



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

[REDACTED]
Bula P.,¹
Complainant,

v.

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

Appeal No. 2023003359

Agency No. 200H-646-2022-144259

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 21, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

The issue is whether the Agency properly issued a final decision (FAD) concluding that Complainant was not discriminated against and subjected to a hostile work environment (non-sexual) regarding denied reasonable accommodation, reassignment, and removal based on disability (mental/multiple) and reprisal (for prior EEO activity).

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 Certified Registered Nurse Practitioner (CRNP) at the Agency's VA Health Care System in Pittsburgh, Pennsylvania. Complainant had applied, and was interviewed but not selected for the same position in 2019. Report of Investigation (ROI) at 89, 1298-99 and 1305. She had last worked as a hospitalist in 2007. ROI at 769, 833-34, 858, 962, and 1063.

Complainant asserted that she was diagnosed with Depression, Anxiety, Complex Post-Traumatic Stress Disorder (CPTSD), and Attention Deficit Hyperactivity Disorder (ADHD). ROI at 92. Her disability is permanent. Complainant also provided medical documentation from her doctor confirming that she was diagnosed with the disabilities and requesting that she be provided with an accommodation "in a less acute setting and identify an appropriate clinical position that allows her to manage her space and time so she can focus and concentrate with reduced distractions impacting her ADHD diagnosis." ROI at 781-800 and 841-42. Complainant stated, and her medical documentation reflected, that her "disabilities substantially impair several major life activities including thinking, concentration, recall, interacting with others, and working. Mental and cognitive disabilities can substantially affect her ability to perform additional functions, including activities of daily living, and completing essential job functions accurately and/or quickly." ROI at 92-3.

Complainant also engaged in prior EEO activity having filed at least one prior EEO complaint on May 29, 2020. ROI at 725. Complainant asserted that management officials in her supervisory chain were all aware of her protected bases. ROI at 88-9.

Complainant's former first-level supervisor (Supervisor 1A) was the Attending Physician. He was aware of Complainant's protected bases. Complainant had a new supervisor, a Nurse Manager (Supervisor 1B). ROI at 359-60. Complainant's second-level supervisor (Supervisor 2) was an Associate Chief Nurse. ROI at 371-72. An Acting Supervisory Human Resources Specialist was the facility's Local Reasonable Accommodation Coordinator (LRA Coordinator). She was unaware of Complainant's prior EEO activity. ROI at 391-92.

According to LRA Coordinator, Complainant initially requested seven different accommodations that include: Job Coach to assist/teach skills to mitigate difficulty with attention, focus, organization, planning and

prioritizing tasks; five-six patients assigned with the option to complete one patient at a time in order to minimize frequent multitasking; flow charts of tasks that are performed simultaneously, labelling each task in preferential order; written instructions with check lists; task priority cheat sheets; a desk calendar and planner; and a designated one hour break each day at mid-day.

LRA Coordinator stated that Complainant's initial reasonable accommodation request was denied, explaining that in order to provide Complainant with a Job Coach, one of the other nurse practitioners (NP) on the Medicine A team would have to assume this role. This would take the NP out of their normal role of providing direct patient care for patients admitted to the medicine service to oversee Complainant and work with her as her job coach. Furthermore, the Job Coach position did not exist within the medical service line. The patient load was dependent on the patient census of the hospital. It is not feasible to state that Complainant would only ever have to take five or six patients if the hospital census was high. That would highly burden the other providers on the team and could compromise patient care.

According to LRA Coordinator, flow charts, written instructions, check lists, and task priority cheat sheets were not feasible in Complainant's work environment. A NP on the Medicine A team was expected to provide care for any type of patient that came through the Emergency Room (ER) or was directly admitted onto the Medicine A service regardless of diagnosis. There was not a 1 size fits all checklist/flowchart of what a NP needed to do to provide care for each patient with a different diagnosis. LRA Coordinator also explained that a 1-hour mid-day break may not always be feasible for a NP on the Medicine A service due to patient census and acuity. Patient issues were often not predictable, and providers needed to be available when issues arise. ROI at 393.

Supervisor 1A corroborated LRA Coordinator's statement, asserting that she was of the opinion that Complainant's disabilities limited her ability to perform the essential functions of her position. According to Supervisor 1A, "Complainant was not able to perform the essential job functions independently as a Full Practice Authority provider." ROI at 360-61.

Complainant initiated EEO contact on February 10, 2022. On April 15, 2022, Complainant filed an EEO complaint (with subsequent amendments on February 11 and 25, 2022) alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (mental/multiple) and reprisal for prior protected EEO activity

under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. On August 23, 2021, Complainant was removed from clinical duties and assigned to administrative duties resulting from unsatisfactory performance and failure to provide a reasonable accommodation while attempting to learn the new unfamiliar duties;
2. On February 14, 2022, Complainant was issued a Notice of Summary Suspension of her Clinical Privileges, effective February 10, 2022;
3. On March 2, 2022, Complainant's request for a reasonable accommodation was denied;
4. On approximately April 4, 2022, Complainant was issued a Notice of Proposed Removal, dated March 16, 2022; and Complainant was denied her clinical privileges; and
5. Effective May 7, 2022, Complainant was removed from Federal Service.

The Agency noted that by Notice dated July 12, 2022, it dismissed Complainant's claims alleging that she was removed from clinical duties and assigned to administrative duties (Claim 1), on the grounds of untimely EEO Counselor contact. The record shows that Complainant initiated EEO contact regarding this matter on February 10, 2022. See ROI at 31. The record also shows that Complainant engaged in protected EEO activity on at least one prior occasion. ROI at 725 and 747. Complainant therefore had constructive knowledge of the regulatory time requirements. Upon review, we concur with the Agency's determination and affirm the dismissal of Claim 1 pursuant to EEOC Regulation at 29 1614.105(a)(1) & 107(a)(2). The Agency however addressed Claim 1 as evidence to support Complainant's harassment claim. ROI at 54-7. This decision will also address Claim 1 as part of Complainant's overall harassment allegations.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, on April 21, 2023, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant through counsel contests the FAD, reiterating her allegations. Complainant also reiterates arguments she previously raised in the instant complaint, and in a separate complaint, that had been addressed by the Agency and the Commission regarding her denied reasonable accommodation requests. As she previously argued, Complainant again alleges that the record in the instant complaint was incomplete, noting that the Agency either failed to secure, or failed to include in the ROI, fundamental source documents, and failed to interview three of the responsible management officials.

Complainant also alleges that the Agency intentionally placed her in a position in which it knew she could not perform. Complainant admits to utilizing the reasonable accommodation process to address an interpersonal situation she found difficult but faults the Agency for removing her from a situation that was allegedly exacerbating her medical condition. Complainant insinuates that the Agency misused the interactive process in order to target her, appearing to argue that despite her prior experience in the hospitalist position and decades of experience as a Nurse Practitioner, the Agency was wrong to reassign her to a hospitalist position and give her two full orientations because she was never going to be able to complete the essential functions of the job, with or without an accommodation. Complainant also appears to insinuate that the timing of the criticisms and the attitudes of the nurses who were helping to train her through her orientations make those incidents more severe.

In response, the Agency reiterates its stated reasons for the challenged actions, asserting that the record evidence supports its FAD. According to the Agency, nothing in Complainant's appeal brief presents any material evidence showing that the Agency treated Complainant in a disparate manner or harassed her. The Agency states that despite its best intentions to assist Complainant both in her prior position and the position from which she was removed, Complainant was unable to perform the essential functions of her job. The Agency also states that Complainant failed to present any evidence that the Agency's articulated reasons were merely a pretext for discrimination. The Agency requests that the Commission uphold its FAD and dismiss Complainant's appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

ANALYSIS

At the onset, the Commission finds the record in this case to be adequately developed and complete. Complainant also had an opportunity to review and supplement the record before the Agency issued a FAD. The record is devoid of any evidence that Complainant took any such action or inform the Agency of any record development inadequacies.

Failure to accommodate (Claim 3)

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).

Once an employer becomes aware of the need for an accommodation of an employee's disability, the employer may engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3) (2019). An Agency may choose among reasonable accommodations as long as the chosen accommodation is effective, and while the preference of the individual with a disability should be given primary consideration, an Agency has the ultimate discretion to choose between effective accommodations. See Enforcement Guidance, supra, at Q. 9.

Here, Complainant stated that she had permanent multiple mental disabilities including depression, anxiety, CPTSD, and ADHD. ROI at 92. She asserted that management officials in her supervisor chain were aware of her disabilities. Complainant also provided medical documentation from her doctor confirming her diagnosis and recommending reasonable accommodation to address Complainant's disabilities. ROI at 841-42 and 934. Complainant stated that "her disabilities substantially impair several major life activities including thinking, concentration, recall, interacting with others, and working. Mental and cognitive disabilities can substantially affect her ability to perform additional functions, including activities of daily living, and completing essential job functions accurately and/or quickly." ROI at 92-3.

Complainant also provided medical documentation, which corroborated the fact that her disabilities adversely affected her ability to perform these major life activities. In sum, it appears Complainant is an individual with disability who is not qualified for her position because Complainant failed to show that she could perform all the essential duties of her CRNP position with or without a reasonable accommodation.

Importantly, Complainant acknowledged that her medical conditions prevented her from performing all the essential duties of the position. See ROI at 95. The record also reflects that the duration of Complainant's impairments were permanent, meaning they were long-term and not expected to improve at any time in the near future. ROI at 92 and 95.

We find that management made reasonable attempts to address Complainant's medical needs, they continued to engage in the interactive process with her, and they promptly attempted to provide her with effective accommodations that complied with the requirements outlined in her medical documentation. We note Supervisor 1A's acknowledgment that she served as the Deciding Official who denied Complainant's initial

accommodation request. Supervisor 1A stated that Complainant's original reasonable accommodation request was denied because the requested accommodations would not have enabled the employee to perform the essential functions of the job and due to the impact, it would have on the facility's ability to conduct business.

Supervisor 1A also asserted that the requests did not meet the full practice authority standards, which is a requirement for all Nurse Practitioners. Full practice authority (FPA) is the collection of state practice and licensure laws that allow for APRNs to evaluate patients, diagnose, order, and interpret diagnostic tests, initiate, and manage treatments including prescribing medications under the exclusive licensure authority of the state board of nursing. However, prior to denying the request, a 90-day job search canvas was completed to potentially provide an alternative position for Complainant. ROI at 364.

According to Supervisor 1A, in addition to LRA Coordinator conducting a 90-day job search, Supervisor 1A also offered the following alternative accommodations to Complainant: a FPA nurse practitioner was made available to Complainant as a resource during her tour of duty. The FPA nurse practitioner was responsible for reaching out via phone at least once per day to ensure Complainant was supported with her daily work.

A weekly meeting was conducted between Complainant and Supervisor 1A, as Complainant's direct manager, and one of the FPA nurse practitioners from the Hospitalist Team that had recently been working with Complainant. They met to discuss performance and progress towards established goals. A U.S. Department of Defense Computer/Electronic Accommodations Program (CAP) Needs Assessment was initiated and completed. A quiet office space on the 9th floor of the facility was made available for Complainant to utilize.

Management also made arrangements to have Complainant work with one specific mentor FPA Nurse Practitioner for a period of 30 days. ROI at 362. Supervisor 1A asserted that these alternative accommodations also proved to be ineffective, and the completed 90-day job search canvas failed to produce any suitable positions. ROI at 365.

Complainant presented no evidence to dispute that management took extensive steps to accommodate her. Nor did she provide any alternative accommodations that would effectively address her needs. We note that having reassigned Complainant, Complainant's failure to improve her performance reflects that what Complainant is now requesting is make work

as she was no longer able to perform the essential functions of her position without encroaching on the rights of other employees who would have to assume duties Complainant could no longer perform. In that regard, the Rehabilitation Act does not require the agency to consider accommodating complainant's restrictions (or performance deficiencies) by creating a work assignment because such an assignment is not a vacant, funded position. See Saul v. United States Postal Service, EEOC Appeal No. 01970693 (May 10, 2001).

We also note Complainant's appeal arguments, including that the Agency is required to continuously engage in the interactive process with her and to accommodate her. However, although employers must provide reasonable accommodation to assist disabled employees in performing the essential functions of their jobs, employers do not need to change a job's essential functions or split them across multiple employees. 29 C.F.R. app. § 1630.2(o); see also Shin v. Univ. of Md. Med. System Corp., 369 Fed. Appx. 472, 482 (4th Cir. 2010); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir.1995) (finding ADA does not mandate accommodations that would require other employees to work "harder or longer").

Regarding Complainant's remaining appeal arguments linking the instant complaint to her previous complaint, our record includes the Commission decision affirming the FAD finding of no discrimination or reprisal. See Bula P. v. Department of Veterans Affairs, EEOC Appeal No. 2022001374 (Apr. 20, 2023, [req. for recon. den'd, EEO Request No. 2023003362]). In that case, the record supported that the Agency granted Complainant's request for reassignment to another position away from Supervisor 1A after management determined that Complainant's initial accommodation requests were not possible. The record also supported that the Agency engaged in the interactive process with Complainant and ultimately granted Complainant's request for reassignment to a position, chosen by Complainant.

As such, Complainant's appeal allegations in the instant complaint that the Agency intentionally placed her in a position in which it knew she could not perform is unsupported by the record. Therefore, we find that Complainant has failed to prove that the Agency violated the Rehabilitation Act.

Disparate Treatment Based on Disability and Reprisal (Claims 2 and 5)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

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

The Commission applies the McDonnell Douglas analysis to complaints involving retaliation claims. Orlando O. v. Department of Health and Human Services, EEOC Appeal No. 0120170253 (Aug. 8, 2018) (citing Hochstadt v. Worcester Found, for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976)). The Commission also applies the McDonnell Douglas analysis to complaints involving disability claims. Kenneth M. v. Dep't of Justice, EEOC Appeal No. 2022004767 (Nov. 17, 2022).

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. Department of the Air Force, EEOC Appeal No. 2021004539, (Aug. 17, 2023).

In order to establish a prima facie case of retaliation, a complainant must demonstrate that: (1) she participated in EEO activity; (2) an Agency official(s) was aware of the protected activity; (3) a subsequent adverse action took place, and (4) there is a causal link between the adverse action and the employer's knowledge of protected activity. Nida R. v. Dep't of Def., EEOC Appeal No. 0120152884 (Apr. 22, 2016) (internal citations omitted); see also EEOC Enforcement Guidance on Retaliation and Related Issues, § II.C.2, n. 154 (Aug. 25, 2016) (citing Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010)). Furthermore, "[t]he cases that accept mere temporal proximity between an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close' [in time]." Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (citing to O'Neal v. Ferguson Constr. Co., 237 F.3d

1248, 1253 (C.A.10 2001); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (finding a three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (finding a four-month period insufficient).

Once Complainant has established a prima facie case, the burden of production 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 Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on disability and reprisal.

Complainant meets the four elements to establish her prima facie case of reprisal to the extent that she engaged in protected EEO activity when she filed an EEO complaint on May 29, 2020, some 21 months before she initiated EEO contact in the instant complaint on February 10, 2022. Management was also aware of that protected activity; and the Agency took adverse actions against Complainant, including removing her from federal service.

Likewise, Complainant established that she is an individual with disability to the extent that she had permanent mental disability of which some management officials were aware. Complainant was unable to perform her job functions with or without reasonable accommodation. Nor did Complainant identify any other similarly situated employees outside of her protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on her protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management actions; and we find no persuasive proof of pretext.

Regarding Claims 2 and 3, the record reveals that Complainant was issued a notice of Summary Suspension of her Clinical Privileges based on concerns raised during her Focused Professional Practice Evaluation (FPPE) for Cause that suggested aspects of her clinical practice did not meet the accepted

standards of practice and potentially constituted an imminent threat to patient welfare. Specifically, the concerns raised were in relation to patient evaluation and assessment, medication management, and incomplete medical record documentation. ROI at 363.

According to Supervisor 1A, on April 8, 2021, Complainant was placed on a Focused Professional Practice Evaluation (FPPE) for Cause due to documenting inaccurate information in a medical record, the inability to formulate a differential diagnosis based upon history and physical exam and diagnostic test results, the inability to independently manage a full assignment of patients, and difficulty in discharging/admitting/transferring patients. An assessment was made in relation to the FPPE for Cause on July 2, 2021, wherein it was concluded that Complainant was not a good fit for fully independent practice in acute care medicine. ROI at 366.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K . v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015)).

Here, Complainant failed to show pretext because she failed to establish a link between the challenged management actions and any of her protected bases. Nor did she dispute management's explanations or demonstrate that their actions were motivated by discriminatory or retaliatory animus.

Complainant argues on appeal that management's awareness of, and involvement in, her prior protected EEO activity demonstrates that their actions were motivated by retaliation. However, it would be difficult to conclude that the activity which occurred almost two years prior to Complainant initial EEO contact in the instant complaint was the reason for any of the challenged management actions. The Commission has also held that an agency is not required to refrain from non-discriminatory personnel actions it would otherwise take simply because the employee has engaged in EEO activity. See Sotomayer v. Dep't of the Army, EEOC Appeal No. 01A43440 (May 17, 2006); Carter v. Dep't of Education, EEOC Appeal No. 01842314 (Aug. 25, 1986).

Notably, The Commission has repeatedly held poor performance to be a legitimate, nondiscriminatory reason for termination. See Complainant v. USPS, EEOC DOC 01974324 (Jan. 28, 2000); Complainant v. Dep't of Defense, EEOC DOC 0120071574 (Apr. 21, 2009); Complainant v. Dep't of Commerce, EEOC DOC 01A05464 (Nov. 21, 2000). Moreover, an employer is not barred from imposing discipline or terminating an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and is consistent with business necessity. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002 at Question 36 (Oct. 17, 2002).

Complainant also failed to identify any similarly situated employees who received more favorable treatment under her similar circumstances. Based on statements provided by Supervisor 1A, none of Complainant's coworkers failed to meet performance expectations that were part of the essential functions of their position.

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is also precluded by the determination above that the Agency's explanations demonstrate that her claims did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Complainant had also alleged that her supervisors removed her from clinical duties, assigned her to perform administrative duties, and issued her a Notice of Proposed Removal and Denial of Clinical Privileges. As discussed above, she has not proven that the actions taken were based upon animus regarding her protected classes.

To prevail in a retaliatory harassment claim, a complainant must show that a reasonable person would have found the challenged action materially adverse, i.e., an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination in the future. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

In the instant complaint, the record is devoid of any evidence to establish a nexus between Complainant's prior EEO activity which occurred almost two years earlier and the management actions that form the basis of Complainant's retaliatory harassment allegations in this case. Complainant's allegation also lacks the requisite severe and pervasive unwelcome verbal or physical management conduct that would constitute actionable harassment

or dissuade an employee from future participation in protected activity. Notably, while Complainant asserted on appeal that Supervisor 1A had previously stated that her reassignment was due to her prior EEO complaint, Complainant failed to cite any negative reference made by Supervisor 1A or any other agency official to that prior protected EEO activity. As we also earlier noted, Complainant herself had requested, and the Agency had granted, that reassignment as a reasonable accommodation.

Having reviewed the record, we find that the Agency correctly analyzed the facts and law of this case to determine that Complainant did not establish that the Agency subjected her to disparate treatment as alleged. The Commission recognizes that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures, monitoring subordinates, scheduling the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and to otherwise manage the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (Jun. 16, 2017). We find that many of the allegations stated in Complainant's complaint fall within these types of management prerogatives, and Complainant has not shown how she was treated differently than others who were similarly situated and outside of her protected groups.

Upon careful review of the Agency's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the Agency correctly determined that the preponderance of the evidence did not establish that Complainant was subjected to discrimination or unlawful reprisal as alleged.

CONCLUSION

Accordingly, we AFFIRM the Agency's final 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