



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

[REDACTED]
Joelle L.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 2023001760

Hearing No. 510-2019-00494X

Agency No. BOP-2019-0276

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 7, 2022, final order 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 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.

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.

ISSUE PRESENTED

The issue presented is whether the Administrative Judge properly issued a decision without a hearing finding no discrimination or harassment as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant held a position as a Teacher (GS-11) at the Agency's Federal Correctional Complex in Coleman, Florida.

On February 21, 2019, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and harassment on the bases of sex (female) and disability (physical), and in reprisal for prior protected EEO activity, when:

1. on or about February 2018, Complainant was informed that Human Resources provided incorrect information to Grand Prairie;
2. on or about September 6, 2018, Complainant was assigned an "8-point letter";²
3. on or about September 8, 2018, a Supervisor asked Complainant for additional medical documentation;
4. on or about September 16, 2018,³ the Agency denied Complainant's request for a reasonable accommodation; and
5. on or about November 25, 2019, the Agency denied Complainant's request for reconsideration of the denial of her reasonable accommodation.

The EEO investigation revealed that Complainant suffered a workplace injury when she fell and had been out of work since April 10, 2014. Complainant was previously removed by the Agency on June 23, 2016, and she filed an EEO complaint alleging discrimination for her removal.

² Complainant was issued an "8-point letter" requesting an assessment of her current medical status. Report of Investigation (ROI) at 241.

³ In her affidavit, Complainant stated that she made her reasonable accommodation request on April 19, 2019, and the Agency denied her request on September 19, 2019. ROI at 105, 661-4.

On October 2, 2017, the Agency issued a final decision finding that Complainant was subjected to disability discrimination when she was terminated for missing a fitness-for-duty exam, but management officials ignored her attempts to reschedule. The Agency noted that Complainant may be entitled to reinstatement, but she needed to undergo a fitness-for-duty exam to determine her ability to perform the essential duties of her position. If Complainant was found unable to perform her duties, she would not be entitled to reinstatement. Complainant underwent a fitness-for-duty exam on November 17, 2017, and she was found fit for duty in December 2017. Report of Investigation (ROI) at 92, 95, 122-39, 442-3.

Complainant was instructed to report to work in February 2018. However, she informed the Agency that she had not been released back to full duty by her doctor ("Doctor") and provided supporting medical notes. Complainant received benefits from the Office of Workers' Compensation Program through February 2018, when she was placed on a leave without pay (LWOP) status. ROI at 603, 351-353, 92.

Complainant stated that she was informed in February 2018 that a Human Resources Manager provided incorrect information to Grand Prairie. Specifically, Complainant's date of entry; job title; salary information; job description; and pay rate. ROI at 100-1.

On September 6, 2018, the Supervisor sent Complainant a letter stating that the Agency needed to assess her ability to perform her duties because she had been unable to return to work since February 5, 2018. The Supervisor noted that all positions located at the Federal Correctional Complex were hazardous duty law enforcement officer positions that require physical and mental ability to perform correctional work safely and successfully. The Supervisor requested that Complainant return specific medical information, including a diagnosis; assessment of current clinical status and plans for future treatment; and an explanation of the impact of the medical condition(s) on life activities, both on and off the job. ROI at 164-6.

Complainant emailed various medical documents to the Supervisor and other Agency officials on November 9, 2018, including the Doctor's report that Complainant has osteoarthritis in her right knee, and that she was unable to squat, kneel, or climb. The Doctor determined that Complainant was at maximum medical improvement (MMI) for her right knee, and that she had permanent work restrictions to include "sedentary work only for her right lower extremity." ROI at 257-67.

Based on Complainant's submitted documents, the Chief of the Occupational & Employee Health Branch ("Chief") concluded on December 18, 2018, that Complainant was not fit for duty as a correctional worker and would not be able to hold any position within the Agency's institutions. ROI at 436.

On February 22, 2019, the Human Resources Manager sent Complainant a letter notifying her that, since she was medically unable to perform the essential functions of her position, there may be available positions for a reassignment. However, the Agency would not eliminate the essential function of responding to emergencies as a form of reasonable accommodation. The Human Resources Manager requested that Complainant return a completed form if she was interested in pursuing another position. Complainant was also asked to indicate the lowest possible grade and geographic locations that she was willing to accept and to provide her current resume. The Human Resources Manager added that positions with a built-in promotion beyond Complainant's current grade level were not eligible for consideration as a reasonable accommodation. ROI at 354-6.

On March 1, 2019, Complainant requested a relocation into another position within the Agency, or with another federal agency, at her same grade or higher. ROI at 357. On or about April 17, 2019, the Human Resources Manager responded to Complainant's request. She reminded Complainant that any reassignment to a position with a promotion potential beyond her current level was not available as a reasonable accommodation, and the Agency would limit any searches to positions at Complainant's current grade level (GS-11) or an equivalent level. The Human Resources Manager noted that Complainant needed to provide a resume and her geographic location preferences, and she granted Complainant seven days to submit this information. ROI at 382-3.

Complainant submitted an updated reasonable accommodation request on April 17, 2019, for a reassignment for herself with a grade increase (GS-12/13) and a reassignment for her husband, who was also an employee at the Coleman Federal Correctional Complex. She further requested that the Agency pay for a move for her family and expressed interest in relocating to Georgia and Grand Prairie, Texas. Complainant added that she was updating her resume and "very capable" of performing any law enforcement position. ROI at 372-5.

On June 14, 2019, the Assistant Human Resources Manager responded to Complainant's updated request. She reiterated that the Agency would only search for positions at Complainant's current grade level or its equivalent.

The Assistant Human Resources Manager also stated that the Agency would not conduct a reassignment search for her spouse or pay for a move. She noted that Complainant had not provided a resume and that the Agency would use the resume retrieved from the electronic Official Personnel Folder (eOPF) system. ROI at 628-9. The Assistant Human Resources Manager notified Complainant on June 28, 2019, July 9, and 15, 2019, and August 15, 2019, that she searched for positions within Complainant's chosen geographic locations in Texas and Georgia for a GS-11 or equivalent position, and she found no position. ROI at 632, 634-6.

On August 16, 2019, the National Reasonable Accommodation Coordinator emailed personnel across the Department of Justice about a reassignment for Complainant. The responses yielded no vacancies. ROI at 638-60. On September 19, 2019, the Acting Warden notified Complainant that the search period had concluded without a vacant, funded position for a reassignment within her identified geographic areas and grade level. As such, her reasonable accommodation request was denied. ROI at 661-2. Complainant requested a reconsideration of the denial. ROI at 668-70.

On November 25, 2019, the Deputy Regional Director responded to the reconsideration request, noting that the Agency was unable to find a vacant position in the areas identified by Complainant at her pay grade. Complainant submitted no new information with her request for reconsideration. Therefore, the Deputy Regional Director concurred with the denial of Complainant's reasonable accommodation request. ROI at 672-3.

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 granted the Agency's motion and issued a decision without a hearing on November 3, 2022.

As an initial matter, the AJ determined that issues 1-4 were not timely discrete acts. For claim 5, the AJ found that the record evidence failed to establish that Complainant was qualified for her position. It was undisputed that she could not perform the essential functions of her position. The Agency commenced searching for a position for a possible reassignment into a vacant, funded position. The Agency denied Complainant's request after repeated searches failed to uncover a suitable position.

The AJ also determined that Complainant's hostile work environment claim failed because the record was devoid of any evidence to show that the Agency's actions were based on Complainant's sex, disability, or prior EEO activity. The AJ concluded that the Agency did not subject Complainant to unlawful discrimination or harassment.

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

Through her attorney, Complainant complains about the "tone" of the AJ's decision, and the dismissal of claims 1-4 as timely discrete claims. In addition, she asserts that the AJ erred regarding the proffered undisputed material facts. For example, she challenges the AJ's finding that her medical documents were in response to the 8-point letter. Complainant also disputes the AJ's statement that Complainant delayed the reasonable accommodation process when she did not return a resume because one was not necessary.

Complainant further contends that the Agency failed to engage in the interactive process, and that a reassignment is an accommodation of last resort, and she requested the ability to telecommute or videoconference as a reasonable accommodation. She also argues that the Agency did not show a direct threat of substantial harm. Complainant requests that the Commission reverse the Agency's final order adopting the AJ's decision and remand the complaint for further processing.

The Agency did not respond to Complainant's appeal.

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 Chap. 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

AJ Bias

As an initial matter, Complainant appears to be accusing the AJ of bias based on the "tone" of the decision. She notes that the AJ stated that Complainant requested a hearing because she was "[d]issatisfied with the results of the Agency's investigation," but that Complainant never conveyed or implied any dissatisfaction with the investigative record. Complainant is also displeased that the AJ stated that Complainant "falsely stated" that she was fully capable of performing her duties and updating her resume, which implied that Complainant was dishonest and misled the Agency, and that it was "outrageous" for the AJ to find that Complainant failed to participate in the interactive process. Complainant Appeal Brief at 2, 10, 18.

Complainant must make a substantial showing of personal bias by the AJ in order to prevail on her contention that the AJ displayed bias. Such bias must be shown to have prejudiced her in this matter. Complainant must establish that the alleged bias demonstrated, so permeated the process, that it would have been impossible to receive a fair hearing, or that the process was so tainted by substantial personal bias that she did not receive a fair and impartial hearing. See Smith v. Dep't of the Army, EEOC Appeal No. 01880866, (May 11, 1988) (citing, Roberts v. Morton, 549 F.2d 158 (10th Cir), cert. denied); and Roberts v. Andrus, 434 U.S. 834 (1977).

In this case, there is no evidence that the AJ was biased in favor of the Agency such that Complainant did not receive a fair evaluation of her case.

Claims

Complainant also challenges the AJ's dismissal of claims 1-4 as untimely discrete actions. EEOC regulation requires that complaints of discrimination should be brought to the attention of the EEO counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1). Here, Complainant contacted the EEO office on November 16, 2018. ROI at 26. Any claims prior to October 2, 2018, are not timely as discrete acts, and claims 1-3 occurred in February 2018 and September 2018. We find that the AJ did not err in finding that claims 1-3 were not timely as discrete claims and included only as part of the overall harassment claim.

However, for claim 4, Complainant stated that she requested a reasonable accommodation on April 19, 2019, and the record shows the Agency denied her request on September 19, 2019. ROI at 105, 661-4. As such, claim 4 is timely as a discrete claim and will be analyzed accordingly.

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. For example, Complainant asserts that the AJ erred in finding that the Doctor specifically responded to the 8-point letter and that "NO PHYSICIAN RESPONDED TO THE 8-POINT LETTER." Complainant Appeal Brief at 4. She further disputes the fact that the Chief reviewed medical documentation submitted in response to the 8-point letter. However, Complainant submitted the medical documents to the Agency on November 9, 2018, and she stated "[h]ere is the 8 point response from my Dr. again." ROI at 257. Complainant's representation to the Agency that the medical documents were in response to the 8-point letter undermines her assertion that no physician provided medical documentation in response to the 8-point letter.

Complainant also disputes the AJ's finding that she delayed the reasonable accommodation process when she failed to submit a resume. The record shows that Complainant informed the Agency that she was updating resume on April 17, 2019, but as of June 14, 2019, the Assistant Human Resources Manager did not have a resume from Complainant, so she utilized a copy of Complainant's resume from her eOPF because a resume was required for a reassignment search. ROI at 372, 628-9. Complainant disagrees with the AJ's assessment that she caused a delay, but mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for recon. denied, EEOC Request No. 05A10914 (Oct. 1, 2001).

Complainant further asserts that there is a dispute regarding whether she is able to perform the essential functions of her position. She relies upon a medical document dated November 27, 2017, in which a physician concluded that "within [a] reasonable degree of medical certainty these requirements [such as use of firearms and dragging a body an extended distance] seem to be met." ROI at 258-9. However, when the Agency instructed Complainant to return to work in February 2018, she submitted medical notes from the Doctor that Complainant was not released from the Doctor's care for her left shoulder and right knee. ROI at 351-3. Complainant provided additional medical documents from the Doctor generated from June 2018 through November 2018, describing her current medical restrictions, such as no climbing. The Doctor specified that she had reached MMI in her right knee and had permanent work restrictions for only sedentary work due to her right lower extremity. ROI at 261-9. We find that the medical document from November 2017 does not create a genuine dispute because the Agency relied upon subsequent medical information to determine that Complainant was unable to perform the essential functions of her position in 2018.

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 4 and 5)

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’s 2018 medical documents from the Doctor reveal that she has osteoarthritis with a limited range of motion in her right knee, and she was unable to stand more than four hours or squat, kneel, or climb. Complainant was limited to only sedentary work for her lower right extremity. Complainant also averred that she was limited in her ability to lift. ROI at 335, 340-5, 94. As such, we find that Complainant 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 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).

The Position Description for the Teacher position shows that the major duties include specific correctional responsibilities; for example, custody and supervision of inmates; responding to emergencies and institution disturbances; and use of physical control when necessary, such as fights among inmates, assaults on staff, and riots or escape attempts.

The physical demands require some lifting of objects and prolonged standing. ROI at 407-14. Law Enforcement positions within the Agency also have 14 physical requirements, including carrying a stretcher with one other person; lifting objects weighing 25 pounds; and climbing stairs. ROI at 151.

As noted above, the Doctor reported that Complainant was unable to climb and was limited to sedentary work, and Complainant stated that she was restricted in her ability to lift. We find that the record evidence supports that Complainant could not meet the physical requirements of her position to perform the essential functions, and she was not qualified.

Regardless, Complainant was placed on LWOP starting in February 2018. Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. See Enforcement Guidance, Leave.

In September 2018, the Agency requested updated medical information and upon receipt of documentation showing that Complainant was still unable to perform her essential functions, the Agency initiated the interactive process and offered a reassignment search as a reasonable accommodation on February 22, 2019. ROI at 354-5. Complainant requested a reassignment with a grade increase (GS-12 or GS-13); a reassignment for her husband; and a "full paid move." ROI at 357, 372-5. However, an employer must reassign an employee to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g. benefits, geographical location), if the employee is qualified for the position. If there is no vacant, equivalent position, the employer must reassign the employee to a vacant lower-level position for which the employee is qualified. See Enforcement Guidance, Reassignment. As such, the Agency properly limited its search for vacant, funded positions at Complainant's current grade level of GS-11.

In addition, Complainant's requests for a reassignment for her husband and a paid move for her family are not reasonable accommodations, which are modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position in question. See 29 C.F.R. §1630.2(o)(1)(ii).

The Agency conducted reassignment searches for Complainant and ultimately found no vacant, funded position.

For example, the National Reasonable Accommodation Coordinator emailed officials at institutions throughout the Department of Justice on August 16, 2019, asking if any had a GS-11 or equivalent position within Georgia or Grand Prairie, Texas, and the responses were negative. ROI at 638-60. The Commission has found that an agency has fulfilled its obligation when it sought to reassign a complainant but could not locate any vacant, funded positions at the complainant's grade level, within the geographic locations specified by the complainant, for which the complainant was qualified and within their medical restrictions. See Emmett W. v. Dep't of the Navy; EEOC Petition No. 2023002692 (Aug. 7, 2024); Myung S. v. U.S. Postal Serv., EEOC Petition No. 2024001404 (Jun. 26, 2024).

Complainant also argues that the Agency failed to engage in the interactive process. However, an agency's failure to engage in the interactive process does not, in itself, constitute a violation of the Rehabilitation Act. See Pitts v. U.S. Postal Serv., EEOC Appeal No. 0120130039 (Mar. 13, 2013) (citing Doe v. Social Sec. Admin., EEOC Appeal No. 01A14791 (Feb. 21, 2003)). Liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation. Id. Accordingly, the fact that the Agency failed to properly engage in the interactive process, does not, by itself, demand a finding that Complainant was denied a reasonable accommodation. Rather, to establish a denial of a reasonable accommodation, Complainant must establish that the failure to engage in the interactive process resulted in the Agency's failure to provide a reasonable accommodation. Id.

Complainant contends that the Agency failed to respond to her requests for telecommuting and videoconferencing as reasonable accommodations. However, the Agency previously informed her that it would not eliminate the essential functions of responding to emergencies as a reasonable accommodation. ROI at 354. The Commission has 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 Lorraine 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). Even crediting that the Agency did not engage in the interactive process for the telework or videoconferencing requests, this did not result in a failure to accommodate because the Agency was not obligated to grant these accommodations since they would remove essential law enforcement functions. Complainant did not identify any other possible accommodations that would not eliminate an essential function.

The Commission has long held that reassignment is the reasonable accommodation of last resort and is required only after it has been determined that there are no effective accommodations that will enable Complainant to perform the essential functions of her current position, or all other reasonable accommodations would impose an undue hardship. See Enforcement Guidance, Reassignment. The evidence shows that the Agency kept Complainant apprised of its results during the reassignment search from June through August 2019. ROI at 632, 634-6. We are not persuaded that the Agency failed to engage in the interactive process, and we find no violation of the Rehabilitation Act when the Agency denied Complainant's request for a reasonable accommodation.

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, 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 disability, sex, and prior protected EEO activity, and she was subjected to unwanted conduct.

However, for claim 1, Complainant offered no connection between the alleged conveying of incorrect information and any of her protected bases. Further, while Complainant blamed the Human Resources Manager, she responded that she had no knowledge of this event. ROI at 206.

The requests for updated medical information (incidents 2 and 3) were reasonably related to Complainant's disability, but not her sex or protected EEO activity. However, employers may require a medical examination or make disability-related inquiries of an employee if the examination is job-related and consistent with business necessity. See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) EEOC No. 915.002 (July 27, 2000), at 5. This requirement is met when the employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform the essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. Id. at 14.

We find that Complainant's inability to report to work since February 5, 2018, and the Doctor's February 2018 notes stating that Complainant was still under his care were objective evidence to support the Agency's request in September 2018 for updated medical information to determine if she was able to perform the essential functions of her position and return to work, and such request was consistent with business necessity. While Complainant argues that the Agency did not meet its burden of showing a significant risk of substantial harm that she posed a direct threat, the Agency's request fell within the first category regarding Complainant's ability to perform her essential functions, and a direct threat analysis is not applicable here.

Further, 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 the instructions for Complainant to submit medical information regarding her medical ability to perform her duties was abusive or offensive, or taken in order to harass Complainant.

As discussed above, we found that Complainant did not establish a case of discrimination for claims 4 or 5. Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that 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 establish that the Agency subjected her to harassment based on disability or sex, or in reprisal for prior protected EEO activity.

CONCLUSION

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

November 18, 2024

Date