



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Catherina B.,¹
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(National Institutes of Health),
Agency.

Appeal Nos. 2022005088 & 2022005089

Hearing Nos. 531-2021-00309X & 530-2022-00225X

Agency Nos. HHS-NIH-NIEHS-092-20 & HHS-NIH-NIEHS-102-21

DECISION

On September 27, 2022, Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 23, 2022 final order concerning her equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. Pursuant to 29 C.F.R. § 1614.606, these appeals are being consolidated for decision. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

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.

ISSUES PRESENTED

1. 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.
2. Whether the Agency properly found that Complainant was not subjected to disparate treatment and a hostile work environment because of her disabilities, sex, and previous EEO activity.

BACKGROUND

Complainant worked as an Administrative Specialist, GS-301-09, within the Health and Safety Branch of the Office of Management at the National Institute of Environmental Health Sciences (NIEHS) at Research Triangle Park, North Carolina

On June 22, 2020, Complainant filed a formal EEO complaint (Agency No. HHS-NIH-NIEHS-092-20 (Complaint 1)) alleging that the Agency subjected her to discrimination and a hostile work environment on the bases of disability (migraine headaches, anxiety and depression), sex (Female) and reprisal (prior EEO activity). She identified the responsible management officials as her first-line supervisor between October 2018 and December 2019 (S1a), her first-line supervisor since January 2020 (S1b) and her former second-line supervisor (S2). The following allegations comprise her complaint²:

1. On January 22, 2020, S1b utilized an unauthorized Performance Management Appraisal Program (PMAP) matrix for Complainant's 2019 close-out and 2020 establishment, which was originally developed by S1a;
2. On January 22, 2020, S1b refused to reinstate Complainant's Maxiflex schedule;
3. On April 16, 2020, S1b set task completion dates ahead of set deadlines;

² Wherever possible, the allegations were reordered chronologically for clarity.

4. On April 29, 2020, Complainant received harassing emails from S1b about departmental notifications and task completions;
5. On unspecified dates in 2020, S1b collaborated with S1a to harass and retaliate against Complainant for filing an EEO complaint;
6. Since July 22, 2020, S1b sabotaged Complainant's efforts to timely complete her work tasks by approving deliberate and intentional erroneous Purchasing Online Tracking Systems (POTS) orders;
7. On August 20, 2020, S1b falsified Complainant's 2020 mid-year and PMAP evaluation narrative;
8. On September 17, 2020, S1b sent Complainant harassing emails regarding daily duties and tasks;
9. Between January and October of 2020, S1b sabotaged Complainant's efforts to timely complete her work tasks;
10. On January 19, 2021, S1b falsified Complainant's 2020 PMAP closeout; and
11. On February 2, 2021, S1b breached Complainant's confidentiality by emailing staff that she was out sick.

On July 20, 2021, Complainant filed a second EEO complaint (Agency No. HHS-NIH-NIEHS-102-21 (Complaint 2)) alleging the following additional allegations of discrimination and reprisal:

12. On June 23, 2021, S1b accused Complainant of abusing Maxiflex;
13. On June 30, 2021, S1b issued Complainant a letter of reprimand;
14. On June 30, 2021, S1b expressed his dissatisfaction to Complainant during her PMAP closeout about submitting assignments before deadlines; and
15. On June 30, 2021, S1b told Complainant that she was ineligible for a step increase.

The Agency investigated each complaint separately. At the conclusion of each investigation, the Agency provided Complainant with copies of the investigative reports³ and notice of her right to request hearings before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing on both complaints.

On May 3, 2021, Complainant requested that the complaints be consolidated. On August 23, 2022, the AJ assigned to the case granted Complainant's requests. On September 20, 2022, the AJ issued a decision in favor of the Agency finding that Complainant was not subjected to discrimination or reprisal as alleged. The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

Allegation (1): Complainant alleged that the PMAP matrix developed by S1a and utilized by S1b on January 22, 2020, to map Complainant's performance was inconsistent with the Agency's policy guidelines. IR1 50-51. S1b averred that he simply used the PMAP matrix that had been drawn up by S1a. IR1 72. S1a confirmed that he did, in fact, prepare the matrix but was unable to present it to Complainant before his retirement at the end of December 2019. He stated that prior to developing the matrix, he consulted with a Human Resources Specialist (HRS). IR1 86-87, 100-101.

Allegation (2): Complainant averred that S1a took her Maxiflex schedule away from her in November 2019 and that S1b refused to reinstate it when he took over as her supervisor. IR 52. S1a averred that Complainant would constantly arrive late, and that in response to Complainant's failure to adhere to the arrival and departure times set forth in her schedule, he kept her schedule in place but adjusted her arrival time so that she would arrive at 7:15 a.m. instead of 7:00 a.m. S1a, S1b, and the HRS all stated that Complainant was never taken off her Maxiflex schedule. IR1 73, 88, 101-02.

Allegation (3): Complainant appears to be alleging that S1b was requiring her to complete her assignments ahead of pre-set deadlines. She cited as an example of a training form that had no set deadline, but S1b asked her to complete the form by April 16, 2020. IR1 62-63. S1b averred that he was not aware of this alleged incident. IR1 82.

³ Citations to the evidentiary record are as follows:

- Investigative Report – Agency No. HHS-NIH-NIEHS-092-20 (IR1)
- Supplemental Investigative Report – Agency No. HHS-NIH-NIEHS-092-20 (SIR1)
- Investigative Report – Agency No. HHS-NIH-NIEHS-102-21 (IR2)

Allegations (4) and (8): Complainant claimed that on April 29 and September 17, 2020, S1b harassed her regarding her daily duties and tasks via email. In particular, Complainant averred that on April 29, 2020, S1b sent her an email telling her that she needed to supplement emails from other departments with commentary so that the staff could understand them. IR1 49. She also claimed that on September 17, 2020, S1b sent her an email in which he asked her to explain, clarify, or, if necessary, rewrite other department emails. IR1 57. With respect to the April 29, 2020 incident, S1b responded that he was merely asking her to perform job tasks, but acknowledged that Complainant felt bullied by his asking her to do so. IR1 70-71. As to September 17, 2020, S1b stated that Complainant had taken exception to being included in a group distribution list that had been used for many years to send messages to staff without disturbing the previous branch chief, S1a. S1b averred that in response to Complainant's concerns, he removed her from the list and ensured that the list was no longer used for routine communications. IR1 77-78.

Allegation (5): Complainant claimed that unspecified dates throughout 2020, S1a and S1b took actions against her that were harassing and retaliatory for her previous EEO activity. IR1 53. S1b and S2 averred that they were unaware as to what Complainant was referring. IR1 74, 94-95. HRS averred that S1b had forwarded to her emails from Complainant regarding being harassed and retaliated against, and that she referred those emails to the Agency's Civil Program which investigates internal complaints of employee harassment. The HRS noted that Civil completed its investigation and could find no violation of Agency policy. IR1 102-03.

Allegation (6): Complainant averred that S1b and S2, who were responsible for purchase orders, intentionally approved errors in at least one POTS purchase order. IR1 58-59. S1b responded that he was not aware of the alleged incident. IR1 79. S2 responded that he was aware of a situation where Complainant had placed an order with Walgreen's Pharmacy and there was an apparent miscommunication regarding the number of units that could be purchased from Walgreen's. S2 disputed Complainant's assertion that her work was being sabotaged as she was not reprimanded for the incident, nor was the incident ever mentioned. IR1 96.

Allegation (7): Complainant claimed that on August 20, 2020, S1b included statements in her mid-year performance appraisal narrative that were derogatory and false.

In particular, Complainant took issue with statements in the narrative to the effect that Complainant was late in completing tasks, that her departmental emails were incomprehensible to staff, and that she had been incorrectly responding to various requests. IR1 61. S1b stated that he had provided Complainant's midyear evaluation verbally on August 19, 2020, in an on-line conference involving just the two of them. He also stated that Complainant refused to provide input to the evaluation and refused to sign it. IR1 81.

Allegation (9): Complainant claimed that between January and October 2020, S1a, who was still with the Agency as a consultant, had been sabotaging her efforts to timely complete her work tasks by constantly sending her a repeating error message. Complainant herself admitted that a Technician explained that it was a program issue that had been subsequently resolved. IR1 49-50. S1a and S1b averred that they were not aware of the alleged incident. In addition, S1a stated that he was not involved with or had any contact with Complainant in 2020. IR1 80, 90.

Allegation (10): Complainant alleged that S1b falsified her 2020 PMAP closeout on January 19, 2021. She stated that for 2020, she received a rating of "3," and that she deserved a higher PMAP rating due to "never receiving any work performance conferencing, warnings, write-ups, or demands since 2017." She further claimed that her PMAP evaluations were never questioned until she was deemed a whistleblower for filing EEO grievances and complaints. Finally, she asserted that after she filed her first grievance in 2018 against S1a, her PMAP rating was lowered from "4" to "3" without any conferencing, warnings, or write-ups. SIR1 14, 82.

S1b averred that Complainant had earned the rating she was given, that the rating was based on her performance, and that she could have improved her rating by performing her assigned tasks and meeting her performance elements. S1b noted that there were complaints that complainant did not provide "clear customer service." SIR1 85-86. Complainant's performance appraisal for 2020 indicates that she had been given an overall performance rating of 2.6, which put her performance at level 2, which meant that she had "partially achieved expected results." SIR1 92, 100. S1b had written that Complainant struggles to provide clear instruction to her teammates. SIR1 101, 103-05.

Allegation (11): Complainant averred that on February 2, 2021, S1b breached her confidentiality by emailing to the staff that she was out sick. She stated that the email went out to the entire NIEHS Division. SIR1 15-16, 82.

S1b acknowledged that he had made a mistake. He averred that Complainant had sent him an email stating that she was sick, and that he crafted an email and sent it to the wrong distribution list. He admitted that the email went out to the entire division, not just the branch, that he immediately recalled the email once he sent it, that he let Complainant know what happened, and that Complainant responded that it was not a problem. SIR1 86-87.

Allegation (12): Complainant claimed that on June 23, 2021, S1b accused her of abusing her Maxiflex schedule. IR2 41. S1b responded that there were no accusations of abusing Maxiflex, and that on June 30, 2021, he had sent Complainant an email that she had been working outside her scheduled hours and was still in the office after her departure time had passed. He stated that this was the second time that he had to remind Complainant, in writing, not to work outside her scheduled hours. IR2 33.

Allegation (13): Complainant averred that on June 30, 2021, S1b issued her a letter of reprimand. She characterized the content of the letter as "bogus and unjustified accusations" IR2 41. S1b responded that on June 20, 2021, he had issued Complainant a letter of reprimand for sending an email that was "rude, inappropriate, and unprofessional" and for her failure to join a Zoom meeting that she had been explicitly instructed to attend. IR2 32-33, 49.

Allegation (14): Complainant alleged that on June 30, 2021, S1b expressed his dissatisfaction to her during her PMAP closeout about submitting assignments before deadlines. S1b averred that he did not recall expressing dissatisfaction with Complainant submitting assignments before the deadline and that there was no statement to that effect in her written PMAP midterm documentation. S1b further asserted that he discussed the need to work with Complainant to ensure that task guidance was adequate and clear. IR2 33.

Allegation (15): Complainant claimed that on June 30, 2021, S1b informed her that she was not eligible to receive a step increase. She averred that S1b had falsified her PMAP evaluation in order to degrade her work performance. IR2 41. S1b averred that Complainant's PMAP rating was at level 2, which was below the minimum level of eligibility for within-grade wage increases. IR2 34, 58, 67, 69-71, 94-97.

ADMINISTRATIVE JUDGE'S FINDINGS AND CONCLUSIONS

At the outset, the AJ found that Complainant was unable to establish a prima facie case of discrimination in connection with any of the allegations in her complaint. He reiterated that Complainant neither provided direct nor circumstantial evidence that any of the actions taken by S1a or S1b resulted from a discriminatory or retaliatory motive on their part. He noted that while Complainant asserted that S1b had issues with female staff and had "received complaints from new female staff," she declined to identify any of those individuals by name. The AJ also noted that, when asked how her disability played a role in any of the supervisors' actions, Complainant merely asserted that her physical and mental illnesses were exacerbated by the alleged hostile work environment. The AJ ultimately concluded that the Agency had articulated legitimate and nondiscriminatory reasons for each of the actions at issue, and that Complainant had been unable to show that any of those reasons were pretext for discrimination on any basis.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates her belief that Agency management intentionally discriminated against her on the bases alleged. She also maintains that she was subjected to a hostile work environment and that the explanations provided by S1a and S1b for their actions were, "a complete pretext." Complainant also contends that the Agency consistently violated the collective bargaining agreement by not addressing what she characterized as "systemic racism."

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.

Preliminary Matters

Complainant alleged that the Agency had retaliated against her for being a whistleblower. IR1 57, 58-59, 62-63; SIR1 14-15, 82; IR2 31, 41. Reprisal based on whistleblowing activity is not within the Commission's jurisdiction. Clifford L. v. Dep't of Veterans Affairs, EEOC Appeal No. 2024001561 n.5 (Sept. 23, 2024) citing Jill M. v. Dep't of Defense, EEOC Appeal No. 2021000550 (July 15, 2021). Similarly, the Commission has no jurisdiction over claims related to the terms of a collective bargaining agreement, enforcing the terms of a collective bargaining agreement, or relations with union representatives. Rashad W. v. Dep't of Def., EEOC Appeal No. 2023004399 (Oct. 31, 2024).

Disclosure of Confidential Medical Information – Allegation (11)

Improper disclosure of medical information by the Agency constitutes a per se violation of the Rehabilitation Act. Ricky S. v. Soc. Sec. Admin., EEOC Appeal No. 2019000442 (Feb. 19, 2020). The disclosure of a specific condition, diagnosis, or symptoms is a violation. Id. However, there is no violation where the Agency's disclosure does not disclose a particular condition, diagnoses, or symptoms. Id. Where the complainant fails to establish that the Agency disclosed a particular condition, diagnosis or symptoms, the Agency does not breach the complainant's confidential medical information in violation of the Rehabilitation Act. See id. Here, S1b acknowledged that he inadvertently sent an email that Complainant had called in sick to the entire division, and nothing more than that. Complainant provided no evidence that S1b had disclosed a specific condition, diagnosis, or symptoms. Consequently, we find no violation of the Rehabilitation Act.

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 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 warrant a hearing on a disparate treatment claim, Complainant must raise a genuine issue of material fact as to whether the Agency's explanation for its actions is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, 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, Burdine, 450 U.S. at 252-53 (1981), the requirements are "minimal," Hicks, 509 U.S. at 506 (1993), and complainant's burden is "not onerous." Burdine, *supra*.

For prong 3 of the prima facie analysis, a complainant can establish an inference of discrimination by identifying a comparator employee who was treated more favorably under similar circumstances, or other evidence of discriminatory motive (e.g. derogatory language about the complainant's protected classes). Comparative evidence relating to other employees is considered relevant when they are "similarly situated." See Anderson v. Dep't of Treasury, EEOC Appeal No. 01A22092 (Mar. 13, 2003). In other words, all relevant aspects of the employees' work situation are identical or nearly identical, i.e., the employees report to the same supervisor, perform the same job function, work during the same time periods, and, in instances where the Agency is responding to "problem conduct" (e.g. attendance deficiencies), engaged in the same conduct. See Stewart v. Dep't of Defense, EEOC Appeal No. 01A02890 (Jun. 27, 2001); Jones v. U.S. Postal Serv., EEOC Appeal No. 01983491 (Apr. 13, 2000); See Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001).

When asked who was treated more favorably than she, Complainant replied that she was not sure or gave vague answers such as "any other staff not female or considered a whistleblower," "no male HSP staff member has been subjected to any of these actions from this supervisor (S1b)," or "no other staff in same position." IR1 50-51, 54, 57, 63; SIR1 14-15; IR2 41. We therefore agree with the AJ that Complainant failed to establish a prima facie case of discrimination on the basis of sex.

To establish a prima facie case of disparate treatment 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).

When asked to identify and describe her conditions, Complainant replied that for two years, she had been experiencing migraine headaches, anxiety, and depression as a result of being subjected to hostile work environment, and that these conditions have been exacerbated by that environment. IR1 48. In Complaint (2), Complainant stated that in addition to her other conditions, she was diagnosed with rheumatoid arthritis resulting from stress related to her hostile work environment. IR2 30. When asked if she was identified as having a disability in the Agency's records, she replied that she was not sure.

When asked if she had requested accommodation for her disabilities, she responded that she did not, and that she only requested a change of supervisor. IR1 48, 50. S1b averred that he was not aware that Complainant had any disabilities or impairments. IR1 70. Consequently, we find that the AJ properly determined that Complainant failed to establish a prima facie case of discrimination based on disability.

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). Here, Complainant engaged in prior and current protected activity by filing the instant complaints and by requesting a reasonable accommodation in April 2019. S1a and S1b were certainly aware of that activity. IR1 85. At approximately the same time, S1a and S1b had taken actions that Complainant considered to be adverse from her own, subjective perspective. Finally, we find that the circumstances surrounding those actions are sufficient to raise a genuine issue of material fact as to whether retaliation had occurred.

Notwithstanding the above, the Agency articulated legitimate and nondiscriminatory reasons for the alleged actions. As to allegations (1), (7), and (10), which pertained to Complainant's PMAP documentation of her performance, S1a stated that he had consulted with the HRS in drawing up Complainant's PMAP matrix. S1b stated that his use of the matrix created by S1a was legitimate and that Complainant's performance rating had been thoroughly documented and supported by his own observations of Complainant's work, particularly in the area of providing clear guidance to other staff members. See IR1 81, 86-87, 100-01, 103-05. Regarding allegations (3) through (6), (8), (9), and (14), which pertained to alleged interference with Complainant's day-to-day work performance, S1b stated that he was either not aware of some of the incidents and that he responded to Complainant's concerns about being bullied by work-related emails as best he could. See IR1 77-78, 80, 82, 90, 96, 102-03; IR2 33. Concerning allegations (2) and (12), which pertained to alleged accusations of Maxiflex abuse, S1a, S1b and the HRS all stated that Complainant had not been adhering to her assigned schedule, and that her Maxiflex privileges were not revoked; rather, her Maxiflex schedule was adjusted to conform with her assigned arrival and departure times. See IR1 73, 88, 101-02; IR2 33.

With respect to the June 30, 2021 letter of reprimand, S1 maintained that the charges and specifications regarding inappropriate and unprofessional behavior as well as her failure to follow supervisory instructions were thoroughly documented. IR 32-33, 49. With regard to allegation (15), S1b reiterated that Complainant's PMAP performance level 2 was not high enough to merit a within-grade increase. See IR2 34, 58, 67, 69-71, 94-97.

Pretext can be demonstrated by showing such weakness, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Larraine D. v. Dep't of Defense, EEOC Appeal No. 2022002980 (Oct. 27, 2022). Indicators of pretext include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, unequal application of Agency policy, deviations from standard procedures without explanation or justification, and inadequately explained inconsistencies in the evidentiary record. Tammy S. v. Dep't of the Army, EEOC Appeal No. 2021000578 (May 5, 2022).

When asked by the investigators why she believed that her sex, alleged disabilities, and prior EEO activity were motivating factors in the actions of S1a and S1b, Complainant responded that her conditions were exacerbated by the conduct of S1a and S1b, that no male staff members were subjected to the treatment that she was subjected to, and that S1a and S1b collaborated to retaliate against her because of her EEO complaints and whistleblowing activity. See IR1 50-51, 53-54, 57-59, 61-63; SIR1 14-16; IR2 30-31. Complainant also provided the testimony of the union president who served as her representative in her EEO complaints. The representative opined that there were discriminatory practices in the organization, particularly with respect to female staff members, but when asked if she witnessed Complainant being subjected to discrimination, she answered, "no." IR2 39. Beyond these statements, Complainant has presented neither affidavits, declarations, or unsworn statements from witnesses other than herself nor documents that undermine or contradict the sworn affidavit testimony of S1a, S1b, or any other management official regarding their explanations for the actions at issue. She has likewise not presented any documentary or testimonial evidence which would cause us to question the truthfulness of S1a or S1b as witnesses. Moreover, she has not presented evidence sufficient to raise a genuine issue of material fact as to the existence of at least one of the indicators of pretext listed above.

We therefore find that the AJ's issuance of summary judgment was proper in that even with all reasonable inferences drawn in Complainant's favor, the evidentiary record would not support a finding of discrimination or reprisal on any basis.

Hostile Work Environment

To the extent that Complainant is alleging that she was subjected to a hostile environment, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) Complainant's claim of a hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory or retaliatory animus. Micki C. v. Soc. Sec. Admin., EEOC Appeal No. 2022004926 (Aug. 19, 2024) citing Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, 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

January 21, 2025
Date