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

[redacted]
Kenyatta S.,[1]
Complainant,

v.

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

Appeal No. 2023003119

Hearing No. 570-2020-00048X

Agency No. FBI-2018-00266

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 5, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

The issues presented are whether there was an abuse of discretion when the Administrative Judge (AJ) denied Complainant's request for sanctions; and whether the AJ properly issued a decision without a hearing finding no discrimination or harassment as alleged.

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Management and Program Analyst (GS-14) at the Agency's Counter Proliferation Center (CPC) in Washington, D.C. On or around March 4, 2018, Complainant stepped down and returned to a GS-13 Management and Program Analyst (MAPA) position. Report of Investigation (ROI) at 65.

On August 14, 2018, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and a hostile work environment based on race (American Indian), and in reprisal for prior protected EEO activity, when:

1. around January 2018, management implemented a new Absent without Leave (AWOL) policy when Complainant was late to work;
2. around February 20, 2018, management denied Complainant's request to leave the office door open;
3. around April 12, 2018, management denied Complainant's alternative work schedule (AWS) request and indicated that staff members were monitoring her time and attendance;
4. around May 22, 2018, management issued Complainant a memorandum regarding AWOL and refused to speak to a Reasonable Accommodations Program Manager;
5. around May 21, 2018, and June 5, 2018, management placed Complainant on AWOL;
6. around May 25, 2018, management denied Complainant's reassignment request;
7. around June 21, 2018, management contacted Complainant about work-related matters while she was on leave;
8. on June 22, 2018, management proposed Complainant's removal and placed her on an indefinite suspension;
9. on June 26, 2018, management informed CPC staff that Complainant was suspended, pending an investigation; and
10. around July 6, 2018, management constructively discharged Complainant.[2]

[2] During the hearing process, the EEOC AJ noted that constructive discharge claims are appealable to the Merit Systems Protection Board (MSPB), but that employees at this Agency are not permitted to file appeals with the MSPB unless they have Veterans Preference. Complainant confirmed that she did not have a Veterans Preference and her constructive discharge claim

The record revealed that on January 26, 2018, Complainant provided a sworn statement for an internal investigation into allegations that she committed time and attendance fraud. When presented with evidence that Complainant recorded as many as fifty (50) workdays during which she did not work or record sick or annual leave, she responded that she could not explain why she was careless in recording her hours. Complainant attested that her time and attendance errors were not intentional, and that she was "disgusted" and "disappointed" with herself. Agency Motion for Summary Judgment, Exhibit 5.

On or about February 21, 2019, Complainant's first-line supervisor ("Supervisor") called Complainant into his office to inform her that he did not have to approve her leave requests when she was late due to her commute, and he considered her AWOL for fifteen (15) minutes. When Complainant asked if this applied to everyone in the section, the Supervisor replied that it only applied to Complainant. ROI at 63.

Complainant explained that the front door of the CPC was typically propped open due to the high volume of traffic because an employee would need to constantly get up to open the door. In February 2018, the Section Chief changed the policy and required that the door remain closed, stating that the Counterintelligence Division Security Office noticed that the door was open and informed the Section Chief that it must remain shut because it was a Sensitive Compartmented Information Facility (SCIF). ROI at 66-7.

After Complainant returned to a MAPA position, she requested the reinstatement of her AWS, which she claimed to have given up when she became a supervisor. She submitted her request to a Supervisory Special Agent, who forwarded it to the Supervisor. Complainant alleged that the Supervisor denied her request without a legitimate justification. She also averred that the Supervisor instructed supervisors to report Complainant's activities to him, but this only applied to Complainant. ROI at 70-2.

On May 21, 2018, Complainant emailed an Acting Unit Chief that she would be out of the office due to a migraine. Despite reporting her absence, the Supervisor charged her with AWOL. Complainant further alleged that the Supervisor refused to speak with the Reasonable Accommodation Program Manager about her medical needs.

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was properly before the EEOC. The AJ also noted that claims 4-10 were timely discrete claims in the Case Management Order Memorializing Initial Teleconference.

Complainant arrived to work 30 minutes late on May 22, 2018, due to a medical issue, and the Supervisor issued her an "AWOL form." The Supervisor also emailed Complainant a copy of the leave counseling, and he reminded Complainant that she needed to submit acceptable medical documentation for her absence on May 21, 2018. ROI at 262, 73-5, 243-4; Agency Motion for Summary Judgment, Exhibit 6.

Complainant met with the Deputy Assistant Director on May 25, 2018, and he denied her request for a reassignment. ROI at 76, 79.

On May 30, 2018, Complainant underwent emergency surgery. On June 4, 2018, while Complainant was still in the hospital, the Unit Chief called to inform her that she was granted 480 hours of Family and Medical Leave Act (FMLA) leave. Complainant asserted that on June 5, 2018, the Unit Chief informed her that she was being charged AWOL until she sent documents to prove her surgery. Complainant stated that she was charged AWOL while she was in the hospital and when she was recovering from her surgery. ROI at 79-82. Complainant's time records show that she was on regular sick leave on May 30, 2018; on FMLA sick leave from May 31, 2018, through June 22, 2018; and on annual leave from June 25, 2018, to July 6, 2018. Agency Motion for Summary Judgment, Exhibit 7.

On or about June 21, 2018, the Deputy Assistant Director called Complainant and stated that she needed to sign time-sensitive documents. A supervisor and a security officer informed Complainant that she was indefinitely suspended due to a proposed removal. They gave Complainant the proposed removal notices from the Office of Professional Responsibility (OPR) Chief based on substantiated allegations of Complainant's time and attendance fraud. During the investigation, Complainant admitted that she could not dispute the analysis of the evidence showing that she recorded as many as fifty (50) workdays not worked or charged as leave. The OPR Chief noted that in 2016 alone, Complainant inappropriately claimed approximately 500 working hours. The OPR Chief considered both mitigating and aggravating factors, including Complainant's prior 3-day suspension and her status as a supervisor at the time, and concluded that a proposed removal was appropriate. The OPR Chief informed Complainant that the OPR Assistant Director would make the final decision after any written or oral response submitted by Complainant. Upon notice of the suspension and proposed removal, Complainant expressed her desire to resign from the Agency, and she was advised to contact human resources. ROI at 82-3, 246-7, 249-51; Agency Motion for Summary Judgment, Exhibit 8.

On June 25, 2018, the Supervisor emailed the CPC staff and informed them that Complainant's security clearance and unescorted access had been suspended until further notice. He instructed employees with any pending work-related matters with Complainant to coordinate with the CPC Front Office. ROI at 259. Complainant resigned on July 6, 2018. ROI at 86.

On July 3, 2019, the Agency accepted the complaint for investigation. However, the Agency noted that 180 days had passed since the filing of her formal complaint, and Complainant had the right to request a hearing before an EEOC AJ. ROI at 40-5. Complainant requested a hearing and simultaneously filed a Motion for Sanctions of a default judgment for the Agency's failure to timely complete an investigation. The Agency opposed Complainant's motion.

On February 17, 2023, the AJ issued an Order denying Complainant's Motion for Sanctions. The AJ found that the Agency provided adequate justification for the delay in completing the investigation. The AJ noted that Complainant amended her complaint in September 2018, and that the federal government was shut down in December 2018, through January 31, 2019. During the shutdown, the EEO staff was furloughed, and the office received an influx of new cases and amended complaints. In addition, Complainant did not respond to the EEO Investigator from July to October 2019. The original investigator also retired and needed to be replaced. The Agency completed the investigation in December 2019, but additional time was required to redact classified or sensitive information. The ROI was ultimately completed in February 2020. The AJ also determined that Complainant failed to demonstrate that she was prejudiced by the delay. The AJ concluded that sanctions were not warranted and denied Complainant's motion.

The Agency filed a Motion for Summary Judgment. When Complainant did not object, the AJ granted the Agency's motion and issued a decision without a hearing on February 28, 2023. The AJ found that the Agency provided legitimate, nondiscriminatory reasons for the actions, such as the findings from the investigation into Complainant's time and attendance abuse issues. The AJ highlighted that Complainant admitted to having problems complying with time and attendance requirements. The AJ also noted that Complainant confessed that she never requested that the Supervisor communicate with the Reasonable Accommodation Program Manager on her behalf, and that the record showed that Complainant was not charged AWOL on June 5, 2018, and she was on FMLA.

The AJ further found that Complainant failed to produce evidence that her resignation was involuntary, and that she resigned when faced with a possible removal action. The AJ concluded by entering judgment in the Agency's favor.

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

The instant appeal followed.

CONTENTIONS ON APPEAL

Through her attorney, Complainant argues that the AJ erred in failing to address and grant her Motion for Sanctions; and in granting the Agency's Motion for Summary Judgment when there are factual issues in dispute.[3] Complainant states that the Agency issued the ROI approximately 390 days late, which warrants a severe sanction, and she requests a default judgment. Complainant also asserts that she established a prima facie case of discrimination based on her race and in reprisal for prior protected EEO activity. She avers that summary judgment was inappropriate because there are genuine issues of material fact regarding the Agency's reasons for "not selecting [Complainant] and the issue of pretext."

The Agency opposes Complainant's appeal. The Agency asserts that the AJ properly exercised discretion to deny Complainant's Motion for Sanctions, and that Complainant cannot show an abuse of discretion. The Agency further contends that the AJ properly granted summary judgment. Complainant failed to establish a prima facie case of race discrimination because she conceded that the management officials were not aware that she is Native American, and some were not aware of her prior EEO activity. In addition, Complainant offered no arguments that the Agency's proffered reasons were pretextual. While Complainant was given opportunities to oppose the Agency's motion, she never filed an opposition.

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.

[3] Complainant's appeal brief cuts off in the middle of page 33, and if there are additional pages, they are not before the Commission.

§ 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

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

ANALYSIS

Decision Without a Hearing

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. In her appeal brief, Complainant simply repeats her allegations and contends that there are genuine issues of material fact for the Agency's reasons for "not selecting" her and issues of pretext. Complainant Appeal Brief at 24. However, there is no non-selection claim in this complaint, and Complainant did not identify any disputed material facts regarding her argument that there is pretext for discrimination.

Complainant asserts that she established a prima facie case of discrimination and harassment, but she did not show a genuine dispute for the Agency's legitimate, nondiscriminatory reasons for the actions, nor cite to evidence to connect the alleged harassment to a protected basis, discussed further below. A review of the record does not reveal any genuine disputes of material facts. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

Sanctions

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and 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; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007).

Under 29 C.F.R. § 1614.109, AJs are granted broad discretion in the conduct of administrative hearings, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. See Malley v. Dep't of the Navy, EEOC Appeal No. 01951503 (May 22, 1997). The AJ evaluated the criteria for sanctions and found that the Agency provided justification for the delay, such as the furlough of the Agency's EEO employees due to a government-wide shutdown; Complainant's amendment and delay in responding to the EEO Investigator; and the need to redact the ROI of any classified or sensitive information. In addition, the AJ determined that Complainant had not shown any prejudice or harm from the delay. On appeal, Complainant reiterates her arguments for a default judgment as a sanction for the Agency's 390-day delay in issuing the ROI, without addressing the AJ's decision to show an abuse of discretion.

Further, we find that the Agency did not act in a manner to warrant a default judgment. The Commission has held that a default judgment is among the harshest sanctions that can be meted out and should only be imposed upon agencies that directly defy Commission orders and whose actions adversely impacted the conduct of the hearing. See Florentino S. v. Dep't of Transportation, EEOC Appeal No. 2023000237 (Jul. 11, 2024); Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018) (no abuse of discretion when the AJ issued a default judgment after the agency defied the AJ's order to cease filing frivolous motions to dismiss which repeatedly delayed the processing of the complaint); see also Ted L. v. Dep't of the Army, EEOC Appeal No. 2022003623 (Sept. 20, 2023) (finding that a default judgment was inappropriate for a delay of at least 210 days in completing an investigation when the complainant did not show any prejudice by the delay or any evidence of the agency's contumacious conduct or bad faith). There is no indication that the Agency directly defied a Commission order or that its actions resulted in harms, to support a sanction of a default judgment.

We find that Complainant has not met her burden to prove an abuse of discretion by the AJ, and we decline to reverse the AJ's denial of Complainant's request for sanctions against the Agency.

Disparate Treatment (Claims 4-9)

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason.

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Service v. Aikens, 460 U.S. 711, 715-716 (1983).

Complainants may establish a prima facie case of race discrimination by providing evidence that: (1) they are a member of a protected class; (2) they suffered an adverse employment action; and (3) either that similarly situated individuals outside their protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

Complainant disclosed that she is American Indian, but she testified that she never informed the Supervisor of her race. ROI at 54, Complainant Deposition at 73. The Supervisor confirmed that he did not know Complainant's race. ROI at 126. Complainant believed that the Supervisor, the Section Chief, and a former Unit Chief discriminated against her and subjected her to a hostile work environment.[4] ROI at 87. However, Complainant did not name the Deputy Assistant Director or the OPR Chief as responsible management officials, and she testified that she never communicated her race to either. Complainant Deposition at 73-4. Further, Complainant did not allege that any similarly situated coworker outside of her protected race category was treated more favorably for claims 4-9, and she did not show that the circumstances raised an inference of race discrimination. As such, Complainant did not establish a prima facie case of race discrimination for claims 4-9.

Complainants may establish a prima facie case of reprisal by showing that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). Complainant based her reprisal claim on a prior EEO complaint filed in November 2017, and she alleged that the Supervisor's attitude toward her changed then. ROI at 62. The Supervisor stated that he first learned of Complainant's EEO complaint on January 29, 2018. ROI at 121.

[4] Complainant's allegations against the former Unit Chief predate the claims at issue, and there is no indication that he was involved with any of the events included in this complaint.

The events in claims 4, 5, and 9 occurred in May and June 2018. A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001). The Supervisor's knowledge of Complainant's protected EEO activity occurred within a few months prior to the incidents at issue, and we will credit a temporal nexus to find that Complainant established a prima facie case of reprisal for claims 4, 5, and 9.

As noted above, Complainant did not accuse the Deputy Assistant Director or the OPR Chief of discrimination. The Deputy Assistant Director stated that he learned of Complainant's EEO activity when he received an email from the EEO Investigator for the instant complaint, and Complainant testified that she did not inform the OPR Chief that she filed an EEO complaint.[5] ROI at 110-11; Complainant Deposition at 75. We find that Complainant did not establish a prima facie case of reprisal for claims 6, 7, or 8.

While Complainant did not establish a prima facie case of race discrimination or reprisal for all her claims, we will consider the Agency's articulated legitimate, nondiscriminatory reasons for the actions. The Supervisor emailed Complainant a Leave Counseling (claim 4), to notify her of the Agency's leave policy. A Human Resources Specialist corroborated that the Supervisor wanted to ensure that Complainant understood the Leave Policy Guide, and the Human Resources Specialist provided standard guidance that was given to all managers dealing with an employee with attendance issues. ROI at 123-4, 139-40. Regarding Complainant's allegation that the Supervisor refused to speak to the Reasonable Accommodation Program Manager, Complainant later testified that she did not ask the Supervisor to communicate with the Reasonable Accommodation office on her behalf. Complainant Deposition at 44.

For claim 5, the Supervisor placed Complainant on AWOL on May 21, 2018, because she did not provide medical documentation to support her sick leave, as requested. ROI at 124. Agency Motion for Summary Judgment, Exhibit 6. Complainant testified that she did not respond to the Supervisor's communication about her May 2018 AWOL charge. Complainant Deposition at 47-8.

[5] The Agency did not obtain an affidavit from the OPR Chief for Complainant's complaint.

Complainant's time records show that she was only charged AWOL on May 21, 2018, and not on June 5, 2018, which was coded as FMLA leave. Agency Motion for Summary Judgment, Exhibit 7.

The Deputy Assistant Director did not specifically recall denying Complainant's reassignment request on May 25, 2018 (claim 6), but he conceded that he would not have approved such request because Complainant was under investigation for time issues, and he would not "push" that onto another supervisor. In response to claim 7, the Deputy Assistant Director admitted that he did not recall the date, but he may have had a conversation with Complainant about the OPR matter. ROI at 115-16.

For claim 8, Complainant was presented with an indefinite suspension and proposed removal based on the results of the investigation into her alleged time and attendance fraud. The OPR Chief considered the evidence, including Complainant's admissions that she believed that it was likely that she failed to properly record her work hours and there was no basis to dispute the analysis of the evidence, to conclude that Complainant engaged in time fraud. The OPR Chief weighed the mitigating factors against the aggravating factors for the proposed penalty. The OPR Chief noted that Complainant was previously disciplined when she claimed overtime when she did not work. While this occurred in 1998, Complainant was on clear notice against providing false or misleading information in her time and attendance records. The OPR Chief found Complainant's conduct egregious in her systematic fraud, which was a gross abuse of taxpayer dollars. Further, Complainant continued to violate the Agency's leave policy even after she was informed of this administrative inquiry, and there was concern that her subordinates could have emulated her fraud. The OPR Chief highlighted that supervisors were held to a higher standard and expected to set a positive example. Based on the circumstances, the OPR Chief saw no potential for Complainant's rehabilitation and proposed her dismissal from the Agency. ROI at 249-50; Agency Motion for Summary Judgment, Exhibit 8.

Regarding claim 9, the Supervisor explained that he did not mention the investigation, but he informed the CPC employees that Complainant's security clearance and unescorted access to Agency space had been suspended because any time an employee loses access to Agency space, employees are notified. ROI at 126.

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

On appeal, Complainant only offered a broad argument that the Agency's proffered reasons were pretexts for discrimination, without challenging any specific response from a management official. Complainant Appeal Brief at 24. Complainant did not show that the proffered reasons are not worthy of belief, and her bare assertions that management officials discriminated against her are insufficient to prove pretext or that their actions were discriminatory. Accordingly, we find that Complainant did not establish race discrimination or reprisal for prior protected EEO activity for claims 4-9.

Constructive Discharge (Claim 10)

The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) the conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. Clemente M. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120160661 (Mar. 11, 2016), citing Walch v. Dep't of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

Complainant failed to show that her working conditions were so difficult that any reasonable person in her position would have felt compelled to resign. Rather, Complainant explained that she resigned because she did not want to jeopardize her benefits if the Agency terminated her. ROI at 86. We find that Complainant's resignation was not a result of the alleged intolerable working conditions but in response to the proposed removal action based on the substantiated allegations of time fraud. As such, Complainant did not establish her claim of a constructive discharge.

Harassment

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

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

As discussed above, we found that Complainant did not establish a case of discrimination on any of her alleged bases for claims 4-10. Further, we conclude that a case of harassment is precluded based on our finding that Complainant did not establish that any of these actions taken by the Agency were motivated by her protected bases. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant did not show that the Agency subjected her to harassment based on her race, or in reprisal for prior protected EEO activity, for claims 4-10.

For the remaining incidents, Complainant did not show a connection to a protected category. The Supervisor denied the allegation that he created and implemented an AWOL policy for Complainant in claim 1, and he asserted that he was reinforcing the Agency's existing leave policy. ROI at 122.

Regarding claim 2, Complainant stated that the Section Chief informed her that the CPC door must remain shut due to a direction from the security office. The Section Chief confirmed that the Security Division admonished them for having the CPC doors open, and she subsequently enforced the closed-door policy. The Deputy Assistant Director substantiated that it was a security violation to leave SCIF doors open. Complainant emailed the Counterintelligence Division Security Management Unit if they were allowed to leave the CPC front door open, and the response verified that SCIF perimeter doors needed to be closed and controlled at all times, and an open door must be continually monitored by a SCIF-indoctrinated individual. ROI at 67, 105-6, 112; Agency Motion for Summary Judgment, Exhibit 3.

For claim 3, the Supervisor responded that Complainant was not on an official AWS schedule when she was previously a MAPA, and she would have to submit the appropriate form (FD-968) to request an AWS schedule. He offered Complainant an AWS of an adjustment to her schedule, but she declined. ROI at 123. The Supervisory Special Agent did not recall receiving Complainant's AWS request, but if he had, he would have referred it to the Supervisor, and he recalled the Supervisor asking him to be more attentive to Complainant's comings and goings because of her time and attendance issues. ROI at 132-3.

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

Accordingly, we find that Complainant did not establish that the Agency subjected her to harassment based on race, or in reprisal for prior protected EEO activity.

CONCLUSION

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

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 4, 2024
Date