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

Nevada R.,[1]
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Forest Service),
Agency.

Appeal No. 2023003352

Hearing No. 570-2022-00435X

Agency No. FS-2021-00451

DECISION

On May 18, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 17, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

The issue presented is whether the EEOC Administrative Judge (AJ) properly denied Complainant's request to reinstate a claim and amend her complaint and issued a decision without a hearing finding that she did not establish that she was subjected to discrimination based on disability as alleged.

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[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 GS-1105-8 Purchasing Agent assigned to the Agency's Procurement & Property Services, Incident Procurement Operations, Equipment & Services Branch, Region 6, Deschutes National Forest, in Bend, Oregon. Report of Investigation (ROI) at 420-27. Because of Covid-19, Complainant was teleworking full-time during the relevant period. ROI at 451.

According to Complainant, she was hired on March 15, 2019, as a GS-1105-7 (target GS-9) Purchasing Agent, and she was promoted to GS-1105-8 on March 15, 2020. ROI at 427. When the Agency underwent a reorganization in 2020, Complainant expressed an interest in working in the Equipment & Services Branch, she received a directed reassignment to this Branch, and a Supervisory Contract Specialist (Supervisor-1; no disability) and the Branch Chief (Supervisor-2; no disability) became her first- and second-line supervisors effective October 1, 2020. ROI at 420, 427-29, 626-28, 882-84.

Complainant identified her disability: as post-traumatic stress disorder (PTSD), a permanent condition first diagnosed in 2012; Ehlers-Danlos Syndrome (EDS), a permanent genetic condition that was diagnosed in 2019 and caused joint instability and dislocation, falls, bruises, injuries, and pain; and dysautonomia and postural orthostatic tachycardia syndrome (POTS), permanent conditions that were diagnosed in 2020 and limited her ability to regulate the functions of autonomic nervous system such as blood pressure, heart rate, digestion, kidney function, temperature control, sleep cycle, pupil dilation, and bladder functions, causing weight loss, malnutrition, nausea, vomiting, pain, diarrhea, fainting, rapid drop in blood pressure, and gastroparesis. ROI at 428. Complainant averred that, as a result of her medical conditions, she was unable to stand for more than a few minutes, was unable to bend, twist, crawl, climb stairs, reach, or grasp repetitively, could only sit for 30 minutes before she needed to lie down. ROI at 428. According to Complainant, she needed to take multiple breaks throughout the day to lie down in order to manage pain and fatigue. ROI at 428. Complainant stated that she also had insomnia, which she described as a secondary condition that was triggered by the other medical conditions and affected her cognitive and executive functions. ROI at 428.

Complainant averred that, pre-reorganization, she worked as a Purchasing Agent in Supply and Services, and her supervisor (Former-Supervisor) worked with her so she could work to the best of her ability. ROI at 429.

Complainant stated that she had the following reasonable accommodations: a maxi-flex schedule, a telework agreement and recurring telework schedule, and ergonomic equipment including a standing desk, chair, arms for monitors, ergonomic keyboard, mouse, and headset. ROI at 429. According to Complainant, with these accommodations, she was able to work between 30-40 hours per week in 2020 as she attended medical appointments and her doctors diagnosed and treated her medical conditions. ROI at 429. Complainant stated that, immediately upon her reassignment, she spoke with Supervisor-1 about her medical condition and how her doctors were adjusting her medications, which was affecting her ability to think and stressing her out because she wanted to do a good job. ROI at 429. Complainant averred that she knew that she was struggling during a medical emergency and wanted to be clear about her needs. ROI at 451-52. Complainant alleged that Supervisor-1 lacked compassion and removed the maxi-flex schedule she needed but assigned a Contracting Officer to serve as her mentor (Mentor-1). ROI at 429, 451-52. According to Supervisor-1, he spoke with Former-Supervisor, who told him that Complainant's reasonable accommodation was no longer applicable while the Agency was operating under maximum telework due to Covid-19. ROI at 629. Supervisor-1 averred that Complainant's reasonable accommodation was approved in 2018 and provided her with two regular days of telework and additional situational telework as needed for her medical condition. ROI at 629.

According to Complainant, the contracts she had been working prior to the reorganization under the supervision of Former-Supervisor were supposed to be reassigned but not all of the work was reassigned as promised. ROI at 449. Complainant averred that "it was known by [Supervisor-1] and [Former-Supervisor] that reassignment of these contracts was to be done right away" in order for her to be able to do her new job duties under the supervision of Supervisor-1. ROI at 450. Complainant added that she made this request at least two or three times, both verbally in meetings and at least once in an email. ROI at 450. Supervisor-1 stated that he never agreed to reassign Complainant's work to other employees and that, in an October 1, 2020, email, Complainant stated that she was working with Former-Supervisor to transfer the contracts that remained open. ROI at 644. Complainant stated that contacts in Dispatch were still contacting her until December 2020, even though another employee was supposed to be handling those contracts and that, while on Family and Medical Leave Act (FMLA) leave, she had to complete a request for wooden stakes and mesh that had not been reassigned. ROI at 449. Complainant averred that a request for an ammunition contract was not transferred and that, when back ordered items were delivered in March or April 2021, she saw emails asking who would close the contract. ROI at 449.

According to Supervisor-1, he had no knowledge that dispatch centers were continuing to contact Complainant, that she had to handle matters while on FMLA leave, or that ammunition contracts were not reassigned. ROI at 644-45.

Complainant coded three hours of wellness time on her time and attendance for pay period 23. ROI at 99, 118. On November 25, 2020, Supervisor-1 emailed Complainant, stating that, given how Complainant had described her current medical condition, he was having trouble approving wellness time on her time and attendance. ROI at 126, 530. Complainant had been out of the work October 19-23, 2020, and October 26-November 6, 2020, and in an October 20, 2020, email, Complainant told Supervisor-1 that she had been "bed ridden" all day on October 19th. ROI at 99, 115. On November 25, 2020, Complainant responded, "I meditate for my wellness time because that's all I can do right now, if you feel that I should not, I will make corrections." ROI at 125. Supervisor-1 informed Complainant that he had approved her time and attendance but still had some concerns and might request a correction at a later date. ROI at 119. Supervisor-1 stated that he would reach out to Former-Supervisor to see if meditation was an approved activity for Complainant's FY2020 wellness plan. ROI at 119. On February 1, 2021, Supervisor-1 emailed Complainant regarding her FY2021 performance plan and his expectations of her and her position, adding, "Wellness agreement/wellness time is not currently authorized, we may discuss this topic in future quarters and an agreement may be activated." ROI at 132. The section of the Agency's Pay Administration, Attendance, and Leave Handbook on Wellness Activities stated that supervisors were "encouraged to grant short periods of administrative leave for employees to participate in officially authorized or recognized wellness, educational, and awareness programs; health, fitness, and lifestyle assessments; and health fairs." ROI at 307. The Handbook further stated that employees were authorized up to three hours per week "to participate in fitness activities and wellness programs" and provided the code employees should use on their timecards. ROI at 307.

Complainant exhausted her accrued annual and sick leave and submitted a request for FMLA leave on November 17, 2020, which was approved. ROI at 429. Complainant was out of work on FMLA leave from November 18, 2020, to January 21, 2021. ROI at 429. Complainant stated that, when she submitted her request for FMLA leave, she also submitted an application for the Voluntary Leave Transfer Program (VLTP), which was approved. ROI at 430. On November 19, 2020, Complainant submitted a request for advanced sick leave to Supervisor-1, which she stated was to be used for the pay periods she was on FMLA leave. ROI at 430.

According to Complainant, Supervisor-1 signed off on her request in December 2020, and the Associate Director of Incident Procurement Operations ("the Associate Director") signed it on January 5, 2021. ROI at 430.

According to Complainant, in pay periods 24 and 25 of 2020, Supervisor-1 caused her to accrue a negative sick leave balance of 72 and 80 hours based on an email he sent her telling her how to code her FMLA leave. ROI at 442. On November 20, 2020, Supervisor-1 emailed Complainant that, when submitting her time and attendance, she would need to code the time as FMLA using Transaction code 62 and Descriptor 01 once her leave was exhausted. ROI at 501-02. Supervisor-1 stated that this guidance was from HR and based on the assumption that leave donated through the VLTP would first be applied to Complainant's advanced sick leave. ROI at 632. According to Supervisor-1, when he reviewed Complainant's VLTP form, he did not notice that Complainant had designated that donated leave should first be applied to LWOP, then to advanced sick leave. ROI at 632. Supervisor-1 averred that Complainant received full paychecks for pay periods 23 through 25, which included 11.75, 72, and 80 hours of advanced sick leave, respectively. ROI at 633.

On December 5, 2020, a Supervisory HR Specialist (HR-1) emailed Complainant and Supervisor-1, stating that there were a few things missing from Complainant's VLTP application, including a signature from her supervisor and medical documentation, and asking Complainant to provide an updated application and medical documentation as soon as possible. ROI at 517. HR-1 explained that the medical documentation needed to be on official letterhead, explain the nature of the illness or injury, the reasons transferred leave was needed, and the probability and frequency of missed work. ROI at 517. Supervisor-1 signed the application on December 7, 2020, and HR-1 stated that Complainant would have until December 18, 2020, to provide medical documentation for her application for the VLTP to be considered. ROI at 515-16. According to Complainant, on December 9, 2020, HR-1 told her that the VLTP could be used to cover one ailment and that, because the holidays were coming up, Complainant needed to provide a doctor's note "right away" or the process would start over. ROI at 435. Complainant averred that she explained that she had a team of specialists, and HR-1 told her that any of the specialists could write the note, so Complainant asked her sleep doctor, who she was seeing that day, to write a note about her insomnia. ROI at 435. Complainant alleged that HR-1 failed to tell her that the condition listed for the VLTP should be her primary medical condition and that Supervisor-1 would not let her use the VLTP unless she specifically provided medical documentation related to insomnia. ROI at 435.

According to HR-1, Complainant said she had multiple medical emergencies, she told Complainant she could only choose one medical emergency for the VLTP and should choose the one that was affecting her the most at that time, and Complainant chose insomnia. ROI at 1070. HR-1 averred that, if Complainant wanted to change the medical emergency for the VLTP, she would have to submit a new request and new supporting medical documentation. ROI at 1070.

Complainant stated that the doctor's notes she had provided to Supervisor-1 could have been used to amend her VLTP request. ROI at 435. According to Complainant, Supervisor-1 was the only person who could approve her timecards to include VLTP donations, but he withheld his approval based on his assumption that she did not deserve the donations and that the donations should be applied to her advanced leave prior to her leave without pay (LWOP). ROI at 435. Complainant alleged that, during a January 5, 2021, meeting with a Lead HR Specialist (HR-2), Supervisor-1 said, "insomnia isn't what this program is for" and that he "would hate to see it go away because of abuse." ROI at 440. Supervisor-1 denied making these comments, stating that, during the call, they discussed the type of medical documentation that would be required to apply donated hours. ROI at 635-36. According to Supervisor-1, it was HR-2 who referenced participating in the VLTP when he had a medical emergency and how he had needed to send weekly doctor's notes regarding the medical condition. ROI at 636. Supervisor-1 stated that Complainant had been providing doctor's notes but that HR-2 was having a hard time finding a correlation between the notes and insomnia, the medical condition for which her VLTP application was approved. ROI at 636. HR-2 stated that he did not hear Supervisor-1 make any derogatory comments about Complainant's disability or stating that insomnia was not a disability. ROI at 990.

Complainant averred that, on January 11, 2021, she spoke with Supervisor-1 about returning to work from FMLA leave and informed him that her doctors were releasing her to work 10-12 hours per week and she would need to attend biweekly doctor's appointments to determine if her work hours could increase, with the goal of returning to full-time work by March 2021. ROI at 430. Complainant alleged that, during that discussion, Supervisor-1 told her that she would not be allowed to work a maxi-flex schedule when she returned to work. ROI at 430. Supervisor-1 stated that Complainant wanted the flexibility to change her schedule on a daily basis and work in the evenings and on Saturdays, which was challenging because she would not be available during core business hours Monday to Friday when her coworkers were working and industry customers were open for business. ROI at 630.

According to Supervisor-1, he let Complainant change her work schedule from week to week to accommodate her medical appointment, but, once she set her schedule for the week, he would schedule meetings to allow her to attend and provide her availability to Mentor-1. ROI at 630-31.

Complainant stated that, on January 11, 2021, Supervisor-1 sent her an email demanding increased communication each week detailing her work accomplishments, doctor appointments, and medical documentation. ROI at 441. Complainant alleged that Supervisor-1 wanted additional medical documentation because he wanted proof of her medical condition, was skeptical of her appointments, and was not willing to approve her time off or apply donated leave without it. ROI at 441. According to Complainant, every Friday, she had to submit a work plan and the hours she would be working the next week and, once it was approved by Supervisor-1, she could not make any changes and would have to take LWOP if she was not able to function because of her symptoms or if a medical provider asked to change the time of an appointment that conflicted with her work schedule. ROI at 430. Complainant stated that, at the beginning of each week, Supervisor-1 sent her a Planning Worksheet to fill out with the work she had completed during the week, which she would return to him on Friday along with an update about the hours she would be working the next week. ROI at 443.

Supervisor-1 stated that he asked Complainant to submit weekly workload planning sheets to ensure she was working on the most critical tasks during her limited work hours. ROI at 637. According to Supervisor-1, Complainant set her work schedule at the start of each week, with the understanding that she could not exceed 10-12 hours per week and that she needed to work during core hours when her coworkers, customers, and contractors were available. ROI at 637. Supervisor-1 averred that he asked Complainant about the dates of her medical appointments to support using donated hours from the VLTP to replace LWOP. ROI at 637. Supervisor-1 denied making any comments about the validity of Complainant’s medical conditions, appointments, treatments, or need for time off. ROI at 636. According to Supervisor-1, Complainant provided doctor’s notes, but they did not include any information about medical appointments or treatments. ROI at 637.

Complainant stated that Supervisor-1 caused delays and failed to take appropriate actions regarding her request for advanced sick leave. ROI at 434.

On February 3, 2021, a HR Specialist (HR-3) notified Complainant that he had been assigned as her new VLTP case manager and that, in reviewing her paperwork, it appeared that the Associate Director had approved Complainant's request for advanced sick leave despite not having the proper authority. ROI at 519, 970. According to HR-3, Complainant would likely need to obtain new approval for advanced sick leave from the delegated approving official, the Associate Deputy Chief of Business Operations ("the Associate Deputy Chief"), and, until the matter was addressed, he would be unable to move forward with applying donated leave to Complainant. ROI at 519, 970. The Associate Deputy Chief averred that, although he was the first-line officer with delegated authority to approve advanced sick leave, he was informed that Complainant's request had been approved by her supervisory chain and she had already begun accruing advanced sick leave hours. ROI at 923. According to the Associate Deputy Chief, when this was brought to his attention, he requested that Supervsor-1 and HR work together to determine the best course of action. ROI at 923. Supervisor-1 stated that it was a challenge to decide what to do about the advanced sick leave that was on the books because HR wanted approval for Complainant's advanced sick leave and the Associate Deputy Chief wanted more information before he would approve the request. ROI at 633-34.

On February 3, 2021, Supervisor-1 emailed Complainant, requesting that she change the designation order for VLTP donations before he would approve her corrected time and attendance. ROI at 436. According to Complainant, during a February 5, 2021, meeting with HR, Supervisor-1 told her that, if she did not first apply her VLTP donations to cover the advanced sick leave, he would send her to collections because the Associate Deputy Chief did not want to authorize the advanced sick leave. ROI at 436, 440, 442. Supervisor-1 denied threatening to send Complainant to collections for her advanced sick leave. ROI at 636, 640. Supervisor-1 averred that, during a February 17, 2021, call with HR-3, he expressed concern about the advanced sick leave on the books because, if Complainant decided to pursue non-medical retirement or left the Agency, the hours would be viewed as a debt to the government and Complainant would receive a bill. ROI at 636, 640. HR-3 stated that he did not hear Supervisor-1 threaten to send Complainant to collections if she did not change how her donated leave was applied. ROI at 970. Complainant alleged that she did not know if the Associate Deputy Chief ever signed the form because no one ever followed up with her. ROI at 430.

According to Complainant, Supervisor-1 denied the requests for reasonable accommodation she made from January 5, 2021, through April 15, 2021, which included multiple requests to return to a maxi-flex schedule and for voice recognition software. ROI at 432-34. Complainant stated that Supervisor-1 would not allow her to continue working a maxi-flex schedule, which would have allowed her to perform her duties. ROI at 429, 433-34. On March 1, 2021, a Reasonable Accommodation Specialist ("the RA Specialist") contacted Complainant, requesting that she complete the attached Confirmation of Request for Reasonable Accommodation form and provide supporting medical documentation. ROI at 481-83. The RA Specialist included a consent form, a letter addressed to her medical provider, and the essential functions of her position for Complainant to provide to her medical provider. ROI at 481-90. The record contains a Confirmation of Request for Reasonable Accommodation form completed by Complainant on March 24, 2021. ROI at 471-72.

Complainant alleged that, during a February 21, 2021, meeting, Supervisor-1 made negative comments about Complainant not being qualified for the VLTP, that he would not approve using donated leave towards her LWOP, and that he would not allow any more donations unless she paid back the advanced sick leave. ROI at 436. Complainant alleged that Supervisor-1 refused to follow the VLTP policy on when and how to send requests seeking VLTP donations to widely distribute an email request every 30 days while she was enrolled in the program. ROI at 443. According to Complainant, Supervisor-1 finally sent out an email soliciting donations on April 23, 2021. ROI at 443.

According to Complainant, her computer had been having issues since October 2020. ROI at 438. Complainant alleged that the Help Desk told her that her computer needed additional RAM, but Supervisor-1 did not believe that she had issues with her computer and told her that purchasing additional RAM was not in the budget. ROI at 438-39. Complainant averred that, when she returned from FMLA leave in January 2021, there were a lot of automatic updates for her computer, which took up a lot of the RAM and kicked her out of a contracting system, hindering her ability to complete assignments. ROI at 438. Complainant stated that the Help Desk determined that she was eligible for a new computer and replaced her computer. ROI at 438-39. According to Complainant, she had to take the new computer to the Redmond, Oregon office to be set up and to return her old computer and was there an hour longer than she was approved to work that day, yet Supervisor-1 would not allow her to account for the additional hour on her timecard. ROI at 439.

Supervisor-1 stated that Complainant emailed him on February 23, 2021, about her computer being slow and that on February 25, 2021, he emailed Complainant and Mentor-1 instructions for purchasing the requested RAM after Supervisor-2 confirmed they had budgetary approval. ROI at 635. According to Supervisor-1, Complainant never purchased the additional RAM, and she informed him in March 2021 that she was receiving a new computer. ROI at 635. Supervisor-1 averred that he would not allow Complainant to claim the additional time on March 22, 2021, because it represented her time driving from home to Redmond and time spent traveling from home-to-work or work-to-home was not compensable. ROI at 635.

Complainant alleged that, beginning March 15, 2021, Supervisor-1 failed to promote her to GS-1105-9, and he did not provide her with a training plan to qualify for promotion or provide notice explaining why she was not being promoted. ROI at 431-32. Complainant stated that she felt Supervisor-1 was discriminating against her based on her disability because he seemed to be withholding her promotion based on her inability to work a 40-hour work week after her doctors released her to work 10-12 hours a week in January 2021. ROI at 432. According to Complainant, the only time she met with Supervisor-1 to discuss her performance was on January 27, 2021, which was when she signed her performance plan. ROI at 450. Complainant averred that Supervisor-1 was supposed to have quarterly performance meetings with her and seemingly set her up to fail. ROI at 450-51. Supervisor-1 stated that, in March 2021, he submitted Complainant's time and attendance records to Employee Relations and was told that she did not meet the time in grade requirements for promotion to GS-9 based on the amount of LWOP she had taken. ROI at 628, 916. According to Supervisor-1, the significant number of hours of LWOP taken by Complainant also made it hard to assess her performance. ROI at 628. Supervisor-1 stated that he informed Complainant that, as a GS-8 Purchasing Agent, the workload planning sheets were not a model for long-term success. ROI at 645. Supervisor-1 stated that he was providing weekly workload planning sheets to Complainant and that they held weekly meetings to discuss her performance. ROI at 645-46. An Employee Relations Specialist stated that Complainant did not meet the requirement of one year at the GS-8 level to qualify for a career ladder promotion because she had taken a significant amount of leave. ROI at 1060. According to Supervisor-2, Supervisor-1 approved the e-tracker for Complainant's promotion to GS-9, but Complainant was not eligible for promotion because she did not serve 52 weeks at the GS-8 grade based on the amount of LWOP she had taken. ROI at 884. On March 14, 2021, Supervisor-1 approved Complainant for a within-grade increase. ROI At 916.

According to Complainant, on April 8, 2021, Supervisor-1 called her about the Planning Worksheet she had submitted that date, stating it did not contain sufficient information and that he had to ask other people what she had done. ROI at 443. Complainant averred that Supervisor-1 also told her that her assignments were not ongoing and needed to be completed in a timely manner. ROI at 443. According to Complainant, she was unable to complete the tasks she was assigned given the number of hours she worked each week and the meetings she was required to attend. ROI at 444. Complainant noted that she had been working with Mentor-1, who told her she had been doing a good job. ROI at 444. The record contains an April 8, 2021, email from Supervisor-1 to Complainant summarizing their discussion and his expectations for the weekly workload planning sheet. ROI at 540.

Supervisor-1 stated that Complainant should have been able to complete all the tasks in the weekly workload planning sheet within the 10 to 12 hours she was scheduled to work and that, if unforeseen challenges were encountered, she needed to explain what happened. ROI at 639. According to Supervisor-1, Complainant did not always submit her work accomplishments for the work on the workload planning sheets, and he was working to ensure that she understood his expectation that she needed to complete this task before logging off at the end of the week. ROI at 639. Supervisor-1 averred that, on April 8, 2021, Complainant's work assignments in question had been ongoing for three weeks, she had not explained what had been completed in the workload planning sheets, and the deliverables were not available. ROI at 640-41. According to Supervisor-1, he had a Teams call with Complainant outlining his expectations and providing additional clarification related to deliverables. ROI at 641.

Complainant averred that, on April 15, 2021, Supervisor-1 sent her an email threatening to mark her time and attendance as absent without leave (AWOL) unless she provided additional medical documentation, even though she was providing Supervisor-1 biweekly doctor's notes and was asked to provide additional documentation for the VLTP and for reasonable accommodations. ROI at 444-45. According to Complainant, her Union Representative and Supervisor-1 had an informal meeting on April 16, 2021, and, as a result of the meeting, she did not believe that Supervisor-1 followed through on his threat to mark her AWOL. ROI at 445. On April 15, 2021, Supervisor-1 emailed Complainant a letter about her continued absence, requesting medical documentation by April 30, 2021, to evaluate her continued absence from work. ROI at 580-82.

Supervisor-1 stated that, if Complainant did not provide the requested documentation and the documentation did not include information about her prognosis, dates of incapacitation, restrictions on performance of her duties, and expected return date, she could be charged AWOL. ROI at 581. Supervisor-1 stated that, on April 15, 2021, he issued Complainant a "Status Request" letter, requesting that she provide medical documentation to support her extended absence by April 30, 2021, and noting that she could be charged AWOL if she did not do so. ROI at 641-43. According to Supervisor-1, Complainant did not work past 12 p.m. on April 15, 2021, and she was not charged AWOL. ROI at 642.

Complainant averred that her doctors recommended that she not return to work and apply for disability retirement. ROI at 447-48. On April 16, 2021, her Union Representative informed Supervisor-1 that Complainant was pursuing disability retirement. ROI at 949. According to Complainant, her Union Representative requested that Supervisor-1 complete the supervisor portion of the disability retirement application, yet he did not fill out his portion of the application, extending her financial hardship. ROI at 448. Complainant alleged that Supervisor-1 did not fill out the paperwork because he did not believe that Complainant had legitimate medical problems. ROI at 448. On May 6, 2021, the Union Representative emailed Supervisor-1 and the HR Specialist who was assigned the HR ticket for Complainant's disability retirement application (HR-4), stating that all of Complainant's doctors had recommended that she not return to work and that she would therefore focus on her application for disability retirement. ROI at 959-60. In the email, the Union Representative asked Supervisor-1 to fill out the Supervisor's Statement part of the application and asked HR-4 some questions about the role of the supervisor and HR in the disability retirement process. ROI at 960.

Complainant stated that, after becoming extremely ill on April 21, 2021, she never returned to work and remained on LWOP. ROI at 445. According to Complainant, her Union Representative had contacted Supervisor-1 about applying donated leave against Complainant's LWOP. ROI at 445-46. Complainant averred that, on April 22, 2021, HR-3 contacted her while she was on leave and very sick and asked her to provide additional documentation for the VLTP even though she was not required to provide additional medical documentation until May 12, 2021. ROI at 446. Complainant alleged that HR-3 was putting pressure on her because Supervisor-1 had been "called to task" by the union about releasing and approving her donated leave. ROI at 446. The record contains an April 22, 2021, email from HR-3 to Complainant, following up on a conversation from earlier that day during which Complainant informed him it was not a good time to talk because she was not feeling well.

ROI at 543. HR-3 stated that his supervisor informed him that Complainant was only approved for the VLTP for insomnia and that she would need a new doctor's note covering January 17, 2021, to the present by April 30, 2021, addressing insomnia and not other medical emergencies. ROI at 543. HR-3 also requested that Complainant provide appointment cards for any doctor's appointments for insomnia during that time frame by April 30, 2021, so he could determine the days and times he should apply donations. ROI at 543.

Complainant stated that, on April 28, 2021, she asked Supervisor-1 for help with providing procurement instrument identifiers (PIIDs) needed for government purchase card (GPC) actions that had been requested on April 14, 2021. ROI at 449-50. According to Complainant, she had not been seeing the emails because she was out on medical leave. ROI at 450. Complainant alleged that, on May 3, 2021, she was notified that nothing had been done and that her purchase card had been suspended. ROI at 450. On April 14, 2021, a Branch Chief in the GPC Oversight Branch emailed Complainant, requesting that she provide PIIDs for two transactions no later than April 29, 2021, and noting that failure to do so could result in suspension of her card. ROI at 622. On April 28, 2021, the GPC Branch Chief emailed Complainant about the status of the request, and Complainant emailed Supervisor-1, asking him to get the needed PIIDs because she was out on extended leave. ROI at 621. On May 3, 2021, the GPC Branch Chief emailed Complainant, asking her to provide the missing PIID for the transactions listed below and requesting that Complainant's GPC be suspended until she was compliant. ROI at 620-21. Supervisor-1 stated that the purchases were from Complainant's prior position and were dated June 6, 2020, and June 19, 2020. ROI at 645. According to Supervisor-1, the PIIDs should have been created before they were reallocated, and he could not create the required PIIDs because they no longer used the same program for PIID generation. ROI at 645.

Complainant alleged that Supervisor-1 failed to notify her of a meeting that was scheduled for May 4, 2021. ROI at 447. According to Complainant, Supervisor-1 sent an email after the meeting to Complainant's personal and work email addresses and to her Union Representative stating that he was "sorry [Complainant] did not attend" the meeting, but the meeting invitation was only sent to her work email, and her Union Representative also had not been invited. ROI at 447. Complainant noted that Supervisor-1 knew that she was non leave on the day of the meeting and questioned why the meeting was held without her and her Union Representative. ROI at 447-48.

Supervisor-1 stated that Complainant was included on the invitation for the May 4, 2021, meeting, which was held to discuss how her donated VLTP leave would be applied. ROI at 643. According to Supervisor-1, he sent Complainant a summary of the meeting on May 5, 2021. ROI at 643.

The record contains the May 5, 2021, email from Supervisor-1 to Complainant and her Union Representative about a May 4 meeting regarding Complainant's participation in the VLTP and corrected time and attendance. ROI at 551. Supervisor-1 stated that HR-3 never received the medical documentation requested on April 22, 2021, which created challenges in ensuring donated hours were applied following the intent of the VLTP. ROI at 551. According to Supervisor-1, Complainant had received 252 donated hours, and they had decided to apply 231 hours of the donated leave towards her LWOP from pay period 26 to pay period 3. ROI at 551. Supervisor-1 stated that the remaining 15 hours could be applied towards LWOP in pay periods 4 through 9 (which ended April 30, 2021) if Complainant provided supporting medical documentation that identified appointments and LWOP related to insomnia no later than May 12, 2021. ROI at 551. HR-3 stated that, prior to the May 4, 2021, meeting, Complainant's donated leave had not been applied because they were waiting for a decision from the Associate Deputy Chief about whether to apply the donations to LWOP or advanced sick leave. ROI at 970-71.

According to HR-3, because Complainant did not provide adequate medical documentation showing that time off work was related to insomnia, the remaining 15 hours of donations were applied to her advanced sick leave balance. ROI at 972-74. HR-3 noted that Complainant's advanced sick leave remained on the books, as advanced sick leave was generally cleared from the books when the employee returned to work and their accrued sick leave was applied to the advanced sick leave balance. ROI at 971. According to HR-3, if an employee resigned or was terminated, they would be billed for their negative sick leave balance, and, if an employee received disability retirement, their advanced sick leave balance could be forgiven. ROI at 971.

Complainant did not provide the medical documentation requested by HR-3 on April 22, 2021, and she was removed from the VLTP on April 30, 2021. ROI at 527, 551, 555, 971. HR-3 stated that, although Complainant was removed from the program, she remained in the program for a 90-day grace period because she had a negative sick leave balance, and any donations received during that time would apply towards her negative sick leave balance. ROI at 527, 554-55, 971.

HR-3 averred that, if Complainant wanted to participate in the VLTP again, she would need to re-apply, and approval of her application would be based on the documents submitted. ROI at 9781-72.

Complainant alleged that Supervisor-1 failed to timely correct issues with her timecards. On May 18, 2021, HR-3 emailed Complainant and Supervisor-1 about Complainant's corrected time and attendance. ROI at 525. According to HR-3, while the system had picked up the corrections with donated leave for pay periods 26 and 1, the system had not picked up the corrections for pay periods 2 and 3, so he requested that Complainant resubmit her time and attendance for pay periods 2 and 3. ROI at 525. On June 1, 2021, HR-3 informed Complainant that they would need to wait until pay period 11 processed to see if the corrections for pay periods 2 and 3 picked up. ROI at 526. On June 11, 2021, HR-3 informed Complainant that the corrections had picked up and that Complainant would receive the pay in her next direct deposit. ROI at 527.

Complainant stated that, on June 9, 2021, Supervisor-1 threatened her with termination by issuing her a Duty Status Letter. ROI at 448. Supervisor-1 stated in the letter that Complainant currently had 0 hours of annual leave, -153.75 hours of sick leave, and 764.25 hours of LWOP. ROI at 809. According to Supervisor-1, Complainant had provided medical documentation stating that her prognosis was poor, which led management to believe that she would not be able to return to work. ROI at 809. Supervisor-1 stated that Complainant's position needed to be filled by an employee who could perform the essential functions, and he informed Complainant of her options, which included returning to duty, resigning, and applying for disability retirement, as well as the availability of the Employee Assistance Program. ROI at 809-11. According to Complainant, Supervisor-1 had not filled out the supervisor section of her disability retirement paperwork at the time, so the letter seemed to be an effort to remove her from her position while denying her the benefits of a disability retirement. ROI at 448. Complainant alleged that, because Supervisor-1 issued the Duty Status letter, she had no choice but to hire an attorney to help her with the disability retirement process. ROI at 448. Complainant averred that her attorney provided Supervisor-1 with the same paperwork and that Supervisor-1 finally returned it on June 19, 2021. ROI at 448. Supervisor-1 averred that Complainant's Union Representative emailed him in May 2021 with an attached disability retirement application and that he followed up with HR on May 15, 2021. ROI at 644. According to Supervisor-1, Complainant's attorney sent him a disability retirement application to complete on June 15, 2021. ROI at 644.

Supervisor-1 signed the Supervisor's Certification on Complainant's application for disability retirement on June 19, 2021. ROI at 334, 644.

On June 22, 2021, Complainant responded to Supervisor-1's Duty Status Letter. ROI at 619. In her response, Complainant stated that, while she did not timely provide medical documentation in support of her request for reasonable accommodation, she was under the impression that her request was still being processed, and that, "This miscommunication was a result of my medical conditions, which cause me difficulty focusing and completing tasks, ultimately leading to failure to complete and engage in the interactive process in a timely manner." ROI at 619. Complainant noted that, while she was pursuing disability retirement, she was still interested in moving forward with her request for reasonable accommodation, including reassignment to a vacant position in the commuting area with the same pay grade/scale and tenure for which she was qualified and medically able to perform. ROI at 619.

On July 28, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (physical) when:

1. Beginning March 15, 2021, and continuing to the present, management failed to approve Complainant's promotion to a GS-1105-9 Purchasing Agent position;
2. On unspecified dates, management denied her requests for reasonable accommodation made January 5, 2021, through April 15, 2021; and
3. On several dates, she was subjected to various incidents of harassment, including, but not limited to:
    a. Since October 2020, her supervisor:
        i. Caused delays and failed to take appropriate actions regarding forms for advanced sick leave;
        ii. Failed to timely correct timecards and address her computer issues; and
        iii. Made derogatory comments about her disability;
    b. On November 25, 2020, and January 11, 2021, her supervisor demanded she submit her work accomplishments, dates of medical appointments, copies of her notes, and her week's schedule in advance;
    c. On February 17, 2021, her supervisor threatened to send her to collections if she did not agree to apply her donated leave towards her negative sick leave balance retroactively;

d. On April 8, 2021, her supervisor accused her of not providing appropriate responses regarding her work assignments and criticized her accomplishments;
e. On or about April 15, 2021, her supervisor threatened to mark her time and attendance as AWOL;
f. On April 23, 2021, HR-3 called her and threatened her while she was on leave after he was contacted by her union representative;
g. On an unspecified date, her supervisor failed to notify her of a meeting scheduled for May 4, 2021;
h. On June 9, 2021, her supervisor threatened her with termination when he issued her a Duty Status Letter;
i. On unspecified dates, her supervisor failed to reassign some of her work assignments to others, as promised;
j. On unspecified dates, her supervisor failed to hold quarterly performance plan meetings;

4. On November 25, 2020, her supervisor revoked her “wellness time” for meditation;
5. On several occasions since October 2020:
   a. Management caused delays and failed to take appropriate action regarding forms for FMLA, the VLTP, and her FERS disability retirement;
   b. A HR Specialist provided her incomplete guidance on the VLTP;
   c. Her supervisor demanded that she make changes to Form AD-1046, Leave Transfer Program Recipient Application, or he would disapprove her time; and
   d. Beginning in late November 2020 (Pay Period 24), her supervisor caused her to have a negative leave balance when he instructed her to code her time under FMLA using Code 62 descriptor 01.[2]

The Agency dismissed claim (4) pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact. The Agency dismissed claim (5) pursuant to 29 C.F.R. § 1614.107(a)(1) as a collateral attack on FMLA, the VLTP, and the FERS disability retirement process. At the conclusion of the investigation into the accepted claims, 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.

[2] We have renumbered the claims for the same of consistency.

Complainant requested reinstatement of claim (5) during the Initial Teleconference, and the AJ granted Complainant's request. The AJ noted that, to the extent the issues raised in claim (5) were discrete acts, they were untimely, but that Complainant could introduce evidence of these issues as background evidence in support of her overall harassment claim. Complainant also requested to amend her complaint to include a failure to accommodate claim covering the period from October 2020 to January 2021. In the Case Management Order Memorializing Initial Teleconference, the AJ denied Complainant's request because she first raised the claim approximately one year after the conclusion of EEO counseling and had not demonstrated she sought EEO counseling on the amended claim at any point prior to the Initial Teleconference.

Complainant filed a Motion to Reconsider the decision denying her request to amend her complaint to include instances dating back to October 2020 of the Agency's failure to accommodate her disability. In her motion, Complainant noted that, in her Preliminary Case Information (PCI) submission, she had asserted that claim (4) raised a reasonable accommodation issue and requested that it be reinstated as part of the reasonable accommodation claim accepted by the Agency. Complainant also argued that, in her investigative affidavit, she raised the issue of the Agency failing to accommodate her as early as October 2020.

On June 28, 2022, the AJ denied Complainant's Motion to Reconsider, stating that the "matter had been resolved and one or both parties may properly raise the issue on appeal." On July 6, 2022, Complainant's attorney emailed the AJ, arguing that Complainant timely raised a reasonable accommodation claim and that claim (4) was also timely raised as another instance of the Agency's failure to accommodate. Complainant's attorney requested clarification as to whether claim (4) would be reinstated. The Agency opposed Complainant's request. On July 14, 2022, the AJ emailed the parties, "Please be advised that the parties will receive a decision concerning Complainant's request shortly." On August 23, 2022, Complainant's attorney responded to the AJ's July 14th email that they were hoping to follow up on the referenced matter. There is no indication that the AJ responded to the email or further addressed whether claim (4) would be reinstated.

On August 23, 2022, the Agency filed a Motion for Summary Judgment. Complainant filed a Response to the Agency's Motion for Summary Judgment, and the Agency filed a Reply to Complainant's Opposition to the Agency's Motion for Summary Judgment.

On April 13, 2023, the AJ issued a decision by summary judgment in favor of the Agency. The AJ addressed Complainant's challenges to the Agency's Statement of Undisputed Facts and found that Complainant failed to establish the existence of a genuine dispute of material fact or credibility. The AJ found that the Agency's legitimate, nondiscriminatory explanation for not promoting Complainant was that she did not have the required time in grade because of the amount of LWOP she had taken. The AJ determined that Complainant did not show the existence of a genuine dispute of material fact or credibility concerning the Agency's justification for her non-promotion and did not provide other evidence of pretext for discrimination.

Regarding Complainant's request for accommodation, on January 20, 2021, Complainant requested to maintain her maxi-flex schedule so she would have flexibility to attend her medical appointments. Although the Agency removed Complainant from her maxi-flex schedule, the AJ found that the Agency granted Complainant's request to maintain a flexible schedule by allowing her to work 10-12 hours per week and tell Supervisor-1 the hours she planned to work. The AJ noted that employees are not entitled to their requested accommodation. The AJ found that it was undisputed that the Agency provided Complainant with an alternative accommodation that allowed her to work 10-12 hours per week and have a flexible schedule, in accordance with her medical documentation. While Complainant alleged that the Agency failed to engage in the interactive process to assess the adequacy of the alternate accommodation, the AJ determined that the breakdown in the interactive process was attributable to Complainant, who delayed providing medical documentation and abandoned her request for reasonable accommodation to pursue disability retirement.

Considering Complainant's harassment claim, the AJ found that the Agency asserted a legitimate, nondiscriminatory reason for the vast majority of the incidents of alleged harassment and that Complainant failed to show that the alleged harassment was based on her disability. The AJ determined that Complainant identified a single incident when Supervisor-1 allegedly made derogatory comments about her disability, stating during a meeting about Complainant's use of the VLTP that "insomnia isn't what this program is for" and "he had used the program and would hate to see it go away because of abuse." According to the AJ, these one-time remarks were insufficient to create a hostile work environment. The AJ found that Complainant could not establish a hostile work environment. The AJ concluded that there were no genuine disputes of material fact or credibility and entered judgment in favor of the Agency. The AJ's decision did not address claim (4).

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

On appeal, Complainant contends that the AJ failed to rule on her request to reinstate claim (4) based on her argument that it was timely raised because it raised a reasonable accommodation issue. Complainant also argues that the AJ improperly denied her request to amend the complaint to expand the timeframe of claim (2) to reflect that Complainant had requested reasonable accommodation as far back as October 2020. According to Complainant, because the AJ erroneously denied her request to amend the complaint and reinstate claim (4), there is also a genuine issue of material fact as to whether Complainant was subjected to a hostile work environment based on disability. Complainant requests that the matter be remanded for a hearing.

In response to Complainant's appeal, the Agency argues that Complainant's allegations of discrimination and harassment are based solely on her personal beliefs, speculation, and assumptions. The Agency contends that, even if the AJ had considered the alleged instances of failure to accommodate that occurred in 2020, the outcome would have been the same. According to the Agency, Complainant's wellness time was not revoked until the last week of January 2021, and her subsequent request for reasonable accommodation did not address the issue of wellness time. Moreover, the Agency maintains that it engaged in the interactive process but that Complainant decided to withdraw and pursue disability retirement instead. The Agency requests that its final order be affirmed.

STANDARD OF REVIEW

In rendering this appellate decision we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes.

In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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").

Administrative Judges have full responsibility for the adjudication of the complaint, including overseeing the development of the record, and have broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a), (e). This gives an AJ wide latitude in directing the terms, conduct, or course of EEO administrative hearings. EEO MD-110 at Chapter 7, § III.D; Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018) (citations omitted). Accordingly, such determinations by the AJ are reviewed based on an abuse of discretion standard.

ANALYSIS

As a preliminary matter, Complainant challenges the AJ's denial of her request to amend claim (2) and the AJ's denial of her request to reinstate claim (4).[3] Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused their discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 n.3 (June 2, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

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[3] By not responding to the email from Complainant's attorney requesting clarification whether the denial of her motion to reconsider included claim (4) and not otherwise addressing the matter in the Decision and Order Entering Judgment, the AJ denied Complainant's request to reinstate claim (4).

Here, Complainant initiated contact with an EEO counselor on June 14, 2021. The Agency accepted claim (2), a claim of ongoing failure to reasonably accommodate beginning on January 5, 2021. On September 13, 2021, Complainant's attorney objected to the phrasing of claim (2) but did not challenge the timeframe of the reasonable accommodation claim. ROI at 405. Complainant's attorney also did not state that claim (4) should be viewed as a reasonable accommodation claim. Id. There is no indication in the record that Complainant raised the pre-January 2021 denial of accommodation or characterized the denial of wellness time as alleged in claim (4) as a denial of reasonable accommodation prior to the hearing process. We find that it was not an abuse of discretion for the AJ to deny Complainant's request to amend her complaint, deny her Motion for Reconsideration, and deny her request to reinstate claim (4).

Decision without a Hearing

We determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant has not identified a genuine issue of material fact or credibility.

For example, Complainant argued that there were genuine issues of material fact concerning whether Supervisor-1 threatened to send her to collections if she did not agree to apply her donated leave towards her negative sick leave balance and whether HR-1 failed to tell Complainant that her application for the VLTP should be for her primary medical condition. The AJ assumed for the purposes of the decision that Supervisor-1 threatened to send Complainant to collections as alleged and that HR-1 failed to tell her that she should apply for the VLTP in connection with her primary medical condition, but these factual disputes were not material because they would not affect the outcome of the case. Accordingly, we find that the AJ properly issued a decision without a hearing.

Failure to Reasonably Accommodate

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

"The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). Essential functions "are the duties of a job," that is, "the outcomes that must be achieved by someone in that position." Gilberto S. v. Dep't of Homeland Sec., EEOC Petition No. 0320110053 (July 10, 2014); Ta v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013); Finnegan v. Dep't of the Air Force, EEOC Request No. 05980065 (Sept. 26, 2001). In determining whether an individual is qualified for a job, the Commission asks whether that person can perform the essential functions of the job when at work. Gilberto S. supra, EEOC Petition No. 0320110053. Employers do not have to eliminate essential functions of a position to accommodate an individual with a disability. See Enforcement Guidance on Reasonable Accommodation at "General Principles."

The term "position" is not limited to the position held by the employee but may also include positions that the employee could have held as a result of reassignment. Therefore, in determining whether an employee is "qualified," an agency must look beyond the position which the employee presently encumbers. Enforcement Guidance on Reasonable Accommodation.

It is undisputed that Complainant is an individual with a disability. Complainant was no longer "qualified" as of late April 2021, when she provided medical documentation stating that she could not work at all and initiated her application for disability retirement. Accordingly, we consider whether the Agency failed to accommodate Complainant from January 5, 2021, through April 15, 2021.

When she returned to work in January 2021, Complainant was restricted to working no more than 10-12 hours per week. Prior to taking medical leave, Complainant had been working a maxi-flex schedule that allowed her to flex her time from day to day, including by working in the evenings and on Saturdays. Given the limited number of hours Complainant was approved to work in January 2021, Supervisor-1 removed Complainant from the maxi-flex schedule. Management determined that Complainant needed to work during core business hours because that was when her coworkers, Mentor-1, contractors and her customers were available. Complainant's schedule for the week could vary, allowing Complainant flexibility to attend medical appointments. For example, Complainant's schedule for one week might indicate she would take Monday off, work three hours on Tuesday starting at 10 a.m., work four hours on Wednesday starting at 9 a.m., work four hours on Thursday starting at 11 a.m., and take Friday off. Supervisor-1 asked Complainant to stick to her schedule for the week once it was established so that she could be included in meetings and her coworkers would know her general availability. Complainant could not announce on Wednesday that she would start work on Thursday at 4 p.m.

The Agency's alternate accommodation allowed Complainant the flexibility to change her work schedule to accommodate her medical appointments. Complainant argues that, if she had a maxi-flex schedule, she would have been able to work more hours when a medical provider changed the time of an appointment or she did not feel well when she was scheduled to work. However, she does not address the Agency's contention that her requested accommodation would not have ensured that her limited working hours coincided with when her mentor, her coworkers, contractors, and her customers were available so she could perform the essential functions of her position.

While Complainant is entitled to an effective reasonable accommodation, she is not entitled to the accommodation of her choice. Lynette B. v. Dep't of Justice, EEOC Appeal No. 0720140010 (Dec. 3, 2015). Moreover, the record reflects that Complainant broke off the interactive process and decided to pursue disability retirement. We therefore find that Complainant has not shown that she was denied a reasonable accommodation for her disability.

Denial of Promotion

Complainant alleged that she was subjected to discrimination based on disability when she was not promoted to the GS-2205-9 Purchasing Agent position. To prevail in a disparate treatment claim, 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 he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. 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 802 n. 13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). 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, 120 S.Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023). Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can also be drawn.

As discussed above, Complainant is an individual with a disability. We will assume for the purposes of analysis that, as of March 15, 2021, Complainant was qualified for her GS-1105-8 Purchasing Agent position. The Agency took an adverse action against Complainant when she was not promoted to GS-9.

Complainant asserted that she was not promoted because she was unable to work 40 hours per week because of her disability and that she therefore established a causal relationship between her disability and her non-promotion. We will assume that Complainant has established a prima facie case of discrimination based on disability.

Accordingly, the burden shifts to the Agency to provide a legitimate, nondiscriminatory reason for its actions. The Agency's legitimate, nondiscriminatory explanation for not promoting Complainant was that she did not satisfy the required time-in-grade for a career ladder promotion because she had taken extended LWOP. Moreover, Supervisor-1 had a hard time evaluating Complainant's performance given the limited number of hours she worked.

As evidence of pretext, Complainant argued that Supervisor-1 did not set her up for a successful promotion because he did not hold quarterly performance reviews with her and did not inform her what she needed to do in order to be promoted. Supervisor-1 stated that he discussed Complainant's performance with her on a weekly basis, and Complainant does not provide evidence or specifically allege that Supervisor-1 treated her differently than her coworkers who did not have a disability with respect to performance reviews or providing information about what was needed for promotion. Moreover, even assuming that Supervisor-1 did not hold quarterly performance reviews or inform Complainant what was needed for promotion, this does not show that the Agency's asserted legitimate, nondiscriminatory reasons were pretextual. Complainant alleged that Supervisor-1 failed to initiate the e-tracker for her promotion based on disability animus. However, Supervisor-2 stated that Supervisor-1 initiated the e-tracker for her promotion. According to Supervisor-2, Employee Relations determined that Complainant did not meet the time-in-grade requirements for a career ladder promotion based on the amount of LWOP she had taken, and it is undisputed that Complainant took the extended LWOP. Upon review, we find that Complainant cannot establish that the Agency's legitimate, nondiscriminatory explanation for her non-promotion was a pretext designed to mask discriminatory animus.

Harassment

Complainant alleged that she was subjected to harassment based on disability. 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 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 disability. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Complainant has not shown a connection between the majority of the instances of alleged harassment and her disability. Supervisor-1 denied agreeing to reassign Complainant’s work assignments, stated that he was unaware that Complainant was being contacted regarding her former contracts, and stated that he could not generate PIIDs for prior transactions because of a program change. Supervisor-1 advised Complainant to code her time in a way that caused her to accrue a negative sick leave balance based on guidance from HR that assumed that Complainant would apply leave donated through the VLTP to advanced sick leave before LWOP. A mistake made by an agency is not evidence of pretext unless there is evidence that the mistake was based on a complainant’s protected classes. See Vickey S. v. Dep’t of Def., EEOC Appeal No. 0120112893 (Nov. 17, 2015); Hsieh v. Dep’t of Veterans Affs., EEOC Appeal No. 0120120980 (June 4, 2012); Carroll v. Dep’t of Justice, EEOC Appeal No. 01A20985 (Jan. 21, 2003). Complainant has not shown that the mistaken assumption was based on her disability.

Even if we were to assume that HR-1 provided Complainant with incomplete guidance regarding the VLTP, Complainant has not shown that HR-1’s incomplete guidance was based on her protected class membership.

Supervisor-1 asked Complainant to submit her work accomplishments, the dates of her medical appointments, and her work schedule on a weekly basis so that he could comprehend what she had completed and communicate her availability for the following week. Supervisor-1 did not hold formal quarterly performance meetings, but he met with Complainant to discuss her work performance on a weekly basis. The record reflects that Supervisor-1 asked Complainant to change the way her donated leave was applied out of concern for her negative sick leave balance. On April 8, 2021, Supervisor-1 informed Complainant that she had not provided sufficient information regarding her progress with ongoing work assignments. On April 15, 2021, Supervisor-1 issued Complainant a status request letter, which requested that she provide additional medical documentation for her absence by April 30, 2021, and stated that she could be charged AWOL if she did not do so. Complainant was not charged AWOL. HR-3 called Complainant on April 23, 2021, to inform her that he needed additional medical documentation for the VLTP. Supervisor-1 informed Complainant about the May 4, 2021, meeting, but she did not see the invitation, which was not sent to her personal email address or to her Union Representative. Complainant has not shown a connection between Supervisor-1 not including her personal email or her Union Representative on the meeting invitation and her disability. On June 9, 2021, Supervisor-1 issued Complainant a duty status letter because she had been absent from work for an extended period of time and the most recent medical documentation did not indicate that she would be able to return to duty.

We will assume for the purposes of summary judgment that Supervisor-1 made derogatory comments at a meeting with HR-2 about insomnia not being a disability and the appropriateness of Complainant using the VLTP for insomnia as alleged by Complainant. Although Complainant found these disability-related comments offensive, she alleges that they occurred on one occasion. Upon review, we find that the alleged harassment is insufficiently severe or pervasive to constitute a hostile work environment. Accordingly, we find that Complainant has not established that she was subjected to a hostile work environment based on disability as alleged.

CONCLUSION

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

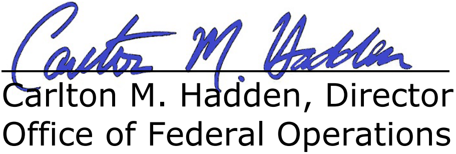
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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