



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

[REDACTED]
Selene M.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2023002701

Hearing No. 480-2022-00414X

Agency No. 2021-29184-FAA-03

DECISION

On April 4, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Administrative Judge's January 23, 2023, 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 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 AJ's decision.

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 is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not subjected to discrimination and a hostile work environment regarding reasonable accommodation, based on race (Hispanic), color (light brown), sex (female), religion (Christian), disability (physical), and/or reprisal (prior request for reasonable accommodation).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Clerk Support Specialist/FV-0303-E at the Agency's Los Angeles West Flight Test Branch, AIR 716 in Lakewood, California. Report of Investigation (ROI) at 145. Complainant is a light brown Hispanic female, and she is Christian. Complainant asserted that she was diagnosed with TMJ disorder and migraines as a result of a service-connected disability. Both were diagnosed by a medical professional, the migraine headaches in 2015 and TMJ disorder prior to that. Complainant described the conditions as permanent, explaining that there are days when she needs to lie down in a quiet room and sometimes the migraine headaches cause her to have nausea, vertigo, and auras (eye migraines). ROI at 146.

Complainant had engaged in prior EEO activity when she filed an informal complaint for reprisal, performance evaluation and appraisal, which was closed on August 15, 2018. ROI at 669. Complainant asserted that she requested a reasonable accommodation in early December 2019, around April 19, 2021, and April 30, 2021. Complainant also asserted that on August 5, 2021, August 6, 2021, and September 14, 2021, the Agency denied her reasonable accommodation request to use her maxiflex schedule to work additional hours on Fridays and Saturdays. ROI at 146-47. Complainant however identified her previous EEO activity specifically as her May 4, 2021, request for reasonable accommodation, which her immediate supervisor denied.

Complainant's immediate supervisor (Supervisor 1) was the Manager, West Flight Test Section. Complainant's second-line supervisor (Supervisor 2) was the Division Manager. ROI at 192.

On October 24, 2018, the Agency granted Complainant reasonable accommodation, including that the second administrative office from the main lobby entrance would be made available for her use.

Aromatic scents in the assigned office space may be used to placate or otherwise avoid scent triggers, provided safety regulations are met and facility/personnel safety is not compromised. A face/nose mask would be provided for Complainant's use, again to mitigate potential scent/smell associated triggers. A white noise machine would be provided for use within, and confined to, the assigned office space to avoid noise triggers and thereby reduce the frequency of migraines in the workplace. An anti-glare cover for Complainant's computer monitor(s) would be provided to reduce the frequency of migraines in the workplace by mitigating potential light associated triggers. Additionally, a Flexible Work Schedule (FWS) would be made available to Complainant under either the Flexitour option or the Gliding Schedule option.

Both of these schedules offered a variable start time, between 0700L and 0830L. Under the Flexitour option, the variable start time is preselected in advanced and requires coordination and approval if changes to those times are desired. Under the Gliding schedule option, a flexible time band from 0700L to 0830L is available for shift start times. Each of these options have an 8-hour day, 40-hour week, 80-hour biweekly pay period basic work requirement. ROI at 835.

Supervisor 1 asserted that Complainant's protected bases were not factors in the denial of Complainant's request. ROI at 178.

On September 24, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the basis of race/national origin (Hispanic), sex (female), religion (Protestant), color (Light Brown), disability (physical), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

- A1. On May 4, 2021, Complainant's request for reasonable accommodation was denied;
- A2. On or about August 5, 2021, August 6, 2021, and September 14, 2021, Complainant's request for reasonable accommodation to use her maxi-flex schedule to work between 6pm and 6am and Saturday was denied;²

² The AJ noted that following a September 28, 2022, Initial Conference, she amended the complaint and removed duplicative claims.

- B1. On April 6, 2020, Complainant's supervisor by email requested additional medical documentation for her Family and medical Leave Act (FMLA) request;
- B2. On or around April 8, 2021, Complainant's supervisor and another individual (Individual 1) interviewed her regarding absences due to her medical condition;
- B3. On or about May 4, 2021, via email, Complainant's supervisor assigned Complainant a task of submitting a daily report of items that she assigned Complainant with due dates;
- B4. On or about May 4, 2021, via email, Complainant was denied scheduling Mondays and Fridays off work at the end of the pay period;
- B5. On May 5, 2021, Complainant's supervisor sent an email assigning her a new weekly task of taking meeting minutes and attendance for the UAS (undefined acronym) internal meeting and the UAS PM/FT (undefined acronyms) meeting;
- B6. On or about May 18, 2021, through May 21, 2021, Complainant's supervisor gave her "unclear directions" regarding researching and production of emails;
- B7. On June 2, 2021, and June 3, 2021, Complainant's supervisor emailed her "confusing" instructions for submitting UAS meeting minutes;
- B8. Around June 3, 2021, Complainant's supervisor informed her that two assignments were immediately due without providing any information on which assignment was priority;
- B9. From June 8, 2021, through June 11, 2021, Complainant's supervisor did not allow her to adjust her time and attendance to reflect a change in leave usage;
- B10. Around June 21, 2021, through June 24, 2021, Complainant received seven email exchanges from her supervisor on an assignment she replied to on June 21, 2021;
- B11. On June 22, 2021, Complainant's supervisor sent her an email inquiring whether she wanted a Weingarten meeting prior to her making a determination on whether she worked 30 minutes outside of her

scheduled shift on June 7, 2021, and was Absent Without Leave (AWOL) on June 10, 2021, from 1420 to 1500;

B12. On or about June 2021, Complainant's supervisor replied to an email she sent asking why her time and attendance (T&A) had not been approved and said she was AWOL from 0600-0630 and working outside shift from 1430-1530 on June 7-13, 2021;

B13. On or about June 22, 2021, Complainant's supervisor emailed her to immediately submit an assignment;

B14. On or about June 23, 2021, and June 24, 2021, Complainant's supervisor wanted explanations on why her numbers were high;

B15. On July 9, 2021, Complainant's supervisor removed two (2) hours from the time needed for her to review time & attendance entries in the CASTLE (undefined acronym) system; and

B16. On July 24, 2021, Complainant's supervisor told her that her request for immediate leave was disapproved/denied.

The Agency conducted an investigation into the complaint. The investigation revealed that Complainant was the only Clerk Support Specialist (Administrative Assistant) assigned to AIR 716. ROI at 154 and 841. Complainant's duties are outlined in her performance standards. See ROI at 672-74. Complainant was a member of the National Air Traffic Controller Association (NATCA) Union. A named individual was Complainant's NATCA Union representative (Union Representative). On February 14, 2021, NATCA initiated a grievance, NATCA Grievance Number 21-EW1-4, on behalf of Complainant, that grieved violations that occurred "about February 10, 2021 and on-going." These included allegations that the Agency denied or failed to allow Complainant to use or alter a Maxiflex work schedule. ROI at 641.

On April 6, 2021, NATCA initiated a grievance, NATCA Grievance Number 21-EW1-7, on behalf of Complainant, that grieved violations that occurred "about February 26, 2021." ROI at 658-59. Likewise, Complainant's specific claims regarding incidents related to a May 4, 2021 email discussing Agency tasking Complainant with submitting a daily report were Grievance Number 21-EW1-9.

NATCA initiated a grievance, NATCA Grievance Number 21-EW1-10, on behalf of Complainant, that grieved violations that occurred "about January 29, 2021." NATCA Grievance Number 21-EW1-10 specifically grieved that "the issue regarding AIR-716 [Agency] management's denial of maxiflex changes is an ongoing issue." ROI at 665-66. On February 9, 2021, NATCA initiated a grievance, NATCA Grievance Number 21-EW1-3, on behalf of Complainant, that grieved violations that occurred "about January 26, 2021 and 11 ongoing." NATCA Grievance Number 21-EW1-3 grieved, among other issues, that "the issue regarding AIR-716 [Agency] management's denial of maxiflex changes is an ongoing issue." ROI at 650-51.

On May 7, 2021, NATCA initiated a grievance, NATCA Grievance Number 21-EW1-9, on behalf of Complainant, that grieved violations that occurred "about May 4, 2021." NATCA Grievance Number 21-EW1-9 grieved, among other issues, alleged violations, that on about May 4, 2021, Complainant received an email from Supervisor 1 that assigned tasks to Complainant. ROI at 663-664.

On October 25, 2021, the Agency and NACTA resolved Grievances Numbers 21-EW1-3, 21-EW1-4, 21-EW1-5, 21-EW1-6, 21-EW1-7, 21-EW1-9 and 21-EW1-10, by an executed Settlement Agreement. ROI at 638.

At the time that Complainant filed the instant complaint, Agency's Flight Test Pilots and Flight Test Engineers were able to utilize maxiflex. The Agency's Flight Test Pilots and Flight Test Engineers are required to travel for job flying tasks and training, including other flyers. Complainant's primary job function as 716's Office Administrative Assistant does not require her to travel and her assigned duty station is an FAA facility located in Lakewood, California. Complainant asserted that she provided Form WH-380-E to Supervisor 1, in which her primary care provider wrote that she needed a reduced schedule and rest in a dark comfortable room, preferably at home during a migraine. ROI at 177.

According to Complainant, around March 18, 2020, and April 6, 2020, Supervisor 1 provided her with memorandums that did not approve her reasonable accommodation request, but instead requested medical records. In the memorandum, Supervisor 1 explained that she did receive "...some documentation stating that [Complainant] may need FMLA for a serious health condition, the form [Complainant] provided was inconsistent and unclear, and was therefore found to be incomplete." ROI at 147.

On April 6, 2020, Supervisor 1 emailed Complainant stating that "I reviewed the materials that you submitted. However, your FMLA request remains incomplete. Please see the attached memorandum explaining why the request is incomplete and what you can do to complete the request." ROI at 218.

On March 23, 2021, Complainant submitted a late leave request to Supervisor 1. ROI at 200. On March 30, 2021, Supervisor 1 requested a meeting with Complainant to discuss her late leave request on March 23, 2021. See ROI at 270. On or around April 8, 2021, Complainant and Supervisor 1 held a meeting to discuss Complainant's leave request on March 23, 2021. ROI at 201 and 269.

Attendees at weekly meetings were requesting UAS meeting minutes. Complainant attended the UAS meeting. ROI at 203 and 258-62. From May 5, 2021 to June 3, 2021, Complainant and Supervisor 1 exchanged emails discussing Complainant's responsibility for taking UAS meeting minutes. ROI at 258-68. On June 3, 2021, 8:32 am, Supervisor 1 emailed Complainant to inquire why Complainant had not submitted the UAS meeting minutes review by the 7:00 am deadline. ROI at 260. At 9:48 am, Complainant responded to Supervisor 1's email, with a statement that she did not timely submit the UAS meeting minutes because she was working on the WAR assignment. That same day, at 10:27 am, Supervisor 1 emailed Complainant to inform her that someone else finished the WAR assignment and that "The meeting minutes, your [Complainant's] revised projected schedule including discrepancy list identified by you [Complainant], and daily task tracker take precedence. Please complete immediately." ROI at 259. From May 18, 2021 to May 21, 2021, Complainant and Supervisor 1 exchanged emails regarding her assignments. See ROI at 182 and 266-68.

On June 8, 2021, Supervisor 1 informed Complainant by email that Complainant made an error on her time and attendance for June 2, 2021, in that "Your [Complainant's] leave request was confusing because it did not match your [Complainant's] actual leave used on June 2, 2021." ROI at 234. Supervisor 1 also informed Complainant by email that "If you [Complainant] believe any corrections are required, submit them to me with your request for correction of the T&A together with any supporting evidence not later than five (5) days from today's date." Id. On June 11, 2021, Complainant responded to Supervisor 1's June 8, 2021, email stating that "I am making some mistakes [on her time and attendance entries]..." Id.

Supervisor 1 sent emails to Complainant between June 16-28, 2021, because Complainant did not timely and accurately complete an assignment by the due date of June 21, 2021. ROI at 184. Complainant admitted that her numbers for the Flight Test Spend Plan were high. ROI at 163. On June 22, 2021, Complainant and Supervisor 1 exchanged emails discussing why time and attendance report did not match Complainant's regular work schedule or her projected schedule for pay period 2020-13. ROI at 244-46.

Supervisor 1 asserted that she had to adjust Complainant's deadline to complete her time and attendance review to an earlier time to allow Agency employees, waiting for Complainant to complete her review, sufficient time to correct and approve time and attendance submissions.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On December 7, 2022, the Agency filed a motion for summary judgment (Agency's motion). On December 21, 2022, Complainant filed a response (Complainant's response). The Agency filed a reply on December 28, 2022.

The AJ assigned to the case admitted the parties' submissions into the record. The AJ reviewed the investigative file, and determined that the administrative record was sufficiently complete. After making all reasonable inferences in favor of Complainant, the AJ found that there were no material facts in dispute regarding Complainant's claims. Therefore, the AJ concluded that a decision may issue based on the record. On January 23, 2023, the AJ issued a decision without a hearing pursuant to 29 C.F.R. §1614.109(g) in favor of the Agency.

The AJ reviewed the Agency's Statement of Undisputed Material Facts and found they accurately captured the undisputed, material facts in this complaint. Therefore, the AJ adopted and incorporated by reference, these facts into her decision. According to the AJ, where Complainant disputed several of these facts in response, the AJ did not find the dispute (or disagreement) to be material to this complaint or impact the outcome of her decision.

The AJ dismissed most of Complainant's claims because she had raised similar claims through the Agency's grievance process. In determining which claims were appropriate for dismissal under 29 C.F.R. §1614.107(a)(4) and §1614.301(a), the AJ considered record evidence reflecting that the October 25 settlement agreement consolidated the 24 grievances filed on behalf of

Complainant, describing violations as early as July 15, 2020. ROI at 641. The October 25 settlement agreement included relief for violations as late as July 22, 2021 (Grievance 21-EW1-10). ROI at 639. The AJ stated that Complainant's claims involving leave issues and maxi-flex scheduling occurred between April 6, 2020, and July 24, 2021.

The AJ determined that the grievances detailed in the record specifically identified the denied accommodation claim in Claim A1 (Grievance 21-EW1-9); the May 3-5 emails in Claims B3, B4, and B5 (21-EW1-9); issues related to assignment of duties compared to Complainant position description; and Complainant's requests for maxi-flex scheduling and claims related to leave issued in Claims A2, B1, B2, B5, B9, B11, B12, B15, and B16 (which are addressed as late as Grievance 21-EW1-10 and captured in the October 25 settlement agreement). ROI at 664. Therefore, the AJ concurred with the Agency that Claims A1, A2, B3, B4, B15, and B16 were appropriate for dismissal pursuant to 29 C.F.R. §1614.107(a)(4) and §1614.301(a).

The AJ also found it appropriate to dismiss Claims B1, B2, B5, B6, B7, B8, B9, B11, and B12 from this complaint. In making this determination, the AJ cited to Commission precedent, noting that a complainant need not actually raise the specific claim of discrimination in the grievance in order to have elected the forum. In reviewing the record, the AJ found that the underlying issues related to these claims were considered through the grievance process. The AJ found it appropriate to dismiss Claim A in its entirety, and Claims B1 through B9, B11-B12, and B15-16.

The AJ addressed the remaining claims that constituted a hostile work environment claim based on email communications from Complainant's supervisor to Complainant (Claim B10 and Claims B13-14).

The AJ determined that a thorough examination of the record and Complainant's response failed to reveal a nexus between Complainant's protected bases and the complained-of emails. According to the AJ, the record reflected that the emails in Claim B10 and Claims B13-14 were related to Complainant's Flight Test Spend Plan assignment. In fact, observed the AJ, the record reflected that Complainant's supervisor sent her the emails because the assignment was overdue. In her response, the AJ observed that Complainant did not dispute the assignment was overdue, but instead argued that her supervisor gave her too short a deadline to submit the assignment. See Complainant's response at 13. Other than her own firmly held belief that she was submitted to discriminatory harassment by the supervisor, the AJ found that Complainant did not identify any evidence to support her assertion.

However, observed the AJ, even if Complainant could connect these emails to her protected bases, these isolated emails were not sufficiently severe or pervasive to constitute a hostile work environment. The AJ did not doubt that Complainant found her workplace environment uncomfortable, tense, and at times, "hostile." However, asserted the AJ, a review of the emails revealed them to be the typical workplace communications between a supervisor and an employee. The AJ cited to applicable Commission precedent, stating that Title VII is not a workplace civility code, and the Commission has repeatedly held that claims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. In considering the circumstances of these emails, the AJ found that they were insufficient to state a claim of 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.

CONTENTIONS ON APPEAL

In her appeal statement, among other things, Complainant contests the AJ's decision, asserting that the AJ erred as a matter of law and regulation in determining that Complainant was represented by the union for her EEO matters. She also asserts that the AJ erred in using union filed grievances and settlement agreement to dismiss Complainant's Title VII claims. According to Complainant, even though there was some overlap of remedies from a few of her EEO claims, her EEO complaint of discrimination, reasonable accommodation denial, and harassment/hostile work environment should still be heard. According to Complainant, case law does not support dismissing her EEO complaint when there are obvious EEO matters that have not been adjudicated.

In response, the Agency requests that the Commission procedurally dismiss Complainant's appeal, reiterating its previous explanations which include that Complainant's had initially elected the Agency's grievance process as the forum to address her claims.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that

the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is “genuine” if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is “material” if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ’s legal and factual conclusions, and the Agency’s final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a “decision on an appeal from an Agency’s final action shall be based on a *de novo* review...”); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge’s determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

Dismissed Claims

At the onset, we address the AJ’s dismissal of most of Complainant’s claims in the instant complaint.

EEOC Regulation 29 C.F.R. 1614.301(a) states that when a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect to raise the matter either under Part 1614 or the negotiated grievance procedure, but not both. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under Part 1614, irrespective of whether the agency has informed the individual of the need to elect or whether the grievance has raised an issue of discrimination.

Here, we find that the AJ's dismissal of Claims A1, A2, B3, B4, B15, and B16 were appropriate for dismissal pursuant to 29 C.F.R. 1614.107(a)(4) was proper because Complainant elected to pursue her allegation of discrimination by pursuing the negotiated grievance process before filing a formal complaint.

We also find appropriate the AJ's dismissal of Claims B1, B2, B5, B6, B7, B8, B9, B11, and B12 from this complaint because the underlying issues related to these claims were considered through the grievance process.

As the AJ asserted in her decision, Complainant did not dispute that she was a covered employee under the Agency's CBA and grievance process. As the AJ aptly stated, the negotiated grievance procedure allows for claims of discrimination and provides that employees must make an election of claims either through the EEO process or in a grievance, but not both. In this case, the record reflects that the union filed several grievances on behalf of Complainant, resulting in a settlement agreement dated October 25, 2021. ROI at 638-40. Pursuant to that settlement agreement, the Agency restored leave and lost pay and benefits to Complainant. The settlement agreement also noted that "grievant will meet with her manager to discuss the application and changes to her Maxi-Flex schedule," and references assignment of duties and her position description. Id.

We note Complainant's appeal contentions regarding the dismissal of her claims, including that the grievances should not count against her because the union filed the grievances on behalf of the union, and not her. We likewise note record evidence including the Agency's arguments and the AJ's stated explanations that the claims raised by Complainant's before the Commission overlapped with the subjects of her grievances that were previously resolved by a settlement agreement. See AJ's Decision at 5, Agency's motion at 16-8, and Agency's reply at 2-6. As did the AJ, we find that the specific grievances addressed in the settlement agreement identify Complainant as the grievant. Therefore, the record supports a conclusion that Complainant benefited from the settlement agreement.

Importantly, addressing these claims by the Commission could constitute an improper collateral attack on a forum outside of the Commission's EEO complaint process. See Walsh v. United States Postal Service, EEOC Request No. 05980369 (Mar. 29, 2001). Therefore, we AFFIRM the AJ's decision regarding the dismissed claims.

AJ's issuance of a 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, despite Complainant's appeal assertions, the AJ did address three of her harassment allegations. However, Complainant presented no additional evidence in her appeal statement to support her allegations that the challenged management actions were motivated by discrimination or retaliation to raise a genuine dispute of material facts. Beyond conclusory and speculative assertions, and even assuming that additional statements by the parties would have favored Complainant, Complainant has presented no other affidavits, declarations, or unsworn statements from other witnesses nor documents which contradict or undercut the explanations provided by Supervisor and her other managers or which would cause us to doubt their veracity as witnesses.

Ultimately, we find that Complainant failed to establish the existence of a factual dispute sufficient to give rise to a genuine issue of material fact. Given that Complainant had access to the ROI concerning her complaint, the opportunity to develop the record significantly during the EEO investigation, and before the AJ, we find that summary judgment was appropriate in this case.

Harassment (Claims B10, B13-14)

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/national origin, color, sex, 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 race/national origin, color, sex, disability and prior protected EEO activity, and she was subjected to unwanted conduct. However, Complainant did not show a connection between any protected basis and the alleged harassment.

Regarding the emails in Claim B10 and Claims B13-14, we agree with the AJ's observation that the emails were related to Complainant's Flight Test Spend Plan assignment. Supervisor 1 had sent Complainant those emails because the assignment was overdue. In her response, the AJ observed that Complainant did not dispute that the assignment was overdue, but instead argued that the deadline her supervisor gave her to submit the assignment was too short. See Complainant's response at 13.

We find Complainant's firmly held beliefs insufficient to sustain her allegations that she was subjected to harassment by Supervisor 1's emails. Moreover, as the AJ aptly stated, Title VII is not a workplace civility code, and the Commission has repeatedly held that claims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See Dayton v. United States Postal Serv., EEOC Appeal No. 0120101659 (Aug. 19, 2020).

The Commission has also repeatedly recognized that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures, monitoring subordinates, distributing the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and otherwise managing the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (June 16, 2017).

Employees will not always agree with supervisory communications and actions, but absent discriminatory motives, these disagreements do not violate EEO law. Steven T. v. Dep't of the Treasury, EEOC Appeal No. 2020003020 (Sept. 19, 2020).

CONCLUSION

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

December 30, 2024
Date