



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Sallie M.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Appeal No. 2023001073

Agency No. DLAP-22-0095

DECISION

On December 6, 2022, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 6, 2022, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

The issue is whether the Agency properly issued a final decision (FAD) concluding that Complainant was not subjected to harassment (nonsexual) and a hostile work environment based on her race (Black), sex (female), age (48), and reprisal (prior EEO 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 a Contract Specialist, GS-1102-12, at the Agency's Construction and Equipment Supplier Operations Directorate, Defense Logistics Agency (DLA) Troop Support facility in Philadelphia, Pennsylvania. Report of Investigation (ROI) at 737. Complainant, age 48, is a Black female. ROI at 737-39. She engaged in prior protected activity when she filed an EEO complaint in April 2018, which was settled on June 29, 2018. Complainant believed that management was aware of her protected bases. ROI at 738-40 and 980-82.

From September 15, 2019, until March 27, 2022, Complainant's first-line supervisor (Supervisor 1 [African American, 54, male, no prior EEO activity]), was the Supervisor, Container IST. He was aware of Complainant's sex and prior EEO activity but only became aware of her race and age in March 2022, when he was contacted by an EEO Counselor. ROI at 1160-63. Complainant's second-line supervisor (Supervisor 2 [Caucasian, 46, male, prior EEO activity]) was the Division Chief, Move and Store Division, Construction and Equipment Directorate (C & E). Supervisor 2 was aware of Complainant's race and sex but he did not learn of her age until May 2022, when he was contacted by an EEO Counselor. He became aware of Complainant's prior EEO activity in March 2022, when he was forwarded a courtesy copy of an email sent by Complainant to her supervisory chain in which she disclosed the information. ROI at 1411-12. Complainant's third-line supervisor (Supervisor 3 [White, 39, male, no prior EEO activity]), was a Supervisory Specialist, Commercial Hardware III Information Technology (IT). Supervisor 3 has served as Complainant's first-line supervisor since March 27, 2022. He was aware of Complainant's race and sex but only became aware of her age and prior EEO activity in May 2022, when he was contacted by an EEO Counselor. ROI at 1267-68.

Complainant's fourth-line supervisor (Supervisor 4 [White Hispanic, 39, male, no prior EEO activity]) was the Division Chief, Miscellaneous Equipment Division. He became aware of Complainant's sex during a phone call in April 2022, but he did not know of her race or age until he was contacted by an EEO Investigator in June 2022. He became aware of Complainant's prior EEO activity in March 2022, via the email Complainant sent to her supervisory chain. ROI at 1666-67. Complainant's fifth-line supervisor (Supervisor 5 [White, 43, male, prior EEO activity]) was the Deputy Director of Supplier Operations, Construction and Equipment Supply Chain. He was aware of Complainant's race and sex.

He did not know her age until February 3, 2022, when Complainant sent out a package of emails to him which included one that stated her age was 47. Supervisor 5 stated he learned of Complainant's EEO activity around 2018, when he was informed of it by the former Deputy Director and former Director of Supplier Operation for Industrial Hardware Supply Chain during a meeting, although he did not know the specifics. ROI at 1235-37. Complainant's sixth-line supervisor (Supervisor 6 [White, 59, male, prior EEO activity]) was the Director, Construction & Equipment Supply Directorate. Supervisor 6 was aware of Complainant's race and sex but not her age. He was aware of Complainant's prior EEO activity since March 22, 2022, when Complainant sent out the email in which she loosely referenced it. ROI at 1647-48.

Complainant's first coworker (Coworker 1 [Caucasian/ 35, male, no prior EEO activity]) was a Contract Specialist. Supervisor 1 was his first-line supervisor and Supervisor 2 was his second-line supervisor. Coworker 1 stated he did not learn of Complainant's race, age, or prior EEO activity until contacted in June 2022 by an EEO Specialist. He was aware of her sex, having met her. ROI at 1687-88. Complainant's second coworker (Coworker 2 [White, 52, female, no prior EEO activity]) was a Contracting Officer. Supervisor 1 was her first-line supervisor and Supervisor 2 was her second-line supervisor. Coworker 2 stated she believed Complainant's race to be Black and sex female from when she met Complainant in 2018. She did not become aware of Complainant's age or prior EEO activity until contacted by an EEO Specialist in June 2022. ROI at 1723-24. Complainant's third coworker (Coworker 3 [Male, race, age, and prior EEO activity unknown]), was a Supervisory Procurement Analyst. ROI at 1749. A named individual (HR Specialist [Female, race, age, and prior EEO activity unknown]), was the Human Resources (HR) Specialist, Labor /Employee Relations. She had no working relationship with Complainant and worked for the Agency's HR Services. ROI at 1745.

Complainant initiated EEO contact on March 21, 2022. On April 13, 2022, Complainant filed an EEO complaint (with subsequent amendments on May 11, 2022, and May 25, 2022), alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), age (48), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 when:

1. Around December 2021, Supervisor 1 harassed Complainant when he made it appear that she did not get along with her coworkers, tried to turn them against her, kept telling Complainant to "be nice, be nice," and insinuated that Complainant would shoot up the building;

2. Around December 2021, Coworker 1 harassed her by constantly saying she should "be nice.";
3. In February 2022, Coworker 2 harassed Complainant by questioning an email she sent to a vendor for a status request. When Complainant emailed Supervisor 1 to complain about Coworker 2's actions, she believed Supervisor 1 spoke with Coworker 2 and took Coworker 2's side, because Coworker 2 is white, without speaking with Complainant first;
4. On March 8, 2022, Complainant was informed by Supervisor 5 she would be reassigned effective March 27, 2022, to the position of Contract Specialist, GS-1102-12, Commercial Hardware III/Federal Supply Group (FSG) 80 Integrated Supply Team (FCEB). Complainant felt this was retaliation by Supervisor 5 and Supervisor 6, who authorized the reassignment, because Complainant had previously worked in the same section in 2018, filing an EEO complaint at the time;
5. On March 17, 2022, Supervisor 3, Complainant's new first line supervisor, emailed her new job duties to her, which included duties she had no idea how to perform, including Qualification Notifications (QN). She explained she did not know QNs and requested training, informing management the reassignment would adversely affect her by pushing down her production;
6. On March 22, 2022, Complainant made management aware she did not want to be reassigned to the section she worked in in 2018, and asked Supervisor 1 about reversing her request for reassignment. Supervisor 1 told Complainant he had spoken to Supervisor 2, who stated it was best Complainant leave as Supervisor 2 was scared of an EEO complaint, and the section she was going to, needed the help;
7. On April 19, 2022, Complainant asked Supervisor 3 for her leave slip back that was for April 20, 2022, and he told her he was working on other things at the moment and was hoping to get it back to Complainant by the end of the day. Complainant felt harassed and that Supervisor 3 was messing with her leave slip, because she submitted it on April 13, 2022, and he did not return it until 15 minutes before her workday ended on April 19, 2022;
8. On April 28, 2022, Complainant felt Supervisor 3 harassed her when he did not return her leave slip for May 2, 2022, until she begged him for it back and elevated it to management. Complainant believed

Supervisor 3 thought it was the perfect opportunity to charge Complainant with Absent Without Leave (AWOL) if she took leave without the approved leave slip;

9. In May 2022, Complainant learned that Supervisor 5 provided a Memorandum for Record to the EEO Counselor which stated several of the employees in the Container IST section felt Complainant was creating a hostile work environment and they were in fear of their safety. Complainant alleged this information was false and was provided by Supervisor 1 and Supervisor 2;
10. On May 9, 2022, Complainant received an email that when she physically returned to the office, her desk would be located in Supervisor 1's section. After Complainant requested to not be seated in this area, management ignored her request and placed her at a desk there;
11. From April 2022 to May 2022, Supervisor 1 continued to assign Complainant as a second look buyer, even after she made several requests to be removed from this task;
12. From March 2022 thru May 2022, Supervisor 1 continued to include Complainant on team emails, even after she had left his section; and
13. On May 25, 2022, Supervisor 3 issued Complainant a Letter of Counseling and Instruction to provide her with guidance and instruction regarding his expectations as her supervisor, and for appropriate and professional workplace conduct.

The Agency conducted an investigation into the complaint. The investigation revealed that regarding Claim 1, Complainant stated that she felt Supervisor 1 frequently singled her out for harassment by constantly insisting she be nice to people in her communications and would go out of his way to find fault with her emails. According to Complainant, she felt Supervisor 1 often took the stance that when a problem occurred with a coworker, he would take their side and not listen to her, insisting Complainant was at fault. Complainant stated that she has had interactions with several employees where this happened. ROI at 13-4 and 741-44.

Complainant stated that she reported the issues she was experiencing with Supervisor 1 to Supervisor 2, Supervisor 5, and Supervisor 6 beginning in 2021 and continuing into 2022.

Complainant stated that she felt her race was a factor, as every employee she took issue with and Supervisor 1 took their side, was not Black. Complainant believed her sex played a role, as Supervisor 1 took the side of Coworker 1, a male employee, over her. ROI at 744-47.

Supervisor 1 denied Complainant's allegations, stating that he had never told Complainant to be nice and did not try to cause problems between her and her coworkers. He stated that he constantly encouraged all his employees to be respectful and patient with each other. Supervisor 1 also denied insinuating to anyone that Complainant was going to shoot up the building, asserting that if he believed that, he would have contacted HR, the Employee Assistance Program, and upper management and alerted the Security Office. Supervisor 1 stated that he never monitored employee communications and/or emails and only became involved if something was brought to his attention by the employee, other employees, vendors, or other interested parties. ROI at 18-9 and 1163-64.

Supervisor 1 acknowledged awareness of issues between Complainant and her coworkers. He recalled an August 2021, incident involving Complainant and an employee (Employee 1); and asserted that he did not reprimand Complainant, but made her aware that the email she sent to Employee 1 was unprofessional. Supervisor 1 was also aware of problems between Complainant and Coworkers 1 and 2. ROI at 18-9 and 1164-65.

Supervisor 1 also confirmed that a second employee (Employee 2) had spoken to him concerning complaints she had received from her customer side team members regarding how Complainant was talking to them. It was his understanding that Complainant wanted an immediate response to her questions and the customer side team members took issue with the tone of her emails. According to Supervisor 1, Employee 2 told him it was difficult to contact customers. He subsequently spoke to Complainant about this, explaining that what she might feel was urgent was not going to be seen the same way by another employee based on their workload. Supervisor 1 also told Complainant that he had requested the customer side team be more responsive even if the response was not an update or reply from the customer. He told Complainant that if she had any issues, to contact him. ROI at 18-9 and 1164-65.

Regarding Claim 2, Complainant and Coworker 1 routinely discussed work issues as he was involved in training Complainant. Many of these conversations were via Microsoft messaging as they were remote working at the time. ROI at 1694-1721.

Complainant had a conversation concerning a work-related matter with Coworker 1, who was providing training to her. The tone of the conversation changed when Coworker 1 stated he would be "nice" in describing how he would communicate to Supervisor 1 a piece of information Complainant was incorrect about. Complainant became upset because Coworker 1 used the word nice, and she decided to end the conversation. Management investigated Complainant's subsequent harassment allegation against Coworker 1 but the allegation was unsubstantiated based on the exchange log between Complainant and Coworker 1. ROI at 1717-20.

Regarding Claim 3, Coworker 2 emailed Complainant on February 2, 2022 about Complainant's contact with a contractor without informing Coworker 2, who was already working with that contractor. ROI at 1228-31. Complainant reported the matter to management, accusing Coworker 2 of being inappropriate; and asking to be reassigned to another section. ROI at 1228 and 1735-37. When Supervisor 1 received the complaint, he conducted an investigation and found nothing that would warrant disciplining Coworker 2. He however implemented a solution in an attempt to avoid future problems between Complainant and Coworker 2. ROI at 1216.

Regarding Claims 4 and 6, Complainant was unhappy with her coworkers and wanted to relocate from her work area. On two occasions, August 2021, and March 2022, she requested a reassignment, although she withdrew the first request. ROI at 580-81, 599, and 1259. Based on Complainant's most recent request, and an assessment of the work environment, management made the decision to reassign Complainant in March 2022. ROI at 525-30, 533, 608-10, and 1422-23. Supervisor 5 met with Complainant and informed her she would be moved from FCDB to FCEB effective March 27, 2022. Complainant was initially happy with where she was being placed and thanked Supervisor 5. ROI at 149-52 and 1250-51. However, when Complainant learned the duties she would be performing would not be identical to those she was currently carrying out, she became apprehensive and tried to withdraw the reassignment. ROI at 537-44 and 1365-66. Management informed her the reassignment could not be withdrawn and assured her she would be given all the resources she would need to perform her new duties when she started them. ROI at 537-38. Complainant then began asserting she was being set up for failure and being forced to work in an office where she had filed an EEO claim in 2018. ROI at 537 and 1658.

Supervisor 6 responded on March 23, 2022, explaining that reassigning an employee is a "significant undertaking that requires a substantial assessment of the situation.

Multiple aspects are considered to include impacts on workload, resource balancing, and mission support.” He stated all these factors had been considered, and he was confident the FCE leadership would give Complainant all the assistance needed to fully perform her new duties. ROI at 1662-63. In response, Complainant threatened to, and subsequently filed complaints against the Agency as she felt the reassignment was a form of retaliation; and she could not understand why she was reassigned to a section against which she had previously filed a complaint. ROI at 1661 and 1680-81.

Regarding Claim 5, before Complainant was scheduled to officially begin to work in FCEB, she emailed management, including her new first-line supervisor, Supervisor 3. The email exchanges included a discussion over the type of work Complainant would be performing when she arrived in her new position. Complainant became upset, expressing concerns that she would fail in her new position as she could not perform the duties, including QN’s. ROI at 1298-99, 1304-05, and 1329. Management, including Supervisor 3, explained to Complainant that the duties in question, including QN’s, were part of the normal work for the section. They assured Complainant she would not be performing any QN’s right away, and she would be provided with any training she needed when she arrived. They told Complainant that she had nothing to worry about. ROI at 1291-92, 1297-98, and 1319.

Regarding Claims 7 and 8, Complainant was upset at management because she believed they were not responding fast enough to her leave requests and schedule changes. Management also questioned her leave usage which Supervisor 3 felt could be considered “excessive.” Supervisor 3 sent an email to Complainant, laying out his policy regarding leave in order to prevent any future issues on the subject. Complainant expressed disagreement with Supervisor 3. She took issue with his use of the word “excessive” regarding her leave usage and threatened to include his response in her EEO complaint. ROI at 1332-34, 1337-45, and 1349-51. She subsequently filed a complaint with upper management, alleging that her leave requests were mishandled; and asking to be moved out of the section and reiterating it was the same section where her prior EEO complaint was revoked in 2018. ROI at 1349-58.

Regarding Claim 9, on March 8, 2022, Supervisor 5 prepared a Memorandum for Record (MFR) which detailed the incidents surrounding Complainant’s two requests for reassignment. This included his meetings with Complainant’s then supervisors, Supervisor 1 and Supervisor 2, their assessment of the working environment, and if Complainant should be reassigned. Supervisor 5 prepared the document for his own personal records and did not distribute it or show it to anyone. ROI at 149-52.

On March 31, 2022, Supervisor 5 was notified that Complainant had filed a formal EEO complaint and was asked to produce documents related to the issues she raised. ROI at 73-8. The following day, Supervisor 5 provided a response to the EEO Counselor's questions. He also provided documents related to the complaint, including his MFR. ROI at 78-81. This was the first time that Supervisor 5 had shared the MFR with anyone.

Regarding Claim 10, after Complainant was informed where her workstation would be (her old work section) when she was returned to the office, she waited five days to respond, asking to be placed elsewhere. Complainant stated that she did not trust or feel safe around Supervisor 1 and wanted her return delayed until a suitable desk could be found in Supervisor 3's section. Complainant stated this was in part because of what she had read in the EEO Counselor's Report and memo written by Supervisor 5. Management responded immediately to Complainant's concerns, and kept her informed as to the status of their efforts to place her elsewhere. Eleven days after Complainant's request, and seven days before she was scheduled to physically return to the office, Supervisor 3 informed her that she had been placed at a desk in Supervisor 3's section. ROI at 456-57, 467-69, 480-481, and 1377.

Regarding Claims 11 and 12, after Complainant was reassigned to FCEB on March 27, 2022, there was a delay of approximately five weeks in order to clear up issues related to the reassignment. Complainant continued to receive team emails related to her previous duties when she worked for FCDB. Complainant was also listed in the system as working for her old office, and was still shown as a second look buyer, which meant she was getting emails on purchase requests to review. Complainant had to return those requests to the original buyer. Consistent with applicable Agency procedures, only a Business Process Analyst (BPA) in the Procurement Process Support Directorate had the sole authority to move Complainant in the system from her old area into the correct area, and remove her as a second look buyer. Coworker 3 stated that in his work as a BPA, so many changes were required to the system when an employee was reassigned; and it was quite common for things to be overlooked. Originally, the Procurement Process Support Directorate was not made aware of Complainant's reassignment until March 30, 2022, by Supervisor 3. Once they were made aware, steps were taken to fix the issues and Complainant received no further team emails. By May 10, 2022, all the issues raised by Complainant had been resolved. ROI at 482, 1226-27, and 1753-71.

Regarding Claim 13, on May 5, 2022, Supervisor 3 notified Complainant that she would need to remain at her old workstation for the time being. Complainant responded on May 10, 2022, stating she did not want to remain seated near Supervisor 1 because of safety issues. Supervisor 3 told Complainant he would look into her request and see what he could do. Complainant then sent an inappropriate and inflammatory email to her former supervisor, Supervisor 1, and copied to her current supervisors, Supervisor 3 and Supervisor 4. She also sent a separate email to a named Brigadier alleging harassment. After consulting with HR Specialist, Supervisor 3 decided to take action and put Complainant on notification that her behavior was inexcusable and would not be tolerated going forward. ROI at 458-60, 1284-85, and 1378. Complainant received the letter on May 26, 2022, but declined to sign it. ROI at 1284-85.

Complainant then emailed HR Specialist on May 26, 2022, complaining that she was being harassed and abused and was ready to quit. Complainant again emailed HR Specialist about two hours later, complaining about the issuance of the Letter of Counseling and Instruction. She stated the letter should never have been issued to her and she was only following her training by raising issues with harassment she was undergoing. ROI at 478-79.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, on December 6, 2022, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant contests the FAD. She reiterates her allegations and her rebuttal assertions, without supporting evidence, that management provided false information to the EEO Investigator. Complainant also references her request that the Agency be sanctioned for delayed FAD issuance.

The Agency did not submit an appeal brief.

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”).

ANALYSIS

Delayed FAD Issuance

We note that our regulations require agency action in a timely manner at many points in the EEO process. Tammy S. v. Dep’t of Def., EEOC Appeal No. 0120084008 (June 6, 2014). Compliance with these timeframes is not optional; as the Commission stated in Royal v. Dep’t of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009), “the Commission has the inherent power to protect its administrative process from abuse by either party and must insure that agencies, as well as complainants, abide by its regulations.” Because of the length of time it can take to process a federal sector EEO complaint, any delays in complying with the time frames in the regulations can impact the outcome of the complainant’s claims. Id.

Here, we find that the Agency failed to comply with the Commission’s regulations. Included in the record is a December 6, 2022, letter in which Complainant asserted that a FAD was due on October 24, 2022. Complainant stated that on October 11, 2022, she requested the status of the FAD then again on October 27, 2022. She stated that she also expressed her dissatisfaction on October 27, 2022 that the Agency failed to provide a FAD. The Agency did not submit an appeal statement, and they did not dispute her assertions.

Importantly, Complainant’s appeal statement reflects that she received the Agency’s December 6, 2022, FAD on December 8, 2022. This means that the FAD was issued about 40 days after it was due, and Complainant received the FAD two days after it was issued.

However, Complainant did not show how the delay in issuance of the FAD prejudiced her or otherwise resulted in an unconscionable delay in justice.

We also note that on January 14, 2023, Complainant filed a motion asking that the Commission issue a default judgment against the Agency for failing to provide a digital copy of the case file, and for not filing an appeal statement. In that regard, Complainant failed to provide justification for her default judgment request since the Commission has a complete record upon which to review the instant complaint and issue a decision. There is also no requirement that the Agency file an appeal statement.

Although the Agency failed to timely issue a final decision as required by our regulations, it did not act in a manner to warrant the sanction of a default judgment against it. *See, e.g. Josefina L. v. Soc. Sec. Admin.*, 0120142023 (July 19, 2016), req. for recon. denied, EEOC Request No. 0520170108 (Feb. 9, 2017) (finding that the Agency's 571-day delay in issuing the decision did not warrant sanctions, as complainant did not show she was prejudiced by the delay); *Abe K. v. Dep't of Agric.*, EEOC Appeal No. 0120141252 (Nov. 4, 2016) (declining to sanction an agency that issued a decision after approximately 326 days when complainant failed to show that he was prejudiced by the delay); *Jocelyn R. v. Dep't of Def.*, EEOC Appeal No. 0120152852 (Mar. 11, 2016) (citing *Vunder v. U.S. Postal Serv.*, EEOC Appeal No. 01A55147 (May 12, 2006) (declining to sanction an agency that issued a decision after approximately 371 days)); *Anthony M. v. Dep't of the Air Force*, EEOC Appeal No. 2019003380 (Sept. 22, 2020). The Commission finds that there is no evidence that the Agency's delay in this case is attributable to contumacious conduct or bad faith. As such, under the specific circumstances present, we decline to sanction the Agency for its delay in issuing the final decision.

Disparate treatment based on race, age, sex and reprisal (Claims 4-9)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. *See Nanette T. v. U.S. Postal Serv.*, EEOC Appeal No. 0120180164 (March 20, 2019); *McCreary v. Dep't of Def.*, EEOC

Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The Commission applies the McDonnell Douglas analysis to complaints involving retaliation claims. Orlando O. v. Department of Health and Human Services, EEOC Appeal No. 0120170253 (Aug. 8, 2018) (citing Hochstadt v. Worcester Found, for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976)).

In order to establish a prima facie case of retaliation, a complainant must demonstrate that: (1) she participated in EEO activity; (2) an Agency official(s) was aware of the protected activity; (3) a subsequent adverse action took place, and (4) there is a causal link between the adverse action and the employer's knowledge of protected activity. Nida R. v. Dep't of Def., EEOC Appeal No. 0120152884 (Apr. 22, 2016) (internal citations omitted); see also EEOC Enforcement Guidance on Retaliation and Related Issues, § II.C.2, n. 154 (Aug. 25, 2016) (citing Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010)). Furthermore, "[t]he cases that accept mere temporal proximity between an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close' [in time]." Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (citing to O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (finding a three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (finding a four-month period insufficient).

A complainant may establish a prima facie case of age discrimination by showing that he or she is in the protected group (over age 40) and was treated less favorably than someone substantially younger than the complainant. See O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996); Nevin v. Tennessee Valley Authority, EEOC Appeal No. 01992795 (February 14, 2002).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race, sex, age and reprisal.

Complainant meets the four elements to establish her prima facie case of reprisal to the extent that she engaged in protected EEO activity when she filed an EEO complaint in April 2018, some four years before she initiated EEO contact in the instant complaint on March 21, and filed a complaint on April 13, 2022. Management was also aware of that protected activity; and the Agency took adverse actions against Complainant, including reassigning her. However, the record does not support a conclusion that the challenged management actions were in any way linked to Complainant's prior protected activity.

Complainant also established a prima facie case of discrimination to the extent that she is a Black female over age 40; and management officials were aware of her protected bases. Complainant however did not identify any other similarly situated employees outside of her protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on her protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management actions; and we find no persuasive proof of pretext.

Regarding Claims 4 and 6, management explained that Complainant was unhappy with her coworkers and wanted to relocate from her work area. She requested a reassignment on two occasions, although she withdrew the first request. ROI at 580-81, 599, and 1259. Based on Complainant's most recent request, and an assessment of the work environment, management made the decision to reassign Complainant in March 2022. ROI at 525-30, 533, 608-10, and 1422-23. Complainant did not dispute that she was initially happy with where she was being placed and thanked Supervisor 5. ROI at 149-52 and 1250-51. However, when Complainant learned the duties she would be performing would not be identical to those she was currently carrying out, she became apprehensive and tried to withdraw the reassignment. ROI at 537-44 and 1365-66.

Complainant also failed to refute management's assertions that they informed her that her reassignment could not be withdrawn and assured her that she would be given all the resources she would need to perform her new duties when she started them. ROI at 537-38. Nor did Complainant dispute that it only after she became unhappy with her new duties that she began asserting she was being set up for failure and being forced to work in an office where she had filed an EEO claim in 2018. ROI at 537 and 1658.

Regarding Claim 5, management explained that before Complainant was scheduled to officially begin to work in the section to which she had been reassigned, she emailed management, including Supervisor 3, her new first-line supervisor, over the type of work she would be performing when she arrived in her new position. Complainant became upset, expressing concerns that she would fail in her new position as she could not perform the duties, including QN's. ROI at 1298-99, 1304-05, and 1329. Complainant did not dispute that management, including Supervisor 3, explained to her that the duties in question, including QN's, were part of the normal work for the section. Nor did she dispute that they assured her that she would not be performing any QN's right away, and she would be provided with any training she needed when she arrived. Management also told Complainant that she had nothing to worry about. ROI at 1291-92, 1297-98, and 1319.

Regarding Claims 7 and 8, Complainant was upset at management because she believed they were not responding fast enough to her leave requests and schedule changes. Management also questioned her leave usage which Supervisor 3 felt could be considered "excessive." That Complainant took issue with Supervisor 3's use of the word "excessive" regarding her leave usage does not prove discrimination. Nor does it justify Complainant's threat to include Supervisor 3's response to her expressed disagreement with his leave policy in her EEO complaint. ROI at 1332-34, 1337-45, and 1349-51.

Complainant subsequently filed a complaint with upper management regarding her leave requests. ROI at 1349-58. However, the record includes documentation that supports Supervisor 3's challenged response to Complainant's leave requests. For example, the record reflects that Complainant had submitted leave requests to Supervisor 3 on April 13, 2022, for April 20, 2022. ROI at 1334. On April 14, 2022, Complainant submitted a leave slip for April 25, 2022, for approval, stating she had to attend jury duty. On April 19, 2022, Supervisor 3 responded to an inquiry from Complainant via instant messaging at 12:34 PM about the status of her leave slip, letting her know he was working on other things at the moment, but that he could hopefully get to Complainant's leave requests by the end of the day. Complainant then reached out to HR, seemingly out of impatience or frustration with Supervisor 3, requesting to know the rules about leave approval. HR responded telling Complainant to follow up with her supervisor. Supervisor 3 was surprised that Complainant had reached out to HR after he had advised her that he had been busy and would respond regarding her leave request. Supervisor 3 approved the request before the end of the day as he had initially told Complainant he would. ROI at 1337-42.

On April 27, 2022, at 10:30 AM, Complainant emailed a leave slip to Supervisor 3, stating she had a doctor's appointment for April 28, 2022. At 11:17 AM, Complainant emailed Supervisor 3, forwarded a leave slip to him for May 2, 2022, and asked if she could switch her Alternate Work Schedule (AWS) if she needed the day to save leave and be off Monday and work Friday. At 11:21 AM, Complainant emailed Supervisor 3 stating she had forgot she could not work Friday, stating her mother had a medical appointment. She asked if she could work on Saturday. ROI at 1343-44.

Also on April 27, 2022, Supervisor 3 responded to Complainant, stating that he was approving the request for April 28, 2022, but that he would think about the May 2nd information. Supervisor 3 also stated that the amount of leave and changes that Complainant had requested since she joined his section were excessive to him, so Supervisor 3 needed to see if he was willing to allow make up time. ROI at 1345. See ROI at 1354-58 demonstrating Complainant's impatience and frustration when Supervisor 3 did not immediately respond to her leave requests. See also ROI at 1332-33 for Supervisor 3's explanations to Complainant regarding her behavior and letting her know that employees may assume their requests are approved if they have useable leave.

Therefore, while the record reflects that Complainant was impatient when she did not receive immediate responses to her leave requests, the record does not support a conclusion that those requests were mishandled as alleged.

Regarding Claim 9, Supervisor 5 asserted that he prepared the MFR detailing the incidents surrounding Complainant's two reassignment requests. Complainant did not dispute that Supervisor 5 prepared the document for his own personal records and did not distribute it or show it to anyone. ROI at 149-52. Nor did she refute that Supervisor 5 provided the MFR to others in response to her formal EEO complaint. ROI at 73-81.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K . v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant failed to show pretext because she failed to establish a link between the challenged management actions and any of her protected bases. Nor did she dispute management's explanations or demonstrate that their actions were motivated by discriminatory or retaliatory animus. For example, regarding Complainant's reprisal claims, the evidence fails to demonstrate that Complainant's 2018, EEO complaint factored into management's actions. Instead, the facts show that the Agency would have taken the steps it took to address Complainant's reassignment requests even if she had not engaged in any prior EEO activity. The Commission has also held that an agency is not required to refrain from non-discriminatory personnel actions it would otherwise take simply because the employee has engaged in EEO activity. See Sotomayer v. Dep't of the Army, EEOC Appeal No. 01A43440 (May 17, 2006); Carter v. Dep't of Education, EEOC Appeal No. 01842314 (Aug. 25, 1986).

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is also precluded by the determination above that the Agency's explanations demonstrate that Claims 4-9 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Harassment and Retaliatory Harassment (Claims 1-3, and 10-13)

Complainant alleged that she had been subjected to harassment and a hostile work environment for several years in the C & E Directorate by several people, including Supervisor 1, Supervisor 3, Supervisor 4, and HR Specialist. According to Complainant, harassment started in 2018 and she filed an EEO complaint as a result. Although the case was settled, she later withdrew the settlement allegedly due to management. Complainant stated that the environment was positive until 2020, when she began to be harassed by coworkers and others. Complainant believed that Supervisor 3 targeted her for disciplinary action when she tried to complain about harassment from Supervisor 1. Complainant also believed this was part of a plan to set her up for failure or discipline her as a pretext for removal. Complainant stated that she reported the harassment to Supervisors 4, 5, and 6, as well as a named individual (Official) to no avail. Complainant asserted that to her knowledge, no investigation was ever conducted. Complainant asserted that she did not think "these people care at all" and expressed her belief that they were "abusers and harassers." Complainant stated that the harassment and hostile work environment affected her emotionally and physically, asserting that she did not want to do her job and frequently felt like quitting. ROI at 416, 762, 908-09, and 952.

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994)

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, her race, age, 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.

Complainant belongs to protected classes based on her race, age, sex, and prior protected EEO activity which occurred in 2018, some four years before she initiated EEO contact in the instant complaint. Complainant was also subjected to unwanted conduct. However, Complainant did not show a connection between any protected basis and the alleged harassment. She also failed to dispute record evidence demonstrating that management took action to address her harassment allegations each time she brought those allegations to their attention but they could not substantiate them.

For example, regarding Claim 1, Supervisor 1 had to address problems arising from Complainant's conduct in the workplace that was reported to him by other employees. Regarding Claim 2, Complainant took issue when Coworker 1 stated that he would "be nice" when communicating information to Supervisor 1. Coworker 1 did not ask Complainant to be nice.

Management also investigated Complainant's subsequent harassment allegation against Coworker 1 by examining the exchange log, but the allegation was unsubstantiated. Regarding Claim 3, Coworker 2 emailed Complainant on February 2, 2022 regarding Complainant's contact with a contractor without informing Coworker 2 who was working with that contractor. Supervisor 1 again investigated Complainant's complaint of harassment when he received it and found nothing that would warrant disciplining Coworker 2.

Regarding Claim 10, Complainant did not want to sit in Supervisor 1's section, her old workstation, stating that she did not trust or feel safe around Supervisor 1 and wanted her return delayed until a suitable desk could be found in Supervisor 3's section. Complainant stated this was in part because of what she had read in the EEO Counselor's Report and memo written by Supervisor 5 but she did not describe any conduct taken by Supervisor 1 to support a conclusion that Complainant justifiably had safety concerns by sitting in Supervisor 1's section. Moreover, management responded immediately to Complainant's concerns, keeping her informed as to the status of their efforts to place her elsewhere. Supervisor 3 also informed Complainant that she had been placed at a desk in Supervisor 3's section seven days before she was scheduled to physically return to the office. Complainant did not dispute management's explanations; and she did not state that she was at any time forced to sit in Supervisor 1's section against her will.

Regarding Claims 11 and 12, Complainant took issue with continued team emails she received after her reassignment related to her previous duties. Complainant was also listed in the system as working for her old office, and was still shown as a second look buyer, which meant she was getting emails on purchase requests to review. Complainant had to return those requests to the original buyer but did not demonstrate that the teams or other emails she received after her reassignment were intentionally sent or caused to be sent by management. Also, consistent with applicable Agency procedures, once Supervisor 3 informed the Procurement Process Support Directorate of Complainant's reassignment, steps were taken to fix the issues and Complainant stopped receiving team emails. Complainant did not dispute this statement, and she did not dispute Coworker 3's supporting statement that in his work as a BPA, so many changes were required to the system when an employee was reassigned; and it was quite common for things to be overlooked.

Regarding Claim 13, Supervisor 3 issued the Letter of Counseling to Complainant because she sent an inappropriate and inflammatory email to Supervisor 1, with copies to Supervisors 3 and 4. She also sent a separate email to a named Brigadier alleging harassment. After consulting with HR Specialist, Supervisor 3 decided to take action and put Complainant on notice that her behavior was inexcusable and would not be tolerated going forward. Complainant wanted the Letter of Counseling removed from her file but she did not dispute Supervisor 3's stated reasons for issuing it.

Based on the record which Complainant failed to refute with any corroboration, we find that Complainant has failed to sufficiently demonstrate that she was subjected to harassment or a hostile work environment. Instead, having reviewed the record, we find that the Agency correctly analyzed the facts and law of this case. The Commission recognizes that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures, monitoring subordinates, scheduling the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and to otherwise manage the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (Jun. 16, 2017). We find that many of the allegations stated in Complainant's complaint fall within these types of management prerogatives, and Complainant has not shown how she was treated differently than others who were similarly situated and outside of her protected groups.

Importantly, to prevail in a retaliatory harassment claim, a complainant must show that a reasonable person would have found the challenged action materially adverse, i.e., an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination in the future. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

In the instant complaint, the record is devoid of any evidence to establish a nexus between Complainant's prior EEO activity which occurred four years earlier and the management actions that form the basis of Complainant's retaliatory harassment allegations. Complainant's allegation also lacks the requisite severe and pervasive unwelcome verbal or physical management conduct that would constitute actionable harassment or dissuade an employee from future participation in protected activity. Notably, Complainant failed to cite any reference made by Supervisor 1 or any other Agency official to her prior protected EEO activity, only alleging, without evidence, that they did so; and that they provided false information to the EEO Investigator.

Instead, it was Complainant herself who repeatedly referred to that activity, and it was Complainant who threatened to include actions taken by management within their supervisory authority (even a reassignment she had requested and was initially happy with) in her EEO complaint.

CONCLUSION

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

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

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

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

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

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC

20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

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


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

RIGHT TO REQUEST COUNSEL (Z0815)

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

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 13, 2025
Date