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

[redacted]
Annice N.,[1]
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(Health Resources and Services Administration),
Agency.

Appeal No. 2022003841

Hearing No. 531-2019-00303X

Agency No. HHS-HRSA-0278-2017

DECISION

On July 1, 2022, 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 June 7, 2022, final order 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the Administrative Judge properly determined by summary judgment that Complainant failed to meet her burden in proving the Agency

[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.

subjected her to discrimination and/or harassment on the basis of sex, disability, and reprisal.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Business Operations Specialist at the Agency's Office of Information Technology (OIT) in Rockville, MD. Complainant's first-line supervisor was the head of the Business Office (S1) until December 2017. Complainant's second-line supervisor was the OIT Director (RMO), until she became Complainant's first-line supervisor in December 2017.

On August 30, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female-pregnancy), disability (physical)[2], and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. In January 2017, RMO denied Complainant's requested change of duty due to morning sickness;
2. Since January 2017, RMO has interfered with Complainant's first-line supervisor's authority to communicate with Complainant directly and made decisions regarding leave issues, denying her scheduling flexibility that was afforded to her colleagues.
3. Since March 2017, RMO delayed the processing of Complainant's request for telework, change in duty hours, and advanced sick leave.
4. On April 17, 2017, S1 approved Complainant's application for telework, but RMO took no action, and has allowed Complainant's colleagues with non-pregnancy related issues to arrive late and depart early without using their leave.
5. On April 8, 2017, RMO significantly increased Complainant's duties and amended her Performance Management Appraisal Plan (PMAP) to include purchase card duties.
6. On June 8, 2017, RMO continued to treat Complainant differently than her colleagues by authorizing them 59 minutes of leave for completing the DHSS's Employee Viewpoint Survey while Complainant was not granted the time.
7. On September 7, 2017, RMO informed Complainant that her medical documentation was not sufficient to extend her leave.

[2] Complainant's disability included pregnancy related complication. ROI at 142.

8. On October 17, 2017, RMO expected Complainant to attend a Division of End User Support (DEUS) meeting the first day she returned to duty, via telework and without prior notice.
9. On October 18, 2017, RMO notified Complainant via email of a change in her Reasonable Accommodation (RA) agreement the second day she returned from maternity leave that her RA included her physical presence in the office;
10. Since December 12, 2017, RMO has denied Complainant's leave requests and required her to follow instructions that she has never received, and her colleagues are not required to follow;
11. On December 27, 2017, RMO issued Complainant a Performance Deficiency Notice and a Letter of Reprimand; and
12. On January 2, 2018, RMO suspended the role of S1, and Complainant felt forced to resign because she was treated differently than her colleagues and was continuously harassed for filing the instant EEO complaint.

The evidence developed during the investigation revealed that Complainant told her supervisor about her pregnancy in March 2017. RMO was informed about Complainant's pregnancy in late April 2017. RMO's first knowledge of Complainant's protected activity was in July 2017 when she was contacted by the EEO Counselor about the instant complaint.

Duty Hours

The Agency's policy relating to work hours authorizes employees and their supervisors to establish alternative work schedules that differ from the official hours of duty, so long as employees were present for work during the Division's established core hours. However, Complainant had a fixed schedule from 9am-5:30pm from January 2017 through October 2017. Complainant informed S1 that she could arrive by 9:30am, due to the traffic and extra time needed (30 minutes) for her morning sickness medicine to take effect, given her normal waking time of 7:30am. Complainant admitted that nothing about the medication itself or its instructions for use dictated what time she would go to bed or wake up.

RMO stated that Complainant needed to arrive at 9:00am so she could provide the Business Office support to OIT customers as of 9:00am, a rule she applied to all employees in the business office. Other business office employees had varying schedules, but all had an arrival time at or before 9:00am. Over a few months, RMO observed Complainant arriving well after 9:00am, and brought these issues to S1's attention to ensure that

Complainant complied with the mandatory start time. On February 10, March 16, and April 27, 2017, Complainant arrived late to work and S1 sent her an email reminding her of the mandatory start time and to enter leave for the time she was late. After receiving the April 27, 2017 email from S1 regarding her late arrival, Complainant told S1 that she was allowed to arrive by 9:30am. When S1 informed Complainant that RMO stated the "agreed upon" start time was 9:00am, Complainant raised a complaint with the Agency's Labor and Employee Relations unit (LER). The LER Chief responded to Complainant stating that she needed to put leave in for the time she was late beyond the agreed upon time but thought that Complainant was on a flexible schedule with a 9:30am start time instead of a 9:00am start time.

When Complainant submitted a telework request on April 7, 2021, the form plainly spelled out Complainant's tour of duty- i.e., 9:00am-5:30pm five days a week. On May 11, 2017, Complainant was late to arrival again and RMO sent her an email notifying her that there was no approved leave request for her and instructed her to submit leave for her absence. When Complainant protested that she could not enter leave in advance when said leave was unexpected, RMO responded that, when an employee learned that they are not going to be on time, that employee needs to call in to let the supervisor know, per time and leave procedures. Complainant also only submitted a leave request from 9:30am forward, and RMO told her she needed to amend it to cover the additional half hour.

Complainant contacted the LER Chief again seeking intervention. After looking into the matter and realizing Complainant had a fixed schedule that started at 9:00am, and that no request to change it had been made, the Chief advised Complainant she needed to complete an alternative work schedule (AWS) application form. The Agency's security records show that out of eighteen workdays, Complainant arrived after 9:00am sixteen times - nine of those days Complainant arrived after 9:30am, and in three instances, Complainant arrived after 10:45am. Complainant's leave record shows that she requested leave for only three of the nine days on which she had arrivals after 9:30am.

Telework

On April 7, 2021, Complainant submitted to S1 a signed telework agreement seeking both regular telework one day per week (Mondays), as well as episodic telework. On April 18, 2021, S1 notified Complainant that she missed a form in her telework request and asked her to complete it.

After Complainant submitted the additional document, S1 signed off on the telework agreement on April 19, 2017. Complainant did not speak to RMO regarding her telework agreement.

Advanced Sick Leave

The Agency's policy makes it clear that employees have no entitlement to advanced sick leave, but that management can authorize up to thirty days or 240 hours of sick leave to an employee with a zero sick leave balance and a serious disability or ailment. In order to be advanced sick leave, an employee's request must be submitted in writing and the request must be supported by medical documentation acceptable to the leave-approving official consistent with the Agency's instructions. An employee's first-line supervisor can approve advancing up to forty hours of sick leave, and the second-line supervisor can approve an additional forty hours. Any additional hours needed the approval of the Agency's Executive Officer.

On April 27, 2017, Complainant submitted a request for 240 hours of advanced sick leave to S1, to be taken between July 3 and August 7, 2017. Complainant did not submit any medical documentation with this request. The next day, Complainant sent the same form to the Administrative Office to forward to the Executive officer seeking approval for the full 240 hours. This request was not accompanied by supporting medical documentation either. The Administrative Officer suggested Complainant sending her request to RMO for awareness before sending to the Executive Officer, but Complainant declined, choosing instead to ask the Administrative Officer to forwarded it to the Executive Officer. Nonetheless, on May 2, 2017, the Administrative Officer instructed Complainant to forward her request to RMO. Complainant did not.

On May 4, 2017, Complainant wrote the Administrative Officer and told her that she ran into the Executive Officer and had given him the form. That same day, the Administrative Officer told Complainant that she did not think RMO had yet signed the form, that the Executive Officer had some questions, and that he was going to talk to either Complainant or RMO about the form. RMO testified that she had never dealt with an advanced sick leave request and was uncertain about the procedures. After receiving guidance, RMO contacted S1 to inform her that Complainant's request form was deficient in two respects: (1) S1 did not check the box indicating whether she approved or disapproved the request, and (2) the request was not accompanied by any supportive documentation.

That same day, S1 forwarded a revised request from Complainant including medical documentation and RMO signed off on the request the same day.

First RA Request

Complainant submitted an RA request in May 2017 seeking telework, a flexible work schedule, and advanced sick leave directly to the Agency's Office of Civil Rights, Diversity and Inclusion (OCRDI). Complainant did not submit this request to either RMO or S1, and there is no evidence that OCRDI ever shared anything about this request with RMO at the time. The request was denied in May 2017, based on Complainant's failure to establish that she was disabled.

Purchase Card Duties

Prior to September 2016, the OIT Business Office had at least two purchase card holders.[3] After one purchase card holder left, the sole purchase card holder was responsible for about 80-100 procurements per year. In a March 31, 2017 meeting with S1 and another supervisor, RMO instructed S1 that she wanted Complainant to be primarily responsible for making purchase card orders for certain divisions of OIT and instructed her to modify Complainant's performance plan accordingly. Complainant only worked with the Business Office from mid-January 2017 through early July 2017 during the 2017 fiscal year – about 50% of the year, but she submitted only seven orders over that period. The other purchase card holder submitted 152 orders, which made Complainant's orders less than 5% of the number submitted by the other employee. Despite RMO's direction, S1 informed Complainant that her role to serve exclusively as a backup to the other purchase card order, not in conjunction with her as an additional primary user to satisfy the orders. Although Complainant completed the training for using a purchase card and the application prior to going on maternity leave in July 2017, the issuance of the card was put on hold due to the Agency policy of not having open purchase cards held by employees on extended leave.

Modification to RA

In late September/early October 2017, Complainant submitted to OCRDI a request for a reasonable accommodation.

[3] A purchase card is a government credit card in the employee's name utilized for making small purchases for governmental purposes.

The accommodation requested included three days per week of telework, with the remaining two days off, and an alternative work schedule that provided for flexible arrival (between 6:00am and 9:30am) and departure (between 2:30pm and 6pm) times. Initially, RMO and Complainant agreed to the telework and alternative work schedule accommodations in an October 13, 2017 agreement. The RA agreement said nothing about an entitlement to LWOP without complying with the established leave procedures.

On October 11, prior to Complainant's October 17 return from maternity leave, RMO sent an email to the Agency's Purchase Card Coordinator asking about the process for Complainant to receive her purchase card. The Coordinator responded and stated they were uncomfortable giving her a credit card until she was back in the office, and that all cardholders needed to meet with her when they reconcile their credit statements – once a month. RMO alerted OCRDI about this requirement for her purchase card holder duties and OCRDI reached out to Complainant to amend her RA agreement to come into the office one day per month to perform the reconciliation function. Complainant was resistant, but ultimately signed a November 6, 2017 amended agreement.

Employee Viewpoint Survey

Pursuant to annual practice, the Office of Personnel Management (OPM) conducted its 2017 Federal Employee Viewpoint Survey (FEVS) between May 11 and June 22, 2017. On May 12, 2017, the Agency sent out an email to all employees, notifying them of the FEVS. As an incentive for eligible employees to complete the FEVS, RMO granted those eligible employees who completed the survey 59 minutes of administrative leave time. As Complainant was not on board with the Agency as of October 2016 (having begun working with the Agency in January 2017), she was not eligible to participate in the 2017 FEVS; and RMO did not grant her the time. The individuals identified by Complainant as having received the administrative time incentive had been working for the Agency at least since October 2016.

October 17, 2017 Meeting

On the day of her return from maternity leave, Complainant was expected to attend via phone a meeting being held by a OIT customer for which Complainant was responsible. Aware of the meeting, Complainant contacted an employee to ask for the call-in number for the meeting approximately an hour before the meeting. She did not receive a response.

More than three hours after the meeting, Complainant emailed RMO to inform her that she had not received a response with the call-in information and that she had another meeting that had been scheduled at the same time as the other one at 11am.

Extended FMLA

On April 17, 2017, Complainant applied for FMLA leave, related directly to her pregnancy and childbirth. The medical provider certification produced in support of this application made clear the leave was being requested for the delivery and recuperation from delivery. The medical certification identified the probable duration of the condition to be six weeks from her expected delivery date of July 18; that she was not expected to need follow up treatment appointments; neither the condition itself, not any episodic flare ups arising from the condition, would prevent Complainant from performing the duties of her job. Her expected return to work date was set as August 29, 2017. The request for FMLA was approved on April 28, 2017.

On September 5, 2017, Complainant sent an email to S1 stating that her medical leave had been extended by her doctor. Attached to the email was a form requesting 680 hours of leave without pay over the period September 1 through December 31, 2017 and a medical note. The medical note was a certificate to return to work or school signed by a doctor dated September 1, 2017. The form stated that Complainant was being treated for post-partum complications and would be able to work on January 2, 2017. In the remarks sections of the form, it stated "Please Extend FMLA Leave through 12/31/17."

Since S1 was out of the office, Complainant forwarded her email to RMO. Based on advice from LER, RMO responded to Complainant notifying her that she used 395 hours of FMLA leave at this point and the medical documentation was not sufficient for approval of extended leave. RMO noted that the doctor's note was vague and did not indicate the limitations or indicate why Complainant could not perform her duties. RMO provided Complainant with information regarding what documentation was needed for extended sick leave beyond approved FMLA. Despite S1 being out on extended leave herself, she took it upon herself to exercise supervisory authority to approve the LWOP request on September 15, 2017, indicating in the email that she herself was likely going to be resigning in the next month.

Holding to "New" Leave Procedures

On December 12, 2017, Complainant sent RMO an email stating that she would be out of the office that day. Given the limited information in Complainant's email and the absence of a leave request, RMO consulted with LER and sent Complainant an email reminding her to follow the proper procedure for leave requests. Later that day, Complainant sent another request, for 8 hours of annual leave for December 13, 2017, in order to attend a medical appointment and that she would obtain the necessary documentation to support the request. RMO responded the next day reminding Complainant to submit the supporting medical documentation.

On December 14, 2017, Complainant submitted another request to RMO seeking to request blanket LWOP for "medical appointments/sick days." To this request, Complainant attached a LWOP request form and a doctor's note that she was being seen for postpartum complications and required LWOP, sick leave, or any other appropriate leave to cover her recurring treatments through May 2018. Also on December 14, 2017, Complainant submitted a request for LWOP for December 15 and December 18, 2017 attaching the same doctor's note as support.

RMO consulted with an LER specialist and responded to Complainant stating that her request was included in a request she submitted to the reasonable accommodation process, and that she currently did not have an interim accommodation approved for LWOP. RMO further stated that she would not approve a blanket LWOP request, and that Complainant would have to request LWOP for each instance and provide acceptable support for her request. In regard to Complainant's request for LWOP for December 15 and 18, she asked for clarifying information regarding the time of Complainant's treatment and the amount of time Complainant's treatment would take. Complainant sent additional leave requests in December 2017 and asked RMO that the doctor's note be honored until at least December 31, 2017.

In an email exchange between RMO and OCRDI, an OCRDI employee stated, "for leave approving purposes, not unlike RA, this [i.e. the December 12] note is not acceptable by OPM standards." RMO emailed Complainant again to notify her that her doctor's note was too vague and required clarification. RMO informed Complainant that if she did not receive the additional information prior to approving timecards, Complainant would be charged Absent Without Leave (AWOL).

Reprimand

On December 27, 2017, RMO issued Complainant a written reprimand, citing Complainant's failure to follow instructions, failure to attend meetings, and failure to follow leave procedures. Also on December 27, 2017, RMO issued Complainant a "Performance Concerns" memorandum identifying nine separate issues including that Complainant failed to timely process a training materials order and update a spending plan, Complainant not acquiring a certification that was necessary to perform her job, and Complainant failing to attend or leaving meetings without any notification or approval. In the memorandum, RMO specifically cited an incident on November 30, 2017 where Complainant left a meeting because of a baby crying in the background at her location.

Removing S1's Supervisory Responsibilities

On May 18, 2017, RMO issued S1 a memorandum entitled "Warning during Supervisory Probation," in which she had set forth a number of issues that she had observed with S1's performance of her supervisory and other duties. Upon S1's return from extended leave in December 2017, RMO specifically instructed S1 that she was not to act in a supervisory capacity until further notice. After discussions with LER, RMO elected to restore S1's supervisory responsibilities to her subordinates but retained the responsibility to oversee Complainant's work. In doing this, RMO stated that S1 provided inaccurate guidance to Complainant which led to some of Complainant's confusion with not being able to perform and her leave violations.

Both Complainant and S1 submitted their resignations from the Agency in January 2018 alleging harassment and reprisal.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's September 13, 2019, motion for a decision without a hearing and issued a decision without a hearing on January 25, 2021.

In the decision, the AJ found that the Agency's actions were not sufficiently severe or pervasive to create an abusive environment, and they did not unreasonably interfere with Complainant's performance or work environment. The AJ further found that the Agency provided legitimate, nondiscriminatory reasons for each instance of alleged harassment. Regarding Complainant's disparate treatment claims, the AJ found that Complainant failed to establish a prima facie case of disparate treatment because Complainant could not show any similarly situated employees received more favorable treatment under the same or similar circumstances. The AJ found that Complainant established a prima facie case of reprisal, but that the Agency provided legitimate, nondiscriminatory reasons for its actions and Complainant failed to establish pretext. Ultimately, the Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that she established a prima facie case of hostile work environment discrimination. Complainant contends that she also established pretext in the Agency's proffered reasons. More specifically, that RMO had made discriminatory statements about pregnancy, Complainant's being pregnant, and Complainant taking care of her newborn. Complainant also argues that the AJ erred in failing to address Complainant's claim of constructive discharge.

On appeal, the Agency contends that Complainant failed to identify direct evidence of discrimination or reprisal. The Agency contends that the AJ correctly concluded that Complainant failed to make a prima facie case showing of discrimination based on disability, sex, and reprisal. The Agency also contends that Complainant failed to demonstrate the existence of a genuine dispute of material fact as to pretext. As to Complainant's constructive discharge claim, the Agency contends that the AJ correctly declined to address the claim because the AJ found no evidence of discriminatory or retaliatory intent regarding any claim and therefore had no reason to address a constructive discharge claim arising from non-existent discrimination or reprisal.

STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

Summary Judgment

We determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital

Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant alleged disputes of material facts exist in the contradictory testimony of S1 and RMO. More specifically, Complainant alleged that RMO made three discriminatory remarks in two separate instances about pregnancy and teleworking with a newborn, which she alleged is supported by S1's testimony. Complainant argues that these incidents are sufficient to establish direct evidence of discrimination and preclude any summary judgment decision.

RMO's alleged discriminatory comments included her stating, "expecting what?" "it is very difficult to telework with a newborn" and "a baby's crying in the background." S1 testified that RMO allegedly stated "expecting what" before being told that Complainant was expecting a baby. S1 testified that RMO's response was very unusual, and her tone was "cold." See Complaint File at 1244-1246. However, RMO denied making this statement. See Complaint File at 530. Similarly, S1 testified that in the same conversation with RMO, RMO stated, "it is very difficult to telework with a newborn," after S1 mentioned telework as an option for Complainant after childbirth. See Complainant File at 1245. While RMO was not specifically asked whether she made this statement, RMO testified that she did not have any conversations with S1, or anyone else, regarding whether Complainant's pregnancy might impact her ability to do her job. See Complainant File at 532. We note that RMO's comment was not linked to Complainant's actual request for telework, and she did not make a comment specifically about Complainant.

In the last alleged incident of discriminatory comments, RMO, when issuing a memo to Complainant stated, "you were on a conference call and had to briefly leave the meeting because of a baby's crying in the background at your location." ROI at 927. RMO stated that she made that statement after hearing it happened from two separate employees who were on the conference call when the alleged incident occurred. See Complainant File at 576. The statement was included in a Performance Deficiency Notice to Complainant that also contained other issues. ROI at 926-928. We note that Complainant did not deny that this incident occurred in her submissions.

In reviewing the record in its entirety, we do not find these alleged statements to be direct evidence of discrimination, as Complainant alleges. We also do not find issue in the credibility of RMO making these statements because even if stated as alleged, we find they do not provide evidence of discriminatory animus.

Complainant also argued that summary judgment should not have been granted because the AJ failed to include her constructive discharge claim in its Motion for Summary Judgment and the AJ failed to address the claim their Decision Without a Hearing. For reasons discussed herein, we find that the Agency's and AJ's error in excluding Complainant's constructive discharge claim does not affect the outcome of the case in a way that precludes summary judgment.

Harassment/Hostile Work Environment (Claims 1-11)

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001).

To 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 Northern 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). It is important to note, that only if both elements are present, a chilling effect on protected EEO activity *and* retaliatory motivation, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017) (emphasis added).

It is undisputed that Complainant was a member of a protected class for her sex (pregnancy), and the Agency does not contest that Complainant was a qualified individual with a disability for her medical conditions related to pregnancy and postpartum. We acknowledge that claims 1 and 4 as alleged by Complainant suggests that RMO knew of Complainant's morning sickness and pregnancy related issues. However, RMO testified that she was not aware of Complainant's pregnancy until the end of April 2017. ROI at 435. Complainant herself testified that RMO was not informed of her pregnancy until late March or early April. ROI at 145. Based on the testimony of RMO and Complainant, we find that Complainant cannot establish a prima facie case of harassment on the basis of sex (pregnancy) or disability (pregnancy related issues) for claims 1-3 because they occurred before RMO was aware of her pregnancy or any related issues.

It is also undisputed that Complainant was a member of a protected class for her protected activity. However, Complainant stated that she did not have any prior EEO complaints, except the instant complaint which she initiated on May 19, 2017.[4] RMO testified that she became aware of Complainant's protected activity on July 17, 2017 through email. See, e.g., ROI at 434. Therefore, we find that Complainant cannot establish a prima facie case of reprisal for claims 1-6 because they occurred before RMO became aware of Complainant's protected activity. Without knowledge of Complainant's protected classes, RMO could not engage in discriminatory harassment on the basis of sex, disability, or reprisal. Nonetheless, we will consider the Agency's responses to each claim of harassment alleged.

In claim 1, Complainant alleged that RMO denied her requested change of duty due to morning sickness. Complainant testified that she requested her tour of duty start at 9:30AM because she was suffering from severe morning sickness as a result of her pregnancy and that S1 approved the change, but RMO later denied it. In response, RMO stated that she did not deny Complainant's request for a change in duty. Rather, she stated she had a conversation with S1 about the Business Office hours and that staff needed to be in the office by 9:00AM to provide support for the divisions within the office. ROI at 470. RMO also stated that she was not aware of Complainant's pregnancy when Complainant requested her hours be changed in January 2017. ROI at 470. S1 also testified that RMO did not have knowledge of

[4] Complainant also engaged in protected activity when she requested a reasonable accommodation in May 2017, but does not claim this activity as a basis for her reprisal claim.

Complainant's pregnancy at the time of her requested tour of duty change. ROI at 479.

In claim 2, Complainant alleged that RMO continuously interfered with S1's authority to communicate with Complainant directly and made decisions regard leave issues, denying her scheduling flexibility that was afforded to her colleagues. In response, RMO stated that she talked with S1 about her supervisory role over Complainant and responsibility for approving leave after RMO learned that Complainant was frequently late. ROI at 430-431. RMO stated that the reason S1 was removed as Complainant's first-line supervisor in January 2018 was related to a Labor Employee Relations issue and not because of any of Complainant's protected bases. ROI at 430.

In claim 3, Complainant alleged that RMO delayed the processing of her telework request, change in duty hours, and advanced sick leave. Complainant stated that at one point, her requests sat on RMO's desk for at least 60 days. In response, RMO testified that she was not aware of any delays in Complainant's requests for telework, change in duty hours, and advanced sick leave. ROI at 433. RMO indicated that S1 processed Complainant's requests for telework and change of duty hours. ROI at 432. As for Complainant's request for advance sick leave, RMO stated that after receiving Complainant's requests, she reached out to Labor Employee Relations who informed her that Complainant's package was incomplete. Id. RMO testified that once she received the completed advanced sick leave form from S1 on May 16, 2027, she signed the form and sent it form processing that same day. Id.

In claim 4, Complainant alleged that RMO took no action when S1 approved her telework request and allowed other employees to arrive late and leave early without using leave. Complainant stated that her colleagues were permitted to make-up leave, extend their tours of duty, use leave and skip lunch, but she was only given the option of using her leave and was not allowed any other flexible leave options. In response, RMO stated that S1 approved Complainant's telework request. ROI at 438. She explained that she signed the telework agreement, but that her signature was not required. ROI at 437-438. RMO stated that when she served as Complainant's immediate supervisor, she approved the reasonable accommodation requests that were sent to her. Id. RMO also stated that she was not aware of Complainant's pregnancy or EEO complaint at the time she requested telework, and that all employees, including Complainant, were required to follow management's expectations and leave policies. ROI at 438.

In claim 5, Complainant alleged that RMO significantly increased her duties and amended her performance plan to include purchase card duties. More specifically, Complainant stated that RMO took away purchase card duties from another team member to give to Complainant in April 2017, despite the fact RMO knew Complainant was going on maternity leave in July 2017. In response, RMO stated that the office needed an additional credit card holder to ensure that there was adequate coverage, so she requested that Complainant take on the role of purchase card holder. ROI at 440. RMO also stated that processing procurements was part of Complainant's job duties, so RMO directed Complainant to amend her performance plan accordingly. Id. RMO testified that she had no knowledge of Complainant's protected activity at the time, and that Complainant's pregnancy had nothing to do with her decision to change Complainant's duties. ROI at 441. The Director of DEUS stated the addition of the purchase card duties to Complainant's responsibilities was solely a business office decision. ROI at 579. The Branch Chief of LER added that supervisors could amend performance plans and duties at any time for business and operational reasons, per Agency policy, and that the increase of an employee's duties was a management decision based on the work of the organization. ROI at 627.

In claim 6, Complainant alleged that RMO treated her differently than her colleagues by authorizing them 59 minutes of leave for completing the FEVS while she was not granted the time. In response, RMO testified that the survey was only available to employees who had worked at the Agency for at least one year. ROI at 443. A witness employee also confirmed that employee had to have worked with the Agency for a full year in order to take the survey. ROI at 563. RMO stated that Complainant had only worked with the Agency for five and a half months when the survey was distributed, so she was not eligible to complete the survey. ROI at 443.

In rebuttal to RMO's response to claim 6, Complainant stated that RMO violated policy by providing leave time as an incentive to employees for completing the survey. Even if that were correct, Complainant does not allege how the violation in policy relates back to a violation of an EEO law. We do not otherwise find any evidence that RMO's actions in this claim were related to or based on any of Complainant's protected bases.

In claim 7, Complainant alleged harassment when RMO informed her that her medical documentation was not sufficient to extend her leave because it was either insufficient or too vague. In response, RMO stated that the Branch Chief of LER told her that Complainant's medical documentation was not sufficient. ROI at 451.

The Branch Chief of LER stated that she sought guidance from another LER staff member, and they agreed that Complainant's medical documentation was too vague for approval, and she indicated medical notes needed to be specific and include the incapacitation time period and information about the employee's treatment or exam. ROI at 633. In this claim, it is clear that RMO was acting on the advice of the LER office. There is no evidence that LER or RMO's actions were based on Complainant's protected bases.

In claim 8, Complainant alleged harassment when RMO expected Complainant to attend a meeting the first day she returned to duty via telework and without prior notice. Complainant testified that RMO reprimanded her for not attending the meeting even though RMO informed her of the meeting either right before the meeting started or at some point during the meeting. Complainant stated that she was the only employee required to attend the meeting via Skype. In response, RMO stated that Complainant was responsible for providing procurement support to the meeting that was scheduled. ROI at 448. RMO testified that Complainant was invited to attend the meeting electronically on October 17, but that Complainant did not attend the meeting, nor did she provide a reason for her absence. ROI at 449.

In rebuttal, Complainant stated that she was not informed of the meeting on October 17, and that she had a conflicting meeting at the same time that made her unable to attend the referenced meeting. However, the record reveals that Complainant was aware of the meeting as she sent an email to a coworker about the meeting at 9:55am when the meeting was scheduled for 11am. See Complaint File at 644. Additionally, the Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected classes, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). There is no evidence that the work-related incident described in claim 8 was abusive or offensive, or taken in order to harass Complainant on the basis of a protected class.

In claim 9, Complainant alleged harassment when RMO notified her of a change in her RA agreement that included her physical presence in the office. In response, RMO stated Complainant's RA was amended because she was required to come into the office monthly to reconcile her Agency credit card. ROI at 445-446. RMO indicated the RA Office provided Complainant the reason for the change to her RA agreement. ROI at 446. The employee whose responsibility was to sign off on the reconciliation records stated the in-person meeting was a requirement for purchase card holders such as Complainant. The employee stated that other purchase card holders had to physically come into the office at least once per month to complete the reconciliation process as well. ROI at 592. The employee further stated that the modification of Complainant's RA did not make a difference because she did not have an initial meeting with him and did not receive her first statement until January 2018, after her telework agreement would have ended, if not for her resignation. Id. A LER Specialist also testified that the modification made to Complainant's RA agreement was in compliance with Agency policy. ROI at 847. It should be noted that in Complainant's deposition, she stated that she did not have a problem with coming into the office once a month, and that the modification of the RA agreement did not adversely impact her. Complaint File at 419. Given Complainant's testimony, along with the testimony of other management officials, we find that the action described in this claim was neither unwelcome, hostile, or abusive. We also find the conduct not based on her protected classes, but instead on her specifically job duties as a purchase card holder.

In claim 10, Complainant alleged harassment when RMO denied her leave requests and required her to follow instructions that she has never received. Complainant also alleged that her colleagues were not required to follow the instructions given to her. Complainant testified that after removed S1's duties as her supervisor, RMO stated that the way Complainant requested leave was insufficient. Instead, Complainant testified, RMO sent her (and only her) a template to use when requesting leave that required her to include the type of leave she was using (annual or sick leave) and the date for the requested leave.

In response, RMO stated that she sent Complainant instructions for requesting leave and would deny her leave when she did not provide adequate documentation. ROI at 454-455. RMO states that she provided the reasons for the denials to Complainant via email. ROI at 455. The LER Branch Chief testified that Complainant had documented leave problems and LER recommended that a leave instruction memo be issued to Complainant. ROI at 634-635.

The Branch Chief stated that RMO's decision to require Complainant to follow specific instructions when requesting leave was not discriminatory because Complainant had documented leave problems. ROI at 635. The Branch Chief added that S1 had several instances of failing to follow instructions, misconduct, and performance issues and did not hold Complainant accountable for following proper leave procedures. ROI at 636. She also stated that RMO relied on the advice of LER to manage the leave problems of both Complainant and S1. Id. We find that the complained of action was not based on Complainant's protected classes but instead on her history of leave issues and noncompliance.

In claim 11, Complainant alleged harassment when RMO issued Complainant a Performance Deficiency Notice and a Letter of Reprimand. Complainant stated that RMO did not counsel her prior to the issuance of the letter. In response, RMO stated that she worked on the Notice and Letter with LER. ROI at 458. In the Notice, RMO stated that she was very concerned that Complainant was not performing her duties and tasks in a timely manner or at all since Complainant's return to duty in mid-October. ROI at 926. RMO cited incidents regarding Complainant's failure to timely process training material orders, inaccurate work, missing meetings, and failure to upload a spending plan. Id. In the Letter of Reprimand, Complainant was reprimanded for failure to follow instructions, failure to attend meetings, and failure to follow leave procedures. The reprimand cited instances on 17 separate occasions where Complainant's conduct was the subject of concern. ROI at 939-931. The Branch Chief of LER testified that she and another LER employee advised RMO to issue the Notice and Letter to Complainant for the repeated performance, attendance, and conduct issues. ROI at 636.

The Branch Chief stated that the actions in this claim taken by RMO were not discriminatory but rather based on documented evidence of conduct and performance issues. ROI at 637. We agree. We find that the complained of conduct did not occur as Complainant described, and that it was related to the management of Complainant's performance and conduct.

Complainant has not otherwise provided any evidence to suggest that any of the complained of conduct was taken based on an unlawful reason. Accordingly, we find that Complainant did not establish that the Agency subjected her to harassment based on sex, disability, or in reprisal for prior protected activity.

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, 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). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

In line with our earlier finding, we further find that Complainant cannot establish a prima facie case of disparate treatment on any of her protected bases. As detailed above, the Agency provided legitimate, nondiscriminatory reasons for its actions and Complainant has not presented any evidence to establish that the Agency's actions were based on any of her protected bases. Therefore, we find that Complainant failed to prove that she was subjected to disparate treatment on the basis of sex, disability, and reprisal.

Constructive Discharge (Claim 12)

A discriminatory constructive discharge occurs when an employer, motivated by discriminatory animus, creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in Complainant's position would feel forced to resign. See Cullors v. Dep't of Defense, EEOC Appeal No. 01A41560 (Jun. 27, 2006). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) the conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. Clemente M. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120160661 (Mar. 11, 2016), citing Walch v. Dept. of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

The Commission has found that an extremely difficult and upsetting employment situation is not enough for a reasonable person to find working conditions intolerable. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120121920 (Jun. 25, 2014) ("dissatisfaction with work assignments, a feeling of being unfairly criticized or difficult or unpleasant working conditions are not so unreasonable as to compel a reasonable person to resign," quoting Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994)).

To compare, the Commission found a constructive discharge after an employee resigned due to the open and repeated use of racial epithets in front of multiple witnesses in Complainant v. Department of the Air Force, EEOC Appeal No. 0120123332 (September 10, 2014).

In claim 11, Complainant alleged that she was constructively discharged after RMO suspended the role of S1, and she felt forced to resign because of discrimination and harassment by RMO. We note that Complainant has not alleged any personal harm that was caused by RMO's removal of S1's duties or that the action itself was hostile or abusive. Nonetheless, RMO testified that S1 was removed because there were LER issues that she was dealing with S1. ROI at 461. Regarding Complainant's allegation of discrimination and harassment by RMO, we find that a case of constructive discharge is precluded based on our finding that Complainant did not establish that any actions taken by the Agency were motivated by her protected bases. As a result, we find that Complainant has not established that she was constructively discharged from her position.

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 final order in adopting the AJ's summary judgment decision finding no discrimination.

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

November 25, 2024
Date