



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

[REDACTED]
Kathy D.,¹
Complainant,

v.

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

Appeal No. 2022004828

Hearing No. 450-2020-00292X

Agency No. 2003-0740-2019103318

DECISION

On September 10, 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 August 11, 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. For the following reasons, the Commission AFFIRMS the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Lead Medical Support Assistant (MSA), GS-7, at the Agency's Texas Valley Coastal Bend Health Care System in Harlingen, Texas. Person A was a Health Administration Service (HAS) Supervisor and served as Complainant's first line supervisor during the relevant time. Person B was Chief, HAS, and Complainant's second line supervisor. Person C occasionally served as acting supervisor to Complainant. Person D served as Acting Chief in July 2019.

Complainant initiated contact with the EEO Office on April 26, 2019. When the matter was not resolved, Complainant was issued a notice of right to file a formal complaint.

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.

On August 15, 2019, Complainant filed a formal EEO complaint, which was subsequently amended, alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (mixed) and in reprisal for protected EEO activity (present complaint) when:

1. On November 21, 2018, March 5-6, 2019, April 25, 2019, May 2, 7-8, 14-16, 29-30, 2019, and June 5, 11, 20, 2019, Person A, Supervisor, charged Complainant absent without leave (AWOL).
2. On April 17, 2019, Complainant became aware Person B, Chief of HAS, failed to select her for Supervisory Medical Support Assistant (MSA), GS-8, position, Announcement No. CBAE-10447569-19- JB.
3. On May 14, 2019, Person A and Person B failed to offer Complainant the opportunity to telework.
4. On May 14-17 and 21, 2019, Person A assigned Complainant the new Lead MSA's job assignments.
5. On May 21, 2019, Complainant became aware Person B failed to select her for Management Analyst, GS-9/11, position, Announcement No. 104666868.
6. On June 6, 2019, Person A sent Complainant an e-mail requesting her Family Medical Leave Act (FMLA) packet and threatened to charge her AWOL.
7. On June 7, 2019, Person A assigned Complainant additional duties to process timecards.
8. On June 19, 2019, Person A requested Complainant to cover the 30-minute lunch period at the Outpatient clinic without providing a government vehicle and accused her of being late to work.
9. On June 24, 2019, Person A provided Complainant false information concerning an Employee Assistance Program (EAP) appointment.
10. On July 3, 2019, Complainant was requested to submit to factfinding with Person D, Chief of Health Information Management System (HIMS).
11. On September 17, 2019, Complainant became aware Person B, Chief of HAS, failed to select her for the Supervisory Medical Support Assistant, position, Announcement No. CBAE10586585-19-AO.

12. On December 17, 2018, Complainant felt bullied when Person A requested her to look at her when she was talking to her.
13. On December 19, 2018, Person A confronted Complainant and questioned her about where another employee was.
14. On June 11, 2019, Person A requested Complainant to go and pick up a CD at the outpatient clinic without offering a government vehicle.
15. On June 20, 2019, Person A requested Complainant to cover an MSA employee's duties when he was on leave.
16. On July 19, 2019, Person C, supervisor, requested Complainant to cover lunch at the outpatient clinic without providing a government vehicle.
17. On July 22, 2019, Person C requested Complainant to send a reminder notice to the Outpatient Clinics.
18. On July 22, 2019, Person D advised Complainant after returning to work from her FMLA she would be assigned to work in the outpatient clinic for the remainder of the week.
19. On August 9, 2019, Complainant was requested to submit to fact-finding with Person E (Administrative Officer).
20. On September 16, 2019, Person A denied Complainant's request for assistance with her assignment.
21. On September 18, 2019, Person A offered overtime to coworkers without asking Complainant if she was interested in overtime.

The Agency dismissed instances of AWOL occurring prior to March 12, 2019, as untimely discrete acts. However, the Agency determined these events were sufficiently related to the overall pattern of harassment to be included for consideration of the hostile work environment claim. The Agency accepted instances of AWOL occurring on or after March 12, 2019, and events 2, 4, 5, 7, and 11 as timely raised discrete acts. Further, the Agency noted these events were sufficiently related to the overall pattern of harassment and would be considered in the analysis of the harassment claim. The Agency accepted the overall harassment claim consisting of events 1 - 21.

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). Complainant requested a hearing.

Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and issued a decision without a hearing on August 3, 2022.

The Agency subsequently issued a final order on August 11, 2022. The Agency's final order fully implemented the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Claims 1 and 6 (AWOL)

Regarding claim 1, the Agency charged Complainant's absences as AWOL after she failed to return her FMLA documentation in a timely manner. Complainant received FMLA documentation from Person A on April 26, 2019, but she did not return the documentation until June 26, 2019, which the Agency stated was beyond the applicable timeframe. The record reveals Person A tentatively allowed Complainant's absences to be marked under FMLA. In a June 6, 2019, email (claim 6), Person A requested the overdue FMLA certification and advised that no further FMLA requests would be approved until Complainant provided the FMLA package and requisite medical documentation. Person A notified Complainant that if her FMLA package was not received by June 7, 2019, she would be charged AWOL for her absences. Following Complainant's submission of the FMLA certification on June 26, 2019, the AWOL was changed to other leave classifications in accordance with the Agency's policies. In her deposition, Complainant acknowledged that the FMLA-related AWOLs have been resolved.

Claims 2, 5, and 11 (nonselections)

Regarding claim 2, Complainant applied for a Supervisory MSA, GS-8 position under Announcement No. CBAE-10447569-19-JB. Complainant was found qualified and was interviewed for the position. Person B was the Selecting Official and assigned a three-person panel to assess the candidates, which included Person A. The panel evaluated the candidates based on three areas: education and experience; knowledge, skills, and abilities; and performance-based interview questions. Person B noted that Selectee 1 (Person C) was selected with the highest score of 369. Person B noted the Selectee scored a total of 187 points in the interview and has supervisory experience in a clinical setting and front-line MSA experience in the Community Care Department. Complainant did not have supervisory experience on her resume. Complainant received an overall score of 251 and an interview score of 122. Person B explained Complainant was not selected because she scored lower in the interview and overall score as determined by the panelists. Person B noted the interview was fundamental to determine customer service, flexibility, technical skills, and creative thinking. The scoring sheet reveals that Panel Member 3 rated Complainant lower than Person A on education and experience; Panel Member 2 rated Complainant the same as Person A on the interview questions; and Panel Member 3 rated Complainant lower than Person A on the interview questions and lower overall than Person A. Further, each panel member individually rated the Selectee higher than Complainant. Complainant did not allege that Panel Member 2 or Panel Member 3 discriminated against her.

Regarding claim 5, Complainant applied for a Management Analyst, GS-9/11 position. Person B was the Selecting Official and appointed a three-person panel to assess the candidates. Person B noted Selectee 2 was selected with an overall score of 52. Selectee 2 had experience as a Program Analyst and Supervisor MSA in and knowledge of data analysis, process improvements, software applications, and customer service. Selectee 2 had a master's degree in healthcare management. Person B noted that Selectee 2 qualified as a GS-11, which required less training. In contrast, Complainant's overall score was 26 and only qualified at the GS-9 level. The record reveals that only two of the 15 applicants scored lower than Complainant. Further, Person B noted that based on her resume Complainant had minimal experience collecting and researching data and lacked knowledge of common software applications.

Regarding claim 11, Complainant applied for a Supervisory MSA, GS-8 position under Announcement No. CBAE10586585-19-AO. Complainant was found qualified and was interviewed for the position. Person B was the Selecting Official and assigned a three-person panel to assess the candidates. The panel evaluated the candidates based on three areas: applicant characteristics (consisting of education and experience); knowledge, skills, and abilities; and performance-based interview questions. Person B noted that Selectee 3 was selected with an overall score of 58. Person B noted Selectee 3 had a bachelor's degree and experience as a Lead MSA and Advanced MSA in HAS. As for education, the scoring sheet listed: a master's degree or beyond received 5 points; bachelor's degree received 3 points; and an associate's degree received 1 points. The Selectee 3, who had a bachelor's degree, received 3 points and Complainant, who had no degree, received zero points (as did the other two applicants). The record reveals Complainant and Selectee 3 held the same Lead position and both received the same 5 points under previous experience. Selectee 3 scored 23 points in the interview while Complainant scored 17 points in her interview. Additionally, Complainant was ranked last of the four applicants. Person B noted the interview was fundamental to determine customer service, flexibility, personal mastery, technical skills, and creative thinking. Person B also noted that he was aware that Complainant was facing AWOL, failure to follow instructions, and inappropriate conduct charges.

Claim 3 (telework)

Regarding claim 3, Complainant claimed that on May 14, 2019, Person A and Person B failed to offer her the opportunity to telework. Complainant claimed she was told by her supervisor that she could not telework at that time. Complainant stated that she was not given the same opportunity as the new Lead who has hired and filled out telework paperwork. Person A stated that the Lead MSA position was not and still is not suitable for telework. Person B stated that Complainant's Lead MSA position was not suitable for telework. Person B stated the determination was based on duties that required Complainant to be at the facility. Regarding Complainant's contention that other MSAs have been offered telework, Person B stated that is irrelevant since Lead duties are different than those of MSA. Further, Person B noted that the other Lead's position was announced as telework suitable; however, the other Lead falls under a different supervisor.

Moreover, Person B stated although the other Lead's announcement was posted as telework suitable, no Lead within the Service has been allowed to telework due to the Mission Act implementation and change in operational needs.

Claims 4, 7, 15, 17, 18, and 20 (assignments)

Regarding these claims, the Agency states management is within its right to assign reasonable duties to its employees within their scope of work. Regarding claim 4, Complainant claimed Person A told her she would be covering another Lead's daily assignments for a week. Person A noted the Lead duties were divided between the two Leads. She stated the other Lead continued covering his previous clinic without assistance from Complainant. Person A noted Complainant questioned many times about the other Lead's duties and Person A stated she responded she was not his direct supervisor. Complainant stated she believed that her race and EEO case were the reasons for these actions and that her supervisor was trying to get her to refuse assignments so she could "stack up a case against me for removal."

Regarding claim 7, Complainant claimed that on June 7, 2019, Person A advised her she would be assisting with timecards once the fulltime timekeeper, Person C, was promoted. Complainant felt overwhelmed with work and did not agree with the timekeeping assignment. Complainant asked for work to be taken away from her so she could make time for timekeeping but stated that Person A denied this. Person A stated that once the second Lead was hired, Complainant was assigned to enter timecards for half the team and the second Lead was assigned to enter timecards for the other half of the team. The record reveals that Complainant had prior experience doing timecards and that a new timekeeper had not been hired after Person C was promoted.

Regarding claim 15, Complainant alleged that on June 20, 2019, Person A assigned her work to cover for an MSA who was on leave. Complainant claimed there were other MSAs available to cover the assignment, but Person A assigned her as the Lead. Complainant claimed that the other Lead did not cover subordinate duties. Person A stated she requested Complainant cover the workload via email at 8:01 a.m. on June 20, 2019. Person A noted that Complainant responded at 8:10 a.m. stating she was feeling sick and needed to leave. Person A noted Complainant did not leave until 11:00 a.m. and did not do any of the assigned work in question.

Regarding claim 17, Complainant claimed that on July 22, 2019, Person C requested Complainant spend the remainder of the day at the Outpatient Clinic. Complainant stated she asked why she was being sent since Complainant claimed this was unusual as MSAs always cover when someone is out of work. Complainant noted that Person C told her that the MSA went home sick so Complainant needed to cover. Complainant stated it did not make sense for her to be pulled away from staff that needed help. Person C explained that it was standard practice for Lead MSAs to sometimes cover when and wherever needed. Person C states she has also tasked the second Lead to cover in the absence of an MSA.

Regarding claim 18, Complainant claimed that on July 22, 2019, Person D advised her after she returned to work from FMLA that she would be assigned to work in the outpatient clinic for the remainder of the week. Complainant noted that she had not been feeling well due to her FMLA approved medical condition and she advised Person C and Person D that she would be invoking medical leave for the remainder of the day. Complainant stated Person D told her when she returned to work she was going to work at the outpatient clinic for the rest of the week so she would not be sick from the paint fumes. Person D noted that at around 1:00 p.m. on July 22, 2019, Person C asked Complainant to cover at the Outpatient Clinic for rest of the day as they were short staffed. Person D noted Complainant replied she was not feeling well due to the painting that was being done in her work area at the time. Person D noted Complainant stated her asthma was aggravated and asked to use FMLA. Person D replied to Complainant's email saying her request would be approved and asking her to list FMLA on her leave form. Person D stated painting was to continue in Complainant's area throughout the week, so Person D offered Complainant the opportunity to cover at the Outpatient Clinic while the aromas cleared. Person D explained it was not an instruction for Complainant to cover but an offer since that area was short staffed and it could prevent Complainant from further aggravation due to the painting. Person D stated after the offer, Complainant's union representative emailed stating we could not give employees reasonable accommodation and that they must go through Human Resources. Person D replied that she understood.

Regarding claim 20, Complainant alleged that on September 16, 2019, Person A denied her request for assistance with an assignment. Specifically, Complainant stated Person A had a suspense on dialysis patients that needed to be done as soon as possible. Complainant stated the list had hundreds of names and when she asked Person A for help, she could not get help. Complainant noted that Person A offered to put her in a room by herself to avoid distractions. Complainant claimed that Person A stated she only wanted Complainant to do it because she knows Complainant was capable and Person A did not feel confident in the other Lead. Person A stated she cannot assign work or issue orders to other Leads since she is not their supervisor.

Claims 8, 14, 16 (government vehicle)

Regarding claim 8, Complainant stated on June 19, 2019, Person A wanted her to cover for lunch at the Outpatient Clinic without providing her a government vehicle and accused her of being late. Complainant stated that MSAs are the ones who cover lunch periods. Complainant stated she did not understand why Person A was trying to pull her away from work and expected her to walk or ride in a golf cart that veterans used to get to the other clinic. Complainant contended a government vehicle should have been offered whether the location is two minutes or 20 minutes away. Person A stated as a supervisor she sends out an email with coverage daily. She stated on that day, Complainant was assigned to cover the Outpatient Clinic which is 0.03 miles distance. Person A stated they had a golf cart that was used for transportation for veterans/patients and employees. Person A stated Complainant refused to go. Person A stated she offered a government vehicle and Complainant refused that as well.

Regarding claim 14, Complainant stated on June 11, 2019, Person A requested she go pick up a CD at the outpatient clinic without providing a government vehicle. Complainant noted that Person A stated even though the clinic is a mile away, she will request a government vehicle for Complainant. Complainant claimed Person A expected her to walk to the other clinic or get a ride with volunteers in the golf cart used to transport veterans. Complainant stated she did not want to do that because it was hot outside and she did not want to risk catching an illness from sick veterans. Person A stated Complainant requested CDs via email and was not assigned to pick up a CD.

Regarding claim 16, Complainant claimed on July 19, 2019, Person C requested she cover lunch at the Outpatient Clinic without providing Complainant a government vehicle. Complainant noted that MSAs usually cover lunch and stated if Person C wanted her to go, she should have provided a government vehicle. Complainant explained that Person C stated she would request a government vehicle for Complainant and then backtracked and stated she would drive Complainant herself. Complainant stated that per her union representative, she did not have to get into a personal vehicle with a supervisor and so she did not. Complainant stated Person C never brought her the keys for a government vehicle. Person C stated she did request Complainant cover lunch and also requested a government vehicle for Complainant to drive to the Outpatient Clinic, which was less than a mile away. Person C noted that most employees tasked to cover that location usually walked there or asked the volunteer to transport them in the golf cart. Person C also noted that Complainant was a Lead MSA and was not sent over to cover alone. Person C explained Complainant was sent along with a regular MSA who had never covered at the Outpatient Clinic and was sent with the regular MSA to cover lunch from 12:30 – 1:00.

Claim 9 (EAP)

Regarding claim 9, Complainant stated she had secured an appointment with EAP and reached out to Person A to advise of her appointment date and time. Complainant stated Person A responded that she needed to use leave. Complainant stated she was confused because she had been informed that an employee had eight hours of excused absence to use for EAP. Complainant stated she asked for clarification but Person A took a day to respond and made Complainant miss her appointment. Person A stated that the EAP flyer she issued to Complainant at the time was the one on the Agency website. Person A acknowledged receiving an email back from Complainant requesting clarification because the EAP flyer Person A sent had a discrepancy from the one Complainant previously received. Person A explained as soon as Complainant brought the discrepancy to her attention, she reached out to the Behavioral Department for clarification. Person A noted she then got back to Complainant with the correct information. Person A stated afterwards the Agency website was updated. Person A noted Complainant utilized the EAP program by attending appointments. The record contains emails revealing that once Complainant informed Person A that a flyer she had received earlier stated up to eight hours of excused absence could be used for EAP, which contradicted the flyer Person A had sent her, Person A responded within 24 hours to inform Complainant she could use up to

eight hours excused absence for EAP and noting the EAP flyer would be updated on the Agency's website.

Claims 10 and 19 (fact-finding)

Regarding claim 10, Complainant was subjected to a fact-finding with Person D on July 3, 2019, due to allegations of creating a hostile work environment. The Agency stated it had a duty to investigate the claims of a hostile work environment against Complainant by her subordinates. Complainant claimed that Person A, Person B, Person C, and Person D solicited complaints from her subordinates to bring a fact-finding; however, she provides no evidence in support of her assertion. Regarding claim 19, Complainant complained that there was a conflict of interest in having the fact-finding conducted by Person D, who supervised Complainant's husband. The Agency accepted Complainant's request to reschedule the fact-finding due to the alleged conflict and rescheduled it to August 9, 2019, and assigned Person E as fact-finder. Complainant did not claim that Person E discriminated against her.

Claims 12 and 13

Complainant claimed that on December 17, 2018, she felt bullied when Person A requested Complainant look at Person A when Person A was talking to Complainant (Claim 12). Complainant claimed that on December 19, 2018, Person A confronted her and questioned Complainant about another employee's whereabouts (Claim 13). Specifically, Complainant stated she had been assigned to train a new employee, Employee 1. Complainant noted she had emailed Person A to let her know she was done training Employee 1. Complainant stated as she was walking to the restroom, Person A confronted her in the hallway and asked where Employee 1 was. Complainant stated she told Person A she did not know where Employee 1 was and Person A replied that Complainant should know where he was. Complainant stated she replied that she did not know where he was because she was done training him. Complainant stated once Person A walked away, Complainant continued walking behind Person A on the way to the restroom. Complainant stated that Person A opened the door so hard that it almost closed on her hand.

Claim 21 (overtime)

Regarding claim 21, Complainant claimed that on September 18, 2019, Person A offered overtime to her coworkers without asking Complainant if she was interested in overtime. Complainant stated her staff asked if she would be working overtime and Complainant stated she was caught off guard because she did not know anything about overtime. Complainant stated that Person A came by the office to see who was working overtime, but she did not ask Complainant if Complainant wanted to work overtime. Complainant stated she emailed Person A to ask why she was not offered overtime. Complainant stated Person A did not respond directly. However, Complainant noted that Person A then sent an email to all staff, including Complainant, mentioning overtime. Complainant stated at that point it was too late to make arrangements for her kids and she could not work overtime.

Complainant stated her staff knew about overtime two hours prior to Complainant learning about it. The Agency stated that the notification regarding overtime was sent to all eligible employees at 4:28 p.m., including Complainant, and was sent before the end of Complainant's tour at 4:30 p.m. The Agency stated that even if taken as true the incident is irrelevant since Complainant was offered overtime formally at the same time as everyone else.

Complainant appealed, but did not submit a brief on appeal.

STANDARD OF REVIEW

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

ANALYSIS AND FINDINGS

To prevail in a disparate treatment claim such as this, 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 Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction 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 804 n. 14. 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, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases.

Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. See U.S. Postal Serv. Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of a complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994). To establish a claim of harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) 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) there is a basis for imputing liability to the employer. See Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998).

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, adverse actions such as reprimands, threats, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation at II.B. Retaliatory harassing conduct is actionable if it is sufficiently material to deter protected activity, even if it is insufficiently severe or pervasive to create a hostile work environment. Id. at II.B.3.

At the outset, we note that Complainant does not challenge the Agency's framing of the claims. Further, Complainant does not challenge the dismissal of the discrete instances of AWOL occurring prior to March 12, 2019. Thus, we do not address the dismissal of those instances in our decision.

Regarding her disparate treatment claim, assuming arguendo that Complainant established a prima facie case of discrimination on all alleged bases, we find that the Agency articulated, legitimate, nondiscriminatory reasons for its actions as set forth in detail above. Regarding the discrete incidents, we find that Complainant failed to show by a preponderance of the evidence that any of the actions were motivated by discrimination. Complainant was charged AWOL when she failed to timely submit FMLA documentation. Regarding the selections at issue, the Agency hired the highest scoring applicants in each position. Complainant failed to show her qualifications were plainly superior to those of any of the Selectees.

The Agency explained why and how assignments were made. Further, 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). The Agency noted the fact-finding was conducted to investigate claims Complainant had created a hostile work environment for her subordinates. Complainant failed to produce evidence that management solicited complaints from subordinates or that the investigation was motivated by her protected classes. Complainant was denied the opportunity to telework since it was determined her position was not eligible. She failed to produce evidence others were similarly situated and allowed to telework. We note that other than her speculation, Complainant failed to present evidence that the Agency's assignments and instructions were made on the basis of her protected classes.

Regarding the claims alleging denial of a government vehicle, we assume these events occurred as alleged by Complainant, but note Complainant failed to produce evidence that the Agency's actions were based on her protected classes. Regarding claims 12 and 13, even assuming these events happened as alleged they do not rise to the level of severe and pervasive to constitute harassment. Moreover, Complainant failed to provide evidence that the incidents were based on her race. Further, we note claims 12 and 13 occurred prior to Complainant's protected EEO activity and thus, were not motivated by reprisal.

Considering all the events, we find that Complainant failed to show that she was subjected to harassment. On appeal, Complainant does not specifically dispute management's articulated reasons, as set forth in detail above, for the alleged incidents. Based on a thorough review of the record we find that Complainant failed to show that the Agency's actions were motivated by discrimination or retaliation as alleged.

CONCLUSION

Accordingly, the Agency's final order finding no discrimination is AFFIRMED.

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 29, 2024
Date