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

[redacted]
Gaye A.,[1]
Complainant,

v.

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

Appeal No. 2023000499

Hearing No. 531-2020-00014X

Agency No. HHS-NIH-NICHD-042-19

DECISION

Complainant filed a timely appeal, pursuant to 29 C.F.R. § 1614.403, from the Agency's final action concerning an equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final action.

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 Complainant was subjected to discrimination or a hostile work environment on the bases of sex (female) and/or reprisal (prior EEO protected activity).

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as the Chief of the National Institute of Child Health and Human Development, Division of Intramural Population Health Research, Contraceptive Development Program, located in Bethesda, Maryland.

On April 29, 2019, Complainant filed (and subsequently amended) an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of sex (female) and in reprisal for prior protected EEO activity when:

(1) between March 2018 and through the present, management officials repeatedly made demeaning and derogatory comments about Complainant's work; and subjected the Contraceptive Development Program to scrutiny and review above and beyond division procedures;

(2) Complainant was temporarily demoted, and her performance management appraisal plan requirements were changed;

(3) on February 4, 2020, the Director of Clinical Research and Compliance emailed Complainant and senior management, negatively referencing Complainant's claims of discrimination against the Agency; and

(4) senior management, including the named responding management officials in a previous complaint and the instant complaint, made negative, disparaging, and unfounded comments regarding Complainant, including referring to Complainant as a "problem," raising vague, unfounded concerns, stating that she was "defensive" and "less than forthcoming" because she suggested a lawyer review her EEO settlement agreement, and threatening to report Complainant to the Office of Inspector General because of the terms of her prior settlement agreement.

At all times relevant to the formal complaint in this case, Complainant served as the Chief of the National Institute of Child Health and Human Development (NICHD), Division of Intramural Population Health Research (DIPHR), Division of Intramural Research (DIR or Intramural Research Division Division), Contraceptive Development Program (CDP), and has served in this role since June 2017. The CDP uses research and development contracts and technology transfer mechanisms to research and evaluate new contraceptive drugs. Specifically, as Chief of the CDP, Complainant oversees a complex research portfolio including male and female contraceptive development with the objective of translating discoveries of new chemical entities through to US Food and Drug Administration (FDA) approved contraceptive products.

Complainant has been employed by the Agency since 1979. Prior to working in DIPHR, Complainant led the contraceptive clinical program within the Contraception Research Branch, formerly the Contraceptive Discovery and Development Branch, in the Division of Extramural Research (DER or Extramural Research Division). In June 2017, Complainant transferred from DER to DIR.

From June 2017 until September 2017, Complainant's immediate supervisor was the then-Director of DIPHR. In October 2017, after the Director of DIPHR retired, the Scientific Director (Supervisor1) (male) became Complainant's immediate supervisor. Supervisor1 is aware of Complainant's protected classes. On May 12, 2017, Supervisor1 became aware of an agreement that resulted from Complainant's previous EEO case, by which Complainant was transferred from Extramural Research Division to Intramural Research Division.

The Director of Clinical Research and Compliance, GS-15 and Chair of the NICHD's Institutional Review Board (IRB) (Clinical Research Director) (male, prior EEO activity) during the relevant time period returned to NIH in November 2017, to serve in the "newly created position" of Director of Clinical Research and Compliance. In this position, Clinical Research Director is responsible for "oversee[ing] clinical research conduct and compliance, including regulatory issues for NICHD, safety evaluation and human subject protection." Clinical Research Director served as an ex officio (non-voting) member of the CDP Oversight Committee. According to Clinical Research Director, Complainant told him on several occasions that she was transferred from Extramural Research Division to Intramural Research Division as a result of a settlement agreement related to her prior EEO activity. Clinical Research Director was also aware of Complainant's sex.

A Senior Investigator, Molecular Genomics Core Director and Clinical Director (Senior Investigator) (male, prior EEO activity), in the Division of Intermural Research first met Complainant when he was asked by Supervisor1 to review Clinical Trial Agreements (CTA) and Transfer of FDA regulatory obligations in November 2017. Senior Investigator did not supervise Complainant.

A Staff Scientist (Oversight Chair) (female, no prior EEO activity) in the Intramural Research Division was a colleague of Complainant during the relevant time period and served as the Chair of the CDP Oversight Committee. A Senior Technology Transfer Specialist (Technology Specialist) (female, no prior EEO activity) in the National Cancer Institute (NCI) Technology Transfer Center was a colleague of Complainant during the relevant time period. In explaining her relationship to Complainant, she explained that NICHD contracts with NCI for technology transfer services and, since October 2015, Complainant has been a scientist on Technology Specialist's docket of technology transfer matters. The Director of the Office of Acquisitions (Acting Deputy Executive Officer) (female, prior EEO activity) has been a colleague of Complainant since 2010 and in March 2018 became NICHD's Acting Deputy Executive Officer. The director of the Extramural Research Division at NICID (Extramural Supervisor) (female) was Complainant's previous supervisor who was named as a responsible management official in a 2015 prior EEO complaint. Extramural Supervisor was not involved in any of the statements or actions raised in this complaint.

Material Facts[2]

[2] The facts set forth below are undisputed unless otherwise stated.

On October 16, 2015, while working in Extramural Research Division, Complainant filed a complaint of discrimination alleging that the Agency discriminated against her when it selected a purportedly less-qualified younger, male candidate for the Branch Chief position within the then-Contraceptive Discovery and Development Branch (CDDB). None of the named responsible management officials in the complaint at issue were named in Complainant's 2015 EEO complaint. In 2017, Complainant signed a settlement agreement to resolve her 2015 EEO complaint. The agreement provides, in relevant part:

> Complainant will be reassigned to a Senior Scientist position. She will remain a Title 5 employee at her current grade and step (GS-15, step 10) and at her current salary. The position will be in the Division of Intramural Population Health Research ("DIPHR") within the Intramural Program at the Eunice Kennedy Shriver National Institute of Child Health and Human Development ("NICHD") and will be subject to all rules, regulations, and policies within the Intramural program of NIH. Complainant's official title will be Chief, Contraceptive Development Program.

On June 7, 2017, the Director, NICHD (Supervisor2) (female) who was Complainant's second-line supervisor, informed NICHD staff via email that Complainant would lead the CDP from within the Intramural Research Division because it "is better aligned with the intramural program and fits well with the behavioral and fertility aspects of the [DIPHR] program." Supervisor2 also believed that Complainant's program would align well as it was similar to other Intramural Research Division being done by DIPHR investigators. After the settlement agreement was finalized, Extramural Supervisor told Senior Investigator that Complainant was "his problem now."

It was the job of Senior Investigator, as the NICHD Clinical Director, and Clinical Research Director, in the newly created position of Director of Clinical Research and Compliance, to work together "to ensure ethical and regulatory compliance of clinical research in NICHD." Clinical Research Director provided that his involvement with Complainant occurred shortly after he assumed his position with NIH in November 2017. At that time, one of the "key issues at NIH related to IND [(Investigational New Drug)] holders, as there was a change in policy whereby individual investigators could no longer be IND holders. In this regard, Clinical Research Director was "asked to review all existing INDs . . . to make sure that they transitioned appropriately so we did not have any individual investigators holding INDs."

Senior Investigator, likewise, provided that he first interacted with Complainant when he was asked by the Office of the NICHD Scientific Director (i.e., Supervisor1) to review a CTA and Transfer of FDA regulatory obligations that Intramural Research Division was being asked to sign in November 2017. On December 6, 2017, shortly after Complainant transitioned to the Intramural Research Division, Complainant met with Senior Investigator and Clinical Research Director and provided "an overview of how [she] was managing [her] clinical trials." Senior Investigator requested Complainant follow up on her existing INDs to see if "one of the selected sites [would] hold the IND if the coordinating center does not continue to hold it" prior to January 15, 2018, deadline for the new IND policy.

On December 13, 2017, Complainant responded providing information related to her INDs. On March 21, 2018, the Deputy Director, Administration and Budget, Division of Intramural Research Division (Administrative Director) wrote an email to the Budget Officer, NICHD (Budget Officer) commenting that: "[Senior Investigator] is concerned about some of the interactions he's had with [Complainant] when it comes to the input and influence, she has on certain contracts. He has concerns with how she is getting some things done." The same day, Budget Officer responded: "I think [Extramural Supervisor] may also have had concerns, which could be part of the reason she is not in DER anymore."

Following this exchange, Budget Officer set up a meeting on March 22, 2018, to discuss the subject with Administrative Director, Clinical Research Director and Senior Investigator. Per Complainant, Extramural Supervisor was Complainant's prior supervisor in Intramural Research Division and the responding management official in Complainant's prior EEO complaint. On March 27, 2018, Complainant sent an email to Senior Investigator inquiring about the process for review of CTAs. On March 30, 2018, Senior Investigator responded to Complainant, copying Clinical Research Director noting that:

> Your CTAs and contracts are very different than any other clinical work done in NICHD and, thus, we need to make sure everything is consistent with intramural NIH policies. One issue that is not clear is how your engagement in human subject research needs to be approved within the context of DIR human research protections program policies and requirements. Same question applies to other individuals engaged in human resources in your Section. Have you discussed this issue with the DIR Office of Human Subjects Research Protections? . . . If you have not already, I suggest that this be done given the intramural requirements in this area.

On April 4, 2018, Complainant responded to Senior Investigator, copying Clinical Research Director indicating that she had spoken with the Director of Policy and Accreditation (Director of Policy and Accreditation) within the Office of Human Subjects Research Protections (OHSRP) and that "based on [their] discussion, it appear[ed] that the CDP [was] in full compliance with intramural policies related to human subject research protections." Complainant also noted that "the program most similar to our structure may be the Vaccines Research Center, which is an intramural program at [the National Institute of Allergy and Infectious Diseases] NIAID." On April 18, 2018, Complainant sent an email directly to Clinical Research Director, copying Senior Investigator, reiterating the outcome of her meeting with OHSRP and stating if Clinical Research Director had any additional concerns, they must "get them answered because these agreements cannot be held up indefinitely without causing damage to the program."

Complainant indicated she was happy to meet to address any concerns. On May 2, 2018, Clinical Research Director responded to Complainant, copying Senior Investigator, providing that he and Senior Investigator "followed up with NIAID regarding the [Vaccine Research Center] research model and it appears the two programs are not similarly structured."

Claim 1a - Demeaning and Derogatory Comments and Scrutiny

On June 1, 2018, Complainant presented her research to the Board of Scientific Counselors (BSC) during the open session of the BSC meeting. At the close of Complainant's presentation, Supervisor1 stated: "[W]e will talk at the confidential session today about some of the other issues and how we will incorporate the program which has been longstanding but now we have to deal with the issue that it just joined intramural. So, I have invited [Senior Investigator], our clinical director, and [Clinical Research Director], our IRB chair, to be here today . . . and they will present some of their comments on what they heard today."

Complainant alleges that, although she "thought the presentation went well," after she left the room, "[Clinical Research Director] remained behind and made vague, negative comments, including that she acted without supervision, and had regulatory concerns." Complainant provided that she "only heard about the comments from others present" and that, "as a result, on July 18, 2018, [she] received notification that an oversight committee was being established to address alleged oversight concerns." Complainant alleges that she had "never seen [Clinical Research Director] treat male employees in this demeaning and accusatory way" and noted that Clinical Research Director "could have instead discussed any concerns with [her] directly." Complainant also alleges that "[Clinical Research Director was] not familiar with the CDP and he was not in a position to make such assertations nor was it his role to do so."

At the closed session of the June 1, 2018, BSC meeting, the committee discussed various concerns related to the transition of Complainant's program into the Intramural Research Division. Supervisor1 opened, noting that "at some point . . . it was decided by the leadership of NICHD . . . to move [Complainant 's] program from extramural, where they thought it wasn't a good fit, to [intramural] . . . where they thought it was a better fit." Supervisor1 noted that this change "pose[d] several questions or issues for [us] intramurally." First, he pointed out, "from now on, [Complainant's] program has to be reviewed scientifically" and, second, "she has . . . clinical protocols . . . and it's not possible to review all at the same time" and third, "there has to be a cultural change from [Complainant]." Supervisor1 clarified that "now, instead of directing this work in the extramural world, she has to be judged as an intramural investigator; she has to formulate hypotheses, propose those hypotheses to the BSC . . . and execute these programs." Supervisor1 noted that DIPHR created a review process several years ago that is a "well-tested and well-run presentation of hypothesis and execution of programs." Supervisor1 then introduced Oversight Chair, during the closed session, to explain "how programs, projects, protocols are reviewed at DIPHR." Oversight Chair provided:

> [W]e do have a well-established process, and this process has been vetted and approved by the [BSC]. It starts with an idea. Every investigator has an idea, and then develops a concept proposal, based on that idea, and the first level of review happens at the branch level . . . and you go through a branch review, and these reviews are pretty stringent . . . If it passes through that level of review, it's then reviewed by the entire division. . . After it is reviewed by the division, the division leadership . . . which consists of the extramural supervisor and the three branch chiefs, they look at the reviews . . . and prioritize the projects . . . We

> then develop it into a full-fledged protocol, which has all the nitty-gritty details on how to conduct the science. The contract management branch helps us issue requests for proposals in response, an ad hoc committee is then convened to review these proposals, and that committee reviews both the science in the proposal as well as the ability of the author to do the work the RFP [(Request for Proposal)] has stipulated . . . for those proposals that fall within [a] competitive range, we then enter into negotiations with them, give them the contract and the study goes into the field . . . [T]he timeline is anywhere from . . . two to three years . . it's a long process and every project goes through this process, and once it's in the field, its then reviewed by the site visitors every four years.

Following Oversight Chair's comments, Supervisor1 remarked:

> So, this is the process . . . we would like [Complainant] to adhere to. [O]bviously . . . we have to think about how we're going to give her 18-plus protocols . . . and she also has to realize that there will be certain delays . . . but obviously we will do everything we can to accommodate her and her work.

Clinical Research Director then presented at the closed session, noting that Complainant's program was different from DIR and DIPHR investigators' programs as they "come up with a concept, hypothesis, and there is a review process and determination about the science and also the human subject protections." The "main difference," Clinical Research Director noted, is that Complainant's research is done "by contract, where she is continuing what's done in the extramural program, which is essentially grants through contracts, and her role is not clear." He pointed out "if you look at the protocols, it doesn't say what her role is. It does put a lot of liability on the part of NICHD because these range from first-in-human study all the way to phrase III research." He noted "there's no way one particular investigator can take responsibility for them, but we are assuming responsibility for them, because if you look at all of these clinical agreements, it lists NICHD as a co-sponsor with regulatory obligations." Moreover, he noted it is "not . . . the typical DIPHR research that's being done, mostly epidemiologic. Some of the clinical studies involve human subjects, and there are those issues and determinations that have to be made." Clinical Research Director continued "[s]o, I don't know what you would be reviewing . . . if you are reviewing the science in [Complainant's] program, because she's not . . . functioning as an . . . intramural investigator." He noted that, what was "worrisome for [him]" having spent "many years at FDA in medical review" was that "there's a lot of things that sort of fly under the radar." Clinical Research Director noted that he was particularly concerned about "human subjects research protection issues" because, although [Complainant's] programs were reviewed externally, NIH was the entity that was "assuming a lot of responsibility . . . because we're providing funding in the name of an investigator, who is not functioning as an investigator, although she is listed as a program director on the protocols." In this regard, Clinical Research Director observed that Complainant was "not a PI [(Principle Investigator)] . . . as she doesn't write the protocols." Clinical Research Director also expressed concern that Complainant's programs could go through the IRB protocols because he did not know her "role," noting that "she's not a clinician."

Clinical Research Director noted that Complainant "cited the Vaccine Research Center model in NIAID," however, he said they had "spoken with the leadership there" and they are "developing their own products" but Complainant was not. Clinical Research Director indicated that they had been making progress with addressing some of the concerns with Complainant's external programs, but that for any of her new proposals, going forward, she would have to "start back at the concept level" and surmised that, for her to be able to do that, "she would essentially have to reinvent herself" and agreed that she should be given the opportunity to do so.

Senior Investigator noted, in response to Clinical Research Director's comments, "we can give her the opportunity, that is what we are here for, for you to get to know her, give you the opportunity to build her career as an investigator." Throughout the closed session, several other committee members expressed similar concerns about the review of Complainant's external programs and how NICHD could assure their standards were being met.

Senior Investigator later confirmed "like we were discussing earlier, she should be given the benefit of the doubt, be reviewed scientifically." In concluding, Supervisor1 made some suggestions, noting: first of all, Complainant is now an investigator as a senior staff scientist with DIPHR . . . I think we all agree . . . that she has to follow DIPHR processes in everything with regards to any projects. Clearly, for new proposals . . . but we would like to work out with her, with her input, a process for reviewing all the existing ones; not wanting to disrupt any of the ongoing projects. To aid in the transition of Complainant's program, Supervisor1 proposed forming "[a] subcommittee of the BSC, with two or three BSC members." The BSC then voted and unanimously agreed that a subcommittee should be formed for this purpose (hereafter referred to as the CDP Oversight Committee).

On June 10, 2018, Complainant wrote to Senior Investigator and Clinical Research Director inquiring about approval for a CTA involving a Dapivirine/LNG vaginal ring. Complainant noted the urgency of getting the CTA signed because "the IND holder will not allow the study to begin recruiting subjects until there is a signed CTA" and there was "a substantial amount of obligated funds that need to be spent by August 2018."

On June 13, 2018, Clinical Research Director responded, copying Senior Investigator, noting "[Senior Investigator] and I would like to meet with you this week to discuss the CTAs and the research review process." The same day, Complainant responded to Clinical Research Director and Senior Investigator:

> I am not sure if you are aware but there is a settlement agreement that has some bearing on the program when it was moved to DIPHR. If you are not aware, you may wish to consult with the Agency attorneys about the terms of the agreement. If there are any relevant documents about new processes, please send them to me in advance of the meeting Friday so that I can review them with my attorney.

Clinical Research Director responded, attaching two documents that Oversight Chair had presented at the BSC meeting outlining DIPHR's review process.

On June 15, 2018, Complainant attended an NICHD, Office of the Clinical Director (OCD) meeting with Clinical Research Director, Oversight Chair, Senior Investigator and others. The attendees discussed Complainant's program and issues concerning its compliance with NICHD's review process. Per the meeting minutes, Senior Investigator opened the discussion by identifying that they "need[ed] to find a way to make the program review process work within the current DIR or DIPHR models for [Complainant's] program." Senior Investigator commented that "NICHD wants to assist [Complainant] with the transition and it will require some action items on her part due to the uniqueness of her program." Clinical Research Director then discussed the specific steps that would need to be taken for Complainant's program to make this transition.

In response, Complainant questioned how her protocols were not meeting the requirements for human subjects research protection. Senior Investigator reiterated that "the issue [was] where [Complainant was] the investigator and . . . her role [would] require either IRB exemption or reliance or NICHD IRB review. Even though she is not seeing patients, she is publishing and thus a researcher."

Complainant clarified that in her former role as an extramural scientist, she was not coming up with ideas. She supervised phase I, II and III trials; helped identify drugs to test; ensured IND work is done and submitted for FDA approval. She also stated that when she was offered to come to DIPHR, she was promised that the transfer would not adversely affect the program. She stated that she is a project manager, not an investigator. She does not see patients. She is not doing her own original research. The ideas come from experts in the field, and she is helping to manage the overall development process. She issues a contract for someone else to do the work. The contract is buying the service. The program provides money like a grant, but it's done through a contracting mechanism. Complainant noted that she "has . . . one . . . (CTA) that began 5 years ago. . ." Complainant questioned why they needed to review the science again.

Senior Investigator explained "there is a difference between scientific review of pre-clinical work and a clinical protocol." He also noted that "a problem with the CTA is that it states that we (NICHD) are assuming legal obligations for the IND and the research." According to the meeting minutes:

> [Complainant] questioned why NICHD signed off on one CTA in January and one in March. No questions were raised until now. She emphasized the pending CTA needs prompt attention. [Senior Investigator] replied that . . . at that time, he didn't understand the full scope of her program nor . . . that the protocol itself had not undergone scientific review when in DER. [Clinical Research Director] is trying to help [Complainant] navigate the intramural process since she signed on to be an intramural investigator. [Complainant] agreed that she signed on to be an [Intramural Research Division] investigator but also agreed to autonomy, and it appears the two things are inconsistent. She indicated that the lawyers may need to review the [settlement] agreement.

[Senior Investigator] further explained that they were "trying to determine how to accommodate [Complainant's] program," but noted that "the fundamentals ha[d] to be done…" Senior Investigator then explained what Complainant would need to provide in order for them to help bring her program into compliance. Complainant reiterated that she was "a project manager not an investigator. She only gets de-identified data that someone else has analyzed. She does not analyze data. She is above the process, not in it."

Clinical Research Director clarified that all other DIPHR investigators function as researchers, from concept to protocol development to data analysis to ultimate publication. According to the meeting minutes: "[Complainant] conceded that she probably didn't fully understand when she signed and agreed to follow DIR rules and policies and that she is concerned that the program will be hurt." Senior Investigator questioned, with regard to one of Complainant's CTAs, why "they are transferring legal obligations to NICHD," and commented "[l]et them maintain legal obligation of the IND." Per the meeting minutes, "[Complainant] returned to the issue of why she was offered to move her program from extramural to intramural when it appears it can't be done. She [was] not sure where her program belongs."

The attendees discussed different ways that Complainant could address the issues with her existing CTAs. Senior Investigator noted that "neither he nor [Clinical Research Director] were privy to the agreement [Complainant] signed; only that her program must now follow intramural policy." Senior Investigator concluded that "[g]oing forward, if [Complainant] plan[ned] to function as an investigator with her own research, then each of her individual studies [would] have to undergo all steps in the review process, starting with concept review for a new research idea, and she [would] be accountable for following all the recommendations and responsibilities of an intramural investigator."

On July 16, 2018, members of the newly created CDP Oversight Committee had their first meeting. The committee was comprised of five members, including Clinical Research Director, as an ex-officio or nonvoting member; several other participants attended as well. Supervisor1, who attended as a participant, commented that the "formation of an oversight committee for this program came at the recommendation of the BSC," noting that "a similar committee" had been formed for the "Perinatology Research Branch." Supervisor1 said that he anticipated the committee would hold "one or two conference calls per year" to review the program's work" and would be "advisory to the Office of the Scientific Director, the Office of the Clinical Director and the BSC." Clinical Research Director then outlined some of the issues the committee would need to address, noting the fact that "there isn't an existing model for doing this type of work in the NIH intramural program." Supervisor1 noted that the committee was charged with: (1) advising on clinical regulatory issues that arise, developing framework for the program as it integrates into DIPHR; and (2) reviewing the ongoing work to determine if the program is worth investing in.

On July 18, 2018, the Chief of Staff, Office of the Scientific Director (Chief of Staff) (female) sent an email to Complainant notifying her that "[f]ollowing [her] presentation to the [BSC] on June 1, 2018, the BSC made the recommendation . . . to constitute an oversight committee for the [CDP]."

The email notified Complainant of the committee's purpose, the frequency of their review and the members of the committee.

On August 2, 2018, Complainant wrote an email to Clinical Research Director, noting that she was happy to meet with the CDP Oversight Committee to discuss her ongoing work but said she was concerned about their statement related to "clinical regulatory issues that may have or may arise." Complainant also said she had heard from colleagues that Clinical Research Director had "safety" concerns about the Contraceptive Clinical Trials Network (CCTN). Complainant requested Clinical Research Director notify her of any "specific regulatory or safety concerns" that have arisen in the ongoing trials, so she could address them as soon as possible.

Clinical Research Director responded that he was aware of the CDP Oversight Committee but had not raised any concerns about safety related to the CCTN. The same day, Complainant responded "[i]f you don't have specific safety concerns then it's not an urgent matter. Do you have concerns about specific regulatory compliance issues that should be addressed immediately?" Clinical Research Director responded that he and Senior Investigator had "addressed the main issues with [her] research model in [their] June 15, 2018, meeting." He clarified that he "didn't know if there [were] any areas of immediate concern because [he] had not seen all of [her] ongoing studies" and did not know about the "research or . . . [her] role in these studies." Complainant responded that she "ha[d] the minutes from that meeting" but she wanted to address any urgent issues.

On August 3, 2018, Supervisor1 responded to the email chain, providing:

> I think it is important that we state at this point, that we are all committed to accomplishing a successful transition for [Complainant]. Any expediency should have to deal with care to the rules; we cannot bend the rules, but we can find proper alternatives if there are any. If not, then all (including funded entities) need to understand that the transition may cause delays and even losses.

Complainant alleged in her affidavit that she met with Supervisor1 on October 4, 2018, regarding her "concerns about [Clinical Research Director] and his treatment of [her]." Complainant alleged that she told Supervisor1 she "did not want [Clinical Research Director] to speak with committee members without [her] being present to hear and refute allegations." She alleged that "[Supervisor1] agreed." To the extent Supervisor1 provided any such assurances to Complainant, he explained in his affidavit that he "kept his promise to her not to have [Clinical Research Director] present on her work in her absence."

On November 30, 2018, Clinical Research Director wrote an email to Supervisor1, Senior Investigator and Supervisor2 regarding a press release entitled "National Institutes of Health Seeking Men to Test Birth Control Gel." The press release provided that NIH was "looking for about 400 couples . . . to test a new birth control gel."

Clinical Research Director commented that he "f[ou]nd this to be outrageous." He went on to explain:

> This type of press should not be allowed by NIH. We are one of multiple funders of a drug being developed under a pseudo non-profit drug development machine with undisclosed worldwide commercial interests. Our involvement through [Complainant] skirted NIH review processes and used funds essentially to provide a grant under the guise of legitimate research contract. The damage has already been done, but we can't allow this type of spin.

In his affidavit, Clinical Research Director explained that he notified Supervisor2, Senior Investigator and Supervisor1 of the press release because "[t]he press accounts . . . inaccurately implied that NIH investigators were conducting this research here at NIH campus." He noted "[i]n reality, this was not NIH research. It did not involve any NIH intramural investigator and was not being conducted by NIH or at NIH . . . Our involvement through [Complainant] was in the form of funding someone else's research under the guise of a legitimate NIH research contract, thereby skirting NIH review processes for research and research funding."

On December 7, 2018, Complainant presented her program for the first time to the CDP Oversight Committee. Complainant alleged that Clinical Research Director was one hour late for the presentation and, although the other members made positive comments about her program, Clinical Research Director made negative comments about the CDP, alleging that "[Complainant] misrepresented [her] role to the Office of Human Subjects Research Protection (OHSRP), the group that decides whether [she] qualif[ies] for an exemption from certain types of roles in protocols, to get an exception."

In his affidavit, Clinical Research Director provided that he was "30 minutes late" for the meeting because he was attending the BSC meeting that was occurring concurrently. Clinical Research Director noted that he had heard Complainant's presentation and description of her operations on multiple prior occasions. Clinical Research Director denied mentioning the OHSRP or saying that Complainant was untruthful about anything.

Meeting minutes from the December 7, 2018, meeting show that Clinical Research Director complimented Complainant on the past productivity of the CDP and noted that Complainant is currently an NICHD intramural scientist. However, Clinical Research Director noted Complainant is not conducting her own clinical research and describes herself as a program manager who coordinates contraceptives clinical development. Clinical Research Director further stated:

> [Complainant] provides funding for extramural investigators through Intramural Research Division contracts. The intramural program does not conduct scientific review of Extramural Research Division, and use of money appropriated for Intramural Research Division to fund extramural investigators is prohibited.

The concerns Clinical Research Director raised were not with the quality of the science and adding bona fide scientific review to the process would not remedy the problem, since it is not Complainant's own clinical research that is under review and consideration. The concern rather is about Complainant's role as an NIH intramural employee who funds extramural research conducted by extramural investigators through use of research contracts, thereby bypassing the normal processes that govern extramural research funding. Per the meeting minutes, Clinical Research Director also noted that he had "discussed [Complainant's] model with the NIAID clinical director (NIAID Director) who stated that this model does not exist in the NIAID intramural program." Clinical Research Director also noted his concerns that Complainant's contracts were being used to fund research including high risk, first-in human studies as well as Phase 2 and Phase 3 trials of drugs and devices. Clinical Research Director also pointed out that he had "proposed a path forward" whereby Complainant relinquishes her role as a manager of grants within the intramural program and instead transitions to a role of a scientist developing her own research concepts and programs like other scientists in intramural.

On December 21, 2018, Complainant wrote an email to Supervisor2, copying Supervisor1 entitled "request permission to stop hostile activity," wherein Complainant alleged that "over the past 11 months," Clinical Research Director had "s[ought] to harm the Contraceptive Development Program" and her "scientific reputation." Among other things, Complainant alleged that Clinical Research Director had "bullied [her] and other women" and that he was "behaving this way to [her] because [she is] a female scientist." Complainant requested that "the situation be remedied by removing [Clinical Research Director] from all interactions with the [CDP] and me and by issuing him an instruction to immediately cease discussing the Program, my work or me."

On December 28, 2018, Supervisor2 responded to Complainant's email, providing that she would address Complainant's concerns related to the oversight of her program with Supervisor1 when he returned from being out of the country the following week, and that she would refer Complainant's concerns related to "allegations of bullying" to the "Civil program, as it is now NIH policy to handle these types of allegations centrally." On January 29, 2019, Complainant sent an email to Oversight Chair similarly requesting Clinical Research Director be removed from the CDP Oversight Committee and requesting that his comments not be included in the Committee meeting notes.

Also, on January 29, 2019, Complainant's private attorney (Attorney) sent a "cease and desist letter" to Clinical Research Director notifying him that Complainant was pursuing formal complaints regarding his actions and that he should "immediately cease all discussions about [Complainant] and the CDP." On January 22, 2019, Oversight Chair emailed the draft minutes from the December 7, 2019, meeting of CDP Oversight Committee to all of the committee members for their review and comment. Oversight Chair confirmed that it is "standard" practice for all committee members of the CDP Oversight Committee to be provided the opportunity to review and comment on the meeting minutes before they are finalized.

An email chain, from January 24 through late January 2019 shows there was some confusion about whether Clinical Research Director's comments should be included in the final minutes, as it was believed that he had officially recused himself from the CDP committee. Ultimately, Clinical Research Director agreed to step down from the committee. However, it was decided that Clinical Research Director's comments should appear on the final meeting minutes. Clinical Research Director stated that he sought to have his comments included in the meeting minutes because he was present at the meeting and was a legitimate participant. Although Complainant alleged that she was never provided an opportunity to review the meeting minutes or rebut the claims Clinical Research Director made, Oversight Chair provided in her affidavit that she was unaware of "a standard process whereby Complainant should have been allowed to comment and respond to the minutes." Supervisor1 stated that he kept his promise to Complainant not to have Clinical Research Director present on her work in her absence."

Claim 1b - Temporary Demotion and Change of PMAP Requirements

Complainant alleges that in January 2019, Supervisor1 decided to put her under the Deputy Director of DIPHR organizationally instead of under the director of the division. Complainant alleges this was a temporary demotion, that ended in late January or early February 2019. In his affidavit, Supervisor1 explains:

> There was some discussion about who should serve as [Complainant's] supervisor given that I am only acting director of DIPHR (and the current Deputy Director is acting as the full Executive Director) and it was the first time I was asked to establish [Complainant's] PMAP, but it was ultimately decided that I should remain [Complainant's] supervisor. Her supervisor was never changed.

Supervisor1 denies that Complainant's organizational placement ever changed as a result of the brief change in her supervisor. The record shows that the change in Complainant's supervisor spanned a short, twelve-day period between January 24, 2019, and February 6, 2019.

Complainant also alleges that Supervisor1 changed the requirements of her PMAP in late February 2019 to require that she show that her program was fully integrated into the intramural division. Complainant asserts that it was a requirement just for her. In his affidavit, Supervisor1 explains "[t]here was not a new element added to her PMAP; there was just language added to her PMAP, at her request, to clarify how she could be successful." Supervisor1 further explains that during their February 25, 2019, meeting, Complainant requested that he revise her 2019 PMAP elements based on her concerns that the expectations in her PMAP were not sufficiently clear. Supervisor1 explains that the changes were "necessary to ensure that Complainant's PMAP aligned with expectations of an intramural scientist as she was transitioning from extramural to intramural."

On February 7, 2019, Chief of Staff emailed all NICHD staff members requesting they "provide a narrative of [their] 2018 accomplishments to include with the PMAP closures." On February 13, 2019, Complainant responded to Chief of Staff's email with a summary of her accomplishments.

On February 15, 2019, after receiving her 2018 PMAP ratings, Complainant emailed Supervisor1, stating she was "surprised and disappointed" with her ratings as she had received outstanding performance ratings for the last 22 years. She stated: "If my PMAP rating is lowered from my typical total point rating of 29 points for the 6 critical elements with an average of 4.83 points and a rating of outstanding, I need to understand the reason for the lower rating." On February 16, 2019, Supervisor1 responded, "I am happy to meet and discuss this. Please note that:

> 1. This is the first time that I am your supervisor;
> 2. Of these 22 years, this is your 1st year in the Intramural Research Division program (IRP): I am truly happy to see that you are acknowledging that it was "challenging."
> 3. Previous ratings are for a very different position with other challenges . . .
> 4. "More than expected" is an excellent rating -- it is not outstanding, I agree. But I know nobody really that in their 1st year, a year that we both agree was a "challenging" one, in a new job, achieved outstanding results.
>
> I look forward to working with you for the full integration of your program in the IRP -- there is a lot that remains to be done to overcome these challenges, but I am committed along with the rest of the Institute and NIH + NICHD's leadership to make it happen.

On February 19, 2019, Complainant responded:

> To be clear, the Program has had outstanding success this year under my leadership. When I refer to challenges, they are not related to my performance in my duties and position. I am referring to obstacles that should not have been present. I was subjected to harassment, which is the subject of a pending EEO complaint . . . A PMAP is based on a performance plan. The Program has a mission, and my role is to try and achieve that mission. The decision to locate the Program in DIPHR was not based on establishing a new mission for the Program or a new performance plan for me. . . I did not agree to new standards of performance for 2018; therefore, there is no justification to downgrade my performance . . . if new standards are to be discussed for 2019, we would need to establish them, and they would need to be mutually agreeable. I am assuming you were not consulted in the decision to move the Program to DIPHR, so you were not involved in setting expectations. Moreover, as the downgrade is directly related to the obstacles I faced as a result of the harassment, the downgrade is unlawful. It may be necessary to involve my legal team to help resolve the issues of what is entailed in integrating this Program into an intramural setting and to determine the parameters of performance achievements that are acceptable to the division and to me.

Complainant met with Supervisor1 regarding her 2018 PMAP rating on February 25, 2019, and based on comments in Complainant's follow-up email to Supervisor1 on February 28, 2019, Supervisor1 agreed to change her 2018 PMAP ratings to outstanding in five elements.

In his affidavit, Supervisor1 provided that during that meeting they also discussed revising Complainant's 2019 PMAP elements to ensure expectations were clear and Supervisor1 added language to her 2019 PMAP based on that discussion. In her email to Supervisor1 on February 28, 2019, Complainant objected to the new language, commenting that "the CDP has integrated into DIPHR" and expressed concern that requirement was a "binary metric (either fail or comply) and it is difficult to determine how one achieves a rating of outstanding on this metric." Supervisor1 replied:

> I differ with your interpretation: not only integration is not full (hence your meeting with DIPHR-appointed consultants) but also nothing in the PMAP is binary. Clearly, we want you to succeed and eventually fully integrate . . . Please expect to be rated with all potential grades of the scale rather than in a binary fashion.

Supervisor1 requested Complainant work with Chief of Staff and Administrative Director to Finalize her 2019 PMAP, considering his comments noted above. In an email to Administrative Director, on March 4, 2019, Complainant proposed removing the following bullet from critical element 1.

> Work with the Office of the Scientific Director (OSD) to implement recommendations of the BSC and other advisory groups to fully integrate the Contraceptive Development Program (CDP) into DIPHR and ensure its in alignment with all Intramural Research Division program guidelines and policies.

Complainant asserts that there is a negative implication to this statement (i.e., the program is not aligned with IRP policies). Specifically, Complainant states:

> The program was moved to the IRP, and it is not in violation of policies. I've met with the OSD and the BSC to discuss elements of the program that were questioned and have addressed issues that they identified. There is no reason to think that I would not continue to work with the OSD and the BSC if something new is identified. This is already covered in the second bullet and in the mandatory administrative requirements. The terms in this last bullet statement regarding program integration are not defined. How is success measured and how would one excel? This is not a standard metric. Without clear definitions, the goal is very subjective and potentially elusive. I don't think this statement should be in a performance appraisal.

On March 5, 2019, Administrative Director responded "[t]hese elements are not negative, they are simply clarifying the expectation from your supervisor. Not everything can be defined nor measured, that is not the intent of a PMAP."

On March 6, 2019, Complainant responded "without agreement on a clear definition of integration and specifics about how one is successful or excels at that metric, I don't think the wording should be included . . . as there is an implication that CDP is currently not in alignment with IRP policies.

I think that is a negative inference. Perhaps it would be sufficient to say: 'work with the OSD to implement recommendations of the BSC and other advisory committees as they relate to the CDP." Administrative Director consulted with Supervisor1, and they agreed that the language for critical element 1 should remain as proposed. Administrative Director communicated this decision to Complainant in an email on March 7, 2019.

Claim 2 – Retaliatory Email

On February 4, 2020, Clinical Research Director received an email from a reporter with Science Magazine (Reporter), in which she requested to speak with him regarding Complainant's allegations of sex discrimination against him and Supervisor1. Clinical Research Director inadvertently forwarded this email to Complainant and copied the Deputy Director, NICHD (Deputy Director NICHD), Executive Officer, and the Director of Communications, NICHD (Communications Director) commenting:

> Needless to say, I do not intend to acknowledge her email or respond to her request. I assume we will have a coordinated NIH response to address these false allegations. Please keep me informed and let me know if there is anything else I should do at this time.

At his deposition, Clinical Research Director explained that he inadvertently sent this email to Complainant -- as he intended to send it to Supervisor2, but his email accidentally populated to Complainant's address rather than Supervisor2.[3]

Claim 3 – Disparaging Comments by Senior Management

In his affidavit, dated June 20, 2019, Clinical Research Director provided, in pertinent part, that:

> [Complainant] . . . disclosed to us that she had been in the Extramural Division and was apparently moved as part of a settlement agreement to the Intramural Program . . . As part of the settlement agreement, [Complainant] was apparently told that she would be able to function in Intramural but would need to follow Intramural rules and regulations . . . [Senior Investigator] and I identified issues to Complainant [related to the function of her program in the Intramural Division] clearly and she disagreed with our premise, suggesting that she can continue to function in the same manner as she did in extramural . . . She claimed there were mechanisms that allowed her to act as she wanted, and that a settlement allowed that . . . I recommended that Complainant transition to a role of scientist whereby she operates as other Intramural Investigators do. I also suggest that we raise the issue to the OIC and OGC, given that her transition to Intramural resulted from a legal settlement of which I know very little . . . [Complainant's] previous EEO settlement, which she herself disclosed, was apparently signed by senior NICHD

[3] Supervisor2 and Complainant have the same first and last initials in their names.

> and NIH officials, which may make it challenging for them to assess the consequences of her move to the intramural program, giving this potential conflict. Therefore, I believe, and have recommended that her program be independently reviewed by OIG.

Senior Investigator testified Complainant's response to concerns related to her program's suitability in the intramural program "ha[ve] been less than forthcoming and . . . defensive." Senior Investigator also stated: "For example, one of [Complainant's] response[s] during the discussion on June 15, 2018, was that she will talk to her lawyer." Senior Investigator further explained that:

> There are significant concerns about [Complainant's] conduct of her program and resistance to oversight of this program. It may be fine, but oversight means establishing that it is being conducted in a manner consistent with rules, policies and regulations. Not just accepting that because something has been done one way in the past, it is being done in an appropriate manner or in a manner consistent with the organization [to] which one transferred. [Complainant] has resisted oversight and threatened those who oversee her. This has made oversight more difficult than it needs to be . . . Given the concerns that have been raised, combined with [Complainant's] lack of full cooperation with oversight of this program, and the implicit threats to anyone who suggests that there are concerns, her program should probably undergo an external review by the Office of the Inspector General or the equivalent.

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 EEOC Administrative Judge (AJ). Complainant requested a hearing. The AJ issued a summary judgment decision in favor of the Agency.

In the decision, the AJ determined that the alleged incidents were insufficiently severe or pervasive to establish a hostile work environment. Further, the AJ found that there was no evidence demonstrating that the conduct at issue was based on discriminatory or retaliatory animus. More specifically, the record showed that Complainant had transferred in June 2017 from the DER to DIPHR. In November 2017, the Director of Clinical Research returned to the Agency to serve in his newly created position. The Director and Senior Investigator began taking a close look at Complainant's research program and its alignment with DIPHR policies and procedures soon after the Director's return. Most of the alleged comments underlying Complainant's hostile work environment claim involve Agency officials' concerns about Complainant's research program and the way she ran it, specifically with respect to whether Complainant and the program adhered to DIPHR requirements and expectations. Those comments include the Director's remark that Complainant "acted without supervision;" his comment that Complainant's role was limited to the funding of research conducted by third parties, instead of conducting the research herself; and his statement that a press release involving Complainant's research program created the misimpression that the Agency was conducting the research, when in fact the research was being conducted by third parties.

However, the AJ noted that some of the alleged comments did indirectly bear a connection to Complainant's prior EEO activity. Namely, in his February 4, 2020, email message to senior Agency managers, which he inadvertently sent to Complainant, the Director called Complainant's discrimination claims "false." Further, in the Senior Investigator's investigative affidavit, he expressed his belief that, because Complainant resisted DIPHR oversight and made "implicit threats" against anyone who raised concerns about her program, her program should "probably undergo an external review by the Office of the Inspector General or equivalent." The Director also suggested in a January 30 2019, email message to Supervisor2, that OIG review Complainant's program, based in part on the settlement agreement that triggered Complainant's move from DER to DIPHR. Finally, in the Senior Investigator's investigative affidavit, he described Complainant's responses to his and the Director's inquiries about her program, "less than forthcoming and . . . defensive," in part because she expressed her desire to speak to her lawyer about the inquiries.

The AJ determined that none of the above comments were directed at Complainant, and none questioned Complainant's right to raise and pursue discrimination claims. The Director was entitled to believe that Complainant's allegations were meritless and to express that to senior management. The remaining comments pertained only to Complainant's perceived unwillingness to make any adjustments to her research program despite her move from DER to DIPHR.

Finally, Complainant claimed that she was subjected to discrete acts of disparate treatment and/or reprisal when she was purportedly demoted in January 2019, and when her PMAP requirements were modified in or around February 2019. Regarding her alleged demotion, the undisputed record showed that Complainant was temporarily reassigned to another supervisor because there was only one Acting Director of DIPHR at the time and there was some confusion as to whether he or another manager (i.e., the Deputy Director of DIPHR) was best situated to supervise Complainant. Similarly, Complainant's PMAP simply included additional language that required Complainant to adhere to existing Agency guidelines and policies, and to take steps to ensure that her research program, which had been developed and implemented in DER, become fully integrated into DIPHR, her new organizational home.

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 record does not contain a final order issued by the Agency, therefore, the AJ's decision, became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant asserts that the AJ improperly considered evidence in the light most favorable to the Agency, and discounted evidence that created genuine disputes of material fact and witness credibility issues, both of which cannot be resolved without a hearing.

Complainant also asserts that the AJ disregarded or misapplied Commission precedent concerning *per se* reprisal claims and erred in denying Complainant's Motion for Partial Summary Judgment.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at 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. (as revised, August 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 factfinder could not find in Complainant's favor.

The undisputed record establishes that Complainant, in bargaining to move her Contraceptive Development Program from the Extramural Research Division to Intramural Research Division to resolve her prior EEO complaint, expressly agreed that she would be "subject to all rules, regulations, and policies within the Intramural program of NIH." Complainant attempts to cast the Agency's legitimate efforts to ensure that her program was, in fact, compliant with such rules, regulations, and policies as "discriminatory" by providing misleading quotes and/or incomplete testimony.

However, aside from Complainant's bare assertions, the undisputed record establishes that any confusion resulting from Complainant's move to the Intramural Research Division, and Complainant's apparent dissatisfaction with the realities of having to ensure that her program conformed with Intramural Research Division rules and policies, do not create a triable issue of fact. We agree with the AJ that even when viewing the facts in the light most favorable to Complainant, the evidence in the record is simply insufficient to create a genuine issue of material fact as to whether Complainant was subjected to discrimination or harassment based on her protected classes.

Disparate Treatment and Reprisal

Complainant must satisfy a three-part evidentiary scheme to prevail on a claim of disparate treatment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, Complainant must 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. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Second, the burden is on 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). Third, should the Agency carry its burden, Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; St. Mary's Honor Center v. Hicks, 509 U.S. 502 (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 Servs., EEOC No. 0120150971 (Nov. 22, 2017).

To the extent that the employment actions set forth in Claim 1b are considered discrete acts of alleged discrimination, we find that Complainant failed to establish a prima facie case of sex-based discrimination and reprisal. There is no evidence demonstrating that similarly situated employees outside of Complainant's protected classes were treated more favorably.

Further, the record is devoid of evidence linking any discriminatory or retaliatory animus on the part of any responsible management official to the brief change in Complainant's supervisor or the language added to Complainant's PMAP. We note that the record is devoid of evidence to support a finding that Complainant was ever demoted. There is no evidence otherwise raising an inference of discrimination or reprisal.

Even assuming that the record contains evidence of a prima facie case of discrimination and reprisal with respect to Claim 1b, the record is devoid of evidence to support a finding that the Agency's articulated legitimate non-discriminatory/retaliatory explanations (i.e., Supervisor1 was the only acting director at the time and unsure who should supervise Complainant and performance requirements were not changed but language was added to Complainant's PMAP to clarify her duties) were a pretext or otherwise motivated by sex-based animus.

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 § II.B(2) (August 25, 2016). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

We agree with the Agency in finding that the AJ did not misapply the law with regard to Complainant's reprisal claims, nor did the AJ fail to cite Commission precedent, as alleged. Rather, the AJ correctly noted, citing Barbie W. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020004332 (Dec. 2, 2021), that:

> The actions of a supervisor may be considered per se reprisal when the supervisor intimidates an employee and interferes with the employee's EEO activity in any manner. … Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a per se violation of the law. ... Central to a finding of per se reprisal is that the conduct is reasonably likely to have a chilling effect on the complainant or a reasonable employee from engaging in, or pursuing, protected activity.

Complainant alleges that the AJ erred because he considered whether "the actions or comments were intentionally directed toward Complainant," arguing that "while motive and intent determinations may be appropriate for proving harassment-based reprisals, they are not dispositive for purposes of assessing the merits of per se retaliation claim[s] under Commission precedent." Even assuming, arguendo, that Complainant's statement of the law is correct, the AJ did not conclude that the actions or comments were not per se reprisal because they were not intentional. Rather, the AJ properly considered whether the actions and comments constituted per se reprisal by considering them within the undisputed context in which they occurred.

In Burlington Northern v. Santa Fe R.R. Co. v. White, 548 U.S. 53, 69 (2006), the Supreme Court held that in determining whether an action is per se retaliation and likely to deter protected activity, "context matters" -- an act that would be immaterial in some situations is material in others. As noted by the AJ, the background of this case provides important context to the challenged comments of Clinical Research Director and Senior Investigator. Specifically, the undisputed record shows that it was Complainant herself, starting in June 2018, who raised her prior EEO settlement agreement during communications with Senior Investigator and Clinical Research Director in an attempt to suggest that the settlement agreement exempted her from compliance with DIR's review process; she also proposed that "lawyers may need to review the agreement." Within this context, the AJ correctly determined that "[Complainant's] EEO activity was merely tangential to the question underlying the Agency's comments and actions: what was [Complainant's] obligation, if any, to change the way she operated her research program following her move from DER to DIPHR." The AJ observed "that the answer to this question necessarily involved an assessment of [Complainant's] settlement agreement [was] more coincidental and less suspicious, all things considered." The AJ also observed that only one of the alleged comments (i.e., the email by [Clinical Research Director] referring to Complainant's claims of sex discrimination as "false") was communicated to Complainant at the time that it was made, and even that was undisputedly only by mistake. We also note that this email was only sent to two management officials who had a legitimate reason to get this information (i.e., Deputy Director NICHD) and Communications Director). Given the undisputed context, we agree with the AJ in concluding that Clinical Research Director's sex discrimination denials would not have reasonably dissuaded Complainant from engaging in further protected activity.

Contrary to Complainant's assertions, the AJ does not require that the Agency's actions or comments be "directed" at Complainant in order to constitute a per se violation. Rather, the AJ considered whether the challenged comments and actions of the Agency had been directed at Complainant in evaluating whether they would likely deter a reasonable person from engaging in protected activity. The fact that most of the challenged comments were never communicated directly to Complainant at the time they were made simply made it less likely that they would have had the effect of dissuading a person from engaging in EEO activity. Overall, the undisputed record supports the AJ's conclusion that the actions and comments of the Agency were only tangentially related to Complainant's prior EEO activity, and mainly concerned her move from the Extramural Research Division to the Intramural Research Division and whether and how her program would comply with the rules of the DIPHR. We note that "participation in the EEO process does not shield employees from uniformly applied standards of conduct and performance." Berkner v. Dep't of Commerce, EEOC Petition No. 0320110022 (June 23, 2011). Therefore, although Complainant's prior EEO claim and settlement agreement are protected activity, Complainant is not entitled to use this activity to shield herself from the expectations of her position to comply with the intramural program's review process.

Accordingly, when Complainant raises her EEO settlement agreement as justification for noncompliance with these policies, and specifically refers Clinical Research Director and Senior Investigator to her settlement agreement (i.e., stating that "lawyers [should] review the agreement") she cannot then turn around and allege that they have retaliated against her when they take her up on her suggestion to have the settlement agreement reviewed to determine the expectations with regard to her program's compliance.

Accordingly, the record evidence does contain a genuine issue of material fact to necessitate a hearing with respect to this claim.

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 Harassment in the Workplace, EEOC Notice No. 915.064 (April 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; in this case, her sex, or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

We agree with the AJ in finding that Complainant failed to establish a genuine issue of material fact with respect to prong two. Specifically, Complainant does not allege, and the evidence in the record does not suggest, that any of the statements at issue involved Complainant's sex. Complainant's argument that the AJ "disregarded" comparator evidence is baseless, as the record shows that Complainant offered no valid comparator evidence in this case. Rather, she offered only "vague assertions" that other female employees complained about unequal treatment by Supervisor1 and that Supervisor1 and Clinical Research Director did not treat male colleagues with the same "accusatory," "demeaning," or "condescending" manner. Even assuming the truth of this assertion, Complainant nonetheless failed to establish that those individuals were similarly situated to her. The undisputed record shows that Complainant's circumstances were unique when compared to other scientists due to her program's move from DER to DIR.

We also disagree with Complainant's assertion that the AJ "ignored circumstantial evidence" of sex-based animus with respect to comments made by Clinical Research Director and Supervisor1 that Complainant was "not functioning as an investigator" and was "not conducting science." While Complainant argues that these comments have a nexus to Complainant's sex, a view of the record as a whole makes clear that these comments, as the AJ properly concluded, related to the function of Complainant's program and whether it fit within the DIPHR. Thus, we find that the AJ reasonably concluded that the evidence did not raise a genuine issue of material fact with respect to whether responsible management officials held sex-based motives. Moreover, the record shows that many of the terms and descriptions used by Clinical Research Director and Senior Investigator in describing Complainant's program were terms Complainant used herself to describe her program. The mere fact that there was confusion and uncertainty in how to transition Complainant's program to DIPHR does not establish that the Agency's actions were on account of discriminatory animus -- particularly where the facts show that Complainant herself acknowledged the challenges in her program's transition and expressed concerns related to whether and how her program would fit in the DIPHR. Importantly, as noted by the AJ, "[Complainant] makes much of the fact that [Supervisor2] and others disagreed to one degree or the other with [Senior Investigator and Clinical Research Director], and to a lesser extent [Supervisor1], when it came to their perception of [Complainant's] research program," "[b]ut even [Complainant] acknowledged that DER and DIPHR differed in some important respects, and [Complainant] may not have fully grasped her obligation to make some adjustments in order to continue in DIPHR." Accordingly, we agree that the AJ properly concluded that there was "no evidence in the record that even arguably gives rise to a genuine dispute as of material fact as to whether Complainant was subjected to harassment that involved or was otherwise based on her sex."

Credibility Not at Issue

Complainant's claim that material inconsistencies exist with regard to who "asked" either Supervisor1, Senior Investigator or Clinical Research Director to "look into" Complainant's program are immaterial considering the positions held by these management officials in the Intramural Research Division. The undisputed record shows that Supervisor1, as the Scientific Director of the DIR, Senior Investigator, as the Clinical Director of the DIR, and Clinical Research Director, as the Director of Clinical Research and Compliance of the DIR, were responsible for ensuring that Complainant's program upon its transition to the DIPHR complied with the rules, regulations and policies of the intramural program, as this would fall under the purview of their responsibilities. The question of who "asked" them to look into her program, suggesting that they would have had no legitimate reason to do so unless specifically requested by others, is immaterial, as ensuring her program's compliance upon its transition to the DIPHR was a requirement of their positions and attendant job duties and responsibilities.

We also find that the alleged inconsistencies with regard to this matter simply do not exist. Complainant's assertion that "[Supervisor1] adamantly and repeatedly denied asking [Clinical Research Director and Senior Investigator] to review [Complainant's] work and the CDP" is false; nor is it accurate to assert that "both [Clinical Research Director and Senior Investigator] testified

that [Supervisor1] provided direct instruction for them to review and assess [Complainant] and the CDP" Rather, Senior Investigator testified that his first interaction with Complainant occurred in late 2017, when Supervisor1 asked him to review a clinical trial agreement. Although Supervisor1 denied asking either Clinical Research Director or Senior Investigator to "gather information" regarding Complainant's program he testified that he could not recall whether he ever asked Senior Investigator to review a clinical trial agreement related to Complainant's program. However, Clinical Research Director's testimony that Supervisor1 asked him to "review and comment" on the CDP is consistent with Supervisor1's testimony that he asked Clinical Research Director "to give [the BSC] his ideas [regarding Complainant's program] knowing that he was the best expert on regulatory matters;" explaining that this was different than asking him to "gather information" on her program. Supervisor1 testified:

> So [we asked him] to give us his ideas of how to best create the structures, necessary structures, to fit the program. That's not the same thing. This is not to say how good the program is or anything like that. He's a . . . former FDA official, chair of the IRB of NICHD, director of regulatory affairs of NICHD and we are asking him to tell us what he knows about the regulations that we have to follow to make sure that the program is aligned with NIH Intramural Research Division policies.

We also find that Complainant's assertion that Supervisor1 stated that he "never had any concerns about Complainant and the CDP" is misleading at best. Supervisor1's full testimony was: "I had no concerns. I had reservations" about Complainant's program. At his deposition, Supervisor1 discussed his concerns about transitioning Complainant's program to the intramural program and the efforts by himself, Senior Investigator and Clinical Research Director to help Complainant make a successful transition. Specifically, Supervisor1 testified that he did not know whether Complainant's program was "consistent or inconsistent . . . with intramural rules and policies. And this whole affair was to try to find out whether anything needed to be changed." Thus, Complainant's assertion that Supervisor1 did not have "any concerns" about Complainant's program and its transition to the intramural program, suggesting that the review of whether her program complied with intramural policies was baseless, is not accurate.

Complainant's assertion that Supervisor1 testified that he had "nothing to do" with the oversight committee is also inaccurate and taken out of context. The record shows that Supervisor1 testified that he was involved in the formation of the oversight committee, testifying that "the reason we established an oversight committee from the BSC was those recommendations [would] come from the BSC, not from a single person." Supervisor1 did not deny involvement in the recommendation to form an oversight committee for the CDP. However, he testified that he had "nothing to do" with the CDP committee once it was formed.

We also disagree with Complainant's argument that material inconsistencies between the deposition testimony and affidavits of Supervisor2, Director of Policy and Accreditation, and Clinical Research Director exist. Rather it is clear that the affidavits of these witnesses merely clarified their deposition testimony.

For example, Complainant alleges that Supervisor2's assertion in her affidavit that she was not involved in Complainant's transition from extramural to intramural was "inconsistent" with her deposition testimony that she had "signed the settlement agreement that explicitly provided for Complainant's transition from extramural to intramural." We agree with the Agency that the fact that Supervisor2 "signed" a settlement agreement is not inconsistent with her later statement that she was not 'involved" in Complainant's actual transition to the intramural program. Indeed, throughout her deposition, Supervisor2 consistently states that she was not involved in the day-to-day oversight of programs within NICHD and would not have been aware of details of Complainant's transition. For this reason, she repeatedly resisted answering hypothetical questions on the topic. Since Supervisor2 was repeatedly pushed to answer hypothetical questions on numerous topics on which she had little to no personal knowledge, her affidavit was an effort to clarify her testimony on such matters.

Likewise, we find that Complainant's claim is inaccurate that Director of Policy and Accreditation's assertion in her affidavit that "[Clinical Research Director's] communications were not intended to interfere with OHSRP's determination" was an "attempt to reverse her prior position about the purpose of [Clinical Research Director's] communications with OHSRP." Complainant's only support for this argument is that Director of Policy and Accreditation initially testified that she thought Clinical Research Director's inquiries were "unusual" but, importantly, later (in the same deposition), clarified that she was initially confused in her testimony as she thought Clinical Research Director raised his concerns about Complainant's program as IRB chair, but realized his concerns were being raised in his new "regulatory role for the IC," noting that his concerns in this role would not have been unexpected.

We find that Complainant consistently misrepresents the testimony to appear as though there is inconsistent or contradictory testimony, when in fact there is none. Accordingly, based on the foregoing, we agree that Complainant has failed to establish that material inconsistencies exist sufficient to raise a genuine issue of material fact or necessitate credibility findings.

The Commission concludes 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 action.

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

June 24, 2024
Date