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

[redacted]
Mui P.,[1]
Complainant,

v.

Antony Blinken,
Secretary,
Department of State,
Agency.

Appeal No. 2023003377

Hearing No. 570-2021-01223X

Agency No. DOS-0330-20

DECISION

On May 19, 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 19, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., 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 order.

ISSUE PRESENTED

The issue presented is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing finding that Complainant did not establish discrimination based on race, disability, and/or reprisal.

[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-1102-14 Contracting Officer assigned to the Agency's Bureau of Administration, Office of Acquisitions Management (AQM), World Wide Contracts Division, Functional Bureau Support Branch in Arlington, Virginia. Report of Investigation (ROI) at 2, 16, 55, 75. Complainant's first-line supervisor was the Branch Chief (Supervisor-1; African American), and her second-line supervisor was the Division Director (Supervisor-2; Caucasian). ROI at 56-57, 76, 325. According to Complainant, beginning in or around March 2014, she has teleworked full-time from her home in Virginia. ROI at 55, 66, 71.

Complainant is African American and identified her disability as systemic lupus erythematosus (SLE). ROI at 57-58. According to Complainant, she was diagnosed with SLE in 2008, and the condition caused extreme fatigue, gastrointestinal problems, immunosuppressive and other suppressive side effects from medication, costochondritis and chest pain, chronic widespread pain, intermittent arthritic pain in the spine, bone and joint degeneration, nausea, high blood pressure, and blood count abnormalities that put her at increased risk for developing communicable and infectious diseases. ROI at 58-60. Complainant averred that, in addition to the chronic manifestations of her disability, she also experienced periodic flares when she was sick or during periods of high stress, which resulted in lupus attacking her organs. ROI at 59. Complainant described being limited in the major life activities of walking, standing and sitting for a period of time, eating, sleeping, performing tasks such as grocery shopping and cooking, typing or writing for an extended period of time, and wearing shoes for extended periods of time. ROI at 60-61. Complainant stated that she previously filed EEO complaints in 2011 and 2014 and that, since 2010, she constantly voiced opposition to discrimination in the workplace. ROI at 57, 63-64.

Complainant indicated that she was granted two days a week of telework as a reasonable accommodation in February 2010. ROI at 66. Complainant averred that, in 2011, she requested telework as a reasonable accommodation, sent medical documentation to the Agency's Medical Bureau on January 28, 2011, and was granted three days of telework per week on April 1, 2011. ROI at 61-66. Complainant stated that, beginning in 2011, she was instructed to complete an annual telework agreement for documentation purposes and indicate that the reason for her telework schedule was a reasonable accommodation. ROI at 67-68.

According to Complainant, in 2013, her physician recommended full-time telework as an accommodation for her disability, her request for full-time telework, a flexible schedule, and liberal leave as a reasonable accommodation was granted in December 2013, and she began teleworking full time in March 2014. ROI at 60, 66-67, 71. Complainant asserted that her supervisor, her chain of command, and human resources had no role in granting her full-time telework between 2013 and 2019 other than approving her annual telework agreement. ROI at 68-69. Complainant averred that the Disability and Reasonable Accommodations Division (DRAD) was not involved in the administrative process of submitting the annual telework agreement. ROI at 69.

Complainant alleged that, in 2020, she submitted her annual telework agreement reflecting full-time telework because of a reasonable accommodation, yet her submission was denied. ROI at 69. Complainant averred that she was treated unfairly and more harshly than her White coworkers and her coworkers without disabilities with respect to her 2020 telework agreement. ROI at 72. Complainant stated that her prior protected activity was a factor because she had talked to a coworker (Coworker-1; African American) about how Coworker-1's reasonable accommodation request had been denied despite her medical condition being similar to Complainant's. ROI at 62, 72. According to Complainant, she advised Coworker-1 about possibly filing an EEO complaint, which was likely not well received by management. ROI at 72. Complainant alleged that her telework agreement was denied shortly after a January 2020 meeting about taking administrative action against Coworker-1, during which Complainant stated that she heard her reasonable accommodation was mentioned. ROI at 72, 84.

The record contains a February 24, 2020, automated email from the Office of Employee Relations to Complainant stating that her telework agreement was denied by Complainant's Bureau Executive Director because there was no instruction from DRAD granting a full-time telework schedule and stating that, if Complainant had such documentation, she must send it to her supervisor. ROI at 236. On February 24, 2020, Complainant emailed the DRAD Division Director (Director-1; Black), stating that she received a notification that her telework accommodation had not been approved even though she had been teleworking full time since 2012 and asking her to provide the requisite instructions to Supervisor-1 and Human Resources so her reasonable accommodation could be approved. ROI at 215; 235-36.

On February 27, 2020, Director-1 acknowledged Complainant's email, stating that she would review Complainant's case and request with the DRAD Analyst assigned to Complainant's bureau (Analyst-1) and that Complainant could forward any documents or communication regarding the accommodation decision she had mentioned. ROI at 233. Complainant responded that she would do the best she could to locate the information she had from 2011 and 2012 but noted, "Probably the easiest thing to do is to contact the Law Office that represented me for the case file # and then [Analyst-1] should be able to contact EEO for the requisite information. Also, as previously stated, your office has a complete copy of my medical record and all correspondence from my doctors." ROI at 233. Complainant replied later on February 27, 2020, with the Agency number and the hearing number of the EEO complaint she filed in 2011. ROI at 232.

On March 10, 2020, Complainant asked Analyst-1 if he had been able to review her files related to telework as a reasonable accommodation and stated that she had been able to find some documents, which she would provide shortly. ROI at 232. Analyst-1 responded that he had not seen anything in Complainant's file confirming the approval of telework as a reasonable accommodation, adding that he would review the documents when she provided them. ROI at 231. On March 11, 2020, Complainant emailed documents to Analyst-1, stating that she felt they should be sufficient to supplement DRAD's file and verify her reasonable accommodation over the years. ROI at 231. Complainant requested an update on March 23, 2020. ROI at 230. On March 25, 2020, Analyst-1 responded that, after reviewing the documents Complainant provided as well as DRAD's records, he could not find any documentation confirming that DRAD approved telework as a reasonable accommodation for her, adding that the Office for Civil Rights informed him that they did not have a record of a settlement approving telework. ROI at 229. Analyst-1 stated that, to move forward, Complainant would need to complete the request for reasonable accommodation form and provide supporting medical documentation. ROI at 229-30.

Complainant stated that, since denying her telework agreement amounted to a denial of her reasonable accommodation, she contacted DRAD to find out what was happening. ROI at 69-70. Complainant averred that, although DRAD should have been able to review the case file from her prior EEO complaint to verify her reasonable accommodation and she also provided documentation showing she had been accommodated from 2010-2019, DRAD required her to provide updated medical documentation in 2020. ROI at 70-71.

Complainant questioned why she was required to provide new medical documentation and jump through hoops when she had already established that she had a disability and had been accommodated for some time. ROI at 71-72.

On June 18, 2020, Complainant submitted a request for reasonable accommodation, requesting to continue her existing accommodation of 100% telework. ROI at 118-26, 227-28. In support of her request, Complainant provided a June 16, 2020, note from her physician, which recommended that, because of her problems related to SLE they recommended that Complainant's primary work location should be her home and that she be allowed to telework five days per week. ROI at 108-09. Complainant's physician stated that work could be performed on-site in the office as necessary with the following limitations: no more than 10 hours per week or five hours per day, adjusted hours to deal with fatigue and pain, liberal leave, the ability to take frequent stretch or walk breaks, the ability to use the restroom as necessary, limited contact with sick individuals, and the ability to use a heater and ergonomic chair. ROI at 108. The physician also suggested that Complainant be accommodated with 40 hours of telework per week from October through March and 30 hours of telework per week from April through September because lupus symptoms tended to be exacerbated in colder temperatures and viruses and other infections were more prevalent during winter months, which could also exacerbate SLE. ROI at 108.

On August 12, 2020, DRAD granted Complainant's request for full-time telework reasonable accommodation. ROI at 313-14. In an August 12, 2020, email, Analyst-1 stated that, based on the medical documentation, Complainant's accommodation would be implemented immediately and conclude on November 12, 2020, and that, if Complainant needed the telework accommodation beyond November 12, 2020, she would be required to provide updated medical documentation to support the continued accommodation. ROI at 313. On September 2, 2020, Complainant responded to Analyst-1's email, asking why her accommodation had only been approved for three months and why she would need to provide additional medical documentation. ROI at 311-12. Analyst-1 responded on September-4 that the determination was made based on Complainant's medical documentation and to provide the opportunity to assess if changes or updates would be needed based on any changes in Complainant's condition or the Agency's work status. ROI at 310-11.

According to Analyst-1, while DRAD could not provide an indefinite or open-ended telework or schedule modification accommodation, Complainant's management team had the authority to implement a full-time telework schedule beyond the duration of the reasonable accommodation without DRAD's involvement. ROI at 311.

According to Complainant, DRAD made the reasonable accommodation process combative, causing her undue stress. ROI at 79, 82. Complainant asserted that she requested a meeting with DRAD to give a first-hand account of the history of her reasonable accommodation, DRAD's previous actions, and review the case file together, but her request for a meeting was denied. ROI at 72-73, 82. Complainant alleged that, after she tried to explain to Analyst-1 that she had to file an EEO complaint in the past in order to be accommodated, he became confrontational and combative. ROI at 82-83.

Complainant stated that, in 2020, she applied for five vacancies that would have resulted in promotion to GS-15. ROI at 75. Complainant identified four vacancy numbers (A-2020-0041; A-2020-0084; A-2020-0085; A-2020-0104) and alleged that she was not selected for these positions due to discrimination based on race, disability, and reprisal. ROI at 75-79. Complainant noted that she had previously informed the Senior Procurement Executive that she was a "Schedule A employee" and therefore could be promoted directly if she was referred for a position. ROI at 76. The record contains a doctor's note dated January 13, 2020, certifying that Complainant was an individual with a severe physical, intellectual, or psychiatric disability that qualified her for consideration under the Schedule A hiring authority for appointment for persons with disabilities.[2] ROI at 117.

The selecting official for vacancy announcement A-2020-0041 was the Branch Chief for AQM's Diplomatic Security Contracts Division, World Wide Protective Services Branch (Chief-1; White). Supplemental ROI (SROI) at 174-75; Agency Motion for Summary Judgment (AMSJ) Ex. 5 at 3. Chief-1 received a certificate of eligibles for the vacancy with the names of 23 candidates, including Complainant. AMSJ Ex. 5 at 4, 24, Ex. 17; SROI at 175. Chief-1 reviewed the candidates' resumes, evaluating them on their years of experience, the quality of their experience, their demonstrated successful experience working with customers, and their corridor reputation. AMSJ Ex. 3, Ex. 5 at 4-5.

[2] The "Schedule A" hiring authority is a non-competitive appointment authority used for hiring applicants with disabilities. See generally 5 C.F.R. § 213.3102(u).

Chief-1 averred that his top candidate based on resume review (Candidate-1; African American) was not available for this vacancy because he had just accepted a Branch Chief position in Chief-1's Division. AMSJ Ex. 5 at 25-27. Chief-1 selected two candidates Selectee-1 (White) and Selectee-2 (White). AMSJ Ex. 5 at 4; SROI at 176. Chief-1 stated that Selectee-1 and Selectee-2 were the most qualified available candidates because they had extensive experience in security contracts and the most experience working with the Bureau of Diplomatic Security, which he described as a challenging customer. AMSJ Ex. 5 at 5-22, 28-30; SROI at 176. Chief-1 rated Candidate-1's resume 34 points, Selectee-1 had the next-highest score with 31 points, Selectee-2 received 30 points, and Complainant had the eighth-highest score, 28 points. AMSJ Ex. 3. According to Chief-1, he was not aware of Complainant's race, disability, requests for reasonable accommodation, or EEO activity. SROI at 176; AMSJ Ex. 5 at 23-24.

Supervisor-2 was the selecting official for vacancy announcement numbers A-2020-0084 and A-2020-0085. ROI at 331-32; AMSJ Ex. 11 at 3. For vacancy announcement A-2020-0084, Supervisor-2 received a certificate of eligibles with 18 names, including Complainant's, and, after reviewing the resumes, selected one candidate, Selectee-3, who Complainant identified as White. AMSJ Ex. 11 at 5-6, Ex. 18 at 6-9; ROI at 77, 332. Supervisor-2 stated that this position managed most of the international contract requirements, including those supporting Iraq and Afghanistan, and that he selected Selectee-3 because of her extensive experience in the international arena, which had included traveling to and supporting contractors in Iraq and Afghanistan and working at an Air Force base operating a worldwide aviation contract. ROI at 324-25. Supervisor-2 acknowledged that Complainant also had experience with international contracts. AMSJ Ex. 11 at 8-15. Complainant alleged that she was more qualified than Selectee-3 for this Supervisory Contract Specialist position because she had more experience, more education, more higher-level expertise, prior supervisory experience, more wide-ranging experience, and depth of experience. ROI at 77.

The certificate of eligibles for vacancy announcement A-2020-0085 contained 23 names, including Complainant's name, and, after reviewing the candidates' resumes, Supervisor-2 selected one candidate, Selectee-4, who Complainant identified as White. AMSJ Ex. 11 at 6, Ex. 18 at 10-14; ROI at 76, 331. Supervisor-2 stated that Selectee-4 was managing one of the Bureau's most complex contracts that was valued over $1 billion and also managed some of the other most complicated contracts in the Bureau of Operations whereas, in comparison to Selectee-4, Complainant had less experience processing complicated contracts. ROI at 331; AMSJ Ex. 11 at 22-27.

According to Complainant, she was more qualified than Selectee-4 because she had more experience as a Contract Specialist, more education, more higher-level expertise, more experience with complex contracts, and possessed a Top Secret security clearance. ROI at 75-76. Complainant stated that, at the time, Selectee-4 only had a Secret clearance and could not start in her new position until the clearance process was completed. ROI at 75. Complainant alleged Supervisor-1 had supervised both Complainant and Selectee-4 and that, if Supervisor-1 had been asked for input, she would have said that Complainant was more qualified for the promotion. ROI at 75-76.

The Senior Procurement Executive served as the selecting official for vacancy announcement A-2020-0104, and the certificate of eligibles for this vacancy announcement contained the names of 21 candidates. SROI at 178; AMSJ Ex. 19. The Senior Procurement Executive reviewed the resumes and selected two candidates, Selectee-5 (Indian) and Selectee-6 (White). AMSJ Ex. 5 at 5, Ex. 7, Ex. 10 at 32, Ex. 11 at 6. In an August 27, 2021, affidavit, the Senior Procurement Executive stated that she had retired from the Agency and did not have access to her records related to this vacancy but noted that Complainant's resume did not reflect that she had the Level III certification required for the position. SROI at 178. In an August 21, 2020, email to her Chief of Staff regarding the vacancy, the Senior Procurement Executive stated that she selected Selectee-5 and Selectee-6 because they exceeded all the criteria for the position and discussed the applications of the other candidates. AMSJ Ex. 7 at 1-5. Regarding Complainant's application, the Senior Procurement Executive stated that her resume failed to show that she had resolved exceptionally complex issues, had responded to inquiries, formal protests and congressional inquiries, had participated in high-level Agency and interagency meetings and conferences, possessed an extensive range and depth of program and technical expertise as well as in-depth program judgment, and possessed comprehensive knowledge of qualitative and quantitative methods, analytical and evaluative principles, techniques, and processes combined with skill in applying advanced metrics development and assessment techniques. AMSJ Ex. 7 at 2.

Complainant requested EEO counseling on September 21, 2020. On November 4, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), disability (physical), and reprisal for prior protected EEO activity (prior EEO complaints) when:

1. On August 12, 2020, Complainant learned her request for a reasonable accommodation of permanent full-time telework was denied;
2. On or about August 25, 2020, Complainant was not selected for a GS-1102-15 Contract Specialist position;
3. On September 10, 2020, Agency officials refused to meet as part of the interactive process to discuss Complainant's request for reasonable accommodation;
4. Complainant was subjected to harassment and a hostile work environment characterized by, but not limited to, the following:
   a. Belittling comments, intimidation, threatening tones, and humiliation;
   b. Complainant was required to resubmit paperwork and correspondence regarding her disability, with the Agency acknowledged and previously accommodated since 2011, beyond what was required for others since March 2020;
   c. Complainant was required to recertify her disability, provide additional medical documentation, and submit correspondence and paperwork not required for other similarly situated employees with disabilities; and
   d. Complainant was told by Agency officials to have management implement a telework agreement under the work-life balance arrangement instead of going through the DRAD, which she alleges does not provide the same legal protections under reasonable accommodation laws.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing. After Complainant requested a hearing, the Agency completed a supplemental investigation. The parties engaged in discovery, and the AJ granted the Agency's request to extend the case deadlines. Complainant filed a motion requesting an Agency witness for a second time after the close of discovery, which the AJ denied.

The Agency filed a Motion for Summary Judgment. Complainant filed a Response in Opposition to the Agency's Motion for Summary Judgment. Complainant stated in her Response that she was not refuting the Agency's statement of undisputed material facts.

The AJ issued a decision by summary judgment in favor of the Agency. The AJ determined that there were no genuine issues of material fact or credibility and incorporated the Agency's statement of undisputed facts into the decision. Regarding the four nonselections at issue in claim (2), the AJ found that the Agency provided legitimate, nondiscriminatory explanations for its actions. The AJ further found that Complainant provided no evidence showing that the legitimate, nondiscriminatory reasons for the nonselections were pretextual.

Considering Complainant's reasonable accommodation claim, the AJ determined that the evidence demonstrated that the parties were engaged in the interactive process during the relevant time period, which culminated in Complainant's requested accommodation of full-time telework being granted. Moreover, the AJ found that there was no evidence that Complainant was not accommodated with full-time telework at any point before or after November 2020. Accordingly, Complainant's failure to accommodate claim could not survive summary judgment.

Finally, the AJ found that Complainant could not establish a harassment claim. The AJ determined that Complainant could not establish that the alleged harassment was based on her membership in any protected class. The Agency informed Complainant she needed to initiate the reasonable accommodation process because DRAD did not have any documentation that Complainant had an approved reasonable accommodation and requested updated medical documentation in support of her request for reasonable accommodation. According to the AJ, Complainant failed to present evidence showing the existence of a genuine dispute of material fact or credibility concerning the Agency's assertion that it lacked documentation of her accommodation, and the Agency's request for additional medical documentation was reasonable. The AJ also found Complainant had not provided evidence that she was subjected to objectively offensive conduct.

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 experience with Diplomatic Security was not listed as a qualification for vacancy announcement A-2020-0041 and that there was no specialized experience required for the vacancy, which she

asserts casts doubt on the Agency's legitimate, nondiscriminatory reason. Complainant also argues that Chief-1 intentionally downgraded her scores in order to select less qualified White applicants. Regarding vacancy announcement A-2020-0084, Complainant notes that international contracts was not listed as a requirement for the position. According to Complainant, Supervisor-2 intentionally minimized her international contract experience to state that Selectee-3 was more qualified, noting that the breadth of her international contract experience was greater than Selectee-3's and that she had been a senior Contract Specialist for 10 years, whereas Selectee-3 only had six years of experience. Complainant contends that, for vacancy announcement A-2020-0085, Supervisor-2 intentionally lied that she did not have experience processing complicated contracts so he could hire a less qualified White applicant. Complainant avers that she had complicated contracts listed on her resume and had 10 years of experience as a senior Contract Specialist and 16 years in the contracting field, whereas Selectee-4 had four years of experience as a senior Contract Specialist and eight years in the contracting field and lacked the required Top Secret clearance. For vacancy announcement A-2020-0104, Complainant challenges the Senior Procurement Executive's assessment that she did not have the required certification for the position. Complainant also argues that the Senior Procurement Executive's review of the applications was subjective and that Selectee-5 and Selectee-6 were preselected. Complainant requests that the Commission enter judgment in her favor or remand the matter for a hearing on the merits.

In response to Complainant's appeal, the Agency argues that Complainant's arguments are based on her erroneous belief that she was more qualified than the selectees because she performed "senior" level contracts work for a longer time period. The Agency notes that Complainant ignores that the Agency would have selected Candidate-1, who was African American, for one of the vacancies, but he had already been selected for another GS-15 position with greater responsibilities. 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").

ANALYSIS

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 any genuine issues of material fact. Upon review, we find that there are no genuine issues of material fact.

Complainant allege that she was denied a reasonable accommodation for 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).

It is undisputed that Complainant is an individual with a disability and that she was qualified for her position of record. Complainant stated that she had been teleworking full time as a reasonable accommodation for her disability since 2014. In 2020, Complainant submitted a request for a full-time telework agreement and stated that the reason for the telework schedule was a reasonable accommodation. Her 2020 telework agreement was denied after DRAD informed Human Resources that it did not have a record of an approved reasonable accommodation on file for Complainant. When asked to provide documentation of her reasonable accommodation, Complainant provided telework agreements and other documents reflecting that she had teleworked on a full-time basis since 2014 and that the reason for full-time telework was reasonable accommodation. However, Complainant did not provide any documents showing that her request for accommodation had formally been approved by DRAD. Accordingly, the Agency asked that Complainant request a reasonable accommodation through DRAD. Although Complainant alleged that the Agency failed to engage in the interactive process by refusing to meet with her to go through her EEO case file, the record reflects that the Agency engaged in the interactive process and that Analyst-1 reviewed the relevant documents provided by Complainant.

Analyst-1 also asked Complainant to provide medical documentation in support of her request. When an employee's disability or need for an accommodation is not known or obvious, an employer may ask an employee for reasonable documentation about his or her disability, limitations, and accommodation requirements. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 7 (July 27, 2000).

Upon a complainant's request for reasonable accommodation, an employer may require that documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, Number 915.002, Question 6, (Oct. 17, 2002). Complainant objected to providing medical documentation, stating that she had provided documentation many years ago and that it was inappropriate to ask for updated documentation for a chronic condition like SLE.[3] Complainant provided a doctor's note recommending full-time telework, although it stated that she could work on-site in the office up to five hours per day and 10 hours per week during the warmer months of the year. Based on this documentation, DRAD approved Complainant's request for full-time telework as a reasonable accommodation for three months, subject to re-evaluation at that time. Complainant objected to the short approval period because she had been teleworking on a full-time basis for years. However, it is undisputed that the provided medical documentation stated that Complainant could work in the office on a limited basis. Moreover, it is also undisputed that, at the end of the three-month period, the Agency continued to accommodate Complainant with full-time telework. We find that Complainant has not established that she was denied a reasonable accommodation in violation of the Rehabilitation Act.

Complainant alleged that she was subjected to discrimination when she was not selected for four vacancy announcements that would have resulted in a

[3] Complainant has not shown the existence of a genuine issue of material fact regarding DRAD's assertion that it did not have a record of an approved reasonable accommodation or medical records. She seemed to assume DRAD had access to "a complete copy of my medical record" and medical documentation in the case files for her prior EEO complaints. However, the Commission's regulations implementing the Rehabilitation Act provide for the confidentiality of employee medical records. 29 C.F.R. § 1630.14(c)(1) provides, in pertinent part, that: "Information obtained . . . regarding the medical condition or history of any employee shall . . . be treated as a confidential medical record," subject to limited exceptions. By its terms, this requirement applies to confidential medical information obtained from "any employee," and is not limited to individuals with disabilities. See Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (Apr. 13, 2000). Accordingly, even if we were to assume for the purposes of summary judgment that the Agency possessed these documents as suggested by Complainant, the Agency would be responsible for safeguarding these confidential medical records, which were unrelated to her 2020 request for reasonable accommodation.

promotion to GS-15. To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco 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). In a selection case, a complainant can attempt to prove pretext by showing that her qualifications are "plainly superior" to those of the selectee. See Patterson v. Dep't of the Treasury, EEOC Request No. 05950156 (May 9, 1996).

To establish a prima facie case in a nonselection case, complainant must show: (1) she is a member of the protected class; (2) she applied for and was qualified for the position; (3) she was not selected despite her qualifications; and (4) someone outside her protected class was selected. Williams v. Dep't of Education, EEOC Request No. 05970561 (Aug. 6, 1998). Complainant may also set forth evidence of acts from which, if otherwise unexplained, an inference of discrimination can also be drawn.

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 can establish a prima facie case of reprisal by showing that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802). In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough under the circumstances presented to establish a causal nexus).

Here, we find that Complainant has established a prima facie case based on race. Complainant is a member of a protected class based on her race, African American. She applied for and was qualified for the positions. She was not selected for the positions despite her qualifications. The selectees were outside of her protected class. Selectee-1, Selectee-2, Selectee-3, Selectee-4, and Selectee-6 were White, and Selectee-5 was Indian. We acknowledge that there is evidence in the record that Candidate-1, who was also African American, was ranked higher than Selectee-1 and Selectee-2 and would have been Chief-1's top choice for the position if Candidate-1 had not accepted another GS-15 position. However, we find that Complainant has established a prima facie case of race discrimination with respect to these selections.

However, we find that Complainant has not established a prima facie case of discrimination based on disability and/or reprisal. Although Complainant established that she was an individual with a disability, that she was qualified, and that she was subjected to an adverse action, she has not established any causal relationship between her disability and the nonselections. However, Complainant emailed the Senior Procurement Executive and informed her that she was eligible for the Schedule A hiring authority, and the record reflects that the Senior Procurement Executive did not respond to Complainant's email. Accordingly, we will assume for the purposes of analysis that Complainant has established a prima facie case of discrimination based on disability.

Regarding reprisal, Complainant engaged in protected EEO activity. Supervisor-2 was aware that Complainant had engaged in protected EEO activity in the past because she had named him in her 2011 EEO complaint. The record reflects that Complainant initiated EEO counseling after selections were made for the four vacancy announcements at issue. We find that Complainant has not established a nexus between her prior protected activity and the nonselections.

The Agency's legitimate, nondiscriminatory explanation for selecting Selectee-1 and Selectee-2 for vacancy announcement A-2020-0041 was that they had experience working with Diplomatic Security, which Chief-1 described as a challenging customer that required some hand-holding. It is undisputed that Complainant did not have experience working with Diplomatic Security. As evidence of pretext, Complainant stated that she had more overall experience and more senior level contracting experience. However, the Commission has consistently held that years of service, in and of itself, does not make one the most qualified candidate for a promotion and does not render one more qualified than those with less Agency experience. See Kenyatta S. v. Dep't of Homeland Sec., EEOC Appeal No. 0120161689 (Sept. 21, 2017). Complainant also challenges Chief-1's use experience with Diplomatic Security as a distinguishing factor because it was not listed in the vacancy announcement. Regarding personnel actions by an agency, we have consistently recognized that an agency has broad discretion to set policies and carry out personnel decisions, and should not be second-guessed, as here, by the reviewing authority absent evidence of unlawful motivation. See Burdine, 450 U.S. at 259; Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (Jan. 16, 1997). While experience with Diplomatic Security was not specifically listed in the vacancy announcement, Complainant has not shown that evaluating candidates based on such experience was motivated by discrimination based on race and/or disability. Further, the fact that Candidate-1 would have been Chief-1's top choice had he not accepted a GS-15 Branch Chief position shortly before the selection process undercuts any assertion by Complainant that Chief-1 sought to intentionally downgrade her scores because of her race so he could hire less qualified White candidates. Complainant has not established pretext for discrimination with respect to vacancy A-2020-0041.

Regarding vacancy announcement A-2020-0084, the Agency's legitimate, nondiscriminatory reason for selecting Selectee-3 was based on her extensive experience in the international arena, including traveling to and supporting contractors in Iraq and Afghanistan. As evidence of pretext, Complainant noted that international contract experience was not required in the vacancy announcement. However, as discussed above, the Agency has broad discretion make selection decisions based on such experience for a position involving international contracts absent evidence of discrimination. Complainant does not dispute that the position in question handled international contracts, and we find that she has not shown that Supervisor-2 considering experience with international contracts was based on discrimination. Complainant further challenges Supervisor-2's assessment that Selectee-3 was more qualified with respect to international contracts, asserting that she had broader experience with respect to international

contracts than Selectee-3. Supervisor-2 acknowledged that Complainant did have experience with international contracts, but he characterized Selectee-3's experience with international contracts as more relevant for the position in question. While Complainant was qualified for the position, she has not shown that her qualifications were plainly superior or that the Agency's legitimate, nondiscriminatory reason was pretextual.

For vacancy announcement A-2020-0085, Supervisor-2 stated that he selected Selectee-4 because of her experience processing the most complicated contracts, whereas Complainant had less experience processing such complicated contracts. According to Complainant, it was undisputed that she had experience processing complex contracts. Complainant asserts on appeal that she was more qualified because she had more years of experience and more years of senior-level contracting experience. However, as discussed above, years of experience alone is insufficient to show that someone is the most qualified candidate for a promotional opportunity. Complainant also notes that she already possessed a Top Secret security clearance, whereas Selectee-4 only possessed a Secret security clearance, resulting a six-month delay before she could assume the duties of the position. However, Complainant has not shown that Supervisor-2 decided to select Selectee-4 despite not holding a Top Secret clearance because of her race, and we find that Complainant has not established that the Agency's legitimate, nondiscriminatory explanation for this nonselection was a pretext for discrimination based on race and/or disability.

Finally, with respect to vacancy announcement A-2020-0104, the Senior Procurement Executive selected Selectee-5 and Selectee-6 because their resumes demonstrated the technical qualifications that corresponded to the duties, qualifications, and evaluation criteria in the vacancy announcement, including responding to congressional inquiries and participating in high-level Agency and interagency meetings. It is undisputed that Complainant's resume for the position does not mention responding to congressional inquiries or participating in high-level Agency and interagency meetings, whereas both Selectee-5 and Selectee-6 discussed such actions in their resumes. AMSJ Ex. 9; SROI at 118, 122-23. As evidence of pretext, Complainant cites to the Senior Procurement Executive's affidavit stating that she had retired and did not have access to her notes but that, based on her resume, Complainant did not appear to have the Level III certification in contracting. We note that it is undisputed that Complainant's resume for this position did not reference her Level III certification, although Complainant did possess this certification. AMSJ Ex. 9.

However, even if the Senior Procurement Executive mistakenly believed that Complainant did not have the Level III certification, 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 any such mistake on the part of the Senior Procurement Executive was based on her protected class(es). Finally, Complainant argues that there was evidence that Selectee-5 and Selectee-6 were preselected. The Commission notes that even if preselection occurred, it would not be unlawful unless Complainant can show that the preselection was driven by discriminatory animus. See Nickens v. Nat'l Aeronautics Space Admin., EEOC Request No. 05950329 (Feb. 23, 1996). Preselection, per se, does not establish discrimination when it is based on the qualifications of the selected individual and not some prohibited basis. McAllister v. U.S. Postal Serv., EEOC Request No. 05931038 (July 28, 1994). We find that Complainant has not shown that any preselection was based on discriminatory animus, and she has not otherwise established pretext for discrimination based on race and/or disability.

Finally, Complainant alleged that she was subjected to harassment based on race, disability, and reprisal. 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 race, disability, or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Here, while Complainant is a member of a protected class based on her race, disability, and prior protected activity, we find that she has not shown that she was subjected to harassment based on her membership in any protected class. We further find that the alleged incidents of harassment, such as the requests to provide paperwork and medical documentation related to her reasonable accommodation request, constitute commonplace workplace interactions that are not sufficiently severe or pervasive to constitute a hostile work environment. See Complainant v. Dep't of State, EEOC Appeal No. 0120123299 (Feb. 25, 2015). To the extent Complainant argues that Analyst-1 and other officials have made her feel undervalued and treated her in a demeaning manner, we have repeatedly stated that such ordinary friction in workplace communications do not rise to the level of establishing unlawful harassment. See Wen Y. v. U.S. Postal Serv., EEOC Appeal No. 2021002631 (July 11, 2022); Marine V. v. Social Sec. Admin., EEOC Appeal No. 2019001434 (July 7, 2020). Not every unpleasant or undesirable action which occurs in the workplace constitutes an EEO violation. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120120158 (May 15, 2014). The Supreme Court has held that the legal standards for assessing discrimination claims must ensure that the EEO laws do not become a "'general civility code' [and must be sufficiently rigorous to] ... filter out complaints attacking 'the ordinary tribulations of the workplace.'" Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Accordingly, we find that Complainant has not established that she was subjected to unlawful harassment 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 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 18, 2024
Date