had "incurred additional legal expenses" because they had not granted her administrative time to work on the investigative affidavit. At 11:06 a.m. on July 25, 2018, S2B responded that Complainant could have up to eight hours of administrative time and asked her to let him know when she would use the administrative time and if she needed additional time.

Complainant stated that on July 25, 2018, S1C provided her with negative feedback in a case review. S1C averred that the case review is based on five cases, Complainant's Outlook calendar, and her current case list. S1C averred that the case review was actually positive and that she rated Complainant as "Exceeds" in 11 critical job elements and as "Meets" in the remaining four elements. S1C stated that Complainant could improve by trying to get along better with her coworkers and try to treat people more respectfully. According to Complainant, S1C criticized the amount of time she spent on the case and her interactions with taxpayers.

Complainant alleged that she asked S1C to explain her comments but that S1C's reasoning was "vague and non-sensical." ROI 2 at 149. According to S1C, in response to the review, Complainant told her that she should be treated better than everyone in the group because she is transgender. S1C stated that she treated everyone equally.

At 12:38 p.m. on July 25, 2018, S2B emailed Complainant, asking her to call him at 2:00 p.m. and informing her that she could have a union representative if she wished. At 2:01 p.m., S2B emailed Complainant an Alternative Discipline notice, which stated that he was considering suspending her for 10 days for failure to follow directive and unprofessional conduct. The letter stated that Complainant could request the consideration of an alternative form of discipline by August 1, 2018. The Alternative Discipline notice did not specify the bases for the charges of failure to follow directive and unprofessional conduct, but S2B stated that it was based on Complainant's "WTF??" email to S1B and her failure to respond to S2B's email when he asked what she meant. According to S2B, he had been working on the Alternative Discipline proposal for months, and he did not issue it to Complainant as a result of her EEO activity.

On July 26, 2018, Complainant emailed S2B, S1C, and S3B, stating that she had received the Alternative Discipline notice. Complainant alleged that the allegations were false and accused S2B of not providing enough detail in the letter or during the phone call, for her to respond. Complainant stated, "You are already aware that EEO advised me in writing not to follow 'directives' from you due to your bias, negative demeanor, and failures to follow required procedures following the filing of my initial EEO complaint." ROI 1 at 345. Complainant noted that S2B issued the letter "within hours" of receiving notification of Complainant's EEO complaint, and she stated that the disciplinary proposal was retaliatory and that she would "pursue all legal remedies against you." Id. Complainant asked S2B to "permanently recuse yourself from any actions involving me," and she asked S3B to "please remove [S2B] from any personnel actions involving me as a reasonable accommodation due to my transgender status." Id. S2B responded that he and Complainant had discussed the details of her actions during the call, and he offered to discuss them again at any time. On July 26, 2018, Complainant sent an email to the Agency's Anti-Harassment Program and copied S1C and S3B. Complainant stated that S2B proposed suspending her in retaliation for filing an EEO complaint, and she asked for a management inquiry to be conducted "to stop the bullying." ROI 1 at 365. On July 27, 2018, Complainant emailed S1C, stating, "Following [S2B]'s retaliation yesterday, I

am severely depressed and anxious. Why does management have to hate on me?" ROI 1 at 366.

The Chief of Reasonable Accommodation Services (RAC2) stated that, on July 26, 2018, RAC1 forwarded her two emails seeking guidance on Complainant's reasonable accommodation request. RAC1 stated that she reached out to RAC2 because Complainant had asked that her RA request be elevated. RAC2 stated that she asked RAC1 to forward all case history regarding Complainant, so she could have a better of understanding of the situation. According to RAC2, it was not clear what Complainant was requesting as an accommodation or what her medical needs were. RAC2 stated that she emailed Complainant to introduce herself, but she stated that Complainant would respond with vague references to harassment or reasonable accommodations and would not clarify what she was asking for or why she needed a reasonable accommodation. RAC2 averred that Complainant sometimes would not respond to messages she or RAC1 sent, and she stated that Complainant did not clarify her specific reasonable accommodation needs.

On July 30, 2018, Complainant emailed S1C and stated that she was experiencing emotional and physical distress because S2B had bullied her the week before, making it hard to concentrate on work. Complainant averred that S2B only approved half of the administrative time she had requested to work on her investigative affidavit and that he said that she would need to ask him if she needed additional time. Complainant stated, "As such, I request reasonable accommodations to timely complete the required affidavit without any further bullying from or required responses to [S2B] on this matter." ROI 1 at 349. On July 30, 2018, S1C responded that she was forwarding Complainant's reasonable accommodation request to S2B. On July 31, 2018, S1C emailed Complainant, stating that she could report her use of the eight hours of administrative time to S1C and reach out to S1C, rather than S2B, if she needed additional time.

On August 1, 2018, S1C emailed Complainant and asked her to come into the office on August 2, 2018, to meet with her to discuss what had happened during an August 1, 2018, meeting with TPR1. According to S1C, TPR1 called her and stated that Complainant had come to his office that morning for an audit when suddenly she became enraged, started ripping up papers, and left the building. S1C asked TPR1 to come to the Federal Building on August 22, 2018, to finish the audit with Complainant, and she stated that TPR1 had asked for S1C to be present.

S1C averred that, when she asked Complainant about what happened, Complainant stated that TPR1 was the one who lost his temper.

On August 15, 2018, Complainant received an email about a security awareness training that was being offered by a Federal Protective Service (FPS) Inspector at the Little Rock Federal Building. On August 15, 2018, Complainant emailed the Inspector, stating that she experienced hate regularly because she is transgender and asking how she could improve her personal security. As examples, Complainant cited U1 telling her to go to hell and needing to be restrained by other employees, the verbal abuse walking into the Federal Building, and being excluded from TPR1's office. On August 17, 2018, the Inspector replied, stating that he understood her security concerns but that they appeared non-criminal in nature. He advised Complainant that if she felt threatened or was assaulted, she should contact local law enforcement, Agency management, and the FPS. The Inspector also suggested that Complainant attend the upcoming security training. Complainant emailed the Inspector on August 17, 2018, asking whether he was saying that she "must accept the hate due to my gender identity" and who she should talk to about her security concerns. ROI 2 at 404. On September 21, 2018, Complainant emailed the FPS Inspector and S1D, requesting help with her security concerns.

On August 22, 2018, Complainant met with TPR1, TPR1's assistant, and S1C in a conference room at the Agency's office to discuss an audit. According to Complainant, S1C positioned her chair near the door so that Complainant could not exit the conference room. Complainant alleged that TPR1 was abusive towards her, calling her unethical because she was transgender. Complainant stated that she asked S1C to call security but that S1C refused to do so and would not move away from the door, so Complainant could not escape. S1C stated that the small room had a desk with a panic button and two doors, one to the hallway and one to the Agency office space. S1C averred that Complainant sat behind the desk by the panic button, that TPR1 and his assistant sat across the desk from Complainant, and that she sat by the door because there was nowhere else to sit. S1C averred that TPR1 and Complainant immediately began arguing with each other. According to S1C, there was no immediate danger. S1C stated that Complainant began requesting that security be called while TPR1 was trying to explain himself. S1C averred that, because Complainant and TPR1 could not have a civil conversation, she asked TPR1 to leave the documents he had brought with him and suggested that the audit be completed by correspondence so that TPR1 and Complainant would not have to spend time in the same room together.

On August 22, 2018, S1C emailed Complainant, stating that she understood that Complainant's feelings were hurt by TPR1 and that she was angry. S1C stated that Complainant should not take his behavior personally because TPR1 was trying to defend his client and would have acted the same no matter who was auditing the taxes. On August 22, 2018, Complainant responded that she would try not to get upset, but she stated, "Being called unethical without substantiation is abuse." ROI 2 at 329. On August 22, 2018, S1C responded that she understood but that Complainant would have to find a way to get through the audits involving TPR1. On August 24, 2018, Complainant forwarded an email chain involving TPR1 to S1C, stating that TPR1 was publicly accusing her of acting unethically by copying others on their emails. Complainant stated, "This is actionable by me personally in court (defamation and slander). Suggestions on how to put him on notice?" ROI 2 at 338.

According to Complainant, on September 4, 2018, S1C issued her a negative departure rating. Complainant alleged that the only reason the rating was not significantly higher was her transgender status. Complainant stated that S1C accused her of being mad at TPR1 and told her that she was to blame for the negative interaction. On September 4, 2018, Complainant emailed S1C, asking why the appraisal did not discuss "the transgender hate from [S2B] that I was forced to endure as a condition of employment throughout your entire tenure as AGM?" ROI 2 at 350. Complainant also asked S1C why she did not think that an abusive taxpayer representative should not be removed from the office by security and requested that S1C redo the appraisal because it was unfair and biased. S1C rated Complainant as "Exceeds" in 12 critical job elements and as "Meets" in the remaining three elements, Workplace Interaction, Customer Relations, and Written Communication. S1C stated that this departure rating was not negative. For Workplace Interaction, S1C noted, "You generally interact with taxpayers and representatives in a courteous and professional manner." ROI 2 at 866. Under Customer Relations, S1C stated that she had observed Complainant interact with taxpayers who spoke English as a second language in a very courteous manner. However, S1C averred, "at a recent meeting with an accountant, you were not respectful. You threatened to call security on him when he was not being threatening. You should be professional with all representatives and taxpayers, even if they are angry or disagree with you." Id. Under Written Communication, S1C stated that, although Complainant's written work was good, she did not always complete it in a timely manner. On September 6, 2018, Complainant emailed S1C and S1D, rebutting S1C's departure appraisal and stating that she experienced severe psychological distress because of the abuse and the safety concerns related to the August

22, 2018, meeting with TPR1. Complainant asked that her rebuttal be attached to S1C's departure appraisal. According to S1C, Complainant accused her of discriminating against her and told her that she did not understand discrimination. S1C stated, "She said that my treating her the same as everyone else is discrimination. She should receive special treatment because of her transgender status and because of her disability." ROI 1 at 399. S1C averred that Complainant told her that she would file an EEO complaint against S1C if she did not receive preferential treatment and that Complainant bragged about getting managers fired before she transferred to Little Rock.

On August 28, 2018, Complainant emailed a request for approval of outside employment to S1C. The request form stated that she currently had approval for outside employment, and she described the nature of employment as, "Writing, research, and teaching in my academic fields interests for no compensation." ROI 2 at 344. Complainant also listed outside employment in real estate, stating that she held an interest in a family real estate trust and participated in trust management related to land development and rental properties. S1C stated that she did not look at the request because her detail as Acting GM was ending.

Complainant averred that on September 4, 2018, S1D rejected her request for outside employment form. Complainant stated that S1D told her that she did not include an address on the form and told her that there was no connection between the outside employment requests. According to Complainant, there was an address on the form, and she did not need to establish a connection between the activities because they were not related. S1D stated that the form was incomplete and required additional clarification. According to S1D, she asked Complainant to resubmit the form after she added the requested information. On September 20, 2018, S1D emailed Complainant, noting that she had not approved her request for outside employment form due to missing and inconsistent information. The form stated that Complainant had approved outside employment requests, consisting of, "Writing, research, and teaching in my academic fields of interest (organizational leadership, horticulture, history, etc.) for no compensation. Paid consulting services in the field of cannabis production. No tax preparation or accounting services are provided by me in any outside endeavor." ROI 2 at 393. Complainant provided the name and address of her family's real estate trust as a prospective employer with a proposed start date of September 4, 2018. Complainant stated that she was active in leadership of the trust but stated that she did not prepare taxes or provide accounting services.

On September 20, Complainant replied, "I expect specific reasons for this action. When will you explain in detail?" ROI 2 at 389. On September 21, 2018, S1D responded that she had already provided the reasons and that she and Complainant could discuss them at a September 25, 2018, meeting. Complainant replied that S1D's reasons were "non-sensical" and asked, "Please state clearly why this request has been declined in writing." ROI 2 at 408. Although the record does not reflect that Complainant revised the form, on November 1, 2018, S1D signed Complainant's September 4, 2018, request for outside employment form and forwarded it to S2B. ROI 2 at 952. On March 20, 2019, S2B issued Complainant a memorandum, which stated that he could not approve her request for outside employment because it required clarification. ROI 2 at 950-51. S2B stated that Complainant needed to clarify the business activities involved in the management of her father's estate. S2B added that, although her cannabis consulting may have been approved in 2017, he was revoking her permission to engage in cannabis consulting, effective immediately. S2B stated that, based on an opinion from the Deputy Ethics Office, cannabis consulting conflicted with Complainant's official duties with the Agency because marijuana was a Schedule 1 drug under the Controlled Substances Act.

On September 4, 2018, Complainant emailed S1D, stating that S1C forced her to meet with TPR1 and his assistant in a small conference room in August and that, "Due to the size of the room and crowded conditions, I was trapped in the corner and unable to escape continued verbal abuse from [TPR1]. I requested relief by requesting [S1C] to call security. [S1C] refused to call security and forced me to remain in the corner with no avenue of escape. Please advise." ROI 2 at 351. S1D responded that Complainant should always position herself in a seat closest to the exit and that she would look into the matter. On September 4, 2018, Complainant forwarded her email to S1D about the meeting with TPR1 to S1C. On September 10, 2018, S1C responded, "This is absurd." ROI 2 at 380. S1D stated that she spoke with TPR1 regarding a related case. According to S1D, TPR1 told her that Complainant was unprofessional during the meeting with S1C and called security for no reason. S1D averred that TPR1 told her that it would be best to end the meeting at that time. S1D stated that TPR1 provided Complainant with valid, third-party substantiation for an issue, but Complainant would not accept the substantiation. S1D added that TPR1 told her that Complainant went to a taxpayer's house, spoke with his neighbors, and did not notify his representative, TPR1, that she had done so, violating the taxpayer's rights.

Complainant alleged that S1D was forcing her to meet with TPR1 on September 11, 2018, for a site visit. According to Complainant, she asked S1D for an armed escort, but S1D refused. Complainant stated that S1D could have waived the site visit requirement but did not do so. The record contains a September 6, 2018, email from S1D to a TIGTA Agent, stating that Complainant had requested an armed escort for a site visit with someone who subjected her to continued verbal and written abuse and asking what information would be needed. On September 6, 2018, the TIGTA Agent sent a responsive email to S1D, which stated that armed escorts could be granted for a taxpayer/representative with a PDT designation but stating that "verbal and written 'abuse' that does not contain threats, would in and of itself not meet the criteria to get an armed escort." ROI 2 at 367. On September 6, 2018, Complainant emailed S1D, stating that she was not surprised that TIGTA would not help her but asking S1D to waive the requirement for a site visit. On September 7, 2018, S1D responded that the site visit was required. Complainant responded, asking if that meant she had to face verbal abuse alone. On September 10, 2018, Complainant emailed S1C and S1D, noting that TPR1 had been recommended as a Facebook friend because they shared a mutual Facebook friend. Complainant stated that she looked at his Facebook page. On September 10, 2018, S1D responded to Complainant's September 7 email about being forced to endure verbal abuse, stating that she had already indicated that the site visit was required and that she had provided the information from the TIGTA Agent about requirements for being provided an armed escort. On September 10, 2018, Complainant replied, stating that she was transgender and received "substantial hate" because she was transgender, that TPR1 had been "egregiously abusive" towards her in two meetings, and that TPR1 "is a member of a transgender hate group as the basis for his hate of me, as you know." ROI 2 at 378. Complainant stated that S1D was requiring her to conduct the site visit with TPR1 by herself even though S1D could waive the site visit requirement. Complainant added, "You are requiring me to accept this hate and more as a condition of my employment. Does this accurately reflect your position?" Id. On September 10, 2018, Complainant contacted TPR1 and cancelled the site visit scheduled for the next day.

On September 11, 2018, Complainant emailed S1D, stating that her response to Complainant's safety concerns was disconcerting. On September 12, 2018, S1D asked Complainant what safety concerns she was referring to, stating that she thought all issues had been resolved and noting that she had provided Complainant with the message from TIGTA. On September 12, 2018, Complainant responded to S1D, "NO."

My safety concerns have not been addressed. I am bullied and mistreated due to my transgender status.” ROI 2 at 384. On September 21, 2018, Complainant emailed S1D, “I have requested assistance on my security multiple times from you and you do not respond. Why?” ROI 2 at 395. On September 21, 2018, S1D stated that she had contacted TIGTA and forwarded the response to Complainant, and she asked if Complainant wanted her to resend the email from TIGTA. On September 21, 2018, Complainant replied that the TIGTA email did not address her security concerns, including when S1C would not call security when TPR1 was abusing her. On September 21, 2018, a U.S. Army Corps of Engineers employee contacted Complainant, stating that the Little Rock Federal Building security committee had asked her to meet with Complainant to discuss her safety concerns. ACE1 and Complainant set up a meeting for 10:00 a.m. on September 25, 2018.

Complainant alleged that on September 24, 2018, she received a series of harassing and bullying emails from S2B that questioned her professional qualifications and accomplishments. According to Complainant, she was recognized by the Agency as a cannabis expert, and her outside employment dealing with the cannabis industry had previously been approved. On September 9, 2018, Complainant had sent an updated copy of her resume to S1D and S2B. Complainant’s resume stated that she was assigned several cannabis cases while working for the Agency in California and that she was “[s]ubsequently named as the leading national cannabis expert for IRS, providing expert testimony in CA and CO tax litigation, and educating IRS employees and others.” ROI 2 at 372. Complainant also noted that she worked “with potential cannabis state licensees in Arkansas on federal tax compliance under IRS approved outside employment requests for no compensation. Cannabis efforts on IRS behalf resulted in being named 2016 Arkansas Woman Entrepreneur of the Year – Trailblazer by The Arkansas Times.” Id.

On September 25, 2018, S2B emailed Complainant and stated that he had reviewed the resume she sent him on September 9. S2B stated that he was concerned that her resume stated that she represented the Agency as a cannabis expert or in any other capacity related to cannabis, noting that he was unaware that she had received approval to represent the Agency as a cannabis expert or otherwise received approval for outside employment related to cannabis. S2B asked Complainant to refrain from stating that she was allowed or approved to represent or attend events on behalf of the Agency in any capacity on cannabis-related issues.

Complainant responded that she did not represent the Agency in her outside employment, and she stated, "Prior managements approved my cannabis related activities." ROI 2 at 419. S2B responded that Complainant was not approved to represent the Agency in any cannabis capacity and asked her to provide her prior manager's approval of such activity. Complainant responded, "Is this retaliation again?" ROI 2 at 418. On September 25, 2018, Complainant emailed S2B and attached a screenshot from an Agency system that showed a 2017 request for approval of her paid cannabis consulting and a July 20, 2016, memorandum from an Agency Large Business & International Manager, thanking Complainant for her presentation on cannabis during a teleconference for valuation specialists. ROI 2 at 422-24. On September 26, 2018, Complainant emailed S2B, asking whether he was still questioning her cannabis expertise, noting that he had failed to respond to her reasonable accommodation requests, workers' compensation claims, and outside employment requests and that he had retaliated against her EEO activity by proposing a 10-day suspension. Complainant asked, "Why do you have to hate me so much?" ROI 2 at 425. On September 27, 2018, Complainant emailed S3B, stating that she had experienced a series of harassing emails that week from S2B and asking why she continued to receive transgender-based hate from him.

At 8:12 a.m. on October 10, 2018, Complainant emailed S1D and stated that her mother's husband had died and that she would likely take leave that afternoon to travel to Austin, Texas for the funeral. At 8:44 a.m., S1D responded that Complainant needed to be in the office to meet with her and S2B and to attend a town hall meeting that was scheduled 1:00 p.m. When Complainant responded that she planned to call in for the town hall, S1D stated that S2B had only provided a call-in number for group employees not located in Little Rock. Complainant responded, "Guess I missed that memo. Also didn't realize reasonable accommodations can be denied without warning. Is [S2B] going to blindside me with something?" ROI 2 at 432. According to Complainant, there was a group meeting on October 10, 2018, and S1D would not give her the call-in number to participate remotely, even though Complainant had experienced a death in the family that morning and other employees could call in to the group meeting. Complainant averred that she normally participated in meetings remotely because she "worked 100% from home for more than a year" as a reasonable accommodation. ROI 2 at 172. Complainant alleged that S2B was in Little Rock and "wanted to harass me face to face." ROI 2 at 172. S1D stated that the October 3, 2018, Outlook invitation specified that Little Rock employees were expected to attend the town hall in person and that a call-in number would only be provided for employees not based in Little Rock.

According to S1D, Complainant told her that her mother's husband had died, but she told S1D that she would be working the day of the town hall and that she planned to travel to Austin the following day.

Complainant stated that, after the town hall meeting, she met with S1D and S2B. During the meeting, S2B issued Complainant a proposed three-day suspension. The charges in the proposed suspension were: (1) discourteous and unprofessional conduct; and (2) failure to follow managerial directives. The first charge stated that Complainant's use of "WTF??" in her April 2, 2018, email to S1B was discourteous and unprofessional, and the second charge noted that Complainant had failed to respond by noon on April 26, 2018, to S2B with the meaning of "WTF??" as directed. S1D stated that, when S2B issued Complainant the proposed suspension, Complainant got very angry, stated that the Agency had been unfair to her, and alleged that "she has had to prove whether she had a penis or vagina." ROI 2 at 775. According to S1D, S2B remained very professional and asked Complainant if she had any questions about the proposed three-day suspension. Complainant alleged that, during the meeting with S1D and S2B, S2B also told her that she should only discuss her security concerns with him, telling her that she should not discuss these matters with Little Rock Federal Building personnel and stating that he had heard that she was acting inappropriately towards security guards. According to Complainant, she told S2B that one of the security guards has a grudge against her because she reported that he had asked if she had a penis or a vagina in 2016, Complainant alleged that S2B said, "I don't care if you have a penis or vagina, I treat all people equally." ROI 2 at 153. S2B stated that he had received complaints from Federal Building security staff and from the FPS that Complainant would inappropriately request that they escort her to her car and to her appointments in the field. According to S2B, he also learned that Complainant was not showing her employee ID to security as required. S2B averred that he told Complainant that she should bring any security concerns to him and that he explained that FPS and security guards do not escort employees to their car or escort them to appointments. According to S2B, he told Complainant that TIGTA would get involved if there was an issue with a taxpayer who was coded as "approach with caution" or potentially dangerous. S1D denied hearing S2B tell Complainant not to discuss her security concerns with anyone other than S2B.

On October 10, 2018, Complainant emailed an Anti-Harassment Specialist, accusing S2B of retaliating against her for her EEO activity by suspending her for three days. Complainant asked the Anti-Harassment Specialist to add the suspension to her reported harassment claim.

After the October 10, 2018, meeting, Complainant sent S2B an email that stated that his "management theory" that workplace discrimination does not exist when everyone is treated equally "fails as a best management practice. Termed the 'consistency argument' in epistemology, the fatal flaw is that not everyone arrives on the same level base and, therefore, cannot be treated on a basis consistent with others." ROI 2 at 438. Later in the afternoon, Complainant sent S2B another email, stating that, because she had not been "prepared for your accusations of bothering the Federal Police about my safety," she had neglected to mention an incident where S1C refused to call security and forced her to endure transgender hate. ROI 2 at 439. Complainant suggested that the Little Rock office be outfitted with panic buttons in case there was an emergency. On October 18, 2018, S2B replied to Complainant, stating that one of the Little Rock conference rooms had a panic button. On October 19, 2018, Complainant responded, asking where the panic button was and how it worked. Complainant also asked, "Will this be your only response to my myriad of security concerns? Why are you not addressing the prior issues as contained in my June statement to EEO?" ROI 2 at 442. S2B responded, "All statements in your EEO will be addressed in your EEO." ROI 2 at 441. Complainant replied that, since filing her EEO complaint, she had been subjected to transgender-based security incidents inside and outside of the office, and management had not properly addressed her security concerns.

Complainant stated that on October 16, 2018, S1D issued her a negative midyear evaluation. S1D rated Complainant as "Meets" in Customer Satisfaction/Application, as "Exceeds" in Employee Satisfaction/Employee Contribution, and as "Outstanding" in Customer Satisfaction/Knowledge, Business Results/Quality, and Business Results/Efficiency. According to Complainant, the evaluation contained biased comments and did not reflect that she had been subjected to a hostile work environment. On October 30, 2018, Complainant sent S1D an email, stating that the midyear review was not reflective of her efforts, contained false statements from S1C, and did not mention that she had been subjected to a hostile work environment, transgender discrimination, and security concerns. According to Complainant, S1D did not respond to her email. S1D stated that she rated Complainant as "Exceeds Fully Successful" based on her assessment of Complainant's work, as well as evaluations prepared by S1B and S1C.

The Agency uses a Leadership Succession Review to evaluate and identify candidates for leadership positions. On October 23, 2018, Complainant stated that S1D and S2B rated her as "Not Ready" for leadership in her Leadership Succession Review.

According to Complainant, she is more than ready for a supervisory position because she has extensive business and accounting experience as well as a Ph.D. in organizational leadership and a master's degree in taxation. Complainant averred that S1D and S2B did not explain why they rated her as not ready for a leadership position. Complainant alleged that S2B rated her as "Not Ready" so he would have an excuse not to select her for a supervisory position. On October 24 and October 30, Complainant emailed S1D and asked her to explain why she indicated that she was not ready for leadership. On October 30, 2018, S1D emailed Complainant that she based the rating on the skills she had demonstrated. According to S1D, she offered a career learning plan to Complainant to improve the skills needed for a leadership role. S2B stated that he rated Complainant as "ready with development" or "not ready" for leadership on the criteria because she needed more Agency experience. According to S2B, the review was not negative, but reflected her lack of leadership experience with the Agency.

Complainant timely applied for a Group Manager position advertised under vacancy announcement number 18EMB-SBM0201-0512-05-PB, and she appeared on the "Best Qualified" list. According to Complainant, she interviewed for the position on October 31, 2018. Complainant averred that S2B was one of the three interview panelists "despite my request for recusal of [S2B] due to the hostile environment." ROI 2 at 185. The other members of the interview panel were also Territory Managers, one based in Dallas (P1) and one based in Farmers Branch, Texas (P2). S3B was the selecting official for the GM vacancy, and she stated that she selected S1C for the position because she had previously served as Acting GM and because the interview panelists agreed that S1C's interview answers were specific and reflected the practical experience needed for the position, whereas Complainant's answers had been more general and philosophical. S3B averred that both Complainant and S1C had experience running a business outside of the Agency, but she noted that Complainant did not have supervisory experience with the Agency. According to S3B, the interview panel was interviewing candidates for GM positions in the three territories they managed. S3B stated that she instructed S2B, P1, and P2 not to share personal knowledge or information about the candidates with the other panelists during the selection process and that she directed the panelists that, when reviewing a candidate who was in their chain of command, that panelist should give feedback after the other two panelists "to avoid any implication that the feedback had been 'tainted' by the 'reports to' territory manager." ROI 2 at 1432. P1 stated that, overall, Complainant's responses to the interview questions were good, but he stated that not all of the answers were thorough.

P1 averred that S1C had a very good interview and her responses to the questions were complete and detailed. According to P2, Complainant gave very general answers during her interview. P2 stated that he recommended S1C for the position because she was action-oriented and showed leadership potential.

Complainant alleged that she learned on November 8, 2018, that S1C had been selected as the new GM. Complainant stated that S2B never told her why she was not selected. Complainant alleged that she has more Agency experience, leadership experience, professional expertise, and education than S1C. On November 8, 2018, Complainant emailed S2B, "I am quite skeptical you found a better, more qualified person than me to be selected as GM. I assert your bias and discrimination against me due to my transgender issues is the primary concern for my non-selection. See you in Federal Court, sir." ROI 2 at 533. On November 15, 2018, Complainant emailed S2B, stating that S1C was not qualified to be GM and that she had less extensive educational and professional qualifications than Complainant, asking, "How could you non-select me other than due to these transgender issues? I protest this selection of Group Manager and the hostile workplace you have created and maintained for me." ROI 2 at 563. On November 29, 2018, S2B scheduled a meeting for December 3, 2018, with Complainant and the interview panelists to provide feedback on her interview for the GM position. Complainant responded, stating that she protested S2B's involvement in the selection process for the GM and that she was not selected for the position. Complainant stated that S2B had created a hostile work environment for her and knew that "we are headed to Federal Court," and she attached a statement from her EEO complaint "as evidence of [S2B's] conflicts of interest" for the other panelists. ROI 2 at 643. Complainant asked that S2B and the panelists promptly provide her with all documents related to her nonselection. Complainant did not attend the meeting on December 3, 2018.

On November 9, 2018, S1D sent Complainant an email that stated that she was not in compliance with the collective bargaining agreement, which required that she work in the office or in the field for at least two days per pay period. Complainant responded, "As we previously discussed, I have reasonable accommodations granted by management to work from home due to my transgender issues. Employees with reasonable accommodations are excluded from this policy, per se." ROI 2 at 535.

Complainant stated that on November 14, 2018, she attended a group meeting in the office that was scheduled to last all day. According to Complainant, S1D stated that the purpose of the meeting was to educate a Revenue Agent (C5) who had previously served as a full-time union representative, and S1D asked the group members to prepare presentations on assigned topics. Complainant was scheduled to give her presentation in the afternoon. Complainant stated that C5 was not in the office that day but that S1D insisted on conducting the meeting. Complainant alleged that other group members were participating remotely. Complainant averred that, as the group stopped for a lunch break, she asked S1D for the call-in number, so she could participate in the afternoon session remotely. According to Complainant, S1D would not give her the call-in number, so she brought up her reasonable accommodation. Complainant alleged that S1D shouted, "You have no reasonable accommodations!" repeatedly in an argumentative tone. ROI 2 at 190. Complainant averred that the entire group was present and that S1D inappropriately disclosed her reasonable accommodation to her coworkers. S1D stated that, after the morning session of the group meeting, Complainant said that she was going home and asked for the call-in number. According to S1D, she told her that the call-in number was for Mississippi-based employees and that Little Rock employees were expected to attend in person. The record contains the Outlook invitation for the group meeting, which states that Arkansas employees should attend in person and that Mississippi employees would attend by phone or by Skype. S1D averred that Complainant raised the issue of her reasonable accommodation, to which she responded that Complainant was expected to attend the meeting in person. According to S1D, she had already dismissed the group for lunch, and the group members were in the process of leaving the room. S1D stated that Complainant indicated that she was going to go home and do case work. S1C stated that she and two other group members were in the room while Complainant and S1D were talking. According to S1C, Complainant asked S1D for the call-in number for the afternoon session, and S1D told her that she needed to attend in person. S1C averred that, in response, Complainant brought up her reasonable accommodation, but S1D said that Complainant did not have a reasonable accommodation. S1C averred that Complainant left and did not return after lunch.

Complainant did not participate in the afternoon session of the group meeting. Complainant averred that S1D issued her a negative evaluation because she did not attend the afternoon session. According to Complainant, in the days following the November 14, 2018, incident, S1D denied that she had disclosed Complainant's reasonable accommodations.

On November 14, 2018, at 12:23 p.m., Complainant emailed S1D and copied S2B, stating that she had a reasonable accommodation to work from home. Complainant stated, "Confirming that you intentionally excluded me from the remainder of today's group meeting post lunch by refusing to provide me with the call in number and ID# so that I may call in, like others in our group. You falsely stated that I have no reasonable accommodations. You stated my presentation would be covered by others. Due to your exclusion of me, I will perform case work instead for the remainder of the day." ROI 2 at 548. S2B replied that Complainant did not have a reasonable accommodation. Complainant responded that she did have reasonable accommodations that were approved by prior managers, adding, "Again, please stop the hate of me, sir." ROI 2 at 549.

On November 15, 2018, Complainant emailed S1D, asking her to issue a written apology for stating that Complainant did not have a reasonable accommodation in front of other group employees. Complainant also asked S1D to send a copy of the written apology to all group employees. On November 15, 2018, Complainant emailed S1D, stating that she was severely depressed and anxious due to ongoing hate, including the public argument about her reasonable accommodation on November 14. Complainant stated that this constituted a workplace injury. On November 16, 2018, Complainant forwarded the email about her workplace injury to RAC1 and RAC2. RAC2 responded that her office did not handle workplace injuries and provided the proper procedures for reporting such an injury. Complainant replied, "I am providing you with this information as validation of my hostile workplace created by [S2B]." ROI 2 at 571. RAC2 stated that she conducted an extensive review of Complainant's past reasonable accommodation files in November 2018. According to RAC2, she requested historical case file records from all RACs who had worked on Complainant's reasonable accommodation requests, and she noted that she did not receive any medical documentation directly from Complainant.

On November 15, 2018, S2B emailed Complainant and S1D, copying S3B and RAC1. S2B stated that there was no record of a reasonable accommodation that had been granted to Complainant and that management and EDI personnel had tried to work with her over the past several months to determine if Complainant needed a reasonable accommodation. S2B stated that Complainant had not provided the necessary information but that he encouraged her to work with RAC1. S2B concluded, "Without completing the process and providing sufficient information for EDI to assist, we cannot allow any deviation from your work requirements as reflected in your position description and critical job

elements." ROI 2 at 560. Complainant responded, "The EEO affidavits speak for themselves." Id. On November 15, 2018, Complainant emailed RAC1, stating that S1D excluded her from work and publicly announced that Complainant had no reasonable accommodations, asking "Why did she have to make my disability a public discussion?" ROI 2 at 565. R1C replied to Complainant and stated that she had forwarded Complainant's email to RAC2, who would address her concerns. On November 15, 2018, Complainant told RAC2 that she would be available to discuss her concerns and the status of her requests for reasonable accommodations the following week, "contingent upon management approval of admin time." ROI 2 at 564.

On November 16, 2018, Complainant emailed RAC1 and RAC2 and copied S1C, S1D, S2B, and S3B. Complainant stated that she has been reasonably accommodated with working from home since 2012. According to Complainant, the reasonable accommodation was "informal" because of an "agreement with senior IRS management (Commissioner's Office) over the years due to lack of ANY government policy regarding reasonable accommodations for transgender employees." ROI 2 at 569. Complainant alleged that she had incurred \$105,000 in out-of-pocket medical costs that were not covered by her health insurance because she was transgender. Complainant asserted that S2B had "created and maintained a hostile environment for me since he arrived on the scene earlier this year" and that S1C appeared to be even more ignorant than S2B. ROI 2 at 569-70. Complainant concluded, "So my question is...how much of my file drawer would you like to see to prove that I have had informal reasonable accommodations of working from home (at my option) since 2012? Please consider and advise." ROI 2 at 570.

On November 16, 2018, RAC2 emailed Complainant, stating that, in anticipation of their call the following week, she needed to know: (1) what exactly Complainant was requesting as an accommodation; (2) whether her previous informal accommodation was no longer effective; and (3) whether there was a new need for a different type of accommodation. Complainant responded, "As a result of ignorance, [S2B] is improperly attempting to somehow discredit and revoke my approved informal reasonable accommodations granted to me by IRS senior management in 2012. Worse, [S1D] publicly stated to my colleagues this week that I have no reasonable accommodations." ROI 2 at 578. RAC2 replied that she was scheduled to meet with Complainant the following week, at which time they could discuss her concerns and the status of her reasonable accommodation. Complainant emailed RAC2, asking whether she was suggesting that the status of her 2012 informal reasonable accommodations had changed.

RAC2 replied, "I am not suggesting anything. I am requesting a meeting to discuss all the facts. Since I was not in this position at the time I need to review our records and I want to hear from you as well as your managers. I have an individual meeting scheduled with you next week and a joint meeting to include your managers the following." ROI 2 at 576.

On November 16, 2018, S1D responded to Complainant's November 14 email, stating that, when Complainant requested the call-in number as the group broke for lunch, she told her that the call-in number was for Mississippi employees. According to S1D, "You raised the issue of an accommodation and I expressed to you again that all agents in the POD were to attend the meeting in person. In addition, there was only one employee in the room at the time you raised the issue." ROI 2 at 582. S1D stated that she directed Complainant to attend the meeting in person and that her failure to do so was disrespectful and unprofessional. S1D concluded, "In addition, all future group meetings held in Little Rock, should be attended in person." Id. Complainant responded to S1D that her description was misleading and inaccurate and that she should not have to attend a meeting in person that others were allowed to participate in remotely. S1D stated that she had a phone call with Complainant to discuss her November 16 email about the November 14 group meeting. According to S1D, the phone call was one-sided because Complainant was screaming at her for the entire call and called S1D a liar. S1D averred that she did not respond to Complainant's comments because she wanted to remain professional. On November 19, 2018, Complainant emailed S1D, "As we discussed on the phone this morning, why did you have to knowingly lie about no one being present in our group meeting? Shall we poll everyone to prove you are a liar?" ROI 2 at 590.

On November 19, 2018, Complainant reported S1D's November 14 statement that she did not have a reasonable accommodation to the Agency as a breach involving the disclosure of Complainant's PII. On November 19, 2018, S1D issued Complainant an evaluative review of the November 14 group meeting. The review stated that Complainant's actions during the meeting, leaving the meeting, and not giving her presentation in the afternoon were disrespectful, unprofessional, and against management directives. Complainant responded that the review was retaliatory, noting, "You should be ashamed of yourself for lying and now this negative action designed to hurt a marginalized employee." ROI 2 at 596. On November 21, 2018, Complainant emailed S1D and S2B and asked if she could poll all the members of the group to ask what they heard S1D say about Complainant's reasonable accommodation at the November 14 meeting.

S2B responded on November 27, 2018, asking Complainant what she was talking about. Complainant replied that S1D knowingly made false statements about disclosing Complainant's reasonable accommodation status and about excluding her from the November 14 meeting, asking S2B to investigate the matter on a timely basis. S2B responded by asking Complainant to focus on her work, stating that there was no need to poll the group.

On November 20, 2018, Complainant declined a meeting invitation to discuss her reasonable accommodation request with RAC1 and RAC2, stating that management had taken punitive actions against her as retaliation and that she was suffering from severe psychological distress that would prevent her from being able to participate in the discussion until the following week. On November 23, 2018, Complainant emailed S1D and S2B, asking for two hours of administrative time to "file an EEO complaint against you for your lying and other matters." ROI 2 at 609. S2B responded, asking Complainant to have the EEO counselor contact S1D about any needed administrative time. Later that day, Complainant sent an email to S1C, S1D, and S2B that stated, "Be advised I informed EDI this morning that I have no interest in mediation with you. I want to go directly to Federal court." ROI 2 at 612. On November 26, 2018, RAC2 emailed Complainant, RAC1, and S2B, stating that she would reschedule a discussion scheduled for that afternoon because her meeting with Complainant and RAC1 had been cancelled. Complainant responded that no change was needed to her reasonable accommodation of full-time telework, noting, "I am open to any suggestions from you on stopping the hostile workplace environment for me created and maintained by S2B." ROI 2 at 617.

On the afternoon of November 26, 2018, S2B notified Complainant by email that he was suspending her for three days, finding that the specifications in the proposed suspension were sustained. In Complainant's written response to the proposed three-day suspension, she had denied using an expletive in her email to S1B. According to Complainant, when she stated, "WTF???", she was saying, "What the fudge???", and she was not using inappropriate language. Complainant's response included printouts various websites showing that "what the fudge" was abbreviated as "WTF." ROI 2 at 518-21. Complainant alleged that her calendar showed that she was in the field without internet access when S2B had demanded an explanation. Complainant also asserted gender bias and retaliation as affirmative defenses, noting that she had pending EEO matters involving S2B. In response to S2B's email with the decision letter, Complainant responded, "A career ending move for you, I suspect." ROI 2 at 622.

S2B averred that Complainant did not respond to his question about the meaning of "WTF??" until he issued her a proposed suspension. According to S2B, Complainant's claim that she was unable to respond to his email by noon on March 26, 2018, because she was in the field without internet access was not credible because she sent an email at 12:07 p.m. that would have required internet access. S2B stated that he determined that Complainant's behavior had been unprofessional and that she had failed to follow his directive.

On November 27, 2018, Complainant notified the Gulf States Area and S1D that she was locked out of the SBSE system and asked for her access to be restored. Complainant sent a second request on November 28, 2018. On November 28, 2018, Complainant also emailed S1D that she was having IT issues that prevented her from participating in scheduled training. According to Complainant, she could not hear the training, and, after she rebooted her computer, the computer did not recognize the speakers. Complainant stated that she submitted a ticket and that she would reschedule the training. Complainant reported the incident on November 28, 2018, stating that her computer had no sound and that she could not answer phone calls or access her voicemail. On November 30, 2018, the Gulf States Area asked Complainant to try logging into the SBSE system, but Complainant responded that she was still locked out. On December 3, 2018, Complainant reported to the Gulf States Area account and S1D that she was still locked out, and S1D responded that she would send another request.

On November 27, 2018, Complainant emailed RAC1 and RAC2, stating that S1D had publicly and repeatedly told her coworkers that Complainant did not have a reasonable accommodation, "despite all the evidence to the contrary. How can [S1D]'s public denial of my reasonable accommodations be corrected?" ROI 2 at 624. On November 28, 2018, Complainant emailed S2B, S1C, S1D, and RAC2, asking to poll six group members who witnessed S1D's improper actions. Complainant asked S2B whether he condoned S1D's knowingly false statements and noted that she expected a response. On December 3, 2018, S2B emailed Complainant, RAC1, RAC2, and S1C, asking Complainant to provide supporting documentation for any reasonable accommodation that had been granted to her by the Agency. S2B stated that Complainant's last three managers told her that there was no record of a reasonable accommodation for her and that he and RAC1 and RAC2 had attempted to work with her to see if she needed a reasonable accommodation. According to S2B, Complainant had not been responsive to him or to the RA Coordinators.

S2B stated that, as of December 17, 2018, any reasonable accommodations that were not in writing would be considered no longer effective and that, if Complainant required a reasonable accommodation, she could apply independently or with the assistance of RAC1 or RAC2. On December 4, 2018, Complainant responded that she could not provide the supporting documentation because it consisted of investigative affidavits from her former managers provided for her EEO complaint. Complainant stated that S2B was "precluded by law" from taking away her accommodations, that he had provided "zero alternatives" and refused to engage in the interactive process, and that he should "go bully someone else." ROI 2 at 660. On December 4, 2018, Complainant emailed RAC1, RAC2, and S1C, asking for Agency management to be "properly educated in gender identity discrimination issues." ROI 2 at 664.

Complainant served her three-day suspension December 5-7, 2018. Complainant alleged that, during her suspension, S2B cancelled her USAccess credential and revoked her ability to communicate within the Agency and her ability to access Agency databases. Complainant stated that she did not have full access to some systems until February 2019. S1C stated that she did not know why Complainant's USAccess credential was deactivated, but she suggested that it may have been because Complainant was getting a new credential. According to Complainant, S2B told her to go to the U.S. Department of Agriculture (USDA) Service Center on December 12, 2018, to see if they could activate her USAccess credential. Complainant averred that she asked a USDA employee (USDA1) if she could take a new photograph, as her existing photograph was taken shortly after extensive facial feminization surgery, making her face look swollen. According to Complainant, after USDA1 learned that she was transgender, she refused to help her get a new photo and intentionally started referring to her with masculine pronouns. Complainant stated that USDA1 told her that she could not help her with her credential issue. On December 13, 2018, Complainant emailed S1C about how USDA1 had treated her the day before. S1C averred that Complainant told her that USDA1 had referred to her with masculine pronouns. According to S1C, she called USDA1, told her what Complainant had said, and asked her to prepare a statement. S1C stated that USDA1 handed her the statement in the hallway. According to S1C, USDA1 was crying and said that she did not mean to misgender Complainant but that she accidentally referred to Complainant as "him" two times. S1C stated that she forwarded USDA1's statement to S2B.

On March 5, 2019, Complainant emailed S1C and S2B, attaching a document dated September 5, 2012, that stated that her Oakland, California TM (TM1) was approving an interim reasonable accommodation, allowing Complainant to telework while her reasonable accommodation request was being considered. TM1 stated that FOH was currently evaluating her request and that the Agency would make a final decision on her reasonable accommodation request after FOH responded. The record does not contain further documentation concerning Complainant's 2012 interim reasonable accommodation request.

### *Procedural History*

Complainant again requested EEO counseling on April 16, 2018. On June 6, 2018, Complainant filed an EEO complaint ("Complaint 1") alleging that the Agency discriminated against her on the bases of sex (transgender woman), disability (gender dysphoria), and reprisal for prior protected EEO activity when:

1. In or around May 2016, S1A told her that he could not provide any assistance to Complainant regarding managers and colleagues suggesting that it was improper for her to use the women's restroom and security officers asking about her physical anatomy;
2. Beginning on or about May 20, 2016, as she entered the Little Rock Federal Building, Complainant was subjected to negative comments, including vulgarities, about her sex;
3. In or around May 2016, S1A told her that U1 had requested that Complainant work outside the building;
4. On or about June 13, 2016, U1 told her to "go to hell";
5. Beginning in or around August 2016, a taxpayer made negative comments about Complainant's sex on numerous occasions, refused to cooperate with her on numerous occasions, stalked her on social media on June 1, 2017, barred her from his representative's office on July 1, 2017, and made negative comments about her sex in an appeal. On or about February 20, 2018, Complainant was forced to respond in writing to the negative comments about her sex made in the appeal;
6. On August 4, 2017, a State of Arkansas employee made negative comments to Complainant when she served a summons;

7. S1B told Complainant to stop bringing up her concerns about management's understanding of sex discrimination issues because "management does not like it";
8. S2B failed to respond to Complainant's request for assistance regarding S1B's statement;
9. On March 6, 2018, S1B incorrectly attributed errors to Complainant in an email sent to the group about how unpleasant it was to discover such errors;
10. On or about March 21, 2018, a colleague called Complainant "sir";
11. On March 28, 2018, Complainant received an annual appraisal that she described as negative, false, and inaccurate;
12. On April 16, 2018, S2B denied her request to be assigned to a different Acting GM;
13. On or about April 16, 2018, her request for a leave of absence as a reasonable accommodation was denied;<sup>4</sup> and
14. On May 2, 2018, S2B loudly demanded that Complainant meet with him and an EEO counselor to discuss employment issues in front of approximately 20 of her colleagues.

Complainant requested EEO counseling on November 8, 2018. On December 28, 2018, Complainant filed an EEO complaint ("Complaint 2") alleging that the Agency discriminated against her on the bases of sex (transgender woman), disability (gender dysphoria), and reprisal for prior protected EEO activity when:

15. On June 12, 2018, Complainant received "online hate" from a participant and the presenter during an online briefing;
16. On July 25, 2018, S1C provided negative feedback to Complainant on a case review;
17. On July 25, 2018, S2B received Complainant's statement for Complaint 1 and immediately notified her that she would be suspended for 10 days;
18. Beginning on July 30, 2018, management did not respond to Complainant's request for reasonable accommodations and later asserted that she did not have any reasonable accommodations;

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<sup>4</sup> Although the Agency accepted this claim for investigation, Complainant did not explain the allegation that she was denied leave as a reasonable accommodation, responding to the EEO Investigator's questions by referring generally to her responses to other questions and the emails she attached to her investigative affidavit. See ROI 1 at 156-61.

19. From August through October 2018, there were three "hate incidents" with a taxpayer representative, and management dismissed Complainant's security concerns and requests for security escorts while meeting with the taxpayer representative. On August 22, 2018, S1C blocked Complainant from exiting the conference room during a meeting with the taxpayer representative. On September 7, 2018, S1D forced Complainant to meet with the taxpayer representative at the client's location;
20. On September 4, 2018, S1C gave Complainant a negative departure rating;
21. On or about September 4, 2018, management rejected Complainant's revised request for authorization of outside employment;
22. On September 24, 2018, Complainant received a series of harassing and bullying emails from S2B, disputing her professional qualifications and accomplishments;
23. On October 10, 2018, after a group meeting for which Complainant was not allowed to call in, S2B met with Complainant and directed her not to discuss security matters with anyone but S2B;
24. On October 10, 2018, Complainant received a proposed three-day suspension;
25. On October 15, 2018, S1D issued Complainant a negative mid-year evaluation;
26. On October 23, 2018, S1D issued Complainant a negative evaluation on her Leadership Succession Review;
27. On November 8, 2018, despite making the Best Qualified list, Complainant was not selected for the GM position listed under vacancy announcement number 18EMB-SBM0201-0512-05-PB;
28. On November 14, 2018, after excluding Complainant from group meetings by denying her requests for reasonable accommodation, S1D disclosed publicly that Complainant did not have any reasonable accommodations, subsequently denied having disclosed this, and gave Complainant a negative evaluation regarding her exclusion from group meetings;
29. On November 26, 2018, S2B issued Complainant a three-day suspension, and Complainant served the suspension December 5-7, 2018;
30. On December 12, 2018, Complainant was harassed by a USDA employee at the Little Rock Federal Building concerning her USAccess credential; and

31. Complainant was subjected to additional incidents involving disparaging words and body language from coworkers and managers.

At the conclusion of each investigation,<sup>5</sup> the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing on her EEO complaints within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued final decisions pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency discriminated against her based on sex, disability, and reprisal. Complainant argues that the Agency incorrectly applied the legal standard for a hostile work environment to the facts of the case. According to Complainant, the Agency is liable for the harassment by her supervisors because the Agency failed to take prompt and effective action when she reported the harassment. Complainant also asserts that the Agency is liable for the harassment by non-employees. Complainant contends that the Agency improperly deemed her testimony not credible because it was not corroborated by witnesses. Complainant requests that the Agency's final decisions be reversed and, in her brief for Appeal No. 2019002568, she notes that she "also seeks a hearing to determine the facts of the matter."

The Agency did not submit a brief or statement responding to either of Complainant's appeals.

#### ANALYSIS

As these are appeals from decisions issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decisions are subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment

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<sup>5</sup> The Agency accepted Complainant's claims that she was subjected to discrimination because she is transgender. Since the Agency investigated her claims and issued the final decisions, the Supreme Court has held that discrimination based on transgender status is prohibited under Title VII. Bostock v. Clayton County, Georgia, 590 U.S. 644 (2020).

Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 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”).

On appeal, Complainant asks for a hearing. EEOC Regulation 29 C.F.R. § 1614.108(f) provides that a complainant has the right to request a hearing before an AJ within 30 days of receipt of the investigative file. The record reflects that the Agency sent notice of the right to request a hearing and a copy of the investigative file for Complaint 1 to Complainant and her attorney on November 23, 2018, and that the Agency sent notice of the right to request a hearing and a copy of the investigative file for Complaint 2 to Complainant and her attorney on May 24, 2019. Both notices properly notified Complainant that she had 30 days from receipt of the notice to request a hearing, but Complainant does not argue that she timely requested a hearing. Accordingly, we find that the Agency properly issued the final decisions, and we will address the merits of Complainant’s EEO complaints.

#### *Denial of Reasonable Amount of Official Time*

The record reflects that, on various dates from April to November 2018, Complainant requested administrative leave for an interview with an EEO counselor, to discuss her EEO complaint with her attorney, to work on her investigative affidavit, and to file another EEO complaint. We find that Complainant’s requests for administrative leave constituted requests for a reasonable amount of official time to prepare her EEO complaint and/or to respond to Agency requests for information.<sup>6</sup> Although the Agency did not separately process Complainant’s claims that she was denied a reasonable amount of official time, we find that the record is sufficiently developed to adjudicate these matters on appeal because the record contains evidence

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<sup>6</sup> Complainant also requested administrative leave in April 2018 to respond to her performance evaluation. Because responding to her performance evaluation was not related to an EEO matter, she was not entitled to official time under 29 C.F.R. § 1614.605. See Sherman K. v. Dep’t of the Treasury, EEOC Appeal No. 2019005774 (July 19, 2021).

regarding Complainant's requests and the Agency's justifications for denying Complainant's requests.

EEOC Regulation 29 C.F.R. § 1614.605(b) states, in relevant part, "If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he (*sic*) designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information." The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. EEO MD-110 at Chap. 6 § VII.C.

The Commission has stated that a claim regarding the denial of official time concerns a violation of the Commission's regulation and does not require a determination of whether the denial was motivated by discrimination. See Edwards v. U.S. Postal Serv., EEOC Request No. 05960179 (Dec. 23, 1996). The Commission has the authority to remedy a violation of 29 C.F.R. § 1614.605(b) without a finding of discrimination. Edwards, supra. The Commission held that such a claim should not be processed in accordance with 29 C.F.R. 1614.108 et seq., because the focus is not on the motivation, but rather on the justification of why the complainant was denied a reasonable amount of official time. Edwards, supra.

On April 25, 2018, Complainant requested eight hours of administrative leave to prepare for and participate in an interview with an EEO counselor. S1B provided Complainant one hour of administrative time to prepare for the interview and one hour for the interview itself based on the anticipated duration of the interview. Complainant objected that one hour to prepare was insufficient and that she would need at least five to six hours in addition to the one hour allotted for preparation. We find that Complainant was provided a reasonable amount of official time to prepare for and participate in the interview with the EEO counselor.

On May 22, 2018, Complainant requested two hours of administrative time to discuss her EEO complaint with her attorney. On May 23, 2018, S2B denied Complainant's request because the EEO counselor had closed Complainant's pre-complaint EEO matter and Complainant did not have any pending EEO cases at the time. On May 22, 2018, the EEO counselor emailed Complainant Notice of the Right to File a Discrimination Complaint.

ROI 1 at 60-63. Complainant filed her EEO complaint on June 6, 2018. ROI 1 at 1-25, 69. The preponderance of the evidence in the record therefore reflects that, on May 22, 2018, Complainant was requesting two hours of official time to discuss filing a formal EEO complaint with her attorney after receiving notice of the right to file a complaint from the EEO counselor. S2B justified the denial of Complainant's request by stating that the EEO counselor had closed out the pre-complaint process and Complainant did not have any pending EEO matters. Under the circumstances, the Agency's justification for denying Complainant official time was not appropriate, because she was requesting official time in order to consult with her attorney about filing an EEO complaint upon receipt of notice of the right to file. Two hours was a reasonable amount of official time under the circumstances, so we therefore find that Complainant was not allowed a reasonable amount of official time on this date and will order the appropriate remedies. See Maddox v. U.S. Postal Serv., EEOC Appeal No. 0120081760 (Feb. 17, 2011) (pursuant to finding of denial of reasonable amount of official time, ordering reimbursement of any paid leave or compensation for any leave without pay taken by complainant as a result of being denied official time and ordering training for all supervisors at facility).

In July 2018, Complainant requested administrative time to work on the investigative affidavit related to her EEO complaint. On July 25, 2018, S2B informed Complainant that she could have up to eight hours of administrative time and to let him know when she would use the administrative time and if she needed additional time. On July 30, 2018, Complainant emailed S1C, stating that S2B had bullied her, only approved half of the administrative time she requested to work on her investigative affidavit, and said that she would need to ask him if she needed additional time. On July 31, 2018, S1C informed Complainant that she could report her use of the eight hours of administrative time to S1C and reach out to S1C, rather than S2B, if she needed additional time. Under the circumstances of this case, we find that the Agency did not deny Complainant a reasonable amount of official time to work on her investigative affidavit when it provided her eight hours, asked her to inform management when she would use the official time, and told her to request additional official time if needed after using the eight hours.

On November 23, 2018, Complainant emailed S1D and S2B, asking for two hours of administrative time to "file an EEO complaint against you for your lying and other matters." ROI 2 at 609. S2B responded, asking Complainant to have the EEO counselor contact S1D about any needed administrative time.

The record reflects that S2B asked the EEO counselor to contact S1D so management could determine a reasonable amount of official time to grant for Complainant's EEO activity. We therefore find that Complainant has not established that she was denied a reasonable amount of official time on this date.

### *Disparate Treatment*

Complainant alleged that she was subjected to disparate treatment based on sex, disability, and reprisal.<sup>7</sup> 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). 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 Constr. 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 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). 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 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

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<sup>7</sup> Throughout the record, Complainant asserted that, although her supervisors stated that they treated Complainant and her coworkers equally, the equal treatment could still constitute discrimination because her supervisors did not consider her experience as a transgender individual or her limitations as an individual with a disability. Complainant alleged discrimination based on sex, disability, and reprisal in violation of Title VII and the Rehabilitation Act. The laws enforced by the Commission prohibit discrimination in various forms, including disparate treatment, disparate impact, reprisal, and harassment. Under the Rehabilitation Act, an agency is also required to accommodate a qualified individual with a disability absent undue hardship. However, outside of the context of reasonable accommodation, there is not a cognizable claim of discrimination under these laws where Complainant is treated the same as her coworkers despite being transgender and having a disability.

Complainant alleged that she was subjected to discrimination with respect to her annual performance appraisal issued on March 28, 2018. The Agency's legitimate, nondiscriminatory explanation for the appraisal was that S1B evaluated Complainant's performance, considered S1A's departure rating, and noted areas for improvement. As evidence of pretext, Complainant alleged that the appraisal was false and inaccurate, noting that it did not refer to all of her achievements, including her work on TP1's case and being recognized for contributing to Agency policy regarding transgender employees. However, it is not clear that specifically evaluating Complainant's work on TP1's case or mentioning her involvement with the Agency's new policy for transgender employees would have changed her rating. The record reflects that Complainant was rated "Exceeds," the highest possible rating, for the "Workplace Environment" aspect of the Employee Satisfaction – Employee Contribution critical job element. ROI 1 at 707. For the "Workplace Environment" aspect, Complainant's rater commented, "You consistently support a work environment free from harassment and discrimination, You work cooperatively and willingly share your knowledge/skills within the workplace." ROI 1 at 713. We find that Complainant has not established that the Agency's proffered legitimate, nondiscriminatory reason was pretextual.

Complainant alleged that she was discriminated against on July 25, 2018, when S1C issued her a negative case review. The Agency's legitimate, nondiscriminatory explanation for the case review was that Complainant spent too much time case time on certain matters and that some of her interactions with taxpayers were contentious. As evidence of pretext, Complainant alleged that S1C should have considered the ongoing discrimination and harassment she was subjected to in the workplace. The preponderance of the evidence in the record reflects that S1C used the same criteria for evaluating her subordinates' work, and we find that Complainant has not established that the Agency's legitimate, nondiscriminatory reason is a pretext for discrimination or retaliation.

Complainant alleged that she was subjected to discrimination when S2B issued her an Alternative Discipline notice on July 25, 2018. The Agency's legitimate, nondiscriminatory reasons for issuing the Alternative Discipline notice were Complainant's "WTF??" email to S1B on April 2, 2018, and her failure to respond to S2B's request that she explain the meaning of the email by noon on April 26, 2018. As evidence of pretext, Complainant alleges that she sent S2B a copy of her statement for her EEO complaint hours before she received the Alternative Discipline notice. However, this goes to establishing an inference of reprisal, not to establishing pretext.

Moreover, S2B stated that he had been planning to issue Complainant discipline since late April 2018. We find that Complainant has not established that the Agency's proffered reason is a pretext designed to mask discriminatory or retaliatory animus.

Complainant alleged discrimination with respect to the September 4, 2018, departure rating issued by S1C. The Agency's legitimate, nondiscriminatory reason was that Complainant's performance could be improved, particularly in the area of courteous communication with taxpayers and their representatives. As evidence of pretext, Complainant alleged that S1C improperly blamed her for the negative interaction with TPR1 at the meeting on August 22, 2018. However, S1A and S1D also observed interactions between Complainant and TPR1, and S1A and S1D agreed with S1C's assertion that Complainant acted unprofessionally towards TPR1. Complainant also noted that S1C failed to consider that she was subjected to discrimination and harassment because she was transgender. Upon review, the record reflects that S1C used the same criteria for all of her subordinates, and Complainant is not entitled to a more favorable performance evaluation than her coworkers by virtue of her sex, gender identity, disability, or participation in protected EEO activity. Complainant has not established by preponderant evidence that the Agency's legitimate, nondiscriminatory reason is a pretext for discrimination.

Complainant alleged that she was discriminated against when her request for approval of outside employment was denied. S1D initially denied Complainant's request because Complainant did not provide addresses for all outside employment or describe the relationship between the requests for outside employment, although she subsequently signed off on the form and forwarded it to S2B. In March 2019, S2B denied Complainant's request, specified an area of the request that needed additional clarification, and instructed her not to participate in cannabis consulting because of an ethics opinion. According to the record, the Deputy Ethics Official provided an opinion stating that engaging in such activities while federal law considered cannabis to be an illegal drug conflicted with Complainant's official duties as a Revenue Agent. ROI 2 at 1499-1500. As evidence of pretext, Complainant asserted that she properly filled out the form and that there was no relationship between the requests. However, based on the record, Complainant appears to have combined multiple requests for approval of outside employment on one form, and she did not describe the specific business activities she wished to engage in with her father's estate. Complainant has not established by the preponderance of the evidence in the record that her submission was clear and detailed.

Complainant also alleged that S2B questioned her cannabis expertise because she was transgender and because she had filed EEO complaints. The record reflects that S2B did not respond to Complainant's request until March 2019 because he was seeking technical assistance as to whether Complainant's cannabis consulting was appropriate. We find that that Complainant has not established that the Agency's legitimate, nondiscriminatory explanation was pretextual.

Complainant alleged that she was subjected to discrimination when she was required to attend group meetings in person. The Agency's legitimate, nondiscriminatory reason for requiring Complainant to attend the October 10 and November 14, 2018, meetings in person was that in-person attendance was required for employees based in Arkansas, so the call-in number was only available for out-of-state employees. Complainant alleged that S1D knew that she had a death in the family on October 10, 2018, and that S1D wanted her to attend the town hall meeting in person that day so S2B could harass her. On November 14, 2018, Complainant attended the morning session of the group meeting in the morning but asked for the call-in number for the afternoon. As evidence of pretext, Complainant alleged that S1D loudly announced that Complainant did not have a reasonable accommodation in response to her request for the call-in number. However, the preponderance of the evidence in the record establishes that Complainant was the one who loudly brought up her reasonable accommodation after S1D would not provide the call-in number. We find that Complainant has not established by preponderant evidence that the Agency's legitimate, nondiscriminatory reason for requiring Complainant to attend town hall and group meetings in person is pretextual. We will separately address whether Complainant was denied a reasonable accommodation.

Complainant alleged that she was subjected to unlawful discrimination when she received a negative mid-year evaluation on October 15, 2018. The Agency's legitimate, nondiscriminatory explanation was that S1D incorporated input from S1B and S1C's departure rating and evaluated Complainant's performance based on the same criteria she used to evaluate her other subordinates, rating her as "Meets" on one element due to communication issues. Complainant alleged that the negative comments in the evaluation did not reflect that she was forced to work in a hostile work environment. However, as discussed in the context of the September 4, 2018, departure rating, Complainant is not entitled to a more favorable review of her work than her colleagues because of her sex, gender identity,

disability, and EEO activity. Complainant has not established that the Agency's proffered reason is pretextual.

According to Complainant, she was discriminated against when S1D and S2B rated her as "Not Ready" for leadership on her Leadership Succession Review. The Agency's legitimate, nondiscriminatory reason for rating Complainant as not ready was that she had limited leadership experience with the Agency and would benefit from further development. As evidence of pretext, Complainant cited her doctorate degree in organizational leadership, her master's degree in taxation, and her experience leading multiple small and mid-size organizations as CEO for decades. However, Complainant's education and experience outside the Agency does not establish that the Agency's legitimate, nondiscriminatory reason, that she had limited Agency leadership experience, was a pretext.

Complainant also alleged that she was subjected to discrimination when she was not selected for the Group Manager position. The Agency's legitimate, nondiscriminatory reason for selecting S1C for the Group Manager position was that her interview answers were thorough and practical, whereas Complainant's answers were more general and theoretical. Complainant alleged that she exceeded the experience required for the position, and she asserted that S1C was less qualified than she was. However, this does not establish that the Agency's legitimate, nondiscriminatory reason for selecting S1C is a pretext for discrimination. Complainant also alleged that S2B's role in the interview panel was inappropriate. However, S3B noted that she asked the panelists to evaluate the employees in their chain of command after the other panelists so that they would not influence the other panelists. Moreover, both P1 and P2's testimony corroborated S2B's description of Complainant's interview performance. We find that Complainant has not established by preponderant evidence in the record that the Agency's legitimate, nondiscriminatory reason for her non-selection was pretextual.

Complainant alleged discrimination with respect to the three-day suspension, which she served in December 2018. The Agency's legitimate, nondiscriminatory reasons for suspending Complainant were the April 2, 2018, "WTF??" email to S1B and her failure to respond to S2B's request that she explain the meaning of the email by noon on April 26, 2018. As evidence of pretext, Complainant contends that "WTF" meant "What The Fudge." Complainant also alleged that she was unable to respond to S2B's email by the deadline on April 26, 2018, because she was working in the field and did not have internet access, which is needed to access Agency email.

Regarding Complainant's assertion that she could not respond to S2B's email by noon on April 26, 2018, the record contains an email that Complainant sent from her Agency email address at 12:07 p.m. on April 26, 2018. Not only did Complainant not respond to S2B's email at the time, she did not respond to his email or otherwise assert what she meant by stating "WTF??" to S1B until after she was issued the proposed three-day suspension. Complainant has not established by preponderant evidence that the Agency's legitimate, nondiscriminatory reasons for suspending her for three days were pretextual.

### *Reasonable Accommodation*

Complainant alleged that she was denied a reasonable accommodation in violation of the Rehabilitation Act. The standards used to determine whether there has been a violation of Section 501 of the Rehabilitation Act are the same standards as the Americans with Disabilities Act (ADA). See 29 C.F.R. § 1614.203(b). In order to establish that she 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 EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). 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).

In its final decisions, the Agency assumed that Complainant was an individual with a disability. Under EEOC regulations implementing the Rehabilitation Act, an "individual with a disability" is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g)(1).

For purposes of this decision, we will assume, as did the Agency, that Complainant is an individual with a disability because of her depression and anxiety and proceed to analyze whether she was unlawfully denied reasonable accommodation. The Agency does not dispute that Complainant is qualified for her Revenue Agent position by virtue of her successful performance in the position.

Complainant has stated that she is seeking a reasonable accommodation for her gender dysphoria. According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR) published by the American Psychiatric Association (APA) in 2022, to be diagnosed with gender dysphoria, one must experience “a marked incongruence between one’s experienced/expressed gender and their assigned gender” lasting at least 6 months, several specific symptoms, and “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” DSM-5-TR at 452.

The Commission has not yet addressed whether an individual may be entitled to reasonable accommodation on the basis of gender dysphoria. The Rehabilitation Act provides that a “gender identity disorder” that does not arise from a physical impairment is not a disability (and therefore could not entitle an individual to reasonable accommodation). 42 U.S.C. § 12211(b)(1); 29 U.S.C. § 791(f); 29 C.F.R. § 1630.3(d) (excluding from consideration as disabilities “gender identity disorders not resulting from physical impairments”). The only federal court of appeals to have addressed the question has held that one plaintiff’s complaint plausibly alleged that her gender dysphoria was not subject to the exclusion under 42 U.S.C. § 12211(b)(1) for two independent reasons: (1) her gender dysphoria was not a gender identity disorder within the meaning of 42 U.S.C. § 12211(b)(1); and, even if it were, (2) her gender dysphoria resulted from a physical impairment.<sup>8</sup> See Williams v. Kincaid, 45 F.4th 759, 766-72 (4th Cir. 2022),

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<sup>8</sup> See Kevin M. Barry & Jennifer L. Levi, The Future of Disability Rights Protections for Transgender People, 35 *Touro L. Rev.* 25, 44 (2019) (gender dysphoria can be a covered disability either because it is different from gender identity disorder – “[u]nlike the outdated diagnosis of gender identity disorder, which the APA first introduced in the DSM in 1980, the hallmark or presenting feature of gender dysphoria is not a person’s gender identity” – or because “the diagnosis of gender dysphoria in the DSM-5 rests upon a growing body of scientific research showing that gender dysphoria has a physical cause related to the interaction of the developing brain and sex hormones.”) (collecting cases); Shorter v. Garland, 2021 WL 6062280, at \*1

cert. denied, 143 S. Ct. 2414 (2023). Several courts have applied the reasoning in Williams to find that the ADA and Rehabilitation Act do not categorically exclude gender dysphoria from their protections.<sup>9</sup>

In a corrections case, for example, the court denied a motion to dismiss the disability discrimination claims brought under Title II of the ADA and Section 504 of the Rehabilitation Act, finding that the plaintiff's complaint sufficiently alleged that their gender dysphoria was the result of a physical impairment and therefore outside the statutory exclusion. Doe v. Penn. Dep't of Corrections, 2021 WL 1583556 at \*11-12 (W.D. Pa. Feb. 19, 2021). Noting that courts typically lack the expertise in various disciplines to identify the cause of gender dysphoria without the aid of expert testimony, the court held that "courts should rarely hold as a matter of law, based on a plaintiff's

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(N.D. Fla. Dec. 22, 2021) (denying summary judgement in Rehabilitation Act Section 504 corrections case noting that "a growing number of district courts have determined that gender dysphoria may result from physical causes, such that it is not categorically excluded under the RA [Rehabilitation Act]."); Doe v. Hosp. of Univ. of Penn., 546 F. Supp. 3d 336, 350 (E.D. Pa. 2021) (denying motion to dismiss in ADA and Rehabilitation Act employment case because plaintiff had sufficiently pled that gender dysphoria affected her major life activities); Doe v. Triangle Doughnuts, 472 F. Supp. 3d 115, 135 (E.D. Pa. 2020) (denying motion to dismiss in ADA employment case based on plaintiff's "alternative theories of disability related to either gender dysphoria or some other neuroanatomical disability related to her gender identity."); Second Statement of Interest of the United States of America, Blatt v. Cabela at 3-5 (No. 5:14-cv-04822-JFL #67) (November 16, 2015) (discussing scientific studies and supporting gender dysphoria's exclusion from the gender identity exclusion because, in part, "evolving scientific evidence suggesting that gender dysphoria may have a physical basis") (available at <https://clearinghouse.net/doc/82307/>).

<sup>9</sup> See Doe v. Horne, 2024 WL 3091984 at \*4 (D. Ariz. June 21, 2024) (denying motion to dismiss because "gender dysphoria qualifies as a disability under the ADA and RA"); Doe v. Georgia Dep't of Corr., 2024 WL 1962021 at \*13 (N.D. Ga. Apr. 17, 2024) (concluding "the ADA does not exclude gender dysphoria from its protection" because gender dysphoria and gender identity disorder "simply mean different things"); Kozak v. CSX Transportation, Inc., 2023 WL 4906148 at \*6, \*7 (W.D.N.Y. Aug. 1, 2023) (finding that "gender dysphoria is not categorically excluded by" the ADA because of a "close examination of the statutory text" and the marked difference in diagnoses for gender identity disorder and gender dysphoria).

complaint alone, that a plaintiff's gender dysphoria is or is not the result of a physical impairment. Id. at \*8-9; see also Guthrie v. Noel, 2023 WL 8116864 (M.D. Pa. Sept. 29, 2023) (adopting the magistrate judge's recommendation to deny the partial motion to dismiss because plaintiff "plausibly alleged that her gender dysphoria results from a physical impairment and, accordingly, is not excluded from the statutory definition of disability").

The court in Blatt v. Cabela's Retail, Inc., 2017 WL 2178123 at \*4 (E.D. Pa. May 18, 2017) found that gender dysphoria was not a gender identity disorder under 42 U.S.C. § 12211(b)(1), narrowly interpreting the term gender identity disorders "to refer to simply the condition of identifying with a different gender." The court denied the motion to dismiss, finding that the plaintiff's gender dysphoria could be a disability because it "substantially limits her major life activities of interacting with others, reproducing, and social and occupational functioning." Id.; see also Doe v. Mass. Dep't of Correction, 2018 WL 2994403, at \*6-7 (D. Mass. June 14, 2018) (denying motion to dismiss corrections case brought under ADA Title II and Rehabilitation Act Section 504 because the plaintiff's gender dysphoria could result from a "physical etiology" and therefore fell under the exception for gender identity disorder or because "gender dysphoria" is a distinct diagnosis from "gender identity disorder"). But see Parker v. Strawser Constr. Inc., 307 F. Supp. 3d 744, 753-54 (S.D. Ohio 2018) (disagreeing with Blatt and refusing to consider plaintiff's claim regarding her gender dysphoria resulting from a physical impairment because it was not pled in the complaint).

Given our conclusions below, we need not reach the question of whether Complainant has provided sufficient evidence regarding her gender dysphoria to establish that she is an individual with a disability. For purposes of this decision, we will assume, as did the Agency, that Complainant is an individual with a disability because of her depression and anxiety and proceed to analyze whether she was unlawfully denied reasonable accommodation. The Agency does not dispute that Complainant is qualified for her Revenue Agent position by virtue of her successful performance in the position.

According to the record, from 2012 through 2015, Complainant teleworked full-time as a reasonable accommodation while working for the Agency in California.<sup>10</sup> Complainant began working in Little Rock in the spring of 2016, and she stated that, while S1A was her supervisor, she worked in the office every day. See ROI 2 at 1270. S1A retired at the end of December 2017. The record reflects that Complainant began requesting reasonable accommodation from S2B in April 2018, when she asked to be assigned to a different Group Manager. On April 17, 2018, S2B responded that he would not assign her to a different GM because S1B was a good leader and provided good assistance. Complainant requested status updates from S2B on April 18, 2018, and S2B responded by providing information about the reasonable accommodation process. Complainant asserted that she had already requested a reasonable accommodation and, when she asked S2B for another status update on April 23, 2018, S2B asked Complainant to submit her medical documentation to FOH as well as a release that would allow FOH to contact her medical providers. Complainant alleged that S2B denied her reasonable accommodation request without engaging in the interactive process. The record contains a May 23, 2018, memorandum from S2B to Complainant, which summarized their correspondence about reasonable accommodations and concluded that, upon review, he could not understand Complainant's need for accommodation, he had provided her written information about what she would need to do to request a reasonable accommodation, and that he would consider the matter closed.

On May 30, 2018, Reasonable Accommodation Coordinator 1 (RAC1) emailed Complainant, S1C, and S2B, introducing herself and describing the RA process. RAC1 asked Complainant to complete several forms. Complainant provided one completed form to RAC1 on June 4, 2018, but she did not provide the completed medical form, noting that she had provided medical documentation multiple times in the past and that FOH had "confirmed" her disability. The form that Complainant provided listed her disability as gender dysphoria and stated that the affected job functions were "severe psychological distress over transgender hate." In the space where Complainant was supposed to describe the accommodation requested, Complainant wrote, "Multiple requests over the last year, all related to transgender workplace hate by management and other. See prior correspondence to management on all requests." RAC1 responded by

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<sup>10</sup> The record reflects that the Agency allowed Complainant to telework as an interim accommodation beginning on September 10, 2012, and approved telework as a reasonable accommodation on April 10, 2015. ROI 2 at 1070-74.

seeking clarification, noting that she was not aware of any previous RA requests and that she could not tell what Complainant was requesting, other than being assigned to a different supervisor. According to RAC1, Complainant requested that RAC1 elevate her RA request, which she did by asking Reasonable Accommodation Coordinator 2 (RAC2) to get involved. With respect to Complainant's April 2018 request for reasonable accommodation, the preponderance of the evidence in the record establishes that it was not clear what she was requesting as an accommodation or why she needed a reasonable accommodation. Accordingly, it was reasonable for S2B and RAC1 to request clarification, as well as medical documentation, regarding her reasonable accommodation request.

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 Enforcement Guidance on Reasonable Accommodation 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 her disability, limitations, and accommodation requirements. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 7 (July 27, 2000). However, Complainant did not clarify what she was asking for or why she needed accommodation or provide the up-to-date medical documentation. On April 16, 2018, Complainant provided S1B with the October 2, 2012, doctor's note, which stated that Complainant was suffering from untreated gender identity disorder, which manifested as severe depression and panic disorder and recommended that, because the workplace was a major source of stress for her, Complainant be able to work from home as an accommodation. See ROI 1 at 253. Complainant later provided the same doctor's note to S1C, S1D, S2B, RAC1, and RAC2. However, by April 2018, this doctor's note was more than five and a half years old. The note also indicated that Complainant's depression and anxiety was a result of her workplace, but Complainant was working in California, not Arkansas, in 2012. We find that, under the circumstances, Little Rock management and the Reasonable Accommodation Coordinators were entitled to new medical documentation.

Complainant continued to request reasonable accommodations and asserted to management and RAC1 and RAC2 that she already had a reasonable accommodation and did not need to clarify her requests, provide new medical documentation, or meet with RAC1 or RAC2 and management as part of the reasonable accommodation process.

Complainant alleged that S2B, S1C, and S1D harassed her by telling her that she did not have a reasonable accommodation and by asking her to provide documentation of her reasonable accommodation.<sup>11</sup> The record reflects that Complainant did not provide a copy of her September 5, 2012, interim reasonable accommodation memorandum to S1C and to S2B until March 5, 2019, approximately 11 months after she requested accommodation and began asserting that she already had a reasonable accommodation. The record also reflects that, as of March 5, 2019, RAC1 and RAC2 were still working with Complainant and with S1C and S2B to assess Complainant's needs and clarify what she was asking for in the reasonable accommodation process. We find that the preponderance of the evidence in the record does not establish that the Agency denied Complainant a reasonable accommodation for her disability during the timeframe of the instant EEO complaints. By refusing to clarify her needs for accommodation, clarify her request, provide updated medical information, or even provide evidence of her interim 2012 accommodation, Complainant effectively failed to engage in the interactive process. Accordingly, she has not shown how she was denied a reasonable accommodation and was not discriminated against with respect to her presumed disability.

### *Harassment*

Complainant alleged that she was subjected to harassment based on sex, disability, and reprisal. 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

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<sup>11</sup> In some emails, Complainant requested "reasonable accommodations" to work on her EEO complaints or to report that she was being harassed or bullied by management. An employee may request a reasonable accommodation to participate in the EEO process or in the Agency's harassment prevention program. However, the record reflects that Complainant made these requests because she wanted additional administrative leave or she wanted her supervisors to stop asking her to follow Agency procedures. These are outside of the purview of reasonable accommodation under the Rehabilitation Act.

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 Harassment in the Workplace, EEOC Notice No. 915.064 at § III.B (Apr. 29, 2024).

Complainant alleged that she was subjected to harassment by her supervisors, including S1B, S1C, S1D, and S2B. With respect to element (5), an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance on Harassment in the Workplace at § IV.C.2.b. This defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) being taken against the employee.

Complainant alleged that S1B repeatedly told her not to bring up issues related to her transgender status and suggested that she “keep quiet about the transgender hate.” S1B denied telling Complainant not to raise civil rights issues affecting transgender individuals or to keep quiet about transgender hate. According to S1B, she only remembered discussing these types of issues with Complainant on two occasions: when she praised Complainant’s activism when she received a copy of Complainant’s bio and when she congratulated Complainant that the bathroom access legislation she had been fighting against was not passed into law. S1B denied treating Complainant differently than other employees or being disrespectful towards Complainant, and the record contains various emails where Complainant requested leave, mentioned a family emergency, or reported experiencing severe psychological distress to S1B. S1B approved Complainant’s requests for leave, and her email responses were supportive. On one occasion, S1B advised Complainant not to worry about a scheduled meeting until she was feeling better.

Complainant alleged that S1B called her out for making a mistake in a group email. However, S1B did not refer to Complainant in the email. S1B averred that she sent the email as a general reminder to the group because Complainant had not noticed that some cases she was about to close were not in the monthly case report. Upon review, we do not find that Complainant established by preponderant evidence that S1B told her to stop raising issues related to her transgender status. S1B's group email reminding employees to check that their cases were on the monthly case report did not refer to Complainant directly or indirectly and was a reminder sent to the whole group. Regarding the alleged harassment by S1B, we find that Complainant has not established by preponderant evidence in the record that the harassment occurred as alleged or that the alleged harassment was sufficiently severe or pervasive to constitute a hostile work environment.

Complainant also alleged that she was harassed by S1C and S1D. Complainant alleged that S1C and S1D harassed her about her reasonable accommodation, that S1D publicly announced that Complainant did not have a reasonable accommodation, and that S1C and S1D ignored her security concerns. As discussed above, we find that S1C and S1D's communications concerning Complainant's asserted reasonable accommodation were appropriate because Complainant would not clarify her reasonable accommodation request, provide up-to-date medical documentation, or provide documentation reflecting that she had an existing reasonable accommodation. Regarding the November 14, 2018, incident, the record reflects that it was Complainant who brought up her reasonable accommodation in an attempt to get the call-in number for the afternoon session of the group meeting. S1D's responded that Complainant did not have a reasonable accommodation. Regarding Complainant's asserted security concerns, the preponderance of the evidence in the record does not establish that S1C or S1D ignored Complainant's security concerns. On August 22, 2018, S1C sat by the door so Complainant could sit in front of the panic button. S1C stated that she did not call security because there was no security threat, and she arranged to conduct the remainder of the audit through correspondence so Complainant and TPR1 would not have to meet to discuss the matter again. In September 2018, S1D contacted TIGTA on Complainant's behalf, and she ultimately did not require Complainant to complete the site visit with TPR1. The preponderance of the evidence reflects that the complained-of harassment consists mostly of ordinary supervisory oversight, and we find that S1C and S1D's conduct in these matters is insufficiently severe or pervasive to constitute a hostile work environment.

Complainant alleged that she was subjected to extensive harassment by S2B. According to Complainant, on May 2, 2018, S2B confronted her in front of approximately 20 coworkers and loudly demanded that she meet with him immediately. Complainant alleged that, when she told S2B that his request was inappropriate because she had recently filed an EEO complaint, he demanded that she meet with him with an EEO counselor. Complainant stated that she did not meet with S2B because there was no EEO counselor available. S2B stated that he asked to meet with Complainant after the town hall, when there were approximately six people remaining in the room. According to S2B, Complainant got very loud and told him that an EEO counselor told her that she should not meet with him unless an EEO counselor was present. According to the record, the EEO Lead told Complainant that she should not speak with management about her EEO complaint without an EEO counselor present, but she also informed Complainant that management needed to be able to speak with her about work-related matters. We find that S1C's testimony corroborates S2B's description of what happened after the town hall meeting. Moreover, although the EEO Lead may have advised Complainant that she should not discuss EEO matters with S2B, an employee's manager must be able to communicate with that employee even after the employee requests EEO counseling or files an EEO complaint.

Complainant alleged that, on October 10, 2018, S2B issued her the proposed suspension and told her that he did not care whether Complainant had a penis or a vagina. S1D stated that Complainant became very angry when she received the proposed suspension, accusing the Agency of being unfair to her, shouting that she had to prove whether she had a penis or a vagina, and yelling that she would see S2B in federal court. S1D stated that S2B remained professional and asked Complainant if she had any questions about the proposed suspension. S2B averred that he was trying to communicate to Complainant that he treated all of his subordinates equally. We find that, to the extent S2B stated that he did not care whether Complainant had a penis or vagina, he was responding to Complainant's assertion that the Agency was asking her to prove whether she had a penis or a vagina. Although S2B should have phrased his response without referring to genitalia, we do not find that this remark, under the circumstances, rose to the level of actionable harassment.

Regarding the October 10, 2018, meeting, Complainant also alleged that S2B told her that she should not go outside of her chain of command to discuss safety concerns. S2B stated that FPS and Federal Building security staff complained to him that Complainant had asked security guards to

escort her to her car and to appointments, which is not within the scope of their duties. According to S2B, he asked Complainant to direct her security concerns with him, so he could address them. Complainant has not established by preponderant evidence that S2B's handling of her security concerns constituted actionable harassment.

Complainant alleged that S2B's involvement in the interview process for the GM vacancy was inappropriate, and she also accused S2B of refusing to provide feedback on her interview performance. As discussed in the context of disparate treatment, S3B put certain safeguards into the process so interview panelists would not be able to affect the candidacy of employees in their chain of command, and P1 and P2 agreed with S2B's assessment of Complainant's interview performance and that it was not as good as S1C's interview performance. Moreover, the record reflects that S2B, P1, and P2 scheduled a meeting with Complainant for December 3, 2018, but she did not attend the meeting. Complainant has not established that these allegations constituted harassment.

Finally, Complainant alleged that she was unable to access various Agency systems after S2B suspended her. Based on the record, it is not clear why Complainant could not access these systems, although S1C noted that Complainant was in the process of obtaining a new USAccess credential, which may have affected her ability to use her credential. Moreover, the record shows that S1C and the Gulf States Area worked with Complainant to restore her access. We find that Complainant has not established by preponderance of the evidence that she lost system access because of her sex, disability, or protected activity.

Complainant also alleged that she was subjected to harassment by Agency coworkers, by the employees of other federal agencies, by non-federal employees she interacted with in the course of her job duties, and by other third parties. In the case of coworker or non-employee harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. See Enforcement Guidance on Harassment in the Workplace at § IV.C.3.

Complainant alleged that she overheard her coworkers make comments about her, that U1 suggested that Complainant should work from home if she felt harassed in the workplace, that U1 harassed her and tried to attack her, and that, during an online presentation, she was harassed.

For example, Complainant alleged that she overheard C1 suggest that female athletes “like [Complainant]” might have an advantage. Complainant reported this comment to S1A, who had a meeting with U1 and U2 to discuss the matter. Complainant alleged that U1 told S1A that Complainant should telework if she felt harassed in the workplace, but S1A stated that it was U2 who made the suggestion and that he made it clear that he would not force Complainant to telework. According to S1A, he had a discussion with C1 and advised him to avoid all potentially harassing comments. S1A stated that he also allowed Complainant to move to a cubicle that was farther away from C1’s cubicle, noting that she had complained that C1’s voice was loud and distracting. Complainant alleged that, on June 13, 2016, she asked U1 why he and the union were not supporting her. According to Complainant, U1 began yelling at her that she was a horrible person and that she should “go to hell” because she was transgender. Complainant alleged that S1A and other coworkers had to physically restrain U1 from attacking her. However, S1A denied hearing U1 yell at Complainant or having to separate U1 from Complainant, and he noted that he found that both Complainant and U1 contributed to the confrontation. S1A stated that Complainant raised the incident with him, so he reported it to S2A. S1A averred that he told Complainant that U1 was about to take leave for surgery and planned to retire shortly thereafter, which meant that Complainant should not have any further incidents with U1. Complainant alleged that C2 deliberately misgendered her to cause her emotional distress. According to Complainant, she told C2 not to call her “sir,” and he responded that he had done so because of his military background. Complainant averred that she did not complain about this incident with C2 because S1B had told her not to complain about transgender harassment. Regarding these incidents, there is no evidence that Complainant was subjected to additional instances of alleged harassment by C1, C2, U1, or U2. Upon review, we find that these incidents do not rise to the level of harassment.

Complainant also alleged that she was harassed by C3 and C4 during the online training about background checks. Complainant asked C3 questions about how her transgender status would affect her in background checks. C3, who was not prepared for the question, mistakenly responded by discussing sexual orientation. When Complainant added a comment that she was worried about background checks in light of President Trump’s comments about transgender people, C4 commented that Complainant’s comments had nothing to do with the training. Complainant alleged that C3 further destroyed the record of the comments so that she would not be able to substantiate that she was harassed during the presentation.

The record reflects that, after Complainant reported her concerns to S1C, S2B investigated the matter and determined that C3 and C4 had not targeted Complainant. While confusing sexual orientation and gender identity and denying the relevance of gender identity in the context of background checks is offensive, we find that C3 and C4's comments do not constitute actionable harassment because they are insufficiently severe or pervasive.

Complainant stated that she was assigned TP1's case from August 2016 until February 2018. Complainant alleged that TP1 refused to turn over the documents she needed to examine the case and that he also harassed her by "liking" Facebook photographs of Complainant's daughters on June 1, 2017. According to Complainant, she served a summons at TP1's workplace on August 4, 2017, and A1 repeatedly called her "sir" in a loud voice, calling attention to the fact that Complainant was transgender. Complainant alleged that TP1 encouraged to be hateful towards her. Complainant also alleged that TP1 falsely reported to S1A that Complainant caused an altercation while serving the summons and had to be escorted out by security guards. According to Complainant, she reported these incidents to management and the Anti-Harassment Office, to no avail. S1A averred that he interviewed TP1, who denied harassing Complainant or encouraging A1 to do so, S1A stated that he consulted with S2A, and they determined that the Agency could not address the behavior of TP1 or A1 because it did not take place in the workplace. According to S1A, he asked Complainant if she wished to pursue a complaint against A1 and TP1 through the State of Arkansas, but she declined to do so. S1A added that he advised Complainant that she could adjust the privacy settings of her Facebook account. Complainant alleged that, when TP1 appealed the civil penalties Complainant had imposed on him, he referenced her transgender status in his appeal, and she was forced to defend herself as a transgender individual when she had to respond in writing to TP1 and to Agency management on February 20, 2018. Although Complainant alleged that TP1 stalked her, S1A's recommendation that Complainant change her privacy settings was a reasonable response to Complainant reporting that TP1 liked two photos on Complainant's public Facebook page. Moreover, to the extent that Complainant felt harassed by A1 and TP1 on State of Arkansas property, S1A was correct in suggesting that the proper remedy would be to pursue the matter with the State of Arkansas, not the Agency. Regarding Complainant being asked to respond to TP1's appeal, the preponderance of the evidence in the record reflects that Complainant was asked to respond because of TP1's allegations that she was biased against him in assessing civil penalties.

The record reflects that another Revenue Agent would have been asked to respond to allegations of bias, regardless of the Agent's sex or gender identity. We find that Complainant has not established by the preponderance of the evidence that TP1's conduct rose to the level of actionable harassment. Moreover, we find that the Agency appropriately helped Complainant solutions to remedy the alleged harassment, such as adjusting her Facebook settings or working with the State of Arkansas.

Complainant alleged that TP1's representative, TPR1, subjected her to harassment, including by stating that Complainant was not welcome in his office because of his religious views on "queer people." S1A stated that TPR1 would not allow Complainant to come to his office because she had filed a discrimination lawsuit against the deceased former owner of the CPA firm. Complainant stated that she and S1A met with TPR1 in the Federal Building, that TPR1 loudly insulted her for being transgender, and that S1A had to push TPR1 out of the office. However, S1A denied observing TPR1 harass or insult Complainant and stated that Complainant was very rude to TPR1 during the meeting. According to S1A, he did not have to "push" TPR1 out of the office, but he did escort him to the elevator. Complainant alleged that, during an August 22, 2018, meeting in the Federal Building, S1C sat by the door while she met with TPR1 and his assistant, blocking Complainant's ability to leave the room and refusing to call security when TPR1 was abusive towards her. Complainant alleged that TPR1 told her that she was unethical because she was transgender. Complainant also alleged that S1D insisted that she go on a site visit with TPR1 without an armed escort. In a September 4, 2018, email to S1C and S1D, Complainant stated that she had been subjected to verbal abuse by TPR1 on August 22 and that S1C refused to call security or move away from the door so Complainant could escape. S1C responded to the email, "This is absurd." Regarding TPR1 not allowing Complainant to enter his office, the Agency cannot control a non-federal employee's actions outside of federal property. S1A and S1C both characterized their meetings with Complainant and TPR1 in a very different manner than Complainant. S1A stated that Complainant was rude to TPR1, not the other way around, and he denied that he witnessed TPR1 insult Complainant or that he had to force TPR1 to leave the Agency's office. Similarly, S1C stated that she sat by the door because it was the only available space when Complainant sat in front of the panic button and TPR1 and his assistant sat on the other side of the desk from Complainant. According to S1C, although Complainant and TPR1 were arguing, there was no security threat. S1C stated that TPR1 was trying to explain himself but that Complainant kept asking for security.

S1C averred that she arranged for the remainder of the audit to be conducted by correspondence so Complainant and S1C would not have to meet about the case anymore. S1D stated that she contacted TIGTA on Complainant's behalf and was told that Complainant was not eligible for an armed escort. S1D ultimately waived the requirement that Complainant conduct the site visit. We find that Complainant has not established by preponderant evidence that TPR1's conduct rose to the level of actionable harassment, and the Agency also properly took steps to minimize Complainant's contact with TPR1 after their negative interactions.

Complainant stated that, in May 2016, she approached a group of security guards in the Little Rock Federal Building to discuss state legislation that would affect restroom access for transgender people in order to prevent a future confrontation when she used the women's restroom. Complainant characterized the conversation as friendly, but she alleged that one guard asked whether she "had a penis or a vagina as that would tell him which restroom" she should use. Complainant reported the comment to S1A, an Agency Safety Officer, and the union. Complainant averred that, the day after the discussion, a supervisory security guard approached her as she entered the building and told her that she should not have any additional issues with security guards. With respect to this allegation, the preponderance of the evidence in the record reflects that S1A allowed Complainant to email the Revenue Agent groups based in Little Rock to disclose that she was transgender and would be using the women's restroom, and Complainant does not report that she had any issues using the women's restroom in the Little Rock Federal Building. About the security guard questioning Complainant about her genitalia when she discussed restroom access, the security guard's response was crude and disrespectful. Ideally, when Complainant raised the issue of restroom access as a transgender individual, the security guard would have politely suggested that Complainant use the restroom that corresponded to her gender identity. However, as noted by the Supreme Court in Faragher, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" 524 U.S. at 788. Although the guard's remark was inappropriate, the record reflects that Complainant was always able to access the women's restroom, and we find that it does not rise to the level of actionable harassment.

Complainant alleged that she was harassed by USDA1 when she was trying to get her new USAccess credential. According to Complainant, USDA1 repeatedly misgendered her after she requested a new photograph because her face was swollen in the existing photograph, taken shortly after facial feminization surgery. S1C investigated Complainant's allegation and she stated that USDA1 was very upset that she had accidentally misgendered Complainant. Although federal employees should, as S1C told USDA1, be careful with their language, we find that this accidental misgendering was insufficiently severe or pervasive to constitute a hostile work environment. See Lusardi, supra ("inadvertent and isolated" use of the wrong pronouns would likely not constitute harassment). Given that USDA1 showed remorse for her mistake, it is unlikely that this conduct would repeat itself. Upon review, we note that the individuals involved in these instances of third-party harassment are unconnected to each other. Moreover, these individual incidents do not directly implicate the Agency.

Finally, Complainant alleged that she was subjected to harassment by construction workers and a landscaping crew on two occasions outside of the Little Rock Federal Building. Complainant alleged that construction workers working on a street outside of the Federal Building referred to her with disparaging language, including by calling her a "tranny fag."<sup>12</sup> Complainant

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<sup>12</sup> Not all claims of harassment are actionable. However, had this highly offensive comment been made by an Agency employee, it could be sufficiently severe to constitute a hostile work environment if management did not intervene. The Commission has held that, under certain circumstances, a limited number of highly offensive slurs or comments may in fact state a claim or support a finding of discrimination under Title VII. See Brooks v. Dep't of the Navy, EEOC Request No. 05950484 (Jun. 25, 1996). These highly offensive slurs include the term "fag" or "faggot" as it was historically used in the United States as highly offensive, insulting and degrading sex-based epithet against LGBTQ+ individuals or individuals who are perceived as failing to conform to gender stereotypes. See Couch v. Dep't of Energy, EEOC Appeal No. 0120131136 (Aug. 13, 2013), Complainant v. United States Postal Serv., EEOC Appeal No 0120132452 (Nov. 18, 2014). The Commission has also taken into account the context in which the language is used and management's response when determining whether a few comments are so severe that they state a claim of harassment. See Bryon F. v. United States Postal Serv., EEOC Appeal No. 0120133382 (Feb. 11, 2015) (allegation that complainant's coworker called him a "homo" and told him that he was "living in sin and would be going to hell" sufficiently severe to state a claim of sex-based harassment because of

averred that a landscaping crew whose trailer was blocking the crosswalk in front of the Federal Building used similarly disparaging language towards her until the light changed and the truck pulled away. Complainant reported both incidents to S1A and to Little Rock Federal Building security. S1A stated that he reported the incidents to management, but he stated that the Agency did not have the authority to take any action in response to Complainant's allegations because the harassment did not occur on federal property. According to Complainant, she did not report further, similar instances of harassment outside of the federal building to the Agency or the GSA because she knew that nothing would be done. Regarding these incidents, there is no evidence that the construction workers or landscapers were employed by the federal government or had any connection to the Little Rock Federal Building. Moreover, Complainant did not allege that she was harassed by the same construction workers or the same landscapers on multiple occasions. Accordingly, we find that the Agency is not liable for this alleged harassment because the Agency cannot control or be responsible for the conduct of third parties unconnected to federal business that does not take place on federal property.

#### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's determination that Complainant was not denied a reasonable amount of official time to consult with her attorney about filing an EEO complaint between May 22, 2018, and June 6, 2018, and REMAND this matter to the Agency for further processing in accordance with this decision and the ORDER below. We AFFIRM the Agency's final decisions with respect to all remaining claims.

#### ORDER

The Agency shall take the following remedial actions within 90 calendar days of the date this decision is issued:

1. The Agency shall provide a minimum of one hour of in-person or interactive EEO training to all Small Business/Self-Employed Division

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the "hateful nature" of the comments, coupled with the lack of management response).

supervisors and managers in the Field Exam Gulf States Area.<sup>13</sup> The required training shall address the process for requesting official time, as explained in EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) and 29 C.F.R. § 1614.605(b), and this training shall be in addition to any mandatory EEO training that the Agency may require. For assistance in obtaining the necessary training, the Agency may contact the Commission's Training and Outreach Division via email at [FederalTrainingandOutreach@eeoc.gov](mailto:FederalTrainingandOutreach@eeoc.gov).

2. The Agency shall restore up to two hours of paid leave and/or reimburse Complainant for up to two hours of leave without pay, representing up to two hours of paid or unpaid leave, if any, taken by Complainant between May 22, 2018, and June 6, 2018, to discuss her EEO complaint with her attorney.

Complainant shall provide all relevant information requested by the Agency within 30 calendar days of receiving any Agency request for information.

If Complainant is entitled to restoration of annual leave but is no longer a federal employee, the Agency shall pay Complainant the equivalent sum as back pay in lieu of leave restoration.

If there is a dispute regarding the exact amount of reimbursement for leave without pay and/or back pay in lieu of leave restoration, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may file a petition for enforcement or clarification regarding the amount in dispute. The petition for enforcement or clarification must be filed with the Compliance Officer at the address referenced in the statement entitled "Implementation of the Commission's Decision."

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).

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<sup>13</sup> Although Complainant worked in Little Rock at all times relevant to these EEO complaints, the record reflects that her supervisory chain included Group Managers, Territory Managers, and Area Directors located throughout the Field Exam Gulf States Area.

Further, the report must include supporting documentation of the Agency's calculation of back pay or other benefits due Complainant, including evidence that the corrective action has been implemented.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0124.1)

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

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the [EEOC Public Portal](https://publicportal.eeoc.gov/Portal/Login.aspx), which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0124)

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 their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

December 4, 2024  
Date