



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

[REDACTED]  
Sharon M.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2022004167

Agency No. 200H-VI01-2021104009

**DECISION**

On August 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 July 20, 2022 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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 decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Advanced Medical Service Assistant, GS-0679-06, at the Agency's Veterans Integrated Service Network 1 Call Center, Bedford Healthcare System in Bedford, Massachusetts.

On March 24, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (migraines, vertigo, anxiety, and depression) when:

1. From May 2021 to the present, Complainant's first-level supervisor (S1), the Medical Support Assistant Supervisor, has questioned Complainant about her medical conditions and why she takes so much Family and Medical Leave Act (FMLA) leave and allowed coworkers to talk "negatively" about Complainant;

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

2. On May 7, 2021, management denied Complainant's request for a reasonable accommodation and failed to assist Complainant with applying for leave under the leave donation program (LDP) and Leave Without Pay (LWOP), further denying her LWOP;
3. From May 9, 2021, through August 2021, management charged Complainant Absent Without Leave (AWOL) on various dates; and
4. On June 26, 2021, and/or August 13, 2021, Complainant was denied advanced sick leave.

In Claim 1, Complainant alleged that S1 said she noticed Complainant consistently took leave on Mondays, Tuesdays, and the days after holidays. According to S1, these were typically the Call Center's busiest days. After Complainant stopped calling out on these days, S1 then noticed Complainant called out on other days and asked why Complainant took so much FMLA leave. Complainant also alleged that S1 discriminated against her when she accused Complainant of diagnosing patients even though she is not qualified to do so, and compared Complainant's work performance to that of a coworker who did not have a disability.

S1 confirmed that she raised concerns about Complainant's leave usage, but denied referencing FMLA. S1 also denied that any of Complainant's coworkers talked negatively about her.

The record contains an email exchange between Complainant and S1 on June 28, 2021. S1 began by noting that Complainant's performance rating was fully successful but she had areas in which Complainant could improve. S1 highlighted as a concern "entering diagnosis in CPRS (you cannot do this, per nurses you should avoid doing this.\*)" Complainant responded that she was not entering diagnoses, but rather doing what she was told to do, which was to describe what veterans told her in parentheses. S1 explained that Complainant's phrasing in the parentheses "seemed a diagnosis, and that is it [sic] brought to my attention."

The record also contains another email exchange between Complainant and S1 on or about January 6, 2021. Therein, S1 wrote to Complainant to say that she noticed Complainant's "call outs on Mondays and Tuesdays, and the days after holidays (which are our busiest days as you are well aware)." S1 said she and Complainant discussed the matter and Complainant stopped calling out. However, "lately, [S1 is] noticing call outs on Mondays and Tuesdays again." Then, on January 7, 2021, S1 refers to a coworker "being a lead and busy with other Admin stuff takes way more calls than you. This is a concern for me, and your handle time is 8 min."

In Claims 2 and 4, Complainant alleged that she sought full-time telework as a reasonable accommodation. On October 2, 2020, Complainant completed the Agency's reasonable accommodation request form and provided documentation from her physician. Therein, Complainant asserted that her medical conditions flare up three times weekly, which makes it difficult for her to drive and then perform her duties, including answering telephone calls and

using the computer, when she is physically in the office. Complainant's physician also believed that Complainant would recover faster from her flare-ups if allowed to work from home.

The Agency granted Complainant's request to work from home on a full-time basis on October 27, 2020. Prior to requesting a reasonable accommodation, the Agency had granted Complainant FMLA leave, which Complainant exhausted by May 6, 2021. At this point, Complainant sought various types of leave under the Agency's special leave program (SLP), including further FMLA leave, advanced annual leave or sick leave, and LWOP. The Agency denied her request for advanced leave. During this time, Complainant provided notes from her physicians advising that Complainant was to be off work on certain days but could return to work. On May 10, 2021, her doctor advised that Complainant could return to work on May 11, 2021 without restrictions. On August 6, 2021, Complainant was excused for two days but could return on August 9, 2021 so long as she was able to elevate her legs, intermittent icing, and remain "resting" until further assessment. On August 9, 2021, Complainant emailed Human Resources, seeking LWOP due to an "ongoing medical condition and emergency medical condition." In her requests, Complainant did not identify the medical conditions but referred to her prior request for reasonable accommodation.

In Claim 3, the record contains screenshots of text messages between Complainant and her supervisors taking place on or about May 21, 2021. In those messages, Complainant says that she would be out of work and that a note will be provided. S1 responded that Complainant would be "graded AWOL." S1 explained that she charged Complainant AWOL because Complainant had no sick or annual leave available to her. Further, S1 did not have the authority to approve or deny advanced leave.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its decision, the Agency found that management appropriately granted Complainant reasonable accommodation when it granted Complainant's request for full-time telework. Beyond that, Complainant failed to demonstrate that her requests for advanced leave or LWOP were related to her medical conditions. To this end, the Agency concluded that the two doctor's notes did not reference any medical condition, but rather that Complainant was sick for certain days. Even if Complainant referenced her prior reasonable accommodation request, the Agency noted that the request did not indicate that leave was an accommodation, only that she would be able to perform her duties if allowed to work from home.

The Agency further concluded that Complainant did not show S1's explanation for her AWOL charges was discriminatory. The Agency asserted that Complainant would have been charged AWOL without regard of her disability.

As to her claim of harassment, the Agency concluded that, even assuming the conduct Complainant complained of was sufficiently severe or pervasive, Complainant failed to demonstrate that the conduct was because of her disabilities. As a result, the Agency found that Complainant was not subjected to discrimination or a hostile work environment as alleged. The instant appeal followed.

### ANALYSIS AND FINDINGS

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

#### *Denial of Reasonable Accommodation – Claims 2 and 4*

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p).

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the disabled individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), EEOC Notice No. 915.002 (Oct. 17, 2002); see also Abeijon v. Dep't of Homeland Sec., EEOC Appeal No. 0120080156 (Aug. 8, 2012). Protected individuals are entitled to reasonable accommodation, but they are not necessarily entitled to their accommodation of choice. Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994).

Complainant does not dispute the Agency granted her request for full-time telework. Rather, Complainant argues that the Agency should have granted her request for advanced leave or LWOP.

Unpaid leave is a potential reasonable accommodation under the Rehabilitation Act. See Spranger v. U.S. Postal Serv., EEOC Appeal No. 01974565 (Mar. 20, 2000). However, an agency is not obligated to provide indefinite leave. See Herb L. v. U.S. Postal Serv., EEOC Appeal No. 0120140330 (Aug. 17, 2016); Calacsan v. Dep't of the Navy, EEOC Appeal No.

0120110592 (Jan. 4, 2013). Further, the Agency is not obligated to provide Complainant with paid leave beyond that which is provided to similarly situated employees. Joseph v. Dep't of Def., EEOC Appeal No. 0120060710 (Mar. 7, 2007), citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship, EEOC Notice 915.002 at p. 29 (Oct. 17, 2002).

In this case, Complainant does not demonstrate that the Agency should have provided her with any form of leave as a reasonable accommodation. The record is devoid of any evidence that her requests for leave were because of a disability. Moreover, Complainant does not adequately explain how much leave she needed, or when her need for advanced leave would end. See See Herb L. v. U.S. Postal Serv., EEOC Appeal No. 0120140330 (Aug. 17, 2016) (an Agency is not obligated to provide indefinite leave); Calacsan v. Dep't of the Navy, EEOC Appeal No. 0120110592 (Jan. 4, 2013). As such, we find the Agency did not fail to provide Complainant reasonable accommodation in violation of the Rehabilitation Act.

### *Disparate Treatment – Claim 3*

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

Assuming arguendo that Complainant established a prima facie case of discrimination, the Agency articulated legitimate, nondiscriminatory reasons for its actions. In this case, the Agency explained that Complainant was not at work and was not in an approved leave status. Additionally, Complainant had no sick or annual leave available to her. Therefore, she was AWOL as any other employee in that situation would be.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory or retaliatory animus. Complainant provides no evidence tending to establish a discriminatory animus.

Furthermore, to the extent that Complainant claims that the alleged incidents constitute a claim of harassment, the Commission notes that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), a claim of hostile work environment must inevitably fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). A finding of a hostile work environment is largely precluded by our determination that Complainant failed to establish that any of the actions taken by Agency management were motivated by discriminatory animus on any of her alleged bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Specifically, regarding claim (1), the incidents involved were of a type that typically arise out of workplace conflicts or communications; namely, S1 questioning Complainant about the pattern of her absences and comments regarding Complainant's work performance. Complainant presented no evidence of discriminatory animus. As a result, the Commission finds that Complainant was not subjected to discrimination or a hostile work environment as alleged.

### 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 decision.

### 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 29, 2024

Date