



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

████████████████████
Frida L.,¹
Complainant,

v.

James McHenry,
Acting Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2022005033

Hearing No. 440-2021-00152X

Agency No. BOP-2020-01699

DECISION

On September 23, 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 26, 2022 final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of

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.

1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the 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.

Whether the Agency properly found that Complainant was not subjected to discrimination and a hostile work environment on the bases of sex, disability, and in reprisal for prior protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Psychologist/Drug Abuse Program Coordinator, at the Agency's Federal Medical Center (FMC) located in Rochester, Minnesota. On September 1, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to an unlawful hostile work environment, based on her sex (female), disability (groin strain, thyroid cancer, Major Depressive Disorder), and reprisal (prior protected EEO activity) when:

1. from November 8, 2019, through September 1, 2020, management incorrectly determined that her November 8, 2019, injury on the job was due to her pregnancy. Additionally, management provided her with misinformation on how to file an Office of Workers' Compensation Program (OWCP) claim, which resulted in a delay of benefits and the utilization of her acquired leave hours. Also, management provided the Department of Labor (DOL) with misinformation regarding her injury claim;
2. on June 3, 2020, Complainant was given one day to accept and report to a limited duty (LLD) assignment;
3. on June 8, 2020, and July 23, 2020, the Agency denied Complainant's request for a reasonable accommodation;

4. on July 10, 2020, Complainant requested to be placed on Weather and Safety Leave, and to date, Complainant has not received a response from the Agency causing her to remain in a non-paid status; and
5. on July 27, 2020, Complainant became aware that the Agency had placed her on Absent Without Official Leave (AWOL) since May 24, 2020.

On November 8, 2019, Complainant (who was pregnant at the time) injured her right leg/groin area while running and responding to a "body alarm"² during an institutional emergency at FMC Rochester. Complainant was placed on Continuation of Pay (COP) status from the date of the injury until November 25, 2019, when she returned to full duty status. Complainant continued to work from November 25, 2019 until January 19, 2020, when she went to the emergency room after experiencing a worsening of her right hip pain.

On January 21, 2020, Complainant stopped working at FMC Rochester and did not return to work thereafter. On June 23, 2020, the DOL issued a Notice of Decision which denied Complainant's request for Leave Buy Back³ for the period from January 21, 2020 through March 20, 2020, based upon her failure to provide sufficient medical evidence to justify payment of any compensation. The DOL stressed that the evidence Complainant submitted was insufficient to support her claim for disability compensation because the medical documentation received had been from a physician that was not an appropriate specialist to diagnosis and provide work restrictions. On October 20, 2020, the DOL issued another Notice of Decision denying Complainant's request that the DOL reconsider its decision terminating her OWCP wage loss benefits. In its decision, the DOL determined that Complainant failed to submit medical documentation from a qualified physician pertaining to physical restrictions as a result of thyroid cancer or any other medical condition. On November 23, 2020, Complainant was removed from the Agency based upon her physical/medical inability to perform the duties of her law enforcement officer position at FMC Rochester.⁴

² A body alarm is a distress call meaning there is an emergency where all staff need to stop whatever they are doing and run to the location of the alarm.

³ Leave Buy Back is compensation for Leave Without Pay used for a work-related injury, after the fact.

⁴ Complainant's termination is not at issue herein.

OWCP Claim

The Safety and Compliance Administrator (Safety Manager) denied providing misinformation to Complainant regarding the claims process or to the DOL regarding Complainant's OWCP claim. Safety Manager maintained that Complainant did not follow provided guidance concerning the claims process, which delayed her benefits. Safety Manager further stated that he informed Complainant that she must be in Leave Without Pay (LWOP) status in order to receive compensation through the workers' compensation process, which she acknowledged via email to her supervisor (Supervisor1) on January 22, 2020. However, Complainant did not follow through with her LWOP request until March 23, 2020. Instead, Complainant informed Supervisor1 that she had chosen to use her Sick Leave until her claim was reopened, at which time she would attempt to utilize the Leave Buy Back option. Safety Manager further stated that it is an employee's choice to either use Sick Leave or Annual Leave in lieu of workers' compensation.

In a February 21, 2020 email, Complainant stated that she thought "there may have been misinformation provided" by the Agency to DOL regarding her pay rate on an OWCP CA-7 form. Safety Manager acknowledged that he mistakenly used the date of injury 2019 pay scale for Complainant's current rate, when in fact her current 2020 pay rate was almost \$3,000.00 more, prompting him to send a notice to the DOL making them aware of the error, which was immediately rectified. Complainant's OWCP claim for compensation was denied by the DOL due to lack of medical documentation. The Agency has no authority in the acceptance or closing of OWCP cases. This authority lies with the DOL.

Limited Light Duty Assignment

Safety Manager and the Human Resources Manager (HR Manager) acknowledged that Complainant was initially given one day to accept the LLD assignment. Both stated that it is standard protocol for any employee injured on the job to be given a date for such an assignment (typically the employee's next workday) in order to ensure that the employee can return to work as soon as possible. Specifically, on June 3, 2020, Complainant was issued a letter from Supervisor1 detailing the LLD offer (screening staff at an outside tent), which conformed to the limitations established by her physician stemming from her November 2019 on-the-job injury.

The letter noted that Complainant's decision to accept or reject the LLD was required by that date and warned that if she declined the position and the DOL determined that this was a job that she could perform, her benefits under the Federal Employees Compensation Act may be terminated.

On June 3, 2020, Complainant sent an email to Supervisor1 in response to the LLD offer and stated that she spoke with an attorney regarding the proposed job offer. Complainant advised Supervisor1 that the attorney opined that the written offer did not provide sufficient specificity in defining the physical requirements of the offered position and suggested a copy of the proposed job offer be supplied to the DOL for advisement on their opinion as to whether or not they would consider the specificity of the physical requirements of the current written offer to be suitable. Complainant further stated that she was "not accepting or denying the proposed offer at this time."

On June 4, 2020, Complainant was issued a revised letter from Supervisor1 detailing the LLD offer. The letter contained additional details regarding the physical requirements of the subject staff screening position. The letter further noted that Complainant's decision to accept or reject the LLD was required by June 8, 2020, and again warned that if she declined the position and the DOL determined this is a job that she can perform, her benefits may be terminated. On June 4, 2020, Complainant verbally informed Supervisor1 that she would not voluntarily accept the LLD offer because, although it was appropriate for her work-related groin injury, her immune system was "too compromised" due to her cancer diagnosis. On that same date, Complainant also sent an email to Supervisor1 in which she stated that she was "not comfortable accepting or denying the offered [LLD] position."

On June 9, 2020, the DOL issued Complainant a Notice of Proposed Termination, which informed her that it had reviewed the temporary LLD assignment and found that it appropriately accommodates Complainant's current work restrictions. The DOL further informed Complainant that it required medical documentation to support her inability to accept the limited duty job offer and stated:

Your statement indicating that a disability attorney told you not to accept the job offer and that you are going to be receiving medical retirement are insufficient to support your job offer refusal. You must provide medical documentation to support your statements.

... If you decline to report to the temporary light duty assignment and fail to demonstrate that the declination is justified ... your right to wage loss compensation will be terminated indefinitely....

On June 10, 2020, Complainant sent an email to Supervisor1 stating that she was "not refusing or accepting the job offer" as she "wait[ed] for advice" from her attorney.

On June 26, 2020, Complainant sent a memorandum to the DOL formally expressing concern with the June 4, 2020 LLD, based upon her cancer diagnosis, and requesting that the Agency "consider other employment options." On August 13, 2020, the DOL issued Complainant a Notice of Decision which terminated her wage loss benefits effective that date "because [she] failed to accept the June 4, 2020, temporary light duty assignment. The Notice explained to Complainant that:

The evidence you submitted is insufficient to alter the recommendation to terminate your compensation for wage loss because you have not submitted any medical documentation to support your reasons for refusing the temporary limited duty job offer. Your statements indicating that your cancer diagnosis makes you more susceptible to COVID-19 is insufficient. Medical documentation from a qualified physician are [sic] required to support any non-work related medical condition. We have reviewed the duties and physical requirements of the 06/04/2020 temporary light duty assignment and find that it appropriately accommodates your current work restrictions...

On August 30, 2020, Complainant requested that the DOL reconsider its decision terminating her wage loss benefits. On October 20, 2020, the DOL issued a Notice of Decision denying Complainant's reconsideration request, determining that the evidence was not sufficient to modify the decision because the LLD offer was suitable for the restrictions provided by Complainant's medical provider, and she had "not submitted medical documentation from a qualified physician pertaining to physical restrictions as a result of thyroid cancer or any other medical condition." The DOL further stressed in its decision that Complainant's doctor took her off work beginning on September 18, 2020. The DOL further stated:

He did not provide a well rationalized opinion as to why you are totally incapable of all work, why you are no longer able to work according to the restrictions prescribed by [your doctor] on 05/22/2020, or why the duties listed in the 06/04/2020 are unsuitable for you. He seemed to merely echo your own concern that you are incapable of work. A physician's opinion for total disability must be based on his own opinion and supported by objective findings, not the belief of the claimant that she cannot work.

Telework

On June 8, 2020, the Warden denied Complainant's accommodation request because Complainant's position is "mission essential," and as a result, not eligible for telework. The Warden explained that Complainant's position as a Drug Abuse Program Coordinator was deemed "mission essential" because it is a law enforcement officer position located at a federal correctional facility and thus, as detailed in her Position Description, entailed numerous duties which can only take place in-person at the prison (e.g., holding drug classes with inmates, maintaining security of the institution, responding to emergencies, assuming correctional officer posts when necessary, etc.).

On June 8, 2020, Complainant submitted another request for telework as an accommodation. She stated that she was resubmitting her request with additional details related to her "medical conditions." Complainant clarified that the medical conditions which she referenced in her original accommodation request were Thyroid Cancer and Major Depressive Disorder. She further clarified that she is not making any requests for reasonable accommodation related to her OWCP injury. On June 25, 2020, HR Manager responded to Complainant's resubmitted accommodation request, stating: "In order to evaluate all potential effective reasonable accommodation solutions that would enable you to perform the essential functions of your position ... clarifying medical documentation is needed."

On June 26, 2020, Complainant provided medical documentation which indicated that she had been diagnosed as having Malignant Neoplasm of Thyroid Papillary (following a December 2019 thyroidectomy), Major Depressive Disorder, and groin injury.

The documentation further indicated that Complainant's health care provider was aware of no alternate effective reasonable accommodations that would enable Complainant to perform all of her essential job functions of her law enforcement position (including the Agency's 14 physical requirements/self-defense moves), and that she had reached a healing plateau. Complainant's provider stated that Complainant's medical condition impacted her life activities both on and off the job, as she experienced (among other things), fatigue, memory problems, difficulty concentrating, mood instability, and slowness in activity. Complainant's provider also stated that "[d]ue to effects of medical conditions which are expected to remain 12 months or longer, [she] would not be able to successfully carry out the following physical standards without potential injury or harm: ability to use various firearms, running extended distances, ability to perform self-defense movements and dragging a body an extended distance."

Complainant's medical documentation was provided to the Agency's Chief of Occupational Safety & Health Branch (Agency Physician) who reviewed it "while not only considering Complainant's position description but also her law enforcement designation within the [the Agency] and her ability to perform the essential functions" of her position. On July 14, 2020, Agency Physician sent a memorandum to the Agency's Reasonable Accommodation Coordinator (RA Coordinator), concluding that: "Based on the review of medical documents, [Complainant] is considered not fit for duty as a correctional worker for the [Agency] and would not be able to hold any position at any of [Agency's] institutions." On August 6, 2020, Complainant requested reassignment to a GS-13 Psychologist position within the Rochester, Minnesota area, as an accommodation. HR Manager subsequently searched for vacant, funded, available positions for which Complainant was qualified, using Complainant's specific search criteria, but no such positions were found.

Weather and Safety Leave

Pursuant to the Agency's COVID-19 Pandemic Response Plan staff are entitled to Weather and Safety Leave if they are placed in quarantine status by the Agency. The granting official for Weather and Safety Leave is the local warden. During the COVID-19 pandemic, the Agency's Health Services Division notified institutions' Human Resource Departments that individuals with medical conditions that have been noted by the Centers for Disease Control and Prevention (CDC) to be high risk for COVID-19 complications had the option to submit a High Risk Declaration for consideration for a Temporary

Job Modification (TJM) to include Weather and Safety leave until such time that the status of the COVID-19 related emergency changed or there was a change in their medical condition. The Agency's Health Services Division, Occupational Safety & Health Branch, provided recommendations to wardens, considering individual employees' medical condition(s) declared through the High-Risk Declaration submission by the employee, treatments rendered for the condition(s), along with the available information on the COVID-19 virus, and the training and experience of the staff in this branch in the medical field.

On July 10, 2020, Complainant submitted a written request to be placed on Weather and Safety Leave effective June 1, 2020, which is when she requested to telework. Complainant stated that due to her medical conditions, she is in a high-risk category, as identified by the CDC, and not telework eligible. In response to her request, HR Manager had Complainant fill out the High-Risk Designation form (in which she identified her diagnosis as Metastatic Papillary Thyroid Cancer) and sent it to the Agency's Health Services Division for review. On August 18, 2020, the Health Services Division reviewed Complainant's High Risk Designation form and sent an email to HR Manager stating that she could work in the institution on a TJM so long as she maintained a distance of six feet from others. Based upon Health Services' determination that Complainant could come back to work, HR Manager denied Complainant's request for Weather and Safety Leave. Complainant's request was denied because neither her current medical condition nor the treatment that she was receiving qualified her for such leave. Complainant was not notified of the Agency's decision until September 7, 2020, due to several factors, including COVID-19 related complications affecting institution operations, HR Manager's schedule, and communication with Health Services Division.

On November 9, 2020, Complainant sent a memorandum to the Warden requesting that she be placed on Weather and Safety Leave from February 7, 2020 to November 30, 2020, with an attached letter from her medical provider opining that she was high-risk based on her thyroid cancer diagnosis. On November 12, 2020, the Warden responded to Complainant via email, stating: "After careful consideration, I am not approving your request. Knowing you have received a proposal letter indicating your separation from the Agency [on October 20, 2020, for Physical/Medical Inability to Perform Duties of Position], I don't believe this would be an appropriate use of Weather and Safety Leave."

AWOL

On March 30, 2020, Complainant submitted a memorandum to the Warden, requesting to be placed on LWOP status due to sustaining an injury at work which resulted in being on OWCP status from January 21, 2020, to May 22, 2020, and noting that medical documentation to support this leave had been submitted to the DOL. The Warden approved this request. On August 12, 2020, Complainant sent an email to HR Manager questioning why she was placed in "leave status 72." HR Manager explained code 72 is standard for staff who have not requested LWOP from the Warden and policy dictates the Warden is the only one who can approve LWOP. Complainant responded to HR Manager on August 13, 2020, stating that she would like to get this leave status rectified. HR Manager responded that the current status is lack of supporting documentation to approve LWOP. HR Manager also advised Complainant that if she would like to submit documentation to the Warden for approval, she should send it to him and he will have the Warden look at it. Complainant responded to HR Manager's August 13, 2020 email by asking for clarification as to what type of documentation is necessary. HR Manager advised Complainant that she needed to submit a memorandum requesting LWOP for the dates and hours of AWOL. On August 16, 2020, Complainant submitted a memorandum to the Warden requesting "to be placed on LWOP status from May 23, 2020 to October 31, 2020 "due to current medical conditions." The Warden approved Complainant's request, and her AWOL status was changed to LWOP, in which status she remained until her removal from the Agency in November 2020.

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 AJ. Complainant timely requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

In the decision, the AJ first dismissed claim (1) as an impermissible collateral attack on the OWCP administrative process. Next, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions as to the remaining claims. With respect to claim (2), Complainant had recently submitted medical documentation with restrictions. The AJ determined that the Agency's attempt to return Complainant to a duty status seemingly within her restrictions was not based on discriminatory or retaliatory animus.

As to claim (3), based on the medical information presented, the Agency determined that Complainant was not fit/qualified for her position of record. In another separate request for accommodation submitted August 6, 2020, Complainant requested that she be reassigned to a GS-13 Psychologist position within the Rochester area. The Agency indicated that it searched for vacant, funded positions within Complainant specified criteria, however, no positions were found. Based on her physical/medical inability to perform the duties of her position and the fact that no reassignment was available, Complainant's removal was proposed and subsequently implemented on November 23, 2020.

With regard to claims (4) and (5), the AJ determined that Complainant was initially denied Weather and Safety Leave as the Agency's Health Services Division determined she could safely perform duties at the workplace with a Temporary Job Modification. Subsequently, her second request was denied by the Warden because she had been proposed for removal.

The AJ concluded that Complainant failed to show that the Agency's reasons for its actions were pretextual. 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

Complainant asserts that: (1) the AJ erred in dismissing Claim 1 as a collateral attack on the OWCP process; (2) the AJ improperly determined there are no material facts in dispute as to whether the Agency conducted a good faith reasonable accommodation reassignment search for Complainant; (3) the AJ improperly determined there are no material facts in dispute as to whether the Agency discriminated against Complainant based on her physical disability (i.e., cancer) and/or in retaliation when it failed to place her on Weather and Safety Leave, recommended her for a limited light duty assignment as a COVID-19 screener, and when it placed her on AWOL; and (4) the AJ abused his authority by disallowing relevant documents that Complainant discovered and submitted as exhibits after the parties' dispositive motion filings but before the AJ issued his Decision on the respective motions.

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

As an initial matter, we note that AJs have full responsibility for the adjudication of the complaint, including overseeing the development of the record, and have broad discretion in the conduct of hearings. See 29 C.F.R. § 1614.109; see also Equal Employment Opportunity Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015). We find that the AJ did not abuse his discretion and properly denied Complainant's belated, post-discovery request to supplement the pleadings because her initial pleading failed to articulate how these items were unavailable to her at the time of dispositive motions and because the material evidenced occurrences far after the dates at issue.

The Commission is otherwise unable to find evidence of bias, or other reversible error, resulting from the manner in which the AJ managed and adjudicated this case.

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.

Claim 1 – OCWP

We agree with the AJ in finding that Complainant's accusations articulated in Claim 1 amount to an impermissible collateral attack on the OWCP administrative process and, therefore, must be dismissed as a matter of law. Complainant asserts on appeal, that her complaint does not qualify as a collateral attack as her claim involves the basis of retaliation. We disagree. As stated by the Commission in Dion v U.S. Postal Serv., EEOC Appeal No. 2020004149 (Oct. 1, 2020), an employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. In our denial of complainant's request for reconsideration, we found the rule prohibiting collateral attack on the OWCP process is also applicable to claims of reprisal. See Dion v U.S. Postal Serv., EEOC Request No. 2021000608 (Jan. 22, 2021).

Claim 3 - Reasonable Accommodation

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to provide reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p).

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a “qualified” individual with a disability pursuant to 29 C.F.R. §1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation).

It is undisputed that Complainant’s position was deemed “mission essential” and not eligible for telework. Specifically, as outlined in Complainant’s Position Description, her position is a law enforcement officer position located within a Bureau of Prisons’ correction facility and contains duties which can only take place in-person (maintaining security of the institution, responding to emergencies, assuming correctional officer posts when needed). As these duties cannot be performed in a telework status and the Agency is not required to waive essential functions as an accommodation, Complainant fails to establish that she was denied an accommodation when the Agency denied her request to telework.

Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that there are no effective accommodations that will enable complainant to perform the essential functions of her current position, or all other reasonable accommodations would impose an undue hardship. King W. v. U.S. Postal Serv., EEOC Appeal No. 2019001070 (Mar. 20, 2019); Zachary K. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130795 (Nov. 19, 2015). The undisputed record shows that Complainant had ongoing difficulties meeting the physically demanding essential functions of her position with respect to using firearms, running extended distances, performing self-defense movements, and dragging a body an extended distance. Accordingly, an effort to reassign Complainant was appropriate in this instance.⁵

⁵ In addition, Complainant requested reassignment as a reasonable accommodation.

An Agency is not required to create a job to reasonably accommodate an employee with a disability. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, at Question 24 (Oct. 17, 2002); Larraine S. v. Dep't of Agric., EEOC Appeal No. 0120180647 (Aug. 15, 2019), req. for recons. denied, EEOC Request No. 2020000239 (Jan. 29, 2020). Based on the undisputed record before us, the Agency fulfilled its obligations with respect to Complainant's request for a reasonable accommodation when it sought to reassign her but could not locate any vacant, funded positions at her grade level or below within the parameters specified by Complainant for which she was qualified and that complied with her medical restrictions.

Complainant had the opportunity to put forth evidence that such a position existed, but she failed to proffer such evidence. Complainant bears the burden of showing that there was a vacant, funded position for which she was qualified and to which she could have been reassigned. See Alana W. v. Soc. Sec. Admin., Appeal No. 0120180037 (Apr. 17, 2019). The record is devoid of evidence that such a position existed during the relevant time frame. Accordingly, we agree with the AJ in concluding that the record does not support a finding that Complainant was unlawfully denied the reasonable accommodation of reassignment. See also Jeremy S. v. Dep't of Commerce, EEOC Appeal No. 2022002069 (Sept. 30, 2024).

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). 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.

Complainant may 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, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a time and in such manner that a retaliatory motive may be inferred. See Clay v. Dep't of the Treasury, EEOC Appeal No. 01A35231 (Jan. 25, 2005); Dominica H. v. Dep't of Health and Human Ser'v., EEOC No. 0120150971 (Nov. 22, 2017).

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

With respect to claim (2), we note that as a threshold matter, it is undisputed that Complainant was not capable of performing the essential functions of her position. Accordingly, as Complainant fails to establish a prima facie case, her claim of disability discrimination fails.

Complainant also fails to establish a prima facie case of discrimination based on sex or prior protected EEO activity. Management asserts that it is standard for the Agency to provide employees with directions to report for LLD assignments in a short period (typically the next workday).

The record is devoid of comparator evidence which would establish that other employees were given an increased period to report. As Complainant failed to identify comparator evidence or other evidence that would establish an inference of discrimination or reprisal, she has not met her burden to establish a prima facie case on this claim.

Even if Complainant had met her burden to establish a prima facie case, the record is devoid of evidence that the Agency's reasons for its actions were a pretext for discrimination or reprisal. Instead, Complainant had recently submitted medical documentation with restrictions including "Walking for 1 hour, standing for 1 hour, self-defense maneuvers, prolonged running, caring[sic] a stretcher, or dragging of body." The Agency attempted to return Complainant to a duty status within her restrictions and there is no evidence demonstrating discriminatory or retaliatory animus. Accordingly, as there is no evidence that would establish pretext, her claims of discrimination and reprisal fail on this claim.

With regard to claims (4) and (5), as previously discussed, it is undisputed Complainant was not capable of performing the essential functions of her position. As she is not "qualified" pursuant to the Rehabilitation Act, she fails to meet her burden to establish a prima facie case of disability discrimination and her claims of disability discrimination fail.

The undisputed record shows that Complainant was initially denied Weather and Safety Leave as the Agency's Health Services Division determined she could safely perform duties at the workplace with a TJM. Complainant fails to establish a prima facie case as it relates to her claims that she was not granted Weather and Safety Leave as a result of her sex or prior protected EEO activity. Specifically, the record is devoid of evidence of comparators outside Complainant's protected classifications who had similar restrictions yet were authorized Weather and Safety Leave. Subsequently, her second request was denied by the Warden because she had been proposed for removal. Complainant identifies no comparators outside her protected classifications who were authorized such leave despite a pending removal.

The undisputed record also indicates that Complainant was marked AWOL as she had not submitted any request for LWOP during the relevant time period.

The record is devoid of evidence of comparators outside Complainant's protected classifications who were treated more favorably when they were not present for duty but had not requested LWOP. Complainant has failed to present evidence which would raise an inference of discrimination based on sex or her prior protected EEO activity.

Furthermore Complainant fails to introduce evidence that would establish management's articulated reasons for its actions were a pretext for discrimination or reprisal. It is well settled that subjective belief or speculation as to motive, intent, or pretext are not sufficient to satisfy the Complainant's burden of proof. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., et. al., 475 U.S. 574 (1986). Complainant's allegations are unsupported by any evidence other than Complainant's opinion and her bare assertions. See Sims v. U.S. Postal Serv., EEOC Appeal No. 0120070183 (July 2008) ("[A] complainant's own statements of belief that discrimination occurred, no matter how genuinely held, are not proof and cannot withstand legal scrutiny.")

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), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (Apr. 29, 2024).; 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 Harassment in the Workplace, EEOC Notice No. 915.064 (Apr. 29, 2024).

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.

Even assuming Complainant established that the incidents complained of were sufficiently severe or pervasive to rise to the level of harassment, a finding of a hostile work environment is precluded by our determination that Complainant failed to establish that the actions taken by the Agency were motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, the Commission finds that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as alleged.

CONCLUSION

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

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)

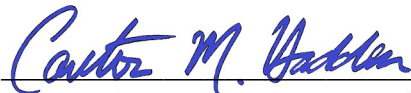
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

February 3, 2025

Date