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

Judie D.,[1]
Complainant,

v.

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

Appeal No. 2022005024

Hearing No. 480-2022-00393X

Agency No. 200P-0593-2021105911

## DECISION

On September 22, 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 September 15, 2022 final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

## ISSUES PRESENTED

Whether the AJ's grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require a hearing.

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[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.

Whether the Agency's final order properly found that Complainant was not subjected to discrimination on the bases of disability and in reprisal for her prior protected EEO activity.

## BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse, Nurse III/7, at the Agency's Referral Coordination Team, VA Southern Nevada Healthcare System in North Las Vegas, Nevada.

On October 5, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against and subjected her to a hostile work environment her on the bases of disability (anxiety/depression) and in reprisal for prior protected EEO activity when:

1. On or about September 9, 2021, Complainant was issued and had to sign a Telework Expectations and Agreement Memorandum;
2. On September 11, 2021, Complainant was instructed to call her supervisor at home when calling to report her absence during the weekend;
3. On September 23, 2021, after Complainant requested leave under the Family and Medical Leave Act (FMLA), management requested that Complainant provide a doctor's note for the absence;
4. On September 27, 2021, Complainant's supervisor questioned why Complainant had requested FMLA leave;
5. On or about September 27, 2021, Complainant was told that effective October 24, 2021, Complainant would no longer telework;
6. On October 24, 2021, Complainant's tour of duty was changed;
7. On October 25, 2021, Complainant was notified by management via e-mail that she was not to make contact with her ex-husband or his supervisor effective immediately;
8. On October 25, 2021, Complainant was informed that she was the subject of a fact-finding inquiry; and
9. On an unspecified date, Complainant's second-level supervisor refused to meet with her.[2]

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[2] The Agency dismissed Claim 9 for failure to state a claim. However, an EEOC Administrative Judge (AJ) reinstated the claim during the hearing process. The Agency does not dispute the AJ's decision.

Complainant stated that she experiences complications from anxiety and depression. Complainant asserted that she was eligible for intermittent leave protected under the FMLA, and that the Agency approved her for FMLA leave. Complainant's supervisor (S1) said she was unaware Complainant had a disability.

In Claim 1, S1 asked all nurses on the Referral Coordination Team to sign and acknowledge a memorandum entitled "Telework Expectations and Agreements." All nurses signed the agreement. Complainant felt she did not have any option other than to sign the agreement. Complainant argued that her disability prevented her from meeting the productivity standards as outlined in the agreement.

In addition to setting out the expectations that teleworking employees be at their remote workstation by the start of their tour of duty, be visible via TEAMs during the tour, and not work outside of their tour unless authorized, the agreement stipulated that the employees would maintain their productivity. Any decline in productivity "may result" in teleworking privileges being revoked. The Agreement articulated the Agency's expectation that nurses should be processing 28 consults per day with fewer than five documented errors as identified on the 4-to-6-month review. As to the 7-to-12-month review, the nurses should process 36-40 consults with fewer than five documented errors. The Agreement concluded by reinforcing the Agency's position that telework is a privilege, not a right.

In Claim 2, Complainant averred that she was not feeling well on Saturday, September 11, 2021, and sought to take sick leave. S1 was not on duty that day, so Complainant called the Nurse of the Day who said he would notify S1. Two days later, Complainant received an email from S1, asking that Complainant contact S1 if she would not be able to work the weekend. Complainant said that she felt she was being reprimanded for doing the right thing.

As to Claim 3, Complainant protested that S1 required her to provide a doctor's note to verify her sick leave request. Complainant argued that her FMLA documentation should have been sufficient due to documentation on file.[3] S1 noted that Complainant was on annual leave, and then called in sick. Accordingly, S1 followed her supervisor's advice to request a doctor's note.

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[3] The record contained a copy of the policy applicable to FMLA leave certifications. Therein, the policy notes that bargaining unit employees are

Regarding Claim 4, Complainant reported to work 30 minutes after her scheduled tour of duty was to begin. In response to S1's inquiry as to Complainant's whereabouts, Complainant requested FMLA/sick leave and said that she would "self-certify" the request. Complainant explained that she "already knew what was wrong with me and it's supported by my FMLA approval." Complainant said that she had been approved to take FMLA leave in August 2020.

Complainant alleged that S1's actions regarding her leave requests created a hostile work environment because she felt intimidated and was required to provide more paperwork. Complainant said that it made her feel guilty for being sick.

In claims 5 and 6, Complainant argued that she was being directed to report on site in "retaliation regarding my FMLA that occurred that morning and past weekend." Complainant said that she received a memorandum changing her duty hours indicating that the change was for "failure to meet needs of the department." Complainant said she was not given an opportunity to discuss the change.

S1 explained that Complainant and two other nurses were not performing up to standard while teleworking, so she wanted all three back on-site to receive training. S1 and the Associate Nurse Executive (ANE) agreed on a schedule for training which would have changed Complainant's duty hours, and S1 said that the schedule was approved by the union. Complainant was given the schedule via memorandum. Ultimately, Complainant was never required to report on-site. In her affidavit, S1 maintained that the matter was strictly a performance issue.

Regarding claims 7 and 8, the record demonstrated that Complainant's ex-husband was employed by the Agency as a police officer and reported to a different chain of supervision than Complainant. On October 13, 2021, Complainant contacted the Chief of Police seeking to ascertain her ex-husband's work schedule. Complainant said she needed to know the schedule so that she could arrange for child visitation.

Complainant was subjected to an investigation because the Chief of Police told Complainant's ex-husband about Complainant's contact.

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entitled to 12 weeks of Leave Without Pay during any 12-month period. The employee is entitled to 16 weeks for maternity or paternity reasons.

Complainant’s ex-husband believed he had already provided his schedule to Complainant and felt that Complainant was harassing him by bringing personal matters into the workplace. Therefore, Complainant’s ex-husband filed a complaint. As a result of the complaint, S1 told Complainant that a fact-finding had been initiated, and directed Complainant to have no contact with her ex-husband during the fact-finding.

Complainant acknowledged the no-contact order and that ANE later contacted Complainant to let her know that the fact-finding investigation found Complainant did not harass her ex-husband, but ANE questioned the professionalism of contacting her ex-husband’s boss. ANE directed Complainant to refrain from contacting the Chief of Police without the ex-husband’s permission.

Complainant objected to the sequence of events because she had been unsuccessful in “attempting to handle a court order with my ex-husband concerning his work schedule” and was receiving assistance from the union. Complainant believed that she was being treated as if she was the “bad person.”

In Claim 9, Complainant alleged that, when the ANE began working in her department in December 2017, Complainant sought to meet with him to discuss her work tour. According to Complainant, ANE refused the meeting. Complainant believed this to be harassment.

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 timely requested a hearing. Over Complainant's objections, the AJ issued a summary judgment decision in favor of the Agency.

In the decision, the AJ concluded that summary judgment was appropriate because Complainant did not set forth any evidence that she was an individual with a disability. As the AJ said, “the sole evidence in the hearing record regarding Complainant’s medical condition is her statement that she was diagnosed with ‘anxiety/depression’ in August 2020.” Complainant did not point to any medical or other documentary evidence in support of her condition, nor did she testify as to the severity of her condition. The AJ also found that Complainant failed to establish that S1 or ANE knew about her medical condition.

Even assuming Complainant established she was an individual with a disability, the AJ found that Complainant provided no evidence showing that she was subjected to any action because of her disability. The AJ also found that the Agency articulated legitimate, non-discriminatory reasons for Claims 1-8, and with respect to Claim 9, found that the allegation was not sufficiently severe or pervasive to constitute a hostile work environment. As a result, the AJ found that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

## CONTENTIONS ON APPEAL

On appeal, Complainant argues that the AJ failed to ensure that the record was adequately developed and drew inferences in favor of the Agency, and failed to fully analyze Claims 1, 2, or 3. As to being required to report on site, Complainant contends that the Agency only asserted that others in her protected class were treated similarly. Further, Complainant argues that the AJ failed to analyze broadly the question of whether she had a disability. Complainant asserts that she had anxiety/depression and argues that her supervisors should be constructively aware of her disability because she requested FMLA leave. Complainant contends that summary judgment was inappropriate, and she should have been permitted to conduct discovery. Complainant also argues that the AJ inappropriately made credibility findings. Accordingly, Complainant requests that the Commission reverse the final order.

## STANDARD OF REVIEW

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

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review…"); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

## ANALYSIS

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory or retaliatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

*Disparate Treatment – Claims 1-3*

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) she is a member of a protected group; (2) she suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

To establish a prima facie case of discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539 (August 17, 2023).

Complainant may establish a prima facie case of reprisal by showing that she (1) engaged in a protected activity; (2) the Agency was aware of her protected activity; (3) Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse action. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2010).

Complainant argues solely that she has anxiety/depression and that her supervisors should be constructively aware of her disability because she requested FMLA leave. Complainant failed to provide any evidence in the record that explains how her anxiety and/or depression constitutes a disability under the Rehabilitation Act. Specifically, Complainant does not identify a major life activity that is substantially impaired or provide any medical documentation in support. Further, Complainant does not identify the basis for her FMLA leave. In addition, Complainant's FMLA certification was approved in August 2020. The events giving rise to this complaint began in late September 2021. As noted in the Agency's policy, FMLA leave may be granted to an employee for 12 or 16 weeks of leave within a 12-month period.

That period would have expired in August 2021, before any of these events took place, and Complainant does not argue that her FMLA approval was renewed or extended.

Moreover, the standards for granting FMLA leave are different than that of establishing a disability for purposes of the Rehabilitation Act. See Shakia H. v. Dep't of Veterans Affairs, EEOC Appeal No. 2023001465 (Feb. 20, 2024). As more fully described in Shakia H., we disagree with the use of FMLA certification paperwork as the basis for refusing to provide additional medical documentation in support of a request for reasonable accommodation. It follows, then, that the Agency is not obligated to assume Complainant has a disability within the meaning of the Rehabilitation Act simply because she had FMLA documentation in place more than 12 months earlier. Therefore, Complainant does not demonstrate she had a disability within the meaning of the Rehabilitation Act and her prima facie case as to disability must fail.

With regard to reprisal, Complainant did not show that she engaged in prior protected EEO activity and therefore, fails to establish a prima facie case of reprisal.

Further, we find that the Agency articulated legitimate, nondiscriminatory reasons for the actions at issue in claims 1, 2, and 3. S1 stated that all teleworking employees were required to sign the agreement in Claim 1. In Claim 2, S1 wanted Complainant to call her at home to report her absence because S1 was not in the office at the time. S1 asked Complainant to provide a doctor's note in Claim 3 because she was seeking sick leave right after taking annual leave.

Aside from Complainant's conclusory allegations and speculations, Complainant has not shown that the Agency's reasons for its actions were pretext to mask illegal discriminatory or retaliatory animus. As a result, the Commission finds that Complainant was not subjected to discrimination or reprisal as alleged.

*Hostile Work Environment*

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her

work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The incidents Complainant cites in support of her harassment claim, taken together, are not sufficiently severe or pervasive to be unlawful. Rather, the incidents challenged by Complainant reflect common workplace disagreements between supervisors and subordinates that relate to disagreements with managerial decisions and processes, including those relating to assignments, overtime, scheduling, and performance evaluations. Without evidence of an unlawful animus, we have found that similar disputes 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 is 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).

Even assuming that the conduct alleged was sufficiently severe or pervasive to create a hostile work environment, we find that Complainant has not shown that any of the alleged incidents were motivated by discriminatory or retaliatory animus.

We find that the Agency's actions toward Complainant here were ordinary workplace interactions, with no abusive conduct based on Complainant's protected classes.

## CONCLUSION

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

## STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at https://publicportal.eeoc.gov/Portal/Login.aspx. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

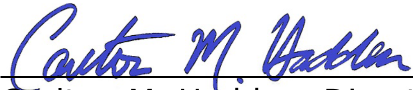
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 8, 2025
Date