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

[redacted]
Tressa L.,[1]
Complainant,

v.

Antony Blinken,
Secretary,
Department of State,
Agency.

Appeal No. 2022001932

Agency No. DOS-0308-17

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 31, 2022, final agency decision (FAD) concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, we AFFIRM the Agency's FAD.

ISSUES PRESENTED

Whether the Agency properly found that Complainant was not subjected to discrimination in reprisal for her prior protected EEO activity when she was allegedly subjected to a variety of discriminatory actions.

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

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment for two positions at the Agency. Initially, Complainant applied for a career Foreign Service Officer (FSO) position.[2] Thereafter, Complainant also applied for the non-career Professional Associate (Political) position at the U.S. Embassy in Copenhagen, Denmark, where her husband was assigned as a career FSO. Complainant applied for the Professional Associate position through the Agency's Expanded Professional Associates Program (EPAP), which provided employment opportunities for spouses of deployed FSOs.

Believing that she had been subjected to discrimination, Complainant filed a formal EEO complaint on October 23, 2017, alleging discrimination in reprisal for prior protected EEO activity (approximately nine prior EEO complaints) under Title VII when:

1. The Agency delayed processing of her suitability investigation and security clearance, resulting in her being ineligible for the EPAP position that she was conditionally offered.
2. Between July 16, 2017, to September 15, 2017, Embassy Staff entered or provided access to her residence without informing her.
3. She was subjected to a hostile work environment characterized by, but not limited to, management visiting her residence and not responding to her requests for maintenance.
4. The Department failed to reimburse her spouse's legal fees.

Complainant subsequently amended her formal complaint, alleging that the Agency subjected her to discrimination based on reprisal when:

5. On November 17, 2017, her appeal of the decision to terminate her candidacy for the Foreign Service Officer position was denied.

On November 21, 2017, and December 28, 2017, the Agency informed Complainant that it would only accept claims 1 and 5 for investigation because Complainant failed to show that she had been aggrieved with regard to claims 2, 3, and 4. The Agency further explained that claim 4 was not actionable because it involved her spouse's complaint, and not a term, condition, or privilege of her employment.

[2] Complainant did not apply for any specific location.

The investigation into the accepted claims revealed that both the career FSO position and the non-career EPAP position required candidates to undergo an intensive background investigation. As a condition of employment for the career FSO position, Complainant was required to obtain a favorable suitability determination and a top-secret security clearance. The non-career EPAP position, however, only required Complainant to obtain a top-secret clearance. There was no requirement for Complainant to obtain a favorable suitability determination for the EPAP position.

Regarding Complainant's application for the career FSO position, the record reflects that she initially received a conditional offer of employment. However, her candidacy abruptly ended on May 22, 2013, when the Staff Director of the Agency's Board of Examiners notified Complainant that the Agency's Final Review Panel (FRP) found her to be unsuitable for the position. See Report of Investigation (ROI) at 00400-402. In his letter, the Staff Director explained that the FRP's adverse suitability determination was based on evidence that Complainant had engaged in criminal, dishonest, or disgraceful conduct, examples of which included a D.C. Superior Court civil judgment in the amount of $11,500.00 for "assaultive and harassing conduct" towards a neighbor, as well as negative performance reviews and references from her two prior supervisors at a large government contractor. Id. The Staff Director advised Complainant that the denial did not constitute a denial of a security clearance, as the FRP's decision solely addressed Complainant's suitability for the position. Id. Complainant was advised that she could appeal the FRP's decision within 60 days of receipt of the decision, but that the FRP would only consider new evidence that addressed the grounds for the initial denial. Id. Complainant subsequently filed at least 10 requests for an extension, each lasting 60 days, so that she could obtain documentation from the Agency under the Freedom of Information Act (FOIA), prior to appealing the FRP's decision. The Agency granted all of Complainant's requests.

In February 2015, while Complainant's FOIA requests were pending, she applied for the non-career position of Professional Associate (Political) at the U.S. Embassy in Copenhagen, Denmark. ROI at 00108 and 00145. The Agency had posted the position pursuant to the EPAP hiring authority. Under the terms of the EPAP vacancy announcement, candidates were required to have at least one year remaining on their overseas posting and commit to serving at least one year. Id. at 00171. Because Complainant's spouse was assigned to Copenhagen until June 2018, Complainant initially met the basic requirement for employment under the EPAP hiring authority.

Shortly after Complainant submitted her application for the Professional Associate position, the Agency informed her that it had decided not to fill the position. ROI at 00109. She subsequently filed an EEO complaint in June 2015, alleging that the Agency's failure to hire her was due to reprisal. Id. The Agency then reposted the vacancy announcement in August 2015. Complainant again applied for the position. Id. In November 2015, Complainant was given a conditional offer of employment, contingent on passing an anti-nepotism review and obtaining a top-secret security clearance. Id. at 00162-3.

Complainant submitted the required security clearance forms in early December 2015; however, the Agency's Bureau of Diplomatic Security (DS) declined to grant Complainant an interim top-secret security clearance and opened a full investigation into Complainant's background. ROI at 00308. The Agency completed the anti-nepotism review in June 2016, six months after Complainant submitted the required information. Id. at 00109. Complainant asserted that the six-month wait was an unusually long time for conducting an anti-nepotism review. Id.

The delays in processing Complainant's top-secret security clearance application lasted even longer and continued well into the following year. Complainant maintained that in July 2017, she became ineligible for the Professional Associate position under the original EPAP rule, which required at least a year remaining at post. Id. at 00110.

In October 2017, Complainant received the requisite top-secret security clearance. However, she was informed by an official at the U.S. Embassy in Copenhagen that while the Agency was not withdrawing EPAP offers based on the minimum remaining time at post requirement, the Agency nevertheless could not onboard Complainant due to the hiring freeze that the new Administration had imposed in January 2017. ROI at 00111 and 00190. The Embassy Official advised Complainant that the Agency could consider waiving the minimum remaining time at post requirement once the freeze was no longer in effect. Id. Complainant, however, believed that the Agency was obligated to grant her an exception to the hiring freeze because it had issued hundreds of exceptions to the hiring freeze, including approximately 884 exceptions for eligible family members. Id. The hiring freeze was subsequently lifted in December 2017. However, no one from the Agency contacted her to continue the onboarding process. Complainant ultimately departed Copenhagen in April 2018, when her spouse was recalled back to Washington, D.C., nearly four months earlier than his anticipated return. Id.

Notably, Complainant alleged that while she and her spouse were stationed in Copenhagen, Embassy Officials engaged in reprisal against her family by entering their Embassy leased residence without notice and ignoring their requests to fix non-functioning household appliances. Id. at 00006.

The record further reflects that on June 9, 2017, during the pendency of her EPAP security clearance review, she filed an appeal challenging the FRP's May 22, 2013, decision to terminate her candidacy for the career FSO position based an adverse suitability determination. ROI at 00247-53. Even though Complainant ultimately received a top-secret security clearance in October 2017, the Agency's Appeals Committee rejected Complainant's appeal of the FRP's decision on November 17, 2017. Id. at 00568-72. In rejecting the appeal, the Appeals Committee concluded that the evidence that Complainant submitted in support of her appeal, contextualizing her allegedly anti-social behavior,[3] did not constitute new evidence, as it only challenged the weight that the FRP gave to the positive versus negative aspects of her background, rather than the underlying incidents. Id. The Appeals Committee's decision ended Complainant's candidacy for the career FSO position. Complainant believed that the Appeals Committee's decision was discriminatory and based on reprisal because the Agency failed to inform the Appeals Committee that she had recently been granted a security clearance for the non-career Professional Associate position. Id. 00120-22. Complainant maintained that the Appeals Committee should have found her to be suitable, as the non-career Professional Associate position was functionally equivalent to the career FSO position. Id.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing; however, she subsequently withdrew her request after the assigned AJ notified the parties of her intent to issue a *sua sponte* decision without a hearing in favor of the Agency. Consequently, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The Agency ultimately concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

[3] For example, while a D.C. court awarded $11,500.00 in compensatory damages to Complainant's neighbor for Complainant's conduct, Complainant noted that the award was based on the court's finding that she unreasonably interfered with her neighbor's use and enjoyment of her residence. Complainant emphasized that the court found that she did not assault her neighbor.

Complainant subsequently appealed the Agency's decision to the Commission, which was docketed as EEOC Appeal No. 2020001680.

On July 12, 2021, in EEOC Appeal No. 2020001680, we vacated the Agency's FAD and remanded the matter for further processing. In issuing our appellate decision, we first addressed the Agency's decision to procedurally dismiss claims 2 - 4 for failure to state a claim. While the Agency found that Complainant failed to show that she suffered some harm or loss to a term, condition, or privilege of employment with respect to claims 2 – 4, we concluded that claims 2 and 3 stated viable claims of reprisal because the alleged repeated unwelcome intrusion into Complainant's shared abode, if true, could reasonably deter Complainant or others from engaging in protected activity. As for claim 4, concerning Complainant's allegation that the Agency failed to reimburse her husband's legal fees in retaliation for her prior EEO activity, we found that the Agency erred in failing to accept this claim for investigation, as the Commission has long held that reprisal against a complainant's spouse may constitute reprisal against the complainant. See, e.g., Rhinesmith v. Dep't of the Treas., EEOC Appeal No. 01983350 (Jan. 13, 2000) (holding that retaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity *and* the relative, where both are employees); see also Battle v. U.S. Postal Serv., EEOC Appeal No. 0120110487 (Mar. 24, 2011) (allowing complainant to proceed with her claim that the agency had subjected her to reprisal by forcing her husband to undergo a drug test because she had engaged in protected EEO activity). Given our decision to remand claims 2, 3, and 4 for an investigation, we further ordered the Agency to afford Complainant the opportunity to develop the record on claims 1 and 5, so that an informed decision could be rendered as to whether the underlying incidents in claims 1 to 5, when considered collectively, amounted to an actionable retaliatory hostile work environment.

In our order, we instructed the Agency to accept claims 2, 3, and 4 for investigation. We also instructed the Agency to conduct a supplemental investigation into claims 1 and 5 and ordered the Agency to either allow Complainant to request relevant records and obtain affidavits from relevant witnesses or provide clear reasons for denying the request(s).

In accordance with our order, the Agency notified Complainant on July 15, 2021, that it would accept claims 2 to 4 for investigation and conduct a supplemental investigation into claims 1 and 5.

Complainant subsequently requested hundreds of records from the Agency, such as comparator evidence pertaining to her allegation that the Agency unreasonably delayed processing her suitability investigation and security clearance. She also sought comparator evidence pertaining to the more than 100 appeal cases that the Staff Director of the Board of Examiners handled. The Agency, however, ultimately did not provide the requested records or provide clear reasons for denying the requests.

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The supplemental investigation into claims 2 and 3 revealed, in relevant part, that Agency personnel generally coordinated their visits with Complainant and/or husband. After these visits became very acrimonious due to repeated disagreements as to whether the Agency and/or landlord had an obligation to replace Complainant's appliances in lieu of repairing them, Agency personnel entered Complainant's residence, while Complainant and her husband were out of the country, to repair the appliances. As for claim 4, concerning the Agency's failure to reimburse her husband's legal fees, the Agency attributed the failure to oversight.

On December 21, 2021, the Agency completed the ordered EEO investigation approximately 42 days beyond the 120 days ordered. The Agency subsequently issued Complainant a new FAD on the merits of claims 1 to 5 on January 31, 2022, approximately 83 days late. The Agency ultimately concluded that Complainant failed to prove her claims of discrimination. This appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant disputes the Agency's finding of no discrimination. Through her attorney, Complainant initially argues that the Agency's decision was based on an incomplete record due to the Agency's failure to provide her with the records, email communications, and comparator evidence that she requested. Complainant argues that there were over 1,000 potential comparators who were potentially treated more favorably than her as to claim 1 and between 100 to 1,400 potential comparators as to claim 5. She contends that the Agency's failure to grant her requests for documentation was in direct violation of the Commission's order to either "allow Complainant to request relevant records and obtain affidavits" or "provide clear reasons for denying the request(s)." Complainant asserts that the need for sanctions is compounded by the Agency's failure to comply with the timeframes that we set for completing the supplemental investigation and issuing a new FAD.

As for the merits of claims 1 and 5, Complainant contends that she established a prima facie case of discrimination because the record shows that the responsible management officials were aware of her prior EEO activity. Given the temporal proximity between the alleged acts and her prior EEO activity, Complainant maintains that the causation requirement for a prima facie case has been met. While Complainant acknowledges that she lacks evidence to rebut the Agency's articulated reasons, she contends that the lack of evidence is not dispositive because the Commission has long held that agencies cannot rely on the lack of evidence when they are ones responsible for the lack of evidence. Complainant reiterates that the Agency's failure to develop the record in accordance with our order warrants sanctions.

Furthermore, Complainant argues that the hiring freeze should not have impacted her because the Agency had previously granted nearly 1,000 waivers to the hiring freeze. According to Complainant, the hiring officials at Embassy Copenhagen "just had to ask for an exception for the Complainant to be appointed to the EPAP position." She also argues that the Agency should have found her to be suitable for the FSO position given the fact that she had recently been granted a top-secret security clearance for the EPAP position.

Finally, Complainant contends that she established a prima facie case of harassment based on the acts alleged in claims 1 to 5. In so arguing, Complainant notes that when an individual alleges reprisal, he or she need not show that the alleged act affected a term, condition, or privilege of employee. Rather, any allegation of adverse treatment that is based upon retaliatory motive and is reasonably likely to deter the complainant or others from engaging in protected activity will suffice to state a claim. As we previously found that the alleged repeated unwelcome intrusion into Complainant's shared abode," if true, would reasonably deter Complainant or others from engaging in protected activity. Complainant contends that claims 2 and 3, standing alone, are sufficiently severe or pervasive to constitute retaliatory harassment. Furthermore, Complainant reiterates that her failure to prove retaliatory harassment on the remaining claims was based on the Agency's failure to develop the record in accordance with our order. Based on the foregoing, Complainant requests that we reverse the Agency's FAD and rule in her favor.

The Agency opposes the appeal and requests that we affirm its FAD. In its brief, the Agency argues that Complainant provided no objective evidence to support her assertion that her prior EEO activity affected either her security clearance or the denial of her appeal from the Agency's negative suitability determination.

Instead, she relies solely upon her own subjective, unsubstantiated assertion that management's stated reasons were pretext for discrimination. As for Complainant's assertion that nearly 1,000 applicants across the Agency's various embassies and offices were exempted from the hiring freeze, the Agency argues that no waiver was requested for Complainant because Embassy Copenhagen did not have a compelling need to hire an EPAP Political Associate. Finally, the Agency argues that Complainant presented no evidence of discrimination with regard to her allegations of harassment.

STANDARD OF REVIEW

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

ANALYSIS

Preliminary Matters

Initially, we address Complainant's request for sanctions for its failure to 1) comply with our order to either "allow Complainant to request relevant records and obtain affidavits" or "provide clear reasons for denying the request(s)"; and 2) timely conduct a supplemental investigation and issue a new FAD.

With regard to Complainant's requests for records, we ultimately find that sanctions against the Agency are not warranted. While we understand that the Agency did not provide Complainant with the requested records or provide clear reasons for failing to do so, we find Complainant's requests for hundreds of records to be excessive and akin to a fishing expedition. We have long held that requests for records should be targeted and specific. See Belia B. v. Dep't of the Army, EEOC Appeal No. 2022003669 (Sept. 14, 2022) (noting that discovery is not a fishing expedition, and that complainant must proffer "what specific evidence that [c]omplainant would obtain that was not available to her because of any limited discovery").

Complainant simply cannot request everything with the hopes of uncovering the proverbially smoking gun. For these reasons, we are disinclined to sanction the Agency for its failure to provide clear reasons for denying her requests.

As for the Agency's failure to timely conduct a supplemental investigation and issue a new FAD, we also find that sanctions are not warranted because Complainant has not shown how she was prejudiced by the delays. We ultimately conclude that the delays were not so unconscionable or adverse to delay justice or affect the integrity of the EEO process to warrant the imposition of sanctions. We therefore deny Complainant's request for sanctions. See Josefina L. v. Soc. Sec. Admin., EEOC Appeal No. 0120142023 (July 19, 2016), req. for recon. den., EEOC Request No. 0520170108 (Feb. 9, 2017) (finding that the Agency's 571-day delay in issuing the final decision did not warrant sanctions, as complainant did not show she was prejudiced by the delay); Jocelyn R. v. Dep't of Def., EEOC Appeal No. 0120152852 (Mar. 11, 2016) (citing Vunder v. U.S. Postal Serv., EEOC Appeal No. 01A55147 (May 12, 2006) (declining to sanction an agency that issued a final decision after approximately 371 days)).

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, they must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802, n. 13; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

For a claim of reprisal, a complainant must show that: (1) they were engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A complainant can also establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996)(citing McDonnell Douglas, 411 U.S. at 802).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253.

Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. Hicks, 509 U.S. at 507.

While it is undisputed that Complainant is a member of a protected class by virtue of her prior participation in the EEO process, and was subjected to adverse treatment, we find that she failed to meet her initial burden because she failed to show the existence of a nexus between the protected activity and the adverse treatment.

Furthermore, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. With regard to claim 1, our review of the record shows that multiple Agency officials asserted that the processing of Complainant's security clearance for her EPAP position was delayed for six months because she needed to undergo an anti-nepotism review. The record reveals that Agency officials attributed Complainant's non-appointment for the EPAP position to delays in processing Complainant's top-security clearance, as well as hiring freezes at the government-wide and department level that collectively extended into January 2018.

Regarding claim 5, the record shows that her appeal of the decision to terminate her candidacy for the FSO position was denied because there was evidence that Complainant had engaged in unprofessional, criminal, dishonest, or disgraceful conduct.

As the Agency articulated legitimate, nondiscriminatory reasons for its actions, Complainant now bears the burden of establishing that the Agency's stated reasons were merely a pretext for discrimination. See, e.g., Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015).

In arguing pretext, Complainant asserted during the EEO investigation that the delay in processing her anti-nepotism review and security clearance took an inordinately long period of time and ultimately coincided with the hiring freeze. Complainant maintained that the hiring freeze should not have impacted her because the Agency had previously granted nearly one thousand waivers to the hiring freeze and could have done the same for her. She asserted that the Agency's failure to do so is in retaliation for her protected EEO activity. Regarding the denial of her appeal for the FSO position, Complainant contended that the Agency should have found her to be suitable for the FSO position given the fact that she had recently been granted a top-secret security clearance for the EPAP position. Complainant argued that her failure to obtain comparator and other relevant evidence in support of her contentions was the result of the Agency's failure to comply with our order to develop the record.

Although we lack jurisdiction to adjudicate the merits of claims pertaining to the denial or revocation of a security clearance,[4] it is well settled that we have the authority to determine whether the grant, denial or revocation of a security clearance was conducted in a discriminatory manner. See Ward v. Dep't of Justice, EEOC Appeal No. 01973627 (Apr. 20, 2000). Therefore, we shall limit our review to the extent set forth in Ward.

While we recognize that it may have taken the Agency an extended period to process the requisite anti-nepotism review and the EPAP security clearance, we ultimately decline to attribute the delays to discrimination, as we find the anti-nepotism review and security clearance process to be fact specific and based on each applicant's personal background history. Given that Complainant's personal background history included numerous allegations of unprofessional, criminal, dishonest, or disgraceful conduct; we do not find the delays to investigate these allegations to be so outside the realm of reasonableness to raise an inference of reprisal.

We are also mindful of Complainant's contention that the Agency granted nearly 1,000 waivers across the Agency to the hiring freeze and that hiring officials at Embassy Copenhagen "just had to ask for an exception for the Complainant to be appointed to the EPAP position." To demonstrate a similarly situated comparator, a complainant must show that all relevant aspects of the comparator's work situation were nearly identical to her own. See Davis v. Dep't. of Labor, EEOC Appeal No. 0120101468 (Jun. 24, 2010).

[4] Dep't of the Navy v. Egan, 484 U.S. 518 (1988)

As the nearly 1,000 individuals were hired by the Agency's various embassies and offices across the world, we are disinclined to find Complainant to be similarly situated to them. Moreover, we note that the Agency explained that Embassy Copenhagen did not request a waiver for Complainant because there was no compelling need to hire an EPAP Political Associate. Complainant has not shown this explanation to be false.

As for the denial of Complainant's appeal of the security clearance decision, we find that Complainant cannot prevail on this claim. While we are mindful of Complainant's contention that the Agency should have found her to be suitable for the FSO position given the fact that she had recently been granted a top-secret security clearance for the Professional Associate position, the record persuasively shows that there is distinction between suitability determinations and the security clearance process and Complainant seems to have improperly conflated the two. More importantly, our review of the record shows that while Complainant attempted to minimalize the allegations of unprofessional, criminal, dishonest, or disgraceful conduct against her, she did not specifically deny the alleged conduct. Based on the foregoing, we conclude that Complainant failed to prove her allegations of discrimination in claims 1 and 5.

Hostile Work Environment

Initially, we find that a finding of harassment on claims 1 and 5 is precluded by our determination that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01932923 (Sep. 21, 2000).

In addition, to ultimately prevail in her claim of retaliatory harassment, Complainant must show that she was subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington N. and Santa Fe Railway Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Com., EEOC Appeal No. 0120160024 (Dec. 20, 2017).

With regard to claims 2 and 3, our review of the record persuasively shows that the Agency personnel generally coordinated their visits with Complainant and/or husband.

After these visits became very acrimonious due to repeated disagreements as to whether the Agency and/or landlord had an obligation to replace Complainant's appliances in lieu of repairing them, Agency personnel entered Complainant's residence, while Complainant and her husband were out of the country, to repair the appliances. While we certainly understand Complainant's frustration and sense of violation, we are disinclined to find retaliatory harassment based her protected classes. See Luciano B. v. Dep't of Vet. Affs., EEOC Appeal NO. 202000369 (Nov. 19, 2020) (noting that actions not based on protected classes are not actionable).

With regard to the Agency's failure to reimburse her husband's legal fees as alleged in claim 4, while we recognize that Complainant has repeatedly attributed the Agency's failure to do so to retaliation, we note that the Agency asserted during the supplemental EEO investigation that its failure was due to an oversight. Generally, an agency's mistake, without more, is insufficient to establish discriminatory intent. Velda F. v. Dep't of the Interior, EEOC Appeal No. 0120122684 (July 10, 2018). As Complainant did not request a hearing into the matter, we do not have the benefit of an AJ's determination, as to the credibility of the Agency's proffered explanation. We therefore find that Complainant failed to meet her burden of establishing her claim of retaliatory harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's FAD.

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, 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 (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by 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:

Carlton M. Hadden, Director
Office of Federal Operations

January 21, 2025
Date