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

[redacted]
Britany C.,[1]
Complainant,

v.

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

Appeal No. 2023001423

Hearing No. 430-2021-00269X

Agency No. 2004-0558-2020106639

DECISION

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

ISSUE PRESENTED

The issue presented is whether the Administrative Judge properly issued decisions without a hearing finding that Complainant did not establish discrimination or harassment as alleged.

[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 Certified Registered Nurse Anesthetist (CRNA) at the Agency's Medical Center in Durham, North Carolina.

On September 15, 2020, Complainant filed an EEO complaint alleging that the Agency subjected her to discriminatory harassment on the bases of disability (mental and physical), and in reprisal for prior protected EEO activity, when:

1. on or around December 3, 2019, Complainant's first-line supervisor ("Supervisor") excluded Complainant from a "Call Guidance Committee Meeting";
2. in December 2019, the Supervisor denied Complainant 59 minutes of administrative leave;
3. on December 9, 2019, the Supervisor forwarded an email concerning Complainant's harassment allegations to the entire CNRA staff;
4. beginning or around December 19, 2019, the Supervisor informed Complainant that her afternoon break was no longer mandatory during her nine (9) hour shift, and that moving forward, Complainant would have to complete her mandatory training on her own time rather than during duty hours, as is standard practice in the unit;
5. on December 19, 2019, the Supervisor did not select Complainant as a volunteer to perform additional duties, which involved preoperative assessments;
6. on January 13, 2020, the Supervisor issued Complainant's fiscal year 2019 performance evaluation and rated her "low" in professionalism with a score of 64 percent, without justification;
7. on January 23, 2020, the Supervisor did not select Complainant to volunteer to perform additional duties in Quality Improvement;
8. on February 10, 2020, Complainant's second-line supervisor, the Chief of Anesthesiology Service ("Chief"), accused Complainant of "causing problems" and "having grievances" with other employees when she requested an update on her investigation;
9. on March 9, 2020, the Chief asked Complainant if she filed an EEO complaint, and then instructed her not to file an EEO complaint or further complaints of harassment;

10. on March 11, 2020, the Supervisor accused Complainant of shirking and undermining her authority;
11. on March 20, 2020, the Supervisor denied Complainant's request to telework as a reasonable accommodation;
12. beginning in April 2020, the Supervisor placed Complainant in an absent without leave (AWOL) status, without justification;
13. from April 2020 through June 2020, the Supervisor failed to approve Complainant's requests for leave under the Family and Medical Leave Act (FMLA);
14. in or about April 2020, an Anesthesiologist and Assistant CNRA Manager removed Complainant from access to various workgroups, thereby limiting her access to important work-related information;
15. on or around April 4, 2020, the Supervisor denied Complainant sick leave and placed her in an AWOL status, without justification;
16. on April 10, 2020, the Supervisor denied Complainant's request for Weather and Safety Leave, without justification; and
17. on July 21, 2020, the Supervisor instructed Complainant to return to work, without accommodation.[2]

The Agency accepted claims 11, 12, and 16 as timely discrete claims of disparate treatment and all claims as part of the overall harassment claim.[3] Report of Investigation (ROI) at 46-7.

The EEO investigation revealed that on December 6, 2019, Complainant learned that she was excluded from a meeting regarding the Call Guidelines

[2] The Administrative Judge (AJ) noted that there was a more thorough statement of claims in Complainant's formal complaint than accepted by the Agency. The claims are listed here as they appear in the AJ's Order on Initial Conference Deadlines and Record Completion.

[3] The Commission has found that a discrete action states a claim outside of the framework of a harassment analysis and can also be reviewed within the disparate treatment context. See Moylett v. U.S. Postal Serv., EEOC Appeal No. 0120091735 (Jul. 17, 2012); Sedlacek v. Dep't of Army, EEOC Appeal No. 0120083361 (May 11, 2010). Complainant initiated her EEO complaint on April 14, 2020. ROI at 25. Incidents after February 29, 2020, are timely discrete acts that independently state claims outside of the harassment framework. Accordingly, we will also analyze incidents 13, 15, and 17 in the context of disparate treatment.

when the Supervisor emailed a draft of the revised guidelines and asked for feedback. Complainant provided her proposed revisions and comments, which the Supervisor forwarded to the entire group. Complainant alleged that this email concerned her harassment allegations. ROI at 153, 159-60.

On December 3, 2019, Complainant skipped her lunch break, and after she completed her duties and ate her lunch, it was fifteen minutes before her relief. She asked the Supervisor if she should input fifteen minutes of annual leave. The Supervisor responded to Complainant's request by sending the leave policy to everyone, and Complainant used annual leave. Complainant claimed that the Supervisor denied her request for 59 minutes of administrative leave while granting it often to others. ROI at 148-9.

Complainant stated that on or around December 19, 2019, the Supervisor informed Complainant that her afternoon breaks were no longer mandatory, and she needed to complete mandatory training on her own time, rather than during duty hours. ROI at 11. The Supervisor solicited volunteers for other duties in December 2019 and January 2020, including for pre-operative assessments and Quality Improvement. Complainant volunteered but was not selected. ROI at 155, 170.

Complainant reported one of her coworkers ("Coworker") for sex discrimination, harassment, and a hostile work environment starting in November 2019.[4] ROI at 136. On or about February 11, 2020, Complainant met with the Chief and asked for an update on the investigation into her allegations, and he informed her that there was no update. Complainant also reported that another coworker mocked her by calling her by her last name and a different coworker stopped responding to her text messages. Complainant averred that the Chief accused her of "having problems" with her coworkers. ROI at 175. The Chief stated that he offered support and denied accusing Complainant of "causing problems." ROI at 279.

Complainant and the Chief met again on March 9, 2020, and Complainant alleged that the Chief accused her of filing an EEO complaint against the

[4] Complainant stated that she greeted the Coworker when she walked into the computer room in October 2019, and he ignored her and walked out. In November 2019, she heard the Coworker tell others about a department giving lunch and when she questioned him, he responded, "check the board, that is what we do here." For the Agency's internal investigation into Complainant's harassment allegations, the Coworker explained that his actions were to avoid conflict with Complainant. ROI at 740, 747, 760.

Supervisor as retaliation. Complainant claimed that the Chief repeatedly instructed her not to file further complaints. ROI at 140-1, 179-80. The Chief responded that Complainant's description of events was inaccurate. He stated that during this meeting, also attended by the Administrative Officer, the Chief asked if Complainant intended to file two separate complaints because she filed a complaint with Human Resources and an EEO complaint regarding the same events. Complainant replied that she was not aware that she filed an EEO complaint and had submitted an anonymous complaint online. Complainant instructed the Chief to not pursue the EEO complaint. However, Complainant later retracted her position and asked that her EEO complaint be pursued. ROI at 280. During an Agency internal investigation into Complainant's allegations, the Chief and the Administrative Officer both averred that Complainant was never instructed to not file an EEO complaint or further complaints of harassment. ROI at 755.

On or about March 11, 2020, the Supervisor informed the staff about a policy change and that they would no longer be paid for the time spent changing into their scrubs and morning huddles. Complainant asked if the Supervisor spoke with the Union, and the Supervisor responded that she had. Complainant claimed that after the meeting, the Supervisor stated that Complainant was undermining her authority and glared at her. ROI at 186-7.

On March 20, 2020, Complainant emailed the Chief to request working from home as a reasonable accommodation due to her medical conditions that placed her at high risk for serious illness from COVID-19. She provided supporting medical documentation that she has asthma and was suspected of having primary immune deficiency. ROI at 610-11, 625. Complainant also submitted a formal reasonable accommodation request for (1) telework; (2) if telework was unavailable, to wear a mask and not perform certain tasks; and (3) if option 2 was a hardship, to wear full personal protective equipment (PPE), including a non-shared N-95 device. ROI at 636-7.

On March 27, 2020, the Supervisor granted Complainant accommodations of full PPE, including a non-shared approved N-95 device. The Supervisor also approved exclusion from participation on the COVID-19 Airway Team and from treating known positive COVID-19 patients; and leave, as needed and requested by the employee and approved by the supervisor. ROI at 643-4. On April 3, 2020, Complainant, through her attorney, requested a change of the reasonable accommodation to fulltime telework. ROI at 647-8. The Supervisor replied that the Agency would not modify the previously provided reasonable accommodation because Complainant was essential personnel and requested to report to work. ROI at 656.

Complainant requested Weather and Safety Leave for March 25, 2020, through April 9, 2020. On April 10, 2020, the Agency denied her request because she was asymptomatic for COVID-19, and she was not providing direct care to COVID-19 patients. ROI at 685-6. Complainant also submitted two FMLA requests, starting from March 20, 2020, and ending on June 12, 2020, or July 1, 2020. Her requests were initially denied due to insufficient information, but the Agency eventually granted her request on June 12, 2020, retroactive since April 20, 2020. The Agency informed Complainant that she had an entitlement of 12 weeks or 480 hours for twelve months. ROI at 690, 702, 708-9, 713-14.

The Supervisor noted that the FMLA effective date was April 20, 2020, and Complainant was still AWOL from April 14-20, 2020. ROI at 715. On April 21, 2020, the Supervisor informed Complainant that she was being charged with AWOL due to her failure to report to work since April 7, 2020. The Supervisor highlighted that it was Complainant's responsibility to communicate with the Supervisor about her status and properly request leave. Complainant was instructed to return to duty or request leave following receipt of this letter. ROI at 710-12.

In April 2020, Complainant claimed that the Anesthesiologist and Assistant CNRA Manager removed Complainant from various workgroups, which limited her access to important work-related information. ROI at 12.

On July 21, 2020, the Supervisor issued Complainant a Return to Duty letter. The Supervisor noted that Complainant was previously informed that she was entitled to 480 hours of unpaid FMLA leave, but this was incorrect because she was part-time and only entitled to 432 hours. Complainant had exhausted her FMLA entitlement on or about July 10, 2020. The Supervisor ordered Complainant to return to duty immediately. ROI at 724.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ partially granted the Agency's Motion for Summary Judgment on November 1, 2022. The AJ agreed with the Agency's analyses for claims 1, 2, 4-7, and 10. The AJ also ordered the parties to provide supplemental declarations and documentation for claims 3, 8, 9, and 11-17. Both parties complied with the AJ's order.

On November 30, 2022, the AJ issued another decision without a hearing finding in favor of the Agency. Regarding claims 11-17, the AJ found that the evidence showed that the Agency engaged in the interactive process and did not fail to accommodate Complainant. The Agency granted accommodations, such as Complainant's ability to wear full PPE, including a non-shared approved N-95 device. The Agency also granted Complainant's exclusion from caring for patients who were known to be, or suspected to be, COVID-19 positive, but she failed to accept the accommodations and never returned to duty. Complainant also requested FMLA coverage, which was granted and retroactively changed her AWOL to leave without pay, and she applied for disability retirement.

The AJ also found no evidence that the email in question referenced Complainant's harassment complaint (claim 3). For incidents 8 and 9, the AJ determined that there was no record evidence that the Chief accused Complainant of causing problems or having grievances against other employees, or that he discouraged her from filing an EEO complaint.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant asserts that she did not receive an impartial investigation and that management officials lied. She includes a section in her appeal brief entitled, "Complainant's Statement of Disputed Material Facts," and she lists various exhibits and evidence for the Commission to "refer to." Complainant reiterates her allegations and requests that the Commission reverse the previous decision and award remedies. With her appeal brief, Complainant submitted hundreds of pages of evidence, such as text messages with various coworkers and work-related emails and documents.

The Agency opposes Complainant's appeal and contends that Complainant did not provide a valid basis to overturn the AJ's decision and simply reargues her case. Complainant appeared to allege harassment but only presents conclusory arguments.

For her reasonable accommodation claim, Complainant left work in March 2020 and never returned, and she never attempted to use the offered accommodations and admitted that she was unable to perform work in any capacity. The Agency requests that the Commission affirm the final order adopting the AJ's decision.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 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 EEO MD-110, at Chap. 9, § VI.B. (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

Decision Without a Hearing

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 animus. Here, however, Complainant has failed to establish such a dispute. In her appeal, Complainant disputes material facts and provides references to evidence. For example, she states "[r]efer to email with policy from Administrative Officer [and the Supervisor] on November 15, 2019." Complainant Appeal Brief at 4. However, she does not identify any material facts or show a genuine dispute on appeal.

Complainant reiterates that she was subjected to harassment, but she did not submit evidence to raise a genuine dispute that the complained of conduct was based on a protected basis. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. A review of the record does not reveal any genuine disputes of material facts. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

Reasonable Accommodation (Claims 11 and 13)

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), (p). In order to establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is a "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii). Complainant disclosed that she was diagnosed with various medical conditions, such as anxiety, depression, and asthma.

She stated that she is limited to her home and yard, except when attending doctor's appointments, and her anxiety limits her ability to be social. ROI at 143-4, 147. The Agency does not dispute that Complainant is an individual with a disability, and as such, we will consider that she is an individual with a disability.

After a complainant has shown that she is an individual with a disability, the complainant must then establish that she is a qualified and satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). Complainant averred that she can no longer safely or adequately perform her job duties, or any other duties, and she filed for disability retirement. ROI at 145. Complainant explained that she listed March 25, 2020, as the date when she became disabled for her disability retirement applications. Complainant Deposition at 23. We find that Complainant was not qualified for her position as of March 25, 2020.

Regardless, the Agency granted her requested accommodations of full PPE, including a non-shared approved N-95 device; exclusion from participation in the COVID-19 Airway Team and from treating known positive COVID-19 patients; and leave, as needed. ROI at 643-4. Soon after the Agency granted Complainant's accommodations, she asked to change her accommodation to fulltime telework. ROI at 647-8. However, the Rehabilitation Act provides that qualified individuals with a disability be granted an effective reasonable accommodation, and it does not entitle them to the accommodation of their choice. See Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994); see also Enforcement Guidance at Question 9.

In this case, telework would not be an effective accommodation because it would not enable Complainant to perform her essential functions. The Supervisor explained that CNRAs cannot telework because they give direct care to patients. ROI at 254. Complainant confirmed that her duties included performing a thorough check of equipment; selecting, obtaining, and administering anesthetics and adjuvant drugs and fluids necessary to manage the anesthetic care of patients; and managing a patient's airway and ventilation using current practice modalities. ROI at 146. The Commission has also recognized that an agency is not required to remove any of the essential functions of a position as a reasonable accommodation. See Enforcement Guidance, General Principles. See also Larraine S. v. Dep't of Agriculture, EEOC Appeal No. 0120180647 (Aug. 15, 2019); Carlton T. v.

Dep't of the Navy, EEOC Appeal No. 0120151566 (Feb. 7, 2018); Timika O. v. Dep't of the Navy, EEOC Appeal No. 0220140008 (Mar. 9, 2017). Allowing telework would require the removal of essential functions of her position.

In addition, the Agency granted FMLA leave, and unpaid leave is a form of reasonable accommodation, whether or not provided under the FMLA. See Enforcement Guidance, at Questions 16-21, 28. We find that the Agency granted Complainant various reasonable accommodations, and that she did not establish a violation of the Rehabilitation Act.

Disparate Treatment (Claims 12, and 15-17)

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden 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 Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004533 (August 17, 2023).

As discussed above, Complainant is an individual with a disability, but she was no longer qualified as of March 25, 2020, when she was no longer able to work any position. As such, Complainant did not establish a prima facie case of disability discrimination for the events at issue in claims 12 or 15-17, which began in April 2020.

Complainants may establish a prima facie case of reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were 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). Complainant based her reprisal claims, in part, on her complaints about the Coworker's discrimination and harassment from November 2019 through February 2020. The Supervisor corroborated that she was aware of Complainant's EEO activity on or around November 14, 2019, and her filing of the instant EEO complaint in April 2020. ROI at 136-7, 246.

A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001). We find that a temporal nexus can be inferred due to the close period between the Supervisor's knowledge of Complainant's protected EEO activity and the events beginning in April 2020 for claims 12, 15, and 17, and that she established a prima facie case of reprisal for these claims.

The Supervisor averred that she did not deny Complainant's Weather and Safety Leave request (claim 16), and that it was the Assistant Human Resources Officer. However, he stated that the Chief of Staff was the responsible management official. ROI at 260, 313. The Assistant Human Resources Officer and the Chief of Staff responded that they were not aware of Complainant's prior EEO activity. ROI at 300, 1072. As such, we find that Complainant did not establish a prima facie case of reprisal for claim 16.

We now turn to the Agency's articulated legitimate, nondiscriminatory reasons for the actions. For claims 12 and 15, the Supervisor denied placing Complainant on AWOL on April 4, 2020, and the record shows that the Supervisor placed Complainant on AWOL on April 14-20, 2020, because she failed to report to work and had not properly communicated with the Supervisor about her status or requested leave. ROI at 257, 710-12, 715.

Complainant's time records confirm that there was no AWOL charge for April 4, 2020. ROI at 426.

Regarding claim 16, the Chief of Staff explained that he received documentation from Human Resources that Complainant did not meet the technical requirements for her Weather and Safety Leave request. The Chief of Staff added that this type of leave was intended when a management official directs an employee to not perform their regular duties at a particular worksite due to unsafe conditions. To his knowledge, Complainant was not directed by her supervisors to refrain from performing her duties onsite due to being placed on quarantine following a COVID-19 exposure. Rather, Complainant requested the leave because she was afraid of catching COVID-19, which was not appropriate justification for such leave. ROI at 1074-6.

For claim 17, the Supervisor instructed Complainant to return to work because she had exhausted all her leave, including FMLA, and she was needed at work to provide patient care. ROI at 262.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

On appeal, Complainant repeatedly accuses management officials of lying. For example, she accused the Supervisor of making up false documents and lying because the copies of the evaluations provided to her for claim 6 did not contain additional handwritten notes stating that Complainant did not need to sign, and the notes were added after she received the evaluations. Even if Complainant's contention is true, the EEOC has consistently held that the falseness of one reason does not impeach the credibility of the remaining reasons. See Vito E. v. U.S. Postal Serv., EEOC Appeal No. 0120173065 (Aug. 7, 2018); McCleary v. Dep't of the Navy, EEOC Appeal No. 01933036 (Mar. 7, 1994) (citing Logue v. International Rehabilitation Associates, Inc., 837 F.2d 150, 153 (3d Cir. 1988), request for recon. denied, EEOC Request No. 05940526 (Dec 15, 1994)). Complainant did not show that the Agency's explanations for claims 12 or 15-17 were not worthy of belief.

Complainant provided copious documentation with her appeal, but there was no evidence that she communicated any leave requests to the Supervisor between April 14-20, 2020 (claim 12). Specifically, Complainant submitted a doctor's note excusing her from work on April 13, 2020, and her next communication to the Supervisor regarding leave was on April 21, 2020. Complainant Appeal Exhibits 127-8, 136.

Complainant's bare assertions that management officials discriminated against her are insufficient to prove pretext or that their actions were discriminatory. Accordingly, we find that Complainant did not establish disability discrimination or reprisal for prior protected EEO activity for claims 12 or 15-17.

Harassment

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 disability 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 disability and protected EEO activity, and she was subjected to unwanted conduct. However, we find that she did not show that incidents 1-3 occurred as alleged. For incident 1, when Complainant complained to the Supervisor that she had been left out of the discussion, the Supervisor reminded Complainant that someone was sent to relieve her, but Complainant wanted to stay. While Complainant replied that she was not told that it was for this meeting, she confirmed that she chose to stay with her patient. ROI at 595. There is no evidence that the Supervisor excluded Complainant from this meeting as alleged.

In response to event 2, the Supervisor stated that Complainant did not request 59 minutes of administrative leave. Complainant averred that she asked the Supervisor, "[s]hould I put in for 15 minutes of [annual leave] for Tuesday?" Complainant's evidence shows that she specifically asked about annual leave, and there was no denial of 59 minutes of administrative leave from the Supervisor for December 3, 2019. ROI at 247, 148.

Complainant alleged that the Supervisor forwarded an email related to her harassment allegations to the entire CNRA staff (incident 3). Complainant wrote, "[h]ere are guidelines I revised that reflect the impartial approach I experienced at other institutions. I would be willing to provide that impartial voice as a Floor Leader if needed." In the Supervisor's message forwarding Complainant's email, she stated, "[p]lease review [Complainant's] feedback on Floor leader guidelines. We will meet next Tuesday 12/17 to finalize the guidelines. All welcome." ROI at 596. A fair reading of the messages does not support that the emails disclosed Complainant's harassment complaint.

For the remaining incidents, Complainant did not show that they were based on a protected class. Regarding incident 4, the Supervisor denied informing Complainant that her afternoon breaks were no longer necessary or that she needed to complete mandatory training on her own time. Supervisor Deposition at 30-1. In response to incidents 5 and 7, the Supervisor stated that Complainant was not selected for additional duties on December 19, 2019, because she already had additional duties and those assigned did not have additional duties; and Complainant was not chosen for Quality Improvement duties in January 2020 because she did not have the necessary experience and she had other additional duties. ROI at 248, 251.

Complainant complained of a "low" rating in professionalism (incident 6), but this was part of the Ongoing Professional Practice Evaluation (OPPE), and not her annual performance evaluation.

The Supervisor stated that the score was based on first case on-time starts, a metric that was influenced by factors outside of their control. ROI at 250. The Chief added that he created the template and data collection tool for the OPPE in question and corroborated the Supervisor's explanation. He also stated that Complainant's rating was not "low," and it fell within acceptable parameters. ROI at 276.

For incident 10, Complainant contended that the Supervisor glared at Complainant and accused her of shirking and undermining the Supervisor's authority in response to Complainant's questioning of a policy change regarding employees not being paid for time to change into their scrubs. ROI at 186-7. The Supervisor denied the allegation. ROI at 253.

Even taking Complainant's version of events as true, she did not show that incidents 4-7 or 10, were connected to her disability or protected EEO activity. The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). There is no evidence that any of these work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class.

Complainant also alleged that she was taken off workgroups that excluded her from receiving important messages in incident 14. The Supervisor explained that it was a "WhatsApp" group chat, and those who have been out on extended leave were removed to avoid bothering them. Supervisor Deposition at 86, 88. Complainant did not connect this incident to a protected class. Further, anti-discrimination statutes are not general civility codes, and the Commission has found that personality conflicts; general workplace disputes; and trivial and petty annoyances do not rise to the level of harassment. See Jeffrey R. v. Dep't of Justice, EEOC Appeal No. 2022003500 (Aug. 9, 2023); Rita F. v. U.S. Postal Serv., EEOC Appeal No. 2021002876 (Aug. 16, 2022); Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012).

Retaliatory Harassment

"The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington Northern standard even if it is not severe or pervasive enough to alter the terms and conditions of employment.[5] If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.B, ex. 17. (Aug 25, 2016).

Complainant further claimed that the Chief accused her of "causing problems" and "having grievances" against other employees, and that he instructed her not to file an EEO complaint or further complaints of harassment (incidents 8 and 9). In her affidavit regarding the conversation on February 11, 2020, Complainant stated that she asked the Chief for an update on her investigation against the Coworker, and he responded that there was no update. She then raised concerns when another employee "mocked" her when referring to Complainant by her last name, and that another employee stopped responding to her text messages, and the Chief allegedly stated that Complainant was "having problems" with other employees. However, she did not testify that the Chief accused her of "causing problems" or "having grievances." ROI at 175. The Chief denied the accusation. ROI at 279. While crediting Complainant's account of the conversation, a statement that Complainant was "having problems" with other employees was a reasonable observation based on her complaints about numerous coworkers, and we are not persuaded that such comment would reasonably likely deter engagement in the EEO process.

Complainant's allegation in claim 9 that the Chief instructed her to not file EEO complaints or other complaints of harassment could reasonably likely chill protected EEO activity. However, we find that the preponderant evidence does not support that the Chief made the alleged statement. He responded that Complainant's description was inaccurate, and they discussed her submission of a complaint to Human Resources and an EEO complaint on the same matter. Complainant replied that she was not aware that she had submitted the EEO complaint and instructed them not to act on her EEO complaint.

[5] Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006)

She subsequently changed her mind and asked that her EEO complaint be pursued. The Chief denied ever instructing Complainant to not file an EEO complaint. ROI at 280-1.

Both Complainant and the Chief stipulated that the Administrative Officer was a witness to the meeting on March 9, 2020. ROI at 179, 280. While the Administrative Officer retired and did not participate in the investigation for the instant EEO complaint, the Agency obtained her response for its internal investigation into Complainant's harassment allegations. The Administrative Officer confirmed that the Chief never instructed Complainant to not file an EEO complaint or any further complaints of harassment. Agency's Response to Order for Supplementary Briefing at 2, ROI at 755. Complainant did not challenge the Chief's corroborated denial in her rebuttal or on appeal. ROI at 1015-38.

As discussed above, we found that Complainant did not establish a case of discrimination on any of her alleged bases for claims 11-13 or 15-17. Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that any of these actions taken by the Agency were motivated by her protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant did not show that the Agency subjected her to harassment based on her disability or in reprisal for protected EEO activity.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, AFFIRM the Agency's final order adopting the AJ's decision without a hearing.

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

December 18, 2024
Date