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

[redacted]
Edwina W.,[1]
Complainant,

v.

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

Appeal No. 2023002868

Hearing No. 490-2021-00077X

Agency No. 200I-0614-2020105192

DECISION

On April 13, 2023, Complainant filed a premature appeal[2] with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), prior to the issuance of the Agency's May 26, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and 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 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.

[2] This initially premature appeal has since been cured by the Agency's issuance of its final decision.

ISSUES PRESENTED

The issues presented are: (1) whether it was an abuse of discretion for the EEOC Administrative Judge (AJ) to dismiss Complainant's hearing request as a sanction; and (2) whether the Agency's final decision properly determined that Complainant did not establish that she was subjected to discrimination or harassment based on sex and/or reprisal as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a VN-0610-II Registered Nurse at the Agency's VA Medical Center (VAMC) facility in Memphis, Tennessee. Complainant stated that two Nurse Managers (Manager-1: female; Manager-2: female) were her co-supervisors, and her second-line supervisor was the Chief Nurse (female). Complainant is female and stated that she had engaged in prior protected EEO activity by filing EEO complaints.

Complainant stated that, beginning February 19, 2020, she was out of work because her minor son had an early case of symptomatic undiagnosed Covid-19, her husband developed symptomatic undiagnosed Covid-19 that was subsequently diagnosed as Covid-19, and she self-quarantined after being exposed to Covid-19. Complainant had exhausted her paid leave and requested leave without pay (LWOP). According to Complainant, her absences were legally protected because she invoked the Family and Medical Leave Act (FMLA). Complainant stated that she called and spoke with management, including Manager-1, on numerous occasions to request LWOP and also submitted medical documentation. Complainant averred that Manager-1 and Manager-2 initially granted her requests for LWOP from February 19, 2020, to March 27, 2020. Manager-1 and Manager-2 averred that they could not approve LWOP as Nurse Managers. According to Manager-1, a request for LWOP needed to go to the Chief Nurse and a request for LWOP of more than 30 days needed to go the VAMC Director.

Manager-1 stated that she did not have any direct communication with Complainant when her extended absence began on February 19, 2020. On February 19, 2020, Complainant emailed Manager-1, "I will be out of the office beginning today through February 28, 2020. My leave has been entered." ROI at 127. On February 25, 2020, Manager-1 sent an email to Complainant's Agency and personal email addresses, asking Complainant if the LWOP was related to her Office of Workers Compensation Programs (OWCP) case so her time could be entered accurately. ROI at 127.

On March 2, 2020, Manager-1 again emailed Complainant, asking her to specify what the following leave was for: 24 hours from February 19-21, 2020, 40 hours from February 24-28, 2020, and 40 hours from March 2-6, 2020. Manager-1 noted that, according to the OWCP representative, Complainant's leave was unrelated to OWCP. ROI at 127. According to Manager-1, Complainant would call and speak to the house supervisor on duty, and Manager-1 would receive a note from that supervisor that Complainant would be absent from work for a week and was requesting LWOP. Manager-2 stated that she did not have any contact with Complainant during her absence.

Manager-1 stated that she spoke with Complainant by phone on April 6, 2020, and told her that she and Manager-2 could not approve LWOP and that Complainant's request for LWOP needed to go to the Chief Nurse or otherwise her leave status would be absent without leave (AWOL). Manager-1 averred that she offered to send Complainant the documents for requesting LWOP after she mentioned that she had moved and did not have internet access, but Complainant declined the offer. According to Manager-1, while Complainant had a worker's compensation case and was approved for FMLA in relation to her work-related injury, OWCP had stated that Complainant was not on FMLA leave for that reason. On April 14, 2020, Manager-1 sent an email to Complainant's Agency and personal email addresses, reiterating that she and Manager-2 could not grant LWOP, recommending Complainant submit a request for extended LWOP, and explaining that Complainant had been charged AWOL since February 19, 2020, representing approximately 45 days. ROI at 129. In the email, Manager-1 stated that Complainant had not provided any additional information about her absence or medical documentation to Manager-1 or to the house supervisor, noting that the Worker's Compensation Office had indicated that Complainant's absence was unrelated to her worker's compensation case.

The Chief Nurse stated that she became Complainant's second-level supervisor on March 8, 2020, and that she was not aware of Complainant's prior EEO activity. According to the Chief Nurse, Complainant had been absent from work since February 19, 2020, and she would call the Off-Tour Supervisor most Mondays to request LWOP for the week. The Chief Nurse stated that the Off-Tour Supervisor and the Nurse Managers could not approve LWOP, noting that she could approve LWOP up to 30 days and that any request for more than 30 days needed to be requested and approved by the VAMC Director in a request routed through the Chief Nurse's office.

The Chief Nurse averred that, although Manager-1 informed Complainant of these procedures and offered to send her the documents needed to request LWOP, Complainant declined Manager-1's offer, and she never received a request for LWOP from Complainant. The Chief Nurse denied that Complainant was initially approved for LWOP as alleged, explaining that she and the VAMC Director were the only managers who could approve LWOP and that they did not receive a request from her. According to the Chief Nurse, Complainant was therefore appropriately charged AWOL for the entire time she was absent, noting that Complainant also did not provide any medical or other documentation during her absence that might have served as a basis for approving LWOP or FMLA leave.

On April 17, 2020, Manager-1 sent Complainant an Order to Return to Duty letter, which stated that Complainant had failed to report to work since February 19, 2020, had not submitted a proper leave request to cover her past and continuing leave, had been charged 136 hours AWOL, and would continue to be charged AWOL until she returned to duty or received approval for a properly submitted leave request. Manager-1 ordered Complainant to either return to duty the next day after receiving the letter or to contact Manager-1 no later than the next duty day after receipt of the letter to request leave. The letter also explained the availability of FMLA leave and procedures related to FMLA, the proper procedures for requesting leave, and the Employee Assistance Program. On April 24, 2020, the Order to Return to Duty Letter was returned to the Agency as undeliverable.

Complainant alleged that, on May 12, 2020, Manager-1 modified her time sheets, changing 144 hours of previously approved LWOP from February 19, 2020, to March 27, 2020, to AWOL. Complainant averred that she requested FMLA LWOP for May 20, 21, and 22, 2020, and that Manager-1 changed this request to AWOL, resulting in a running total of 184 hours of AWOL.

Complainant returned to work on May 18, 2020. Manager-1 averred that, by that time, Complainant had been charged approximately 500 hours of AWOL over a span of 75 days. Manager-1 stated that, when Complainant returned to work in May, she raised her family members having Covid-19 as the reason for her absence for the first time, but she did not provide any documentation. According to Manager-1, when she spoke with Complainant on April 6, 2020, she did not mention anything about Covid-19 or being exposed to Covid-19 as the reason for her extended absence. Manager-1 speculated that, if Complainant had reached out earlier to explain the reason for her absence or had submitted documentation, the situation may have turned out differently.

The Chief Nurse stated that, in May 2020, she consulted with the Acting Human Resources Manager (HR-1: male) about what to do about Complainant's situation. The Chief Nurse averred that she considered lesser penalties such as a suspension but decided to propose her removal because she engaged in egregious leave abuse, accruing more than 500 hours of AWOL during a time when the VAMC was experiencing significant staffing issues due to Covid-19.

On May 29, 2020, the Chief Nurse issued Complainant a Notice of Proposed Removal. The first charge was Unauthorized Absence (AWOL), and the proposal listed 58 specifications of dates Complainant was charged AWOL from February 19, 2020, to May 8, 2020. The second charge was Failure to Follow Supervisory Instructions, and the proposal stated that Complainant did not return to duty the next day after receiving the Order to Return to Duty Letter that was mailed to her home address on April 17, 2020. In the proposal, the Chief Nurse noted that Complainant had no past disciplinary record.

Complainant stated that she did not receive the Order to Return to Duty Letter, noting that her family home had been sold on March 5, 2020, and that the record reflected that it was returned to sender. Complainant averred that she had no past history of disciplinary action. Complainant alleged that the real reason for her discharge was retaliation, explaining that the Chief Nurse had well-known friendships and work relationships with individuals Complainant had identified as responsible management officials in her past EEO complaints.

The VAMC Director was the deciding official for the proposed removal. The VAMC Director (male) averred that he was aware of Complainant's prior EEO activity because he reviewed weekly reports from the EEO Office. According to the VAMC Director, on June 9, 2020, he met with Complainant, HR-1, and his Executive Assistant for Complainant to provide her oral response to the proposed removal. The VAMC Director stated that Complainant explained that her absence was due to her husband and son becoming ill with Covid-19 and her own exposure to Covid-19 but that, when he asked why she did not apply for leave under FMLA or the CARES Act or follow the proper procedures for requesting LWOP, she did not have an explanation. The VAMC Director averred that Complainant also indicated that she had moved during this time but could not explain why she did not provide the Agency with her new home address. The VAMC Director noted that Complainant smiled a lot during the meeting, seeming to reflect a cavalier attitude about the whole situation.

On June 19, 2020, the VAMC Director issued a Removal Decision, and Complainant's removal action was effective June 26, 2020. The VAMC Director stated that Complainant signed for receipt of the Removal Decision on June 22, 2020. The VAMC Director found the charges of Unauthorized Absence (AWOL) and Failure to Follow Supervisory Instructions to be sustained. The VAMC Director stated that he reviewed all of the documents in the file, including looking at each of the 58 specifications of AWOL, and considered Complainant's response. According to the VAMC Director, he decided removal was appropriate because 540 hours of AWOL showed a pattern of leave abuse. The VAMC Director averred that he did not see potential for Complainant's rehabilitation based on her failure to communicate with management about the situation and her refusal of management's offer to send the LWOP request packet.

According to Complainant, she received an email from HR-1 about a meeting with the VAMC Director regarding her proposed removal, so she stopped by HR-1's office on June 19, 2020, to discuss the nature of the meeting and what she should expect. Complainant alleged that HR-1 told her, "You know these people around her hold grudges. I helped you last time, but this time it's gonna cost you" while he was licking his lips and rubbing his genitals. Report of Investigation (ROI) at 61. Complainant averred that HR-1 had initially been seated at his desk but stood up and leaned towards her when making these comments and gestures. Complainant stated that she immediately left HR-1's office and went to the restroom in tears. According to Complainant, she tried to raise HR-1's behavior in the meeting with the VAMC Director to discuss her proposed termination, but the VAMC Director cut her off when she began to discuss it. Complainant stated that she was discharged "prior to becoming brave enough to report the incident" with HR-1 to VAMC leadership. ROI at 63.

The VAMC Director stated that he first became aware of Complainant's sexual harassment allegation when she initiated EEO counseling on July 15, 2020. According to the VAMC Director, he referred the allegation to the Chief of Human Resources for VISN-9, and a formal investigation was conducted. An Employee Relations/Labor Relations Consultant in the VISN-9 Executive Service Unit (Consultant-1: male) stated that he was assigned to conduct an internal investigation into Complainant's allegations against HR-1.

Consultant-1 averred that he interviewed HR-1, who stated that he had helped Complainant with leave issues and had met with her about a worker's compensation claim and a detail.

According to Consultant-1, HR-1 denied meeting with Complainant in his office on June 19, 2020, and he stated that the only time he met with Complainant regarding her removal was during the June 9, 2020, meeting when she presented her oral response to the proposed removal to the VAMC Director. HR-1 also denied making the gestures or comments as alleged by Complainant and reiterated to Consultant-1 that he did not meet alone with Complainant regarding her proposed removal.

According to Consultant-1, he interviewed other Human Resources Office employees, who did not remember seeing Complainant in the office or meeting with HR-1 on June 19, 2020. Consultant-1 averred that he contacted the EEO office to see if there had been any previous complaints filed against HR-1, but there were none. Consultant-1 stated that, after the investigation, he determined that it was more likely than not that no incident occurred between HR-1 and Complainant. HR-1 retired prior to the investigation of Complainant's EEO complaint and did not provide an investigative affidavit.

Complainant initiated contact with an EEO counselor on July 15, 2020. On September 13, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female) and reprisal for prior protected EEO activity under Title VII and the Rehabilitation Act when:

1. On June 19, 2020, the Acting Human Resources Manager made inappropriate remarks and gestures towards Complainant of a sexual nature; and
2. On June 26, 2020, Complainant was removed from federal service.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing.

The Agency filed a Motion to Dismiss Hearing Request or Alternatively, Motion to Compel Discovery Responses and Compel Deposition Appearance and for Reimbursement of Costs Incurred from Non-Appearance. The Agency stated that Complainant had failed to timely respond to its discovery requests, which were served to her gmail.com email address of record ("her Gmail address"), by the June 14, 2021, deadline. On June 14, 2021, an Agency Paralegal sent Complainant a Microsoft Teams link and alternate telephone number for her noticed deposition that would occur at 9 a.m. on June 21, 2021.

On June 15, 2021, the Agency Attorney emailed Complainant that her discovery requests were past due and asked her to respond by 4 p.m. that day whether she planned to respond to the discovery requests and attend the deposition. At 1:03 p.m., Complainant replied from a new comcast.net email address ("her Comcast address"), stating that the discovery requests had not been received because the Agency had deviated from her email address listed in the EEOC Public Portal. The Agency Attorney responded that Complainant had not notified the Agency or the AJ of her new Comcast email address and that she also had not confirmed whether she planned to respond to the discovery requests or attend the deposition scheduled for June 21, 2021. At 2:05 p.m. on June 15, 2021, the Agency Paralegal provided the Microsoft Teams link and telephone number for the deposition to Complainant's newly provided Comcast address. At 1:38 p.m. on June 15, 2021, Complainant stated, "Yes, I am planning to respond," but did not specifically state whether she would attend the deposition. The Agency Attorney requested that Complainant submit her complete discovery responses no later than 4 p.m. on June 17, 2021, and confirm whether she would attend the deposition. At 1:48 p.m. on June 15, 2021, Complainant replied that she would not be able to complete the discovery responses in two days and again did not confirm whether she would attend the deposition. At 9:10 a.m. on June 21, 2021, the Agency Paralegal contacted Complainant's phone number of record, but the call went straight to voicemail. The Paralegal left a message stating that, if Complainant did not appear by 9:15 a.m., the Agency would terminate the deposition. Complainant did not appear, and the Attorney terminated the deposition at approximately 9:16 a.m. The Agency incurred fees for the court reporter to appear for the deposition.

Complainant did not respond to the Agency's Motion to Dismiss Hearing Request. However, when the Agency filed a motion for summary judgment and the Attorney noted that he had copied Complainant at both her Gmail email address of record and her "updated" Comcast email address, Complainant responded:

> The Agency continues to replicate this farce of an "updated" email address. This "email" loophole was created as a gesture to negate the Agency's responsibility to ensure email communication was sent to the Complainant's email address of record in a timely manner to in-turn receive a timely response. The EEOC Portal, the official record/source of contact information, will show the Complainant's email contact information has been and continues to be [Comcast address] with no change on file/record of ANY ALTERATION before, during, nor after the filing of this complaint.

The AJ issued a Notice of Intent to Issue Sanctions and Order to Show Cause ("Notice and Order"). According to the AJ, the Scheduling Order set forth the discovery procedures, including that parties must respond to a request for discovery within 30 days of receipt, that any objection to a notice of deposition must be served promptly, and that the parties must cooperate with each other in honoring discovery requests. The AJ stated that, to the extent Complainant's email regarding the Agency's motion for summary judgment appeared responsive to the Agency's Motion to Dismiss Hearing Request, it had been considered. According to the AJ, the email mix-up appeared to be of Complainant's own making, as she listed her Gmail address on her EEO complaint, acknowledged the Agency's ROI and Notice of the Right to Request a Hearing from her Gmail address, and sent a copy of her hearing request to her Gmail address. The AJ noted that, when the Memphis District Hearings Unit Legal Assistant offered to update Complainant's email during a July 30, 2021, phone call, Complainant had declined the offer. The AJ averred that Complainant's Gmail address was listed as her email address of record in the Commission's system until the AJ updated it on February 7, 2022, based on a request Complainant made that date.

The AJ determined that, even if Complainant's email address of record was incorrectly listed in the Commission's system and the Agency's records, the issue was resolved for Complainant to have plenty of notice of her deposition. The Agency served Complainant with a Notice of Deposition at her Gmail address on May 31, 2021. On June 15, 2021, after Complainant informed the Agency that she had not received the discovery requests because they were sent to her Gmail address rather than her Comcast address, the Agency sent the link for Complainant's deposition to her Comcast address as well. She did not appear for the deposition as scheduled at 9 a.m. on June 21, 2021. The Agency was unable to reach Complainant, waited until 9:15 a.m., and terminated the deposition, incurring a cancellation fee from the court reporting service.

The AJ ordered Complainant to show good cause why sanctions should not be imposed for her failure to comply with the terms of the Scheduling Order and to explain whether her conduct was contumacious. The AJ also ordered Complainant to state whether she responded to the Agency's discovery requests after the Agency filed its request to Dismiss Hearing Request or Alternatively, Motion to Compel Discovery Responses and Compel Deposition Appearance and for Reimbursement of Costs Incurred from Non-Appearance.

In an email, Complainant responded to the AJ's Notice and Order:

> Sir, my noncompliance to Agency's request and/or orders was not contumacious. At that time, I was mentally and emotionally challenged due to increased financial pressures caused by unemployment and difficulty meeting the basic needs of my family and myself. I offer my sincere apology. I accept and am willing to reimburse any financial loss I may have cause the Agency. Moreover, I am fully committed to participating in this EEOC process. Thank you for your time and consideration in this matter.

The AJ issued an Order of Dismissal of Hearing Request as Sanction. The AJ found that Complainant violated the Scheduling Order when she failed to timely respond to the Agency's request for discovery. The AJ determined that Complainant's excuse that she was not receiving emails sent to her Gmail address was "false," citing evidence that Complainant was receiving emails sent to the Gmail address and actively using that email address. The AJ found that Complainant's false representation that she was not receiving emails sent to the Gmail address was willful and obstinate. The AJ further found that, even if there had been an email issue, the issue was resolved in time for Complainant to have notice of her deposition, as the Agency provided the video link to both the Comcast and the Gmail addresses. In emails she sent to the Agency from her Gmail address, Complainant stated that she planned to respond to discovery did not respond to the Agency's inquiries regarding whether she planned to attend the deposition. Without providing any notice to the Agency, Complainant failed to appear to for the deposition. The AJ determined that Complainant's failure to attend the properly noticed deposition was a violation of the Scheduling Order and that she engaged in a "cat and mouse" game with the Agency, refusing to confirm whether she would attend the deposition, which amounted to willful and obstinate conduct. The AJ observed that Complainant's response failed to indicate whether she had ever responded to the Agency's discovery request. The AJ found that Complainant's willful and obstinate conduct was contumacious and that her repeated failure to cooperate in discovery, which apparently continued to the present, was a lack of due diligence.

The AJ stated that, in her response, Complainant admitted that she violated the Scheduling Order. While she asserted that she was "mentally and emotionally challenged," the AJ noted that Complainant did not provide any supporting evidence and therefore could not establish that she was so incapacitated that she could not comply with the AJ's orders.

The AJ found that Complainant provided no evidence to support her June 25, 2021, assertion that she had not received the Agency's discovery requests because they were sent to her Gmail address and that the evidence in the record established that this assertion was false. The AJ also noted that Complainant provided no explanation for why she failed to attend the deposition or at least confirm with the Agency whether she planned to attend. Although she stated that she was fully committed to participating in the EEO process, Complainant did not indicate whether she had responded to the Agency's discovery requests, despite the AJ's clear order that she provide the information. The AJ determined that, while Complainant stated that her conduct was not contumacious, her conclusory allegation was contrary to her established conduct, and the AJ found that Complainant failed to show good cause.

According to the AJ, a sanction was appropriate based on Complainant's failure to comply with the AJ's Orders, her contumacious conduct, and her failure to pursue the claim with due diligence. In determining the appropriate sanction, the AJ considered the factors set forth in Chere S. v. General Servs. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). The AJ found that Complainant exhibited blatant disregard of the Scheduling Order, which was compounded by her response to the Notice and Order, which furthered and provided no justification for her non-complying behavior. According to the AJ, the prejudicial effect on the Agency was significant, noting that it appeared that, despite great effort by the Agency, Complainant continued to fail to provide discovery responses. The AJ determined that the effect on the EEO process through Complainant's disregard of the Scheduling Order and the Agency's time was also further compounded by Complainant's conduct since the issuance of the Notice and Order.

The AJ considered a lesser sanction of prohibiting Complainant from offering exhibits or witnesses beyond what were in the investigative record. However, the AJ found that the Agency needed and was entitled to the information it requested from Complainant in discovery and that limiting what Complainant could introduce at hearing would reward her disregard of the process and the AJ's orders by depriving the Agency of that information. Moreover, because Complainant failed to comply with the Notice and Order, the AJ determined that a lesser sanction short of dismissal of the hearing request would not be effective. The AJ found that dismissing the hearing request was the least severe sanction needed to respond to Complainant's failure to show good cause for her actions. Accordingly, the AJ dismissed Complainant's hearing request and remanded the complaint to the Agency for the issuance of a final decision on the merits.

The Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). Concerning Complainant's harassment allegation, the Agency found that Complainant's statements were not internally consistent regarding the circumstances of her meeting with HR-1 and appeared implausible given the chronology of events. The Agency determined that the preponderance of the evidence in the record did not establish that HR-1 made the comment as alleged and that Complainant therefore could not establish a prima facie case of sexual harassment.

The Agency also found that management articulated a legitimate, nondiscriminatory reason for removing Complainant. According to the Agency, there was no evidence to support Complainant's allegation that her requests for LWOP were initially approved but subsequently changed to AWOL. The Agency determined that Complainant did not establish that management's legitimate, nondiscriminatory explanation for her removal was pretextual. The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant states that, at the time of discovery and the date of the deposition, she was working as a travel nurse, 13 hours a day, six days per week. According to Complainant, she was under psychological pressure and experiencing physical fatigue and sleep disturbances and, "Consequently, I was not frequently checking either of my email addresses." Complainant argues that, after receiving an email from the Agency's attorney, she immediately contacted him about her situation, but he only offered two additional days to complete discovery, which was not enough time.

In response to Complainant's appeal, the Agency contends that the AJ appropriately dismissed her hearing request as a sanction, noting that her explanation for her noncompliance on appeal diverges from the explanation provided to the AJ. The Agency requests that its final decision be affirmed.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (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").

ANALYSIS

Sanction

The AJ dismissed Complainant's hearing request as a sanction. An AJ has the authority to sanction either party for failure without good cause shown to fully comply with an order. 29 C.F.R. § 1614.109(f)(3). Such sanctions may include an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information, exclusion of other information offered by the party refusing to provide the requested information, or issuance of a decision fully or partially in favor of the opposing party, or other actions, as appropriate. Id. The Commission has held repeatedly that sanctions must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. See Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

In other words, sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. See Chere S. v. Soc. Sec. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018). Factors pertinent to "tailoring" a sanction, or determining whether a sanction is even warranted, include: (1) the extent and nature of the noncompliance, including the justification presented by the non-complying party; (2) the prejudicial effect of the non-compliance on the opposing party; (3) the consequences resulting from the delay in justice, if any; (4) the number of times the party has engaged in such conduct; and (5) the effect on the integrity of the EEO process as a whole. Id.

Dismissal of a hearing request by an AJ as a sanction is only appropriate in extreme circumstances, such as when the complainant engages in contumacious conduct, not merely negligence. See Schoenrogge v. Dep't of Justice, EEOC Appeal No. 0120130893 (May 20, 2013) (dismissal of hearing request appropriate where the complainant engaged in contumacious conduct that included repeated failure to comply with discovery obligations and serious

abuse of process by filling voice mail boxes of AJ and Agency Counsel with erratic, lewd, and vulgar messages regarding his complaint to the point where intervention of the Federal Protective Service and local police was necessary); Robert A. v. U.S. Postal Serv., EEOC Appeal No. 0120182698 (Feb. 21, 2020) (dismissal of hearing request upheld where complainant failed to respond to order to show cause and did not provide evidence that he was incapacitated and unable to comply with the AJ's order). In more recent cases in which the Commission affirmed an AJ's dismissal of a hearing request, such scenarios are typically characterized by several incidents of noncompliance, the complainant's failure to respond to the AJ's show cause order, or the lack of acts or omissions attributable to the AJ or the Agency that resulted in the complainant's noncompliance. See e.g., Melinda H. v. Dep't of Veterans Affs., EEOC Appeal No. 2021004162 (Oct. 17, 2022); Sheila O. v. Dep't of the Army, EEOC Appeal No. 2021002224 (Aug. 3, 2022).

Consequently, if a lesser sanction would suffice to deter the conduct and to equitably remedy the opposing party, an AJ may be abusing his or her discretion by dismissing the hearing request. See Georgianne B. v. Dep't of Agric., EEOC Appeal Nos. 0120181591 & 0120181592 (Feb. 27, 2020) (dismissal of hearing request rejected on appeal where AJ dismissed hearing request outright rather than grant Agency's motion to compel discovery or limiting the complainant's discovery when the complainant failed to appear at the initial conference and failed to respond to a discovery request despite the fact that the parties and the AJ remaining in continuous email correspondence in an effort to litigate the case); Drucilla Y. v. Dep't of the Treasury, EEOC Appeal No. 0120182728 (Feb. 27, 2020) (dismissal of hearing request rejected on appeal where the complainant made earnest but unsuccessful effort to comply with an onerous acknowledgement and scheduling order); Hale, supra (dismissal of hearing request rejected on appeal where the complainant failed to return a designation of hearing form but informed the hearings office by phone that she was searching for an attorney and requested more time for discovery).

Here, Complainant failed to timely respond to the Agency's discovery requests in violation of the Scheduling Order. Moreover, as the AJ found, her explanation that she was not receiving emails sent to her Gmail address was not substantiated. Complainant would respond to an email sent to her Gmail address to complain that her Comcast address was her email address of record. When it was brought to her attention that this was not the case, Complainant declined the Legal Assistant's offer to update her email address.

Now, on appeal, Complainant contends that she was busy working as a travel nurse and was not frequently checking either the Gmail or the Comcast addresses. Complainant also failed to attend the properly noticed deposition and failed to respond to the Agency's inquiries regarding whether she planned to attend the deposition. Moreover, in responding to the AJ's Notice and Order, Complainant did not state whether she had responded to the Agency's requests for discovery as ordered by the AJ. Even on appeal, Complainant still does not address the open question of whether she ever responded to the Agency's discovery requests. The AJ found that Complainant engaged in willful and obstinate conduct that was contumacious and that her repeated failure to cooperate in discovery reflected a lack of due diligence. The AJ further found that Complainant failed to show good cause for failing to comply with the AJ's orders. Accordingly, the AJ determined that a sanction was warranted. Based on her blatant disregard of the AJ's Orders and her failure to present a justification for the non-complying behavior, the AJ found that dismissal of her hearing request was the least severe sanction that could respond to Complainant's failure to show good cause for her noncompliance.

On appeal, Complainant contends that, when the Agency served its discovery requests and deposition notice, she was working extended hours as a travel nurse and was physically and mentally exhausted from providing care during the Covid-19 pandemic. We have consistently held, in cases involving physical or mental health difficulties, that an extension is warranted only where an individual is so incapacitated by her condition that she is unable to meet the regulatory time limits. See Davis v. U.S. Postal Serv., EEOC Request No. 05980475 (Aug. 6, 1998); Crear v. U.S. Postal Serv., EEOC Request No. 05920700 (Oct. 29, 1992). As in Robert A., we find that Complainant has not shown that she was so incapacitated by her condition to render her physically unable to timely respond to the Agency's discovery requests. Complainant did eventually respond to the Agency's emails regarding discovery, yet she offers no explanation as to why she did not appear for the deposition or at least inform the Agency that she did not plan to attend the deposition. Complainant told the AJ that the issue was that she did not receive emails sent to her Gmail address and that her primary email address was the Comcast address. However, Complainant contradicts that explanation on appeal, stating that she did not regularly check either email address because of her work as a travel nurse. We note that, even on appeal, Complainant does not address the open question of whether she responded to the Agency's discovery requests.

The AJ appropriately determined that Complainant failed to timely respond to the Agency's discovery requests and appear at the properly noticed deposition in violation of the Scheduling Order.

She refused to answer the Agency's questions about whether she planned to attend the deposition. Moreover, Complainant manufactured an excuse about her email addresses, and she finally admits on appeal was not the real reason she did not timely respond to discovery. Complainant did not inform the AJ whether she had responded to the Agency's discovery requests as ordered in the Notice and Order, and she still does not provide this information on appeal. We agree with the AJ that Complainant engaged in contumacious behavior and that she failed to show good cause. Accordingly, the AJ's decision to issue a sanction was appropriate.

We consider whether the AJ appropriately tailored the sanction by considering the factors set forth in Chere S., supra. In considering factor (1), Complainant's noncompliance was extensive, she failed to justify her noncompliance, and she has admitted that the justification she presented to the AJ regarding her email addresses was fabricated. In considering factor (2), the Agency expended significant effort, yet was still deprived of the discovery responses to which it was entitled. Regarding factor (3), the consequences resulting from the delay in justice would be fading memories and unavailable witnesses. Evaluating factor (4), while it was the first time a sanction was being issued in the case, it was based on multiple failures by Complainant to comply with the AJ's orders or show even minimal cooperation. Finally, considering factor (5), the effect on the integrity of the EEO process was the amount of time expended to obtain compliance by Complainant with simplest of requirements set forth in the Scheduling Order and the Notice and Order.

Upon review, we agree with the AJ that Complainant has not justified her noncompliance. There is no indication in the record that Complainant's noncompliance stemmed from any acts or omissions on the part of the AJ or the Agency. Further, as the AJ noted, because Complainant also failed to comply with the Notice and Order, Complainant had shown that the tools at the disposal of the AJ to obtain compliance were not effective with Complainant. Consequently, we find that the AJ's dismissal of Complainant's hearing request as a sanction was reasonable, consistent with Commission precedent, and well within the bounds of the AJ's discretion.

Removal

Complainant alleged that she was subjected to discrimination based on sex and reprisal when she was removed. In order to prove her complaint of employment discrimination, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thereafter, to ultimately prevail, complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (Mar. 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

Complainant can establish a prima facie case of reprisal by showing that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802). In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus).

Here, Complainant was a member of a protected class based on her sex and her prior protected EEO activity.

She was subjected to an adverse action when the Chief Nurse proposed her removal and when the VAMC upheld her removal. Complainant has not shown or alleged that she was treated differently than similarly situated employees outside of her protected class or shown a link between her sex or prior protected activity and her removal. The Chief Nurse, who did not become Complainant's supervisor until March 2020, stated that she was not aware of Complainant's prior protected activity, while the VAMC Director stated that he was aware of her prior protected activity based on reports from the EEO Office. We find that Complainant has not established a prima facie case of discrimination based on sex and/or reprisal but, for the purposes of analysis, will assume that she has done so.

The Agency provided legitimate, nondiscriminatory reasons for removing Complainant. Complainant accrued more than 500 hours of AWOL charges from February 19, 2020, to May 8, 2020. Moreover, Complainant did not respond to requests from Manager-1 and other officials to clarify what type of leave she was taking, she did not submit a proper request for LWOP to the Chief Nurse as instructed, and she did not report to work for approximately three months.

Accordingly, the burden shifts to Complainant to show that the Agency's proffered reasons were pretextual. Complainant alleged that Manager-1 and Manager-2 initially approved her requests for LWOP and that Manager-1 subsequently changed her approved LWOP to AWOL in May 2020 in order to support her removal, but this is not supported by the record. Manager-1, Manager-2, and the Chief Nurse agreed that Nurse Managers, the house supervisor, and the Off-Tour Supervisor could not approve a request for LWOP. Only the Chief Nurse and the VAMC Director could approve LWOP, and there is no evidence in the record that Complainant submitted a request for LWOP to the Chief Nurse or the VAMC Director. Moreover, the record shows that, as early as February 25, 2020, Manager-1 asked Complainant to clarify the type of leave she was taking, and, as early as March 2, 2020, warned her that failing to do so would result in being charged AWOL. ROI at 127. On April 14, 2020, Manager-1 informed Complainant that she had been charged AWOL since February 19, 2020. ROI at 129. Accordingly, we find that Complainant has not shown that any requests for extended LWOP beginning on February 19, 2020, were approved or that Manager-1 changed any approved LWOP to AWOL.

Complainant also argued that she was in contact with management during her absence, informed management that her absence was related to Covid-19 and FMLA, and provided supporting medical documentation related to her absence.

Complainant's assertion that she was in contact with management throughout her extended absence and provided an explanation and documentation for her absence is not supported by the record. The record reflects that Complainant did not respond to inquiries from Manager-1 and would generally call the house supervisor or Off-Tour Supervisor to report her absence and request additional LWOP. According to the record, Complainant was approved for FMLA leave, but only in relation to her work-related injury, and she has not alleged or shown that her absence was related to her OWCP case. Manager-1's statement that Complainant did not provide any explanation or documentation or justification for her absence is supported by contemporaneous emails in which she informed Complainant that she had not provided any explanation or documentation for her absence. The first mention of Covid-19 in the record is a May 19, 2020, email from Complainant to Manager-1 and Manager-2. ROI at 124. The only medical documentation in the record is illegible and the patient's name is illegible, but it appears to be a May 2020 order for six to eight weeks of physical therapy for neck and low back pain. ROI at 126. Complainant has not established by preponderant evidence in the record that she communicated with management while she was absent or provided any explanation or documentation regarding her absence.

As evidence of pretext, Complainant noted that she had no prior disciplinary history. The Chief Nurse noted Complainant's lack of prior discipline in the Proposed Removal, and the VAMC Director also considered this as a factor in deciding whether to remove Complainant. However, the VAMC Director ultimately determined that, despite her lack of prior discipline, removal was warranted based on the gravity of the charges, including her sustained pattern of AWOL charges and her failure to follow supervisory instructions. We agree with Complainant that the preponderance of the evidence record does not establish that she received the April 17, 2020, Order to Return to Duty Letter, which was returned to sender on April 24, 2020. However, the record reflects that, on April 6, 2020, Manager-1 spoke with Complainant over the phone and informed her that she had been charged AWOL and needed to request LWOP from the Chief Nurse. When Complainant stated that she had moved and did not have internet access, the Chief Nurse offered to send her paperwork to request LWOP, but Complainant declined the offer. Moreover, Complainant was unable to respond when the VAMC Chief asked why she did not update her address with the Agency.

Complainant alleged that the real reason for her removal was reprisal, stating that the Chief Nurse was friends with and/or had working relationships with individuals named as responsible management officials in Complainant's prior EEO complaints.

The Chief Nurse denied knowledge of Complainant's prior protected EEO activity, and we find that Complainant has not shown that the Chief Nurse was motivated by reprisal. We further find that Complainant has not established pretext for discrimination based on sex and/or reprisal by preponderant evidence.

Sexual Harassment

Complainant alleged that she was subjected to sexual harassment by HR-1. In order to establish a prima facie case of sexual harassment, a 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 sex; (3) that the harassment complained of was based on her sex; (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. Celine B. v. Dep't of the Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020). 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 at § III.B.3.d (Apr. 29, 2024).

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, her sex. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Complainant is a member of a statutorily protected class based on her sex. Complainant stated that, on June 19, 2020, she met one-on-one with HR-1 in his office to discuss an upcoming meeting with the VAMC Director regarding her proposed termination. Complainant alleged that HR-1 told her, "You know these people around here hold grudges. I helped you last time; but this time it's gonna cost you," while he was licking his lips and rubbing his genitals. ROI at 62. In his interview with Consultant-1, HR-1 denied making the alleged comments or gestures and also denied meeting alone with Complainant in his office regarding her proposed removal.

The record reflects that, on June 9, 2020, Complainant met with the VAMC Director, the VAMC Director's Executive Assistant, and HR-1 to provide her oral response to the proposed removal. Beyond her statement, is no corroborating evidence reflecting that Complainant met with HR-1 after June 9, 2020, or was scheduled to meet with the VAMC Director after June 9, 2020. The VAMC Director stated that he signed the decision to remove on June 19, 2020, which makes it unlikely that he would subsequently meet with Complainant to discuss a proposal that he had already decided to uphold. Moreover, to the extent that Complainant alleged that HR-1 was an authoritative figure who played a key role in determining the outcome of her employment status, the preponderance of the evidence in the record reflects that the VAMC Director was the deciding official who made the decision to remove Complainant. We find that Complainant has not established by preponderant evidence in the record that HR-1 made the comment and gestures as alleged. Accordingly, Complainant cannot establish a prima facie case of sexual harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision finding no discrimination.

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