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

[redacted]
Ceola K.,[1]
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2022004419

Agency No. 200306742021103642

DECISION

Complainant appealed to the Equal Employment Opportunity Commission ("EEOC" or "Commission"), pursuant to 29 C.F.R. § 1614.403, from a July 21, 2022 Final Agency Decision ("FAD") concerning an 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 decision.

ISSUES PRESENTED

Whether the Agency properly determined that Complainant was not subjected to discrimination or harassment based on gender identity, disability, or in reprisal for prior protected activity.

[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 worked as an Advanced Medical Support Assistant ("MSA"), GS-6, for the Central Texas VA Healthcare System's Austin Outpatient Clinic in Austin, Texas.

On June 28, 2021, Complainant filed a Formal EEO Complaint alleging that she was subjected to discrimination, including a hostile work environment, by the Agency, on the bases of gender identity (transgender woman),[2] disability (generalized anxiety disorder, PTSD), and reprisal for prior protected EEO activity. The Agency, in its FAD, framed Complainant's claims as follows:

1. On April 29, 2020, the Supervisory MSA ("Supervisor") emailed Complainant to inform her that she was not meeting her standards for making appointments;

2. From April 29, 2020, to present, Supervisor has failed to acknowledge Complainant's end-of-day email messages indicating completed work and chastised or criticized Complainant for making scheduling mistakes;

3. On May 13, 2020, Supervisor emailed Complainant a "harsh" message for not wearing a face covering in the Eligibility Clinic;

4. On September 25, 2020, Supervisor denied Complainant's request for overtime;

5. On September 28, 2020, Supervisor threatened to place Complainant on sick leave certification;

[2] The Agency framed Complainant's alleged bases as including sex and sexual orientation, but a review of the record reflects that Complainant's alleged basis is gender identity. See Roxanna B. v. Dep't of the Treas., EEOC Appeal No. 2020004142 (Jan. 10, 2024) (discussing terminology and providing guidance for processing and investigating LGBTQIA+ EEO complaints).

6. From October 2020 to December 2020, Supervisor failed to respond to Complainant's request for two hours of compensatory time;

7. On November 27, 2020, Supervisor denied Complainant's request for annual leave;

8. On January 16, 2021, and February 12, 2021, Supervisor failed to respond to Complainant's notification that she has been working in a hostile work environment;

9. In January 2021, Supervisor failed to inform Complainant that there was a one-hour clinic delay due to severe weather;

10. On March 4, 2021, Complainant was forced to drive 72.9 miles to submit a copy of her Family and Medical Leave Act ("FMLA") request from November 19, 2020;

11. On March 16, 2021, Management denied Complainant's request for FMLA leave;

12. On March 23, 2021, Supervisor denied Complainant's request for overtime;

13. On March 29, 2021, Supervisor emailed Complainant a roster with patients' personally identifiable information ("PII") to her personal email address;

14. Since March 2021, Supervisor has failed to respond to Complainant's request to telework;

15. In April 2021, Supervisor removed Complainant's duties as the Teleret Diabetic Eye Examiner ("TDEE") and Sleep Equipment Return-to-Clinic Clerk;

16. On May 27, 2021, (a) the Staff Nurse addressed Complainant as "Sir," and (b) Supervisor failed to allow Complainant to explain why she entered international telephone numbers in a patient's file;

17. On June 8, 2021, the Staff Physician addressed Complainant as "Mr. [different last name than Complainant]" in an email; and

18. On August 30, 2021, Complainant discovered that Management had not changed her name in the VA Talent Management System ("TMS").

The Agency issued a Notice of Partial Acceptance that dismissed Claim 11 pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The Agency also dismissed Claims 4 and 7 as independently actionable claims, pursuant to 29 C.F.R. § 1614.107(a)(2), for failing to comply with the regulatory time limits. However, the Agency determined Claims 4 and 7 were relevant to the overall harassment claim. The Agency accepted Claims 11 and 14 as timely raised independently actionable claims.

The Agency also dismissed several other claims pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency, without specifying these claims, determined that these claims occurred from 2018 through April 29, 2020, the date Complainant's prior hostile work environment EEO complaint was closed. The Agency reasoned that Complainant abandoned these events when she failed to include them in her previous complaint and could not include them in the instant complaint.

The Agency conducted an investigation of the accepted claims which produced the following pertinent facts.

Complainant is a transgender woman. She identifies as female. She asserted that management became aware of her gender identity on June 10, 2015, when she was a speaker for the Agency's Pride Month, and of her name change on May 4, 2018. Her disabilities are generalized anxiety disorder and PTSD. She identified her prior protected activity as an EEO complaint that she filed in 2020.

Complainant identified Supervisor (female, no disability) as the Responsible Management Official. Supervisor attested that she was aware of Complainant's prior EEO activity and gender identity. When asked if she was aware of Complainant's disability/medical condition, she responded, "I was aware of her identity and did not view it as a disability/medical condition."

Communications with Supervisor: Claims 1-3, 9, 13

Complainant's allegations include several claims relating to communications with Supervisor. In Claim 1, Complainant alleged that Supervisor emailed Complainant that she was not meeting standards for making appointments. She attested that Supervisor sent her emails regarding workload reports, but there was no face-to-face meeting scheduled to explain the new requirements for scheduling workload reports. In Claim 2, Complainant alleged that, on multiple occasions, Supervisor failed to acknowledge the end-of-day emails she sent regarding completed work and chastised or criticized Complainant for making scheduling mistakes. Complainant stated this lack of acknowledgment hindered her daily performance and created a sense of being isolated, excluded, and ignored. In Claim 3, Complainant alleged that, on May 13, 2020, Supervisor sent Complainant a "harsh" email advising Complainant that she received a complaint about Complainant not wearing a face covering in shared areas as required.

Supervisor attested that all staff members received emails regarding their work performance. She explained that, as part of her supervisory responsibilities, she was required to inform employees of scheduling errors and corrections. Supervisor also explained that she received multiple end-of-day emails from staff, and, while she was not always able to respond to all of them, she was more likely to respond to issues that need to be addressed immediately. While Supervisor stated that she would correct Complainant's scheduling mistakes, she denied chastising or criticizing Complainant.

Supervisor attested that she received a complaint from the supervisor and staff of the Eligibility Clinic that Complainant was consistently not wearing a face covering in shared areas, such as the copy and break rooms, despite being required to do so. Supervisor acknowledged emailing Complainant about the matter but denied being harsh.

In Claim 9, Complainant alleged that, in January 2021, Supervisor failed to inform her that there was a one-hour clinic delay due to severe weather. She stated that Supervisor emailed her, "[Complainant] One hour delay tomorrow Yesterday."

Supervisor attested that she did not fail to inform Complainant of the delay. She explained that a text message was sent to all staff members that had provided their contact information. She stated that, prior to that incident, an inquiry was made to all staff to verify their contact information and Complainant failed to provide updated contact information.

An email, dated January 10, 2021, from an Administrative Officer to a group email address provides, "All, clinic delay by one hour tomorrow morning due to weather." That next day, Complainant forwarded this email to Supervisor and two co-workers, stating, "Saw this message this morning. I was present at 0730, read message after bringing up all programs. I was not called or aware of the 1 hr delay this morning." That same day, one co-worker replied, "[Supervisor] sent out a message to everyone. Did you change your number?" Supervisor also replied with an email that same day, stating "[Complainant] One hour delay tomorrow Yesterday."

In Claim 13, Complainant alleged that, on March 29, 2021, Supervisor emailed her a roster with patients' PII to her personal email address. Complainant alleged that she emailed the Information Systems Security Officer to notify her that Supervisor had sent her a work message with the attachment of a sleep roster containing names of veterans.

Supervisor acknowledged sending the email to Complainant's personal email address but stated that it was an accident. Supervisor explained that, when she was distributing the workload, she did not realize that she selected Complainant's personal email. The email was encrypted, and Complainant notified her that she couldn't open it because it was encrypted. Supervisor realized her error and did not respond because there was not an indication of PII compromise due to the encryption. Supervisor attested that Complainant sent multiple emails from her personal account inquiring about the email and Supervisor responded that she was not going to discuss the situation through Complainant's personal account. She told Complainant to ignore the previous email because an update list had been sent to the correct account.

Denial of Overtime, Compensatory Time, and Leave – Claims 4-7, 12

Complainant's allegations include several time and attendance matters. In Claim 4, she alleged that, on September 25, 2020, Supervisor denied her request for overtime. Complainant explained that she requested overtime because she stayed late to complete TMS courses, working one hour and 19 minutes past the end of her tour-of-duty.

Supervisor stated that Complainant did not submit an overtime request for September 25, 2020, so no overtime request was denied. Supervisor explained that Complainant had been informed that there was no overtime or compensatory time for TMS training and that such training had to be completed during work hours or on an employee's own time.

An email string indicates that, on September 25, 2020, Complainant emailed Supervisor, "When I have asked for time to do the TMS courses, I've been told the phones are priority, therefore I have been waiting to be informed of when I can complete these courses, as two were past due and one about to be overdue, took it upon my self on my time to complete the TMS courses." Supervisor replied, "That is what we all do."

In Claim 5, Complainant alleged that, on September 28, 2020, she emailed Supervisor to call in sick and Supervisor threatened to place Complainant on sick leave certification. Complainant stated that being placed on leave certification meant she would have to ask her counselor for a doctor's note, increasing her anxiety, as well as the hostile work environment.

Supervisor explained that she noticed that Complainant was calling out on Fridays and Mondays and, she advised Complainant that, if it continued to be a trend, she would place her on sick leave certification. Supervisor attested that supervisors are expected to monitor leave trends to prevent possible leave abuse and notify staff members of such leave patterns prior to a sick leave certification being imposed.

In Claim 6, Complainant alleged that Supervisor failed to respond to Complainant's request for compensatory time. Complainant alleged that, she requested two hours of compensatory time for November 27, 2020, which was about to expire, and, consequently, Complainant was prevented from using her compensatory time. Complainant also alleged that, on that same date, Supervisor denied Complainant's request for annual leave.

Supervisor attested that Complainant never entered a request for compensatory time. She further explained that Complainant did not need permission or authority to enter a request, whether compensatory time, or sick or annual leave, into the VATAS system.

The record includes an email from Complainant, dated November 12, 2020, with the subject, "Expiring 3 Hrs Comp time/Other," requesting to take 3 hours compensatory time on November 27. The record also includes a reply email from Supervisor, dated that same day, stating, in part, "Unfortunately no, the 27th will not be approved because that is a holiday date that has already been established. You have until the 2nd of January to use that time; and there are approximately 45 days or more to make other arrangements, but the 27th of Nov is definitely a 'no, non approval'."

Regarding Claim 7, Supervisor acknowledged denying Complainant's request for annual leave on November 27, 2020. She attested that her reason for denying the leave request was related to clinical coverage. She explained that leave requests do not receive automatic approval. They are considered and approved based on the needs of the clinic. She further explained that, prior to the start of the holiday season, all staff members are encouraged to enter their leave requests. Those who submit their requests first have a higher likelihood of being approved and Complainant submitted a late request.

In Claim 12, Complainant alleged that, on March 23, 2021, Supervisor denied Complainant's request for overtime. Complainant stated that, on March 23, 2021, she sent an email to Supervisor stating that she stayed to complete two TMS courses, but she received no response from Supervisor.

Supervisor stated that she did not deny a request for overtime, as that there was never an actual request for overtime. Supervisor explained that Complainant submitted a notification that she stayed late to finish two TMS courses, which was a repeated practice of Complainant's, even though she had been "previously and repeatedly informed that she cannot and will not receive OT/CT for TMS training."

Report of Hostile Work Environment- Claim 8

In Claim 8, Complainant alleged that management failed to respond to her report of a hostile work environment. She attested that, on January 16, 2021 and February 12, 2021, she sent letters reporting a hostile work environment to two HR Specialists ("HR1"). Complainant recalled reporting that the behavior, actions, and words of those in supervision was severe enough to affect her efforts to perform her daily duties, increase her anxiety and PTSD, cause loss of sleep, and feeling like harm would come to her. She reported feeling and believing she was ignored, isolated, intimidated, as well as having to deal with deceit, having information withheld, having expectations consistently changing with little or no notice and threats of unwarranted punishment, discipline, including threat of termination. She asserted that any communication from Supervisor was either by email or instant messenger and months at a time would pass without her ever seeing Supervisor in person. She stated that often times she felt her opportunities to progress and advance were blocked.

Complainant reported that, in 2020, upon reporting to work at the employee entrance, many times she would be called "sir," sometimes by the same individual, even after she made efforts to inform the person that she was not a "sir." She stated that in February 2020, her employment was threatened due to Complainant informing patients that she is female and not male. She alleged Supervisor sent an email stating, "I have also heard you confirm with people that are female when in fact, it is really none of their business and they should never ask you that questions. I suggest that while in the performance of your duties, if anyone ask you about your status, please just confirm your name and ask, "How can I help you?"" Complainant also stated that she reported an incident regarding a lack of response to her FMLA application. Complainant also stated she reported a hostile work environment on February 28, 2020 to the EEO Office.

HR1 (male, disability) attested that he was not aware that he was part of a complaint or that he had to respond to a complaint. He stated that he was made aware of a complaint on March 9, 2021, but even then, he was not aware of any complaints on January 16, 2021 and February 12, 2021. He explained that on March 9, 2021, he read a letter wherein Complainant stated, "I pray there is no retaliation of my submitting an EEO complaint in April 2020 on the part of my supervisor preventing consideration and approval of my FMLA request."

Supervisor stated that, while Complainant had been filing EEO complaints regarding a hostile work environment since early 2020, her allegations were not clear. Supervisor stated that, in 2021, Complainant also sent such messages without stating what situation or instance she was referring to. Supervisor attested that, when she asked Complainant what she considered to be a hostile work environment, Complainant would not clarify things so that she could address any issues.

An April 26, 2021 email from Complainant to Supervisor provides, "I am dealing with ANXIETY as well as PTSD this morning which for my own well-being in a hostile environment, I need to take care of my-self. No need to call in today in order to do so. This will be for FMLA SICK LEAVE." That same day, Supervisor replied, "You have never explained how your work environment is hostile. Please do so because you are in the most 'peaceful' environment that we have available."

Response to FMLA Request – Claim 10

In Claim 10, Complainant alleged that she was forced to drive 72.9 miles to submit a copy of her Family and Medical Leave Act ("FMLA") request that had been submitted on November 19, 2020. She alleged that Supervisor did not respond to her emails requesting the status of her FMLA application. She attested that, on January 16, 2021 and February 12, 2021, she emailed HR, and was informed that the FMLA leave log did not have a record of receipt of an FMLA packet and, until they had the documents, it could not be processed. On March 4, 2021, Complainant drove 72.9 miles to the regional HR office to hand-deliver her FMLA paperwork.

Supervisor attested that she timely contacted the FMLA point of contact, but there were some questions concerning some of the supporting documentation, requiring multiple meetings and discussions that took additional time.

Telework and Work Duties – Claims 14 and 15

In Claim 14, Complainant alleged that Supervisor failed to respond to her request to telework. Complainant stated that she submitted a request for telework in March 2020. She stated that she was never given an explanation for the denial. She explained that, within a week after she submitted her request for telework, Supervisor sent a work schedule which did not include her working from home and, instead, she continued reporting to her duty station in the Call Center/Contact Center. She stated that she was the only AMSA to not work from home.

Supervisor attested that, in reference to paperwork submitted in March 2020, at the time, all staff were asked to complete the necessary paperwork to telework, but Complainant opted to be one of the few employees to work on-site. Supervisor further explained that all staff were notified via email on November 9, 2020, that teleworking had been rescinded and that all staff were required to be on-site in December 2020. Supervisor also explained that due to the rise in COVID-19 cases, she emailed staff to inform them that telework was a possibility, and, at this time, Complainant let her know that she wanted to be included, but telework was not reimposed.

An email dated April 9, 2021 from Supervisor to Complainant and other staff members provides, "As of 9 April 2021, outside of OT/CT, teleworking ADHOC authorization has been officially revoked."

In Claim 15, Complainant alleged that, in April 2021, Supervisor removed her duties as the Teleret Diabetic Eye Examiner and Sleep Equipment Return to Clinic Clerk. She stated that she was given no justification for the removal of those duties.

Supervisor denied removing Complainant from those clinics. She explained that those are large clinics and require two staff members to work and maintain. She attested that Complainant continued to work those clinics until she retired.

Regarding the Teleret clinic, Supervisor explained that, when COVID-19 became a factor in 2020, "outliers" got pushed aside to focus on the immediate issues and, as processes began to normalize, the workload was redistributed. Once that happened, Complainant was notified that they would resume working on the Tele-ret Diabetic Eye clinic.

Supervisor also explained that one of the staff members wanted to take a primary role regarding Sleep Equipment clinics and she used the opportunity to evaluate her readiness and reliability. Complainant was still assigned to work that clinic because it requires two people.

Misgendering and Deadnaming[3] – Claims 16-18

Complainant's allegations include several allegations of misgendering. In Claim 16, Complainant alleged that, on May 27, 2021, a Staff Nurse ("Staff Nurse," female, no disability) addressed her as "sir" when asking why she entered international telephone numbers in a patient's file. Complainant further alleged Supervisor did not allow her to explain why she entered international phone numbers in Complainant's file.

[3] Some people who are transgender, including Complainant, refer to the name they used prior to their transition as their "deadname," particularly after a legal name change. Addressing or referring to someone who identifies as transgender by their prior name ("deadnaming") is widely considered insensitive or offensive, and, under some circumstances, deadnaming has been found to be psychologically harmful. See Roxanna B. v. Dep't of the Treasury, EEOC Appeal No. 2020004142 (Jan. 10, 2024).

Staff Nurse attested that she had never met Complainant prior to this incident. Staff Nurse explained that she approached Complainant while she was sitting at her desk and addressed her as "sir." Staff Nurse stated that Complainant informed her that she was female, and Staff Nurse apologized.

Supervisor denied failing to allow Complainant to explain why she entered international telephone numbers in the patient's file, but she recalled sending a message to Complainant letting her know that the Agency is unable to make international calls.

An email from Complainant to Supervisor, dated May 27, 2021, reflects that a nurse called Complainant "sir" and asked her why she put in an international phone number. The email also provides that a patient asked her to enter that number because she is in in Mexico, and this was done per the patient's request.

Complainant's allegations also including deadnaming. In Claim 17, Complainant alleged that, on June 8, 2021, a Staff Physician ("Staff Physician," male, no disability) addressed him as, "Mr. [Complainant's former last name]," in an email.

Staff Physician attested that the email was sent in error. He explained that he was reaching out to a Human Resources representative with a similar last name to inform them that he was interested in retiring. When he began typing, Complainant's former name populated, and he did not look to verify the name. He typed the message and hit send.

Supervisor also explained that she read the email, and it was clear it was meant for a Human Resources staff member with the same last name as Complainant's former name. The body of the message indicated that Staff Physician was reaching out because he was thinking about retirement. Supervisor further explained that when Complainant transitioned from male to female, the electronic system and records were set up under Complainant's former name, and, when Complainant legally changed her name and updated her records, the profiles were merged, not deleted.

Regarding Claim 18, Complainant also attested that, on August 30, 2021, she discovered that management did not change her name to reflect her new legal name in the Talent Management System (TMS). Complainant identified Supervisor as the management official who did not change her name in TMS.

Supervisor attested that it is not a supervisor's responsibility to change someone's name in TMS. She stated that Complainant would have been responsible for taking the appropriate steps to ensure that her new name was reflected in TMS.

Following its investigation of the accepted claims, the Agency provided Complainant with a copy of the report of investigation ("ROI") and notice of her right to request a FAD or a hearing before an EEOC Administrative Judge ("AJ"). At Complainant's request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

Complainant's Appellate Brief

Complainant contends that the Agency, in violation of its own conduct policies, has failed to treat her with the same level of respect or dignity afforded to her cisgender colleagues since her transition in 2015. Complainant makes references to events that occurred prior to April 29, 2020 and, without acknowledging the existence of a settlement agreement between the Agency and Complainant involving claims based on events prior to that date, characterizes her prior EEO complaint as "discounted and dismissed."[4] Complainant dedicates much of her appeal to the Agency's allegedly lenient response when Supervisor inadvertently violated the Agency's PII policy (Claim 13). Complainant further contends that the Agency erred when it dismissed her constructive discharge claim.

Complainant also contends that her complaint concerns "an effort to interfere with, restrain, or deny the exercise of my right provided by the FMLA." She recounts in detail how Supervisor's failure to respond to Complainant's update requests led to her driving 72.9 miles to the HR office to deliver the paperwork in person (Claim 10). Complainant recounts that she experienced invasive thoughts about past stressful events, fear of termination or reprisal, a sense of "impending doom" and difficulty sleeping. Her anxiety symptoms included physical manifestations, such as dry heaving and heart palpitations.

[4] This decision will not address Complainant's arguments regarding matters that fall outside the scope of this complaint.

Complainant explains that the FMLA-related retaliatory harassment was especially stressful because it occurred within the context of an existing hostile work environment.

Agency's Brief Opposing Complainant's Appeal

The Agency contends that the FAD should be affirmed. Specifically, Complainant failed to establish a *prima facie* case for all her claims, and even if she did, the Agency provided legitimate nondiscriminatory reasons for its actions. The Agency also contends that Complainant's allegations in Claims 12 and 15 were factually inaccurate. The Agency contends that Complainant's allegations of misgendering were not severe or pervasive enough to constitute harassment as they were one-time mistakes committed by individuals who were not named in the rest of the harassment claims. Moreover, the Agency contends that Supervisor took prompt and effective action to ensure such harassment did not recur.

The Agency also contends, with respect to Complainant's hostile work environment claim generally: "[n]o reasonable person would find [Complainant's] work environment to be hostile or abusive, [Complainant] seems to read her own insecurities and perceived frustrations into almost every interaction or decision that affects her at work." Finally, the Agency contends that Complainant's constructive discharge claim cannot succeed because she did not raise this claim with an EEO Counselor. In the alternative, the Agency contends that as a matter of law, Complainant cannot establish constructive discharge because she did not establish that she was subject to a hostile work environment.

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, ("EEO MD-110") at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the *de novo* standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

Dissatisfaction with the EEO Process

Claims of dissatisfaction with complaint processing must be referred to the agency official responsible for complaint processing and/or processed as part of the original complaint. EEO MD-110 Ch. 4(d)(1). The agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. EEO MD-110 Ch. 4(d)(2). If no action was taken, the file must contain an explanation of the agency's reason(s) for not taking any action. Id. Where a complainant does not request a hearing before an administrative judge, they must raise any dissatisfaction with the processing of their complaint before the agency takes final action on the complaint. EEO MD-110 Ch. 4(d)(3).

On appeal, Complainant asserts that the EEO Investigator waited 130 days to contact her after she filed her Formal EEO Complaint. Then, the EEO Investigator needlessly prolonged the process by rejecting affidavits where Complainant included her middle name in her signature. Complainant recalls that she spent hours completing detailed questionnaires under tight deadlines provided by the EEO Investigator, yet the investigation still took over 180 days to complete. Complainant also states that "it is important to note" that all correspondence from the Agency was addressed to her Union Representative, who "provided absolutely no input or support."[5]

Complainant does not appear to have notified the Agency about her concerns. Further, the record reflects that on December 1, 2021, the Agency notified Complainant that if the EEO investigation exceeded 180 days, Complainant has the right to request a hearing before an EEOC AJ or to file a civil action in an appropriate U.S. District Court. The notice included instructions for both options. Instead, Complainant voluntarily agreed to the Agency's request to extend the deadline for the investigation.

Upon review, the Commission finds no indication that the EEO Investigator's actions materially impacted the investigative record.

[5] Where a complainant provides written designation of a representative in an EEO complaint, it is standard practice for all correspondence pertaining to the complaint to be addressed to the designated representative.

Complainant does not challenge the adequacy of the investigation or indicate that the investigative record itself is deficient. As the Agency met its obligation to develop an impartial and appropriate factual investigative record pursuant to 29 C.F.R. § 1614.108, we decline to address Complainant's dissatisfaction with the processing of her complaint.

Constructive Discharge

A complainant may amend a pending complaint at any time prior to the conclusion of the investigation to include like or related claims. 29 C.F.R. § 1614.106(d). A later claim or complaint is "like or related" to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original compliant during the investigation. See Hurlocker v. Dep't of Veterans Affairs, EEOC Appeal No. 0120141346 (June 27, 2014).

To amend a complaint to include new like or related claims of harassment, the complainant must submit a letter to the Agency's EEO Director or designee specifying the new claims and requesting that the instant complaint be amended to include them. See MD-110 Ch. 5 Pt. III(B). The Agency's EEO Director or designee shall then determine whether the new information: (1) supports the existing claim but does not raise a new claim; (2) raises a new claim that is like or related to the claim raised in the pending complaint; or (3) raises a new claim that is not like or related to the claim raised in the pending complaint. Id. If the new information supports or states like or related claims to the instant complaint, the Agency will not conduct new counseling but will include the new incidents with the pending complaint. Id.

Complainant retired on September 30, 2021, while the instant complaint was pending investigation. However, Complainant did not notify the EEO Investigator or the EEO Counselor to request that her complaint be amended to include an allegation of constructive discharge. Rather, Complainant recalls that she notified the Agency of her new claim of discrimination *after the conclusion of the EEO Investigation*. Complainant was aware that she could amend her complaint during the investigation phase, given that she added Claim 18 as an amendment in September 2021, and added disability as a basis for discrimination in November 2021, while her complaint was still being investigated. Complainant offers no explanation for her failure to timely amend her complaint to include constructive discharge. The Commission finds that the Agency's decision not to accept Complainant's constructive discharge claim was proper.

Procedural Dismissals (Claims 11, 13, and 19 – 23)

As mentioned, in its Notice of Partial Acceptance, the Agency dismissed several of Complainant's claims. In its FAD, the Agency accepted Claim 11, determining that Complainant's allegation of being denied FMLA leave based on her gender identity states a claim.[6] The Agency affirmed its dismissal of the remaining claims.

Complainant's Formal EEO Complaint alleges the following additional claims:

19. Since 2019, Complainant has been regularly called "sir" by contract Security Workers when she enters and exits the Austin Outpatient Clinic;

20. Since 2019, Supervisor and Management have failed to act when Complainant notified them that her call center phone continues to display her deadname; Complainant must see her deadname every day when she logs in;

21. On May 6, 2019, Supervisor told Complainant, "You are not very intelligent;"

22. On October 21, 2019, Supervisor discouraged Complainant from becoming the chairwoman for the Austin Outpatient Care EEO Diversity Committee, so Complainant declined the opportunity; and

23. On February 20, 2020, Complainant became aware that other Agency employees referenced her name change and her transition, violating Complainant's privacy, Complainant felt "outed" and asserts that "this matter was never addressed and has been swept under the rug."

[6] Denial of a leave request is a discrete act warranting disparate treatment analysis. However, the allegation in Claim 11 occurred more than 45 days prior to Complainant's initial EEO contact on May 4, 2021, therefore Claim 11 will only be considered as part of Complainant's hostile work environment allegation. 29 C.F.R. § 1614.107(a)(2).

Claim 13 - Failure to State a Claim

The Agency erred when it accepted Claim 13 for investigation. Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an aggrieved employee or applicant for employment who believes that they have been discriminated against by that agency because of race, color, religion, sex, national origin, age or disability. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If the complainant cannot establish that they are aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

The allegation in Claim 13, where Supervisor sent an email containing PII to Complainant's personal email address, does not allege a harm or loss with respect to a term, condition, or privilege of Complainant's employment. There is no evidence, and Complainant does not claim, that she was subjected to an adverse action as a result of receiving and/or reporting the email to Supervisor and the privacy office. Rather, Complainant asserts that she *would* have been harmed had she been the one to send the email. Such a speculation does not render Complainant "aggrieved." See, e.g., Billy L. v. Dep't of the Army, EEOC Appeal No. 2022004464 (Dec. 13, 2022) (complainant's allegation that another employee reported him for a security violation failed to state a claim because, even though a security violation *could* jeopardize the complainant's security clearance, there was no evidence that his clearance was revoked or re-evaluated, nor was there evidence that the agency took any punitive or disciplinary action as a result of the report.)

Where, as here, a complaint does not challenge an agency action or inaction regarding a specific term, condition, or privilege of employment, a claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Complainant has not shown that the event in Claim 13 impacted the conditions of her employment in any way. Complainant emphasizes the Agency's alleged failure to take action against Supervisor for the breach in privacy protocol. Assuming Complainant's allegation is true, Complainant provides no explanation for how the Agency's lenient treatment of Supervisor created a hostile work environment for Complainant.

Claim 13 fails to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1) and will not be considered in the analysis of this complaint.

Claims 19 – 23 - Events Prior to April 28, 2020

On April 29, 2020, Complainant entered into a binding settlement agreement, which contains the following relevant provision:

> Paragraph 1(b) "Except as provided for in this Agreement and in exchange for the terms provided, Complainant hereby settles, waives, withdraws and forever discharges the Agency, its past and present administrators or employees, in their personal or official capacities, from *any and all complainants*…which are *or may be* asserted by Complainant or on Complainant's behalf, *based on any event occurring before Complainant's execution of this Agreement.*

Complainant does not challenge the validity of the Agreement. Claims 21, 22, and 23 were properly dismissed by the Agency because they allege specific incidents that occurred prior to April 29, 2020.

The incidents in Claim 19 (Complainant being called "sir" by security workers when entering and existing the building) and Claim 20 (Complainant's call center phone displays her deadname) were allegedly never addressed by the Agency and continued through Complainant's retirement on September 30, 2021. The existence of a settlement agreement does not divest the Agency of its legal obligation to maintain a workplace free of discrimination. To the extent that the alleged harassment continued after April 29, 2020, Claims 19 and 20 shall be reviewed in this decision as part of Complainant's hostile work environment claim.

Disparate Treatment (Claims 12 and 15)

A claim of disparate treatment is examined under the three-part analysis first *enunciated* in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). See also Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979). 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, that is, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). 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 (i.e., discrimination). St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant can establish a *prima facie* case of disparate treatment discrimination based on disability, by proving the following elements: (1) she is an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) she is "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against her; and (4) there was a causal relationship between her disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023).

Complainant can establish a *prima facie* case of discrimination based on gender identity, by showing: (1) that she is a member of a protected group; (2) that she was subjected to an adverse employment action; and (3) that she was treated less favorably than other similarly situated employees outside of her protected group(s). We note that it is not necessary for a complainant to rely strictly on comparative evidence to establish the inference of discriminatory motivation required to support a *prima facie* case. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); EEOC Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002, n.4 (September 18, 1996).

Complainant can establish a *prima facie* case of reprisal by showing that: (1) she engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Department of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus).

After establishing a *prima facie* case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

For Claim 12, Complainant cannot establish a *prima facie* case for disparate treatment because the record does not support the allegation that on March 23, 2021, Supervisor denied Complainant's request for overtime. Complainant does not claim, nor is there evidence in the record to indicate, that she submitted a request for overtime through the Agency's time and attendance system, VATAS, for Supervisor's approval. Email exchanges provided for the record establish that Complainant was aware that requests for overtime must be submitted through VATAS. Although Complainant claims MSAs previously used overtime to complete their TMS training, she offers no evidence that this was the case during the relevant time frame for this complaint. Complainant has not identified any other employee who was permitted to use overtime to complete their TMS training.

Furthermore, the Agency articulated a legitimate, nondiscriminatory reason for overtime not being available for Complainant's TMS training. Supervisor explained that overtime was not provided for TMS training, and the record establishes that she had informed Complainant of this on multiple occasions.

Similarly, for Claim 15, Complainant cannot establish a *prima facie* case for disparate treatment because it is not clear that Complainant was subject to an adverse employment action. Supervisor denies removing Complainant's TDEE and Sleep Equipment Return-to-Clinic Clerk duties. Supervisor attested that Complainant continued to work those clinics until her retirement.

Furthermore, the Agency articulated a legitimate, nondiscriminatory reason for any change in Complainant's duties. Regarding the Teleret clinic, Supervisor explained that, when COVID-19 became a factor, some things got pushed to the side to focus on immediate issues, and once things stabilized, she redistributed the workload, including new staff members, and Complainant was notified that they were going to start back at the Teleret clinic. Regarding the Sleep clinic, Supervisor explained that another employee on her staff requested the primary role for the Sleep Equipment clinics, but Complainant was still assigned to work on this clinic because it requires two people.

Regarding pretext, we find no evidence that Complainant's gender identity, disability, and/or prior protected activity played any role in the Agency's actions. Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory actions occurred.

Hostile Work Environment

At the outset, we find that a finding of harassment is precluded on Claims 12 and 15, based on our finding that she failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus. Oakley v. U.S. Postal Serv., EEOC Appeal No. 01932923 (Sept. 21, 2000).

In order to establish a *prima facie* case of harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that they are a member of a statutorily protected class; (2) that they were subjected to unwelcome conduct related to their protected class; (3) that the harassment complained of was based on their protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with their 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. Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 at § III.B.3.d (Apr. 29, 2024).

To prevail on a claim of retaliatory harassment, a complainant must show that they were subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington N. and Santa Fe Ry. 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). A claim of harassment on the basis of reprisal can be actionable "even if it is not severe or pervasive enough to alter the terms and conditions of employment. If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation and Related Issues, at § II-B-3. Nonetheless, a complainant alleging harassment must establish a nexus between the allegedly discriminatory action(s) and having engaged in protected activity for a claim to be actionable.

As an initial matter, we find that Complainant is a member of statutorily protected classes. With respect to her alleged bases of disability and reprisal, even if we find that the alleged incidents of harassment occurred in the manner alleged, and Complainant found the incidents to be unwelcome, we still find that she cannot prevail because she failed to demonstrate prongs (3) and (4) of the legal standard for harassment, i.e., that the alleged harassment was based on her statutorily protected class and affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment. Similarly, regarding her gender identity, except for her claims involving misgendering and deadnaming, Complainant has not shown that the alleged harassment was related to and based on her protected classes. Regarding her allegation of reprisal, the alleged conduct is not sufficiently material to deter protected activity.

The majority of Complainant's allegations can generally be described as workplace disagreements between Complainant and Supervisor, including decisions regarding overtime, compensatory time, leave requests, telework, and work performance. However, routine work assignments, instructions, and admonishments are by definition neither severe nor pervasive enough to rise to a level of abuse on par with a racial epithets or abusive conduct that fosters an illicitly hostile work environment. Complainant v. Dep't of State, EEOC Appeal No. 0120123299 (Feb. 25, 2015). Without evidence of an unlawful motive, we have found that similar disputes relating to managerial decisions do not amount to unlawful harassment. See Complainant v. Dep't of Def., EEOC Appeal No. 0120122676 (Dec. 18, 2014) (the record established that the issues between the complainant and the supervisor were because of personality conflicts and fundamental disagreements over how work should be done and how employees should be supervised, and there was no indication that the supervisor was motivated by discriminatory animus towards the complainant's race, sex, or age); Lassiter v. Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between a supervisor and a complainant do not rise to the level of harassment). Anti-discrimination statutes are not civility codes designed to protect against the "ordinary tribulations" of the workplace. Rather, they forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Service, Inc., 23 U.S. 75, 81 (1998).

That said, the record establishes that Complainant was subjected to misgendering and deadnaming. The Commission holds the position that *intentionally* misgendering someone by addressing or referring to them with pronouns or gendered honorifics that are contrary to their gender identity, would be offensive and demeaning to a reasonable person in that complainant's position. See Joi J. v. United States Postal Serv., EEOC Appeal No. 2022000712 (Oct. 10, 2023), citing Lusardi v. Dep't of the Army, EEOC Appeal No. 0120133395 (Apr. 1, 2015) ("While inadvertent and isolated slips of the tongue likely would not constitute harassment," the record reflected that the supervisor intentionally referred to complainant with a male name and male pronouns to "humiliate and ridicule" her), see also Alyce R. v. United States Postal Serv., EEOC Appeal No. 2024002512 (Jul. 18, 2024) (intentional misapplication of gendered titles (e.g., calling a lesbian employee "sir") is a type of gender policing, intended to demean sexual minorities by emphasizing their apparent gender nonconformity).

However, the record establishes that the incidents of misgendering and deadnaming in Claims 16 and 17 were unintentional. Sworn statements from both Staff Nurse and Staff Physician confirm that the single incidents of misgendering were unintentional. The Agency also provided a copy of the inquiry conducted after Complainant reported the Staff Nurse for misgendering Complainant, where the Staff Nurse explained that she mistook Complainant for a male because Complainant's back was turned, and she had not met Complainant. In her testimony, her contemporaneous account to Supervisor and in the inquiry, Staff Nurse states that she apologized to Complainant. The record also contains the email referenced in Claim 17, which supports Staff Physician's explanation that he mistakenly sent the email to the wrong address. Specifically, the email asks to speak with someone about retirement, which is an HR matter unrelated to Complainant's MSA role.

Regarding Claim 19, Complainant alleges that a contract security guard intentionally misgendered her by referring to her as "sir" when she reported to work. Complainant asserts that she did not report the security guard because she did not know who to report the harassment to. The record does not establish whether the security guard's alleged actions were intentional or unintentional.

Regarding Complainant's allegations regarding her deadname appearing on her TMS profile page (Claim 18) and on the call center phone (Claim 20) and automatically populating (Claim 17), the Commission has found that an Agency's failure to ensure that a Complainant's email address comports with

their name may constitute discrimination. See Eric S. v. Dep't of Veterans Aff., EEOC Appeal No. 0120133123 (April 16, 2014) (complainant stated a claim of sex discrimination where agency failed to act on his request to change his name in its computer system after he legally changed his name to comport with his gender identity). Additionally, the Office of Personnel Management ("OPM") provides that federal agencies should allow employees to have the name they use reflected in *all* electronic and physical places where names are displayed, including *but not limited to* email addresses, email address displays, and employee directories either from the time an employee onboards or promptly after a current employee requests an update. Id.[7]

The record reflects that, with respect to Claim 18, Complainant notified Supervisor about her TMS profile page and Supervisor instructed Complainant to contact the TMS Helpdesk. Complainant offers no evidence that she took this corrective opportunity. As for Claims 17 and 20, emails in the record show that after legally changing her name, Complainant successfully updated her employee records and email address by communicating with individuals in IT and HR. There is no indication that Complainant notified these contacts that the correction did not extend to her phone display or that there was an issue with merging her former and new profiles.

Accordingly, we find that Complainant has not established that she was subjected to a hostile work environment based on disability, gender identity, and/or reprisal 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 finding that Complainant failed to prove, by a preponderance of the evidence, that she was subjected to discrimination as alleged.

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[7] OPM Guidance Regarding Gender Identity and Inclusion in the Federal Workforce, available at https://www.opm.gov/policy-data-oversight/diversity-equity-inclusion-and-accessibility/reference-materials/guidance-regarding-gender-identity-and-inclusion-in-the-federal-workplace.pdf.

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 13, 2025
Date