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

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

v.

Terence G. Emmert,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2023003380

Hearing No. 430-2020-00391X

Agency No. 19-00183-04050

DECISION

On May 20, 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 24, 2023, final order concerning Complainant's equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission DISMISSES Complainant's complaint in part and AFFIRMS the Agency's final order with respect to the remaining claims.

ISSUES PRESENTED

The issues presented are: (1) whether the claims at issue on appeal are the same as those raised in a pending civil action; (2) whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing

[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.

finding no discrimination based on disability and/or reprisal; and (3) whether there is evidence of improper processing of Complainant's complaint.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-0646-6 Cytology Technician at the Agency's Laboratory Department, Directorate for Clinical Support Services, Naval Medical Center facility in Portsmouth, Virginia. The Anatomic Pathology Supervisor (Supervisor-1) was Complainant's first-line supervisor until her August 14, 2019, resignation.[2] The Anatomic Pathology Division Head (Supervisor-2) served as Complainant's interim first-line supervisor from August 2019 to March 2020. A new Anatomic Pathology Supervisor (Supervisor-3) was Complainant's first-line supervisor beginning on March 16, 2020. The Assistant Department Head (Supervisor-4) was Complainant's third-level supervisor and served as his second-level supervisor while Supervisor-2 was the interim first-line supervisor.

Complainant stated that he had engaged in prior protected activity when he grieved a letter of reprimand on April 12, 2019, and when he engaged in formal EEO activity. According to Complainant, he first contacted the EEO office on June 3, 2019, after grieving the letter of reprimand. Complainant also noted that he had requested reasonable accommodations for his disability.

Complainant identified his disability as poly-autoimmune induced arthritis, a chronic condition that caused pain and stiffness that increased during acute flare ups and was particularly bad during the morning hours. Complainant averred that he could not lift heavy items, reach for very low items, or perform activities requiring heavy or increased dexterity without extraordinary pain or difficulty. According to Complainant, he took medication for his disability that suppressed the immune system. Complainant requested various reasonable accommodations, including adjustments/flexibility to start time, overtime allowance, assistance with tasks, pay parity, additional staffing, physical activity during work hours, and designation as an employee with a disability. After the onset of the Covid-19 pandemic, Complainant requested additional accommodations, including telework or job repurposing, because he was immunocompromised.

[2] Supervisor-1 did not participate in the EEO investigation.

The Agency determined that Complainant's position was essential and could not be repurposed and that the essential functions of Complainant's position, using laboratory equipment to process patient samples for use in medical diagnosis, could not be performed through telework. Accordingly, the Agency offered to search for a vacant position to which Complainant could be reassigned as a reasonable accommodation. The Agency identified vacant positions for which Complainant was qualified, but these positions could not accommodate Complainant's medical restrictions.

In October 2018, Supervisor-1 counseled Complainant about filling out the histogel logs daily. Following an investigation by Supervisor-1, Supervisor-4 issued Complainant a letter of reprimand on March 25, 2019, for failing to fill out the Maintenance Records Histogel log daily during December 2018. On July 9, 2019, Supervisor-1 notified Complainant that he was under investigation for certifying the histogel log for December 24-26, 2018, days when Complainant was on leave, and for leaving a patient specimen unaddressed for two weeks in the Cytology Processing refrigerator. Supervisor-4 proposed a 14-day suspension for Complainant's misconduct, which was reduced to a one-day suspension in the grievance process. Complainant alleged that Supervisor-1 monitored the log to see if he was filling it out daily rather than being helpful or warning him.

Complainant averred that, from March 2019 until approximately April 2020, he was denied time differential pay, overtime, comp time, and/or flex time, which forced him into a leave without pay (LWOP) status. The Agency asserted that there was no evidence that Complainant was not paid for premium pay to which he was entitled. Complainant stated that the Agency's assertion was not true because Complainant provided records showing he took LWOP. According to Complainant, the Agency's failure to accommodate his disability caused him to need LWOP. Complainant had requested flex time and the ability to stay late and earn overtime when he was unable to complete his work during complainant's shift.

Complainant alleged that the Cytology Technician in the gynecological (GYN) section (Technician-1) was treated more favorably than he was because Technician-1 was permitted to work nights and received night differential pay. Supervisor-2 stated that Complainant could not work the night shift because Complainant was unable to label GYN slides, which were prepared at night, or load slide labels into the label maker. During the day shift, someone could load labels into the label maker when needed, and the GS-11 Cytotechnologists took turns labeling slides for Complainant. Non-GYN specimens were prepared during the day.

According to Supervisor-2, unlike the GYN Pap smears that were considered routine, a delay in processing non-GYN samples could harm patient care, so it was important to be able to contact the providers during the day when the providers were working to timely resolve problems. Supervisor-3 added that, if Complainant was not present during the day, Cytotechnologists would need to stop their work to process priority (STAT) specimens.

Complainant stated that he had worked on the GYN processing side as well and had switched to non-GYN in 2016 to accommodate Technician-1, who was pregnant and did not want to risk working with the chemicals on the non-GYN side during pregnancy. According to Complainant, he could label slides but let the Cytotechnologists label the slides after processing to promote accuracy, since handwriting was not always legible. Complainant averred that adjusting his hours would not materially affect the processing time for non-GYN specimens and alleged that any delay in patient care was attributable to the staffing levels, noting that he had raised staffing levels in the lab in his 2019 reasonable accommodation request. Complainant stated that processing STAT specimens was a marginal function of his job because the number of STAT specimens was a tiny fraction of the total number of non-GYN specimens.

Complainant stated that, on July 15, 2019, he emailed a Human Resources employee (HR-1)[3] to request correction of his education record. According to Complainant, HR-1 asked him why he wanted to correct the record when it had been that way for years, and Complainant responded that his grievance and EEO activity had prompted Complainant to research Complainant's personnel record. Complainant alleged that his request was denied in retaliation for Complainant's prior protected activity. The Human Resources Officer (HR-2) stated that, while she was not aware of Complainant's request to have his education record corrected, she believed that this was a task Complainant would need to complete himself in the Defense Civilian Personnel Data System (DCPDS).

The complainant alleged that, although Supervisor-4 solicited leave donations on behalf of other employees in July 2019, Supervisor-4 did not solicit leave donations for Complainant. According to the record, an employee (Employee-1) who was participating in the command's Voluntary Leave Transfer Program (VLTP) contacted Supervisor-4, and on July 6, 2019, Supervisor-4 sent an email announcement soliciting VLTP leave donations for

[3] HR-1 resigned from the Agency on March 13, 2020, and did not respond to the EEO investigator's request to provide an affidavit.

Employee-1. Supervisor-4's email included a link to guidance on the VLTP on the Agency's HR website. Complainant did not apply for the VLTP or request that Supervisor-4 solicit leave donations on his behalf.

According to Complainant, on September 13, 2019, Supervisor-4 spoke to him aggressively and falsely accused him of misconduct. Complainant alleged that Supervisor-4 accused him of "forgetting about a specimen for 2 weeks that was meant to be processed," told him that he "cannot be trusted making cell blocks," and threatened him with termination. Supervisor-4 denied speaking aggressively or threatening Complainant.

Complainant stated that, in January 2020, he learned that the Family and Medical Leave Act (FMLA) leave application he submitted to Supervisor-1 in February 2019 had never been processed. Complainant alleged that completing the FMLA paperwork in February 2019 had been onerous and that Supervisor-1's failure to forward the paperwork to the appropriate office was evidence of incompetence, "possible maleficence," and lack of concern about Complainant's health, disability, and job security. The record contains a Certification of Health Care Provider for Employee's Serious Health Condition form signed by Complainant's doctor on February 15, 2019. According to Supervisor-2, when he learned about the issue, he supported Complainant's request for FMLA leave. Supervisor-4 averred that in January 2020, Complainant was advised that the February 2019 FMLA paperwork was incomplete and to submit new FMLA paperwork. Supervisor-2 stated in a February 25, 2020, email to Complainant that his FMLA request was over a year old and four pages of medical documentation were missing. Supervisor-2 also averred that the medical documentation only supported Complainant requesting FMLA leave two times per month for disability flare ups, noting that he had been experiencing disability flare ups more than twice a month. Complainant submitted another application for FMLA leave in March 2020. The record does not reflect that Complainant was denied or disciplined for taking leave between February 2019 and March 2020.

Complainant alleged that, in 2020, Supervisor-2 rescinded advanced sick leave that had been provided to him, and the leave was designated as LWOP. However, Complainant also stated that the request for advanced sick leave had never been approved. On March 5, 2020, Complainant emailed Supervisor-2, requesting four weeks of advanced sick leave to participate in a physical therapy program. On April 1, 2020, Complainant responded to an email from Supervisor-2 about advanced sick leave, asking if the request for advanced sick leave was for leave he had already taken or for future leave, and Supervisor-2 responded that it was for future leave only.

On April 2, 2020, Complainant informed Supervisor-2 that no physical therapy program in the area that accepted his insurance was accepting new patients. Complainant stated that it did not make sense for him to request advanced sick leave at that time, at least until Covid-19 was under control.

According to Complainant, on March 17, 2020, he was subjected to an investigation regarding the sign-in log and the official time he was in the lab to work on Complainant's EEO complaint. According to the record, a Supervisory Medical Technologist (Investigator-1) conducted an investigation after the hours on Complainant's timecard did not match the sign-in log and Complainant was present in the laboratory well after his working hours. Investigator-1 determined that Complainant had been coming to the lab after Complainant's working hours without permission and stayed until 3 a.m. to work on his EEO complaint. Complainant claimed that the discrepancy in his time was due to the time spent working on his EEO complaint. Complainant was not disciplined as a result of the investigation.

Complainant initiated contact with an EEO counselor on August 5, 2019. On November 12, 2019, Complainant filed an EEO complaint, which he subsequently amended, alleging that the Agency discriminated against him on the bases of disability (physical) and reprisal for prior protected EEO activity under the Rehabilitation Act, raising the following claims:

a. Whether Complainant was subjected to discrimination based on disability by the Agency when:
    1. From October 9, 2019, to present, Supervisor-1 denied Complainant's reasonable accommodation request (RA 19-00183-09542);
    2. On March 24, 2020, Supervisor-2 initiated a new reasonable accommodation process (RA 19-00183-09542), which was not requested by Complainant;
    3. Since March 2020, the Agency has failed to provide Complainant with accommodations such as telework or other employee protections in response to the Covid-19 pandemic;
    4. When, beginning on May 5, 2020, to the present, the Agency failed to enact the May 5, 2020, Offer of Reassignment Due to Inability to Accommodate granted as part of the reasonable accommodation process; and
    5. On October 20, 2020, the Agency offered Complainant an unsuitable job placement as part of the reasonable

accommodation process that did not comply with his medical restrictions.

b. Whether Complainant was subjected to discrimination and a hostile work environment based on disability and reprisal by the Agency when:
    1. On July 9, 2019, Complainant was informed Complainant was being investigated for histogel log infractions and specimen handling problems;
    2. On July 15, 2019, Complainant's request to have his education record corrected was denied;
    3. From March 2019 until April 2020, Complainant was denied time differential pay, overtime, comp time, and/or flex time, which resulted in him being forced into a LWOP status;
    4. On September 13, 2019, Complainant was spoken to aggressively by Supervisor-4 and falsely accused of misconduct, including being accused of "forgetting about a specimen for 2 weeks that was meant to be processed," told that he "cannot be trusted making cell blocks," and threatened with termination;
    5. In or around July 2019, Supervisor-4 advocated for other employees with depleted leave balances and solicited leave donations on their behalf but did not do the same for Complainant;
    6. On January 30, 2020, Complainant was advised that the Agency improperly failed to process his FMLA paperwork;
    7. From February 24, 2020, until March 13, 2020, Supervisor-2 rescinded the advanced sick leave Complainant had been provided and designated the time as LWOP; and
    8. On March 17, 2020, Complainant was subjected to investigation regarding sign-in sheet actions, advanced sick leave, and use of official time to complete documents related to his EEO complaint, and he was threatened with disciplinary action regarding the same.

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

Complainant filed a motion to amend the complaint. The AJ granted in part Complainant's motion and remanded the matter to the Agency for a supplemental investigation of the amended issues.

Complainant filed motions for additional review and possible sanction with the AJ regarding an allegation of improper processing of Complainant's EEO complaint by the Agency. Complainant had alleged that the record contained a fraudulent document, a signed February 5, 2019, EEO Contact Sheet that stated he met with an EEO counselor on February 4, 2019, presented grievances to the EEO counselor, and abandoned these matters without filing an EEO complaint. Complainant denied meeting with an EEO counselor on February 4, 2019, and alleged that the EEO counselor, "with possible complicity" by the Bureau of Medicine and Surgery (BUMED) Deputy Director of EEO (Deputy-1), attempted to sabotage his complaint and negatively impact his process rights by producing the fraudulent document. Complainant raised this allegation with the Agency, which was forwarded to the official responsible for the quality of complaints processing, Deputy-1. Deputy-1 responded to Complainant, stating that he had reviewed the material and decided that Complainant's EEO complaint was processed in accordance with regulatory and statutory requirements. In Complainant's filings, Complainant alleged that Deputy-1 failed to conduct a sufficient and impartial investigation into his allegations of improper processing and improper interference in his EEO complaint. According to Complainant, because Deputy-1 was named in Complainant's process complaint, he could not be impartial.

On April 30, 2021, the AJ issued an order denying Complainant's motion for additional review. Regarding Complainant's allegation that the February 5, 2019, form was forged, the AJ stated that Complainant had raised numerous issues while the complaint had been pending but had not raised concerns about whether the February 2019 EEO contact occurred or that his signature was forged until recently, which the AJ found telling. According to the AJ, there was no evidence that the Agency engaged in impropriety as alleged by Complainant, and the record did not support sanctions or further review of Complainant's allegations of improper processing.

The Agency filed a motion for summary judgment. Complainant filed a response opposing the Agency's motion for summary judgment.

The AJ issued a decision without a hearing, determining that the record was sufficiently developed and that there were no genuine issues of material fact. The AJ adopted the recitation of facts from the Agency's motion.

According to the AJ, although Complainant's response challenged the undisputed material facts as set forth by the Agency, none of the clarifying facts were sufficiently material to avoid summary judgment. The AJ found that Complainant failed to establish denial of reasonable accommodation or unreasonable delay in reasonable accommodation.

The AJ found Complainant could not establish a prima facie case of discrimination with respect to the disparate treatment claims because there was no nexus between his protected classes and the alleged incidents and because the employees Complainant alleged were treated more favorably were not true comparators. According to the AJ, there was no evidence that the Agency acted or failed to act on Complainant's FMLA paperwork based on his disability or prior protected activity. Even assuming Complainant established a prima facie case of discrimination, the Agency provided legitimate, nondiscriminatory reasons for its actions, and the AJ found Complainant could not establish pretext for discrimination. Finally, regarding Complainant's harassment claim, the AJ found that a finding of a hostile work environment was precluded by the lack of evidence that the Agency's actions were motivated by discriminatory animus. The AJ further found that Complainant's allegations were insufficiently severe or pervasive to constitute a hostile work environment. The AJ issued a decision by summary judgment in favor of the Agency.

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

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred in granting summary judgment for the Agency. According to Complainant, the AJ seemingly ignored the evidence and arguments he presented. Complainant argues that the AJ failed to view the evidence in the light most favorable to the non-movant. Complainant also raises the issue of dissatisfaction with the processing of Complainant's complaint.

In response to Complainant's appeal, the Agency contends there are no genuine issues of material fact.

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

Complainant's Civil Action

On September 6, 2024, Complainant filed Civil Action No. 2:24-cv-00545 in the United States District Court for the Eastern District of Virginia. A review of the complaint filed in the civil action reflects that the allegations raised in the civil action encompass the denial of reasonable accommodation claims in the EEO complaint currently pending appeal.

EEOC Regulation 29 C.F.R. § 1614.409 provides:

> Filing a civil action under § 1614.407 or § 1614.408 shall terminate Commission processing of the appeal. A Commission decision on an appeal issued after a complainant files suit in district court will not be enforceable by the Commission. If private suit is filed subsequent to the filing of an appeal and prior to a final Commission decision, the complainant should notify the Commission in writing.

Accordingly, the Commission will dismiss a pending appeal/petition under these circumstances to prevent a complainant from simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, and creating the potential for inconsistent or conflicting decisions, and in order to grant due deference to the authority of the federal district court. See, e.g., Wayne C. v. Dep't of Veterans Affs., EEOC Appeal No. 2020002855 (Oct. 6, 2020); Bart L. v. Dep't of Agric., EEOC Appeal Nos. 2020000098, 202000000100 (Mar. 10, 2021); Von E. v. Dep't of the Treas., EEOC Appeal No. 2020004947 (Feb. 17, 2022).

While Count I of the civil action pertained to a different mixed case complaint (Agency No. 22-00183-00305),[4] Claim II of the civil action alleged that the Agency failed to accommodate Complainant's disability, including "by refusing to reassign him to suitable vacant positions within the Department of the Navy or to engage in the interactive process." Civil Action Complaint at 8. The allegations in the civil action included Complainant's requests for the flex time or a flexible schedule, the ability to complete his shift after set hours, and excused absence as reasonable accommodation. Id. at 4-5. In the civil action, Complainant also alleged that, although he accepted the Agency's offer to consider reassignment as a reasonable accommodation in May 2020, the Agency withdrew an offer of a GS-7 Financial Technician position, conducted "deficient" searches for vacant positions, and failed to engage in the interactive process. Id. at 5-7.

Following a review of Civil Action No. 2:24-cv-00545, the Commission has determined that the language in Count II and the preceding allegations in the above-referenced civil action is broad enough to encompass claims (a)(1) through (a)(5) from the EEO complaint currently on appeal. See Jackson v. Dep't of the Army, EEOC Request No. 05940414 (Sept. 1, 1994) (finding that the language of complainant's civil action was so "broad and all-inclusive" that it completely overlapped his EEO complaint claims).

[4] This mixed case complaint was the subject of a petition for review of a decision issued by the Merit Systems Protection Board (MSPB). In Emmett W. v. Dep't of the Navy, EEOC Petition No. 2023002692 (Aug. 7, 2024), we concurred with the MSPB's decision finding no discrimination regarding Complainant's December 3, 2021, removal for medical inability to perform. The Commission found that the Agency fulfilled its obligations under the Rehabilitation Act with respect to Complainant's request for reasonable accommodation and that he did not establish that the removal was motivated by discrimination based on disability.

However, the Commission finds that a fair reading of the civil action shows that Complainant raised denial of reasonable accommodation but did not raise the disparate treatment and harassment claims at issue in the instant appeal. See Jasper S. v. Dep't of Veterans Affs., EEOC Appeal No. 2021005027 (July 17, 2023) (dismissing hostile work environment claim raised in complainant's civil action but not the failure to accommodate claim that was not raised). Accordingly, we dismiss claims (a)(1) through (a)(5) from the EEO complaint currently on appeal and will consider the merits of claims (b)(1) through (b)(8).

Decision without a Hearing

We determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

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

For example, Complainant states that he previously worked in the GYN side of the lab and provides evidence that he switched to the non-GYN side in 2016 to accommodate Technician-1's pregnancy. However, Complainant does not provide evidence or argument that, given his medical restrictions in 2019 and 2020, he could have worked on the GYN side of the lab on the night shift. Even drawing all reasonable inferences in his favor, a reasonable finder of fact could not find that Complainant could prepare non-GYN specimens on the night shift because there would not be Cytotechnologists present to refill the label maker and label his slides. Moreover, although Complainant asserts that preparing STAT specimens was only a marginal function of his position, Complainant does not dispute that processing STAT specimens during the day was his responsibility, that processing STAT specimens would disrupt workflow for the Cytotechnologists, or that the non-GYN Cytology Technician working during business hours made it easier to contact medical providers regarding problem cases.

Regarding the investigations and the alleged threat of discipline, Complainant has not identified genuine issues of material fact regarding management's reasons for investigating his conduct and/or considering discipline. Complainant does not dispute not completing the histogel logs on a daily basis or certifying the histogel logs for days when he was on leave. Similarly, Complainant does not dispute leaving a specimen that was meant to be processed in the refrigerator, where it remained for nearly two weeks before a coworker covering for Complainant located it. Finally, Complainant does not dispute that the sign-in sheet did not match the hours claimed on his time and attendance or that he was in the lab after hours without permission, working on his EEO complaint until 3 a.m.

Upon careful review, we find that Complainant has not identified genuine issues of material fact and that the AJ properly issued a decision without a hearing. Accordingly, we will consider the merits of claims (b)(1) through (b)(8).

Disparate Treatment Based on Disability and Reprisal

In order to prove his complaint of employment discrimination, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978).

Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thereafter, to ultimately prevail, complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of disparate treatment 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 to establish a causal nexus).

Here, we find that Complainant established that he was an individual with a disability. We will assume, without so finding, for the purposes of this decision that Complainant was qualified with respect to the Cytology Technician position.

Complainant engaged in protected EEO activity by requesting reasonable accommodation and initiating the EEO process. We will assume for the purposes of this decision that the relevant management officials were aware of Complainant's prior protected EEO activity.

Complainant alleged discrimination with respect to being investigated for histogel log infractions and specimen handling procedures. Complainant has not demonstrated any evidentiary connection between the investigation and his disability or prior protected activity. However, because the record reflects that the interactive process was ongoing in July 2019, a causal connection can be inferred. Accordingly, we find that Complainant has established a prima facie case of reprisal, but not a prima facie case of disability based on disability. The Agency's legitimate, nondiscriminatory reasons for investigating Complainant in July 2019 were that management learned that he had signed the December 2018 histogel log for dates when Complainant was not at work and that he left a specimen in the refrigerator for approximately two weeks. Complainant generally asserted discrimination, but he has not disputed signing the December 2018 histogel log for dates when he was on leave. Moreover, regarding the specimen in the refrigerator Complainant stated that he regretted the episode, which could have delayed patient care, and acknowledged that he could have facilitated further communication with the submitting laboratory. Complainant's general testimony that the real reason for the Agency's actions was discrimination, without more, is insufficient to establish pretext.

Complainant also alleged discrimination in connection with not receiving night differential pay. Regarding night differential pay, Complainant has not established that he was subjected to adverse treatment because he did not work the night shift and has not shown that he was entitled to night differential pay. We find that Complainant cannot establish a prima facie case of discrimination with respect to this allegation. Moreover, even assuming a prima facie case of discrimination, the Agency's legitimate, nondiscriminatory reason for not paying Complainant night differential pay was that he did not work on the night shift and that he could not work on the night shift because he could not prepare the GYN specimens that needed to be prepared at night. As evidence of pretext, Complainant cites Technician-1 as a comparator who received night differential pay. However, during the relevant time period, Technician-1 worked at night preparing GYN specimens, whereas Complainant could not prepare GYN specimens on the night shift because of his medical restrictions. Complainant also would not have been able to prepare non-GYN specimens at night without the presence of Cytotechnologists to label his slides and reload the label maker as needed. Finally, because Complainant processed non-GYN specimens, he needed to be available during the day to prepare STAT specimens and to contact medical providers during business hours regarding problems. Complainant argued that STAT specimens were rare, but this does not address the Agency's legitimate, nondiscriminatory reason and is insufficient to establish

pretext. We find that Complainant cannot establish that the Agency's real reason for not providing him with night differential pay was discriminatory and/or retaliatory animus.

Complainant alleged that he was subjected to discrimination because Supervisor-4 solicited leave donations for other employees with depleted leave balances but did not do so for Complainant. Here, Employee-1 applied and was approved for the Agency's VLTP, and Supervisor-4 sent an email soliciting VLTP donations on behalf of Employee-1. It is undisputed that Complainant neither requested to participate in the VLTP nor asked Supervisor-4 to solicit leave donations on his behalf. We find that Complainant has not established that he was subjected to adverse treatment and cannot establish a prima facie case of discrimination. Even if we were to assume a prima facie case of discrimination, the Agency's legitimate, nondiscriminatory explanation is that Employee-1, unlike Complainant, was participating in the VLTP and asked Supervisor-4 to solicit leave donations on their behalf. As evidence of pretext, Complainant stated that Supervisor-4 was aware of Complainant's depleted leave balances. We note that Supervisor-4's email soliciting VLTP donations for Employee-1 included a link to HR guidance about the VLTP. While it may have been helpful if Supervisor-4 had informed Complainant of all available opportunities for employees with limited leave, including the VLTP, the fact that Supervisor-4 did not do so is insufficient to establish pretext for discrimination based on disability and/or reprisal.

Complainant alleged discrimination with respect to Supervisor-2 rescinding advanced sick leave that had been approved. However, Complainant stated in the record that the advanced sick leave had not been approved. Moreover, the record contains an email from Complainant to Supervisor-2 explaining that it did not make sense for him to request advanced sick leave for a physical therapy program at that time because no programs in the area that worked with his insurance were accepting new patients and because of the Covid-19 pandemic. Accordingly, Complainant has not established that he was subjected to adverse treatment with respect to this issue and cannot establish a prima facie case of discrimination based on disability or reprisal. Even if we were to assume that Complainant established a prima facie case of discrimination, the Agency's legitimate, nondiscriminatory explanation is that it was Complainant who indicated that he would not be pursuing advanced sick leave at that time. As evidence of pretext, Complainant stated that he incurred LWOP because of his disability, but this does not demonstrate that the Agency's legitimate, nondiscriminatory reason was pretextual.

Moreover, Supervisor-2's apparent willingness to grant Complainant four weeks of advanced sick leave to participate in a physical therapy program undercuts his argument that management was motivated by discriminatory and/or retaliatory animus.

Finally, Complainant alleged that he was subjected to discrimination in March 2020 when he was investigated regarding the sign-in sheet and his use of official time to complete documents related to his EEO complaint. Given that part of the investigation was predicated on his use of official time to prepare documents for his ongoing EEO complaint, we find that Complainant can establish a prima facie case of reprisal but not a prima facie case of disability discrimination with respect to this matter. The Agency's legitimate, nondiscriminatory explanation for its actions were that the sign-in sheet did not match the hours claimed by Complainant on his time and attendance. Moreover, although Complainant had been granted official time to work on the EEO complaint, he had been in the lab after hours without permission until 3 a.m. As evidence of pretext, Complainant noted that no discipline was taken as a result of the investigation, asserting that this proved that he had not engaged in wrongdoing. The fact that no discipline was taken as a result of the investigation does not establish that the reasons for initiating the investigation were pretextual. We find that Complainant has not established pretext for discrimination based on reprisal and/or disability with respect to this allegation.

Harassment Based on 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 he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his 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), approved in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).; Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable

person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove his hostile work environment claim, Complainant must establish that he 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, his 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.

To ultimately prevail on a claim of retaliatory harassment, Complainant must show that he was subjected to conduct sufficient to dissuade a "reasonable person from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017).

We initially note that, with respect to claims (b)(1), (b)(5), (b)(7), and (b)(8), as well as the night differential pay allegation from claim (b)(3), we are precluded from finding harassment with respect to these claims based on our finding that Complainant failed to establish that these actions were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

As discussed above, Complainant has established that he is an individual with a disability, and we are assuming for the purposes of this decision that Complainant is "qualified" under the Rehabilitation Act. Moreover, Complainant has established that he engaged in protected EEO activity.

Complainant alleged that he was subjected to harassment when his request to have his education record corrected was denied, when Complainant was denied overtime, comp time, and/or flex time, when Supervisor-4 spoke to him aggressively and falsely accused him of misconduct, and when the Agency failed to properly process his FMLA paperwork.

Complainant stated that he asked HR-1 to have Complainant's education record corrected and alleged that his request was denied because he disclosed his protected EEO activity to HR-1. HR-1 resigned from the Agency and did not participate in the EEO investigation, and HR-2 was unaware of Complainant's request to correct the education record. However, HR-2 stated that correcting Complainant's education record was a self-service task he would need to complete on DCPDS. Complainant has not shown that HR did not correct the education record based on his membership in any protected class.

Complainant alleged harassment in connection with being denied overtime, comp time, and flex time. In Complainant's reasonable accommodation request, he stated that, when he was unable to complete his normal workload during an eight-hour shift, he should be able to stay longer and receive overtime pay for the additional hours worked. Complainant generally alleged that other employees in Anatomical Pathology had been allowed overtime and/or comp time. However, Complainant has not alleged that other employees were allowed to work overtime or earn comp time when they were unable to complete eight hours of work during an eight-hour shift, nor has he shown that he was entitled to earn overtime or comp time for staying late when he could not complete eight hours of work during an eight-hour shift. Complainant has not shown that he was denied overtime pay and/or comp time based on his disability and/or prior protected activity.

Regarding flex time, Complainant asserted that he should have been able to come in later than his official start time and work for eight hours rather than taking leave. Complainant did not address whether others in the lab worked this type of flexible schedule, but he again noted that others, such as Technician-1, already received night differential pay for working in the evenings. As discussed above, it is undisputed that, based on Complainant's medical restrictions, he could not prepare the GYN specimens at night. Further, Complainant could prepare non-GYN specimens on the night shift because there would not be Cytotechnologists present to refill the label maker and label Complainant's slides. As the non-GYN Cytology Technician, Complainant also needed to be present during the day so he could prepare STAT specimens and be able to contact medical providers regarding problems. Complainant has not shown that he was denied flex time based on disability and/or prior protected activity.

Complainant alleged harassment with respect to Supervisor-4 speaking to him aggressively, falsely accusing him of "forgetting about a specimen for 2 weeks that was meant to be processed," telling him that he "cannot be

trusted making cell blocks," and threatening him with termination. Supervisor-4 denied speaking to Complainant aggressively or threatening Complainant. However, even assuming for the purposes of summary judgment that this occurred as alleged by Complainant, he has not shown that the alleged harassment was based on disability and/or prior protected activity rather than based on Complainant's role in a situation where a specimen that needed to be prepared was left in a refrigerator for approximately two weeks. As discussed above, Complainant had expressed regret that the issue with the specimen in the refrigerator could have led to a delay in patient care and discussed how to improve communication to avoid such issues in the future.

Complainant alleged harassment in connection with respect to the Agency failing to properly process his FMLA paperwork.[5] Complainant stated that, in February 2019, he provided FMLA paperwork to Supervisor-1, who resigned in August 2019. Complainant averred that, in January 2020, he was told that he did not have an approved FMLA case, which meant that Supervisor-1 did not properly process the FMLA application. Although the record reflects that Complainant submitted FMLA paperwork to Supervisor-1 in February 2019 that was not appropriately processed, he has not identified any evident connection between Supervisor-1's failure to do so and his membership in a protected class.

Complainant submitted another FMLA application in March 2020, and he described having to fill out the paperwork and obtain medical documentation again as harassment. However, as Supervisor-2 stated on February 25, 2020, it was in Complainant's best interest to submit new FMLA paperwork because the initial paperwork dated February 15, 2019, was more than a year old, was incomplete, and indicated Complainant have approximately two flare ups per month lasting two days, which did not seem to comport

[5] In its motion for summary judgment and appellate brief, the Agency argued this allegation should be dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) as a collateral attack on the FMLA process. We find, however, that the AJ correctly addressed Complainant's allegation that Agency managers subjected him to harassment when they failed to timely and properly process the FMLA paperwork. The Commission has previously upheld discrimination allegations where the complainant was challenging the acts of an agency manager rather than the decision of an adjudicatory body. See Ramsey v. U.S. Postal Serv., EEOC Appeal No. 07A10080 (July 18, 2003) (finding discrimination regarding the agency's denial of request for FMLA leave).

with the number of disability-related flares he was having in February 2020. Complainant has not identified any evidence that could lead a reasonable finder of fact to find that he was asked to submit new FMLA paperwork based on disability and/or prior protected activity.

We further find that the alleged incidents of harassment constitute commonplace workplace interactions such as work assignments, instructions, and admonishments 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 Supervisor-1, Supervisor-2, and other management officials made him feel undervalued and treated him in a demeaning manner, we have repeatedly stated that such ordinary friction in supervisor-employee 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). Complainant has not established that he was subjected to a hostile work environment as alleged.

Improper Processing of EEO Complaint and Conflict of Interest

Finally, Complainant alleges improper processing of his EEO complaint by the Agency and that the Agency failed to conduct a sufficient and impartial investigation into his allegations of improper processing. A complainant may raise dissatisfaction with the processing of an EEO complaint and has the burden of showing improper processing. When a complainant raises allegations of dissatisfaction regarding the processing of his or her pending complaint, the Agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the Agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the Agency's reason(s) for not taking any action. EEO MD-110. If the Commission finds that the Agency has improperly processed the original complaint, and that such processing had a material effect on the

processing of the complaint, it may impose sanctions on the Agency. See EEO MD-110, at Chap. 5, § IV.D.

Complainant alleged that the EEO counselor produced a fraudulent document reflecting that he raised and abandoned EEO claims in February 2019 and that Deputy-1 had "possible complicity" in the matter. Complainant reported these allegations to the Agency, and Complainant's allegations were referred to Deputy-1, the Agency official responsible for the quality of complaints processing. According to Complainant, Deputy-1 conducted a "hasty investigation" that was insufficient. Complainant also asserts that, because Complainant named Deputy-1 in the allegation of improper processing of his EEO complaint, Deputy-1 could not be impartial. The Commission has reviewed the entire record and finds that the Agency properly addressed Complainant's allegations in accordance with EEO MD-110. Complainant has not explained the allegations of improper processing on appeal, nor did he do so with the Agency or the AJ. Even if we were to find that the February 2019 document was fraudulent as alleged by Complainant, it is unclear what effect, if any, this would have had on the processing of his EEO complaint. We find that there is no indication of improper processing of Complainant's complaint by the Agency.

Moreover, we find that Complainant's vague mention of Deputy-1's "possible complicity" in the inclusion of a fraudulent document in the record is insufficient to raise a question of a possible conflict of position or conflict of interest. Chapter 1 of EEO MD-110 provides that agencies must avoid conflicts of position or conflicts of interest, as well as the appearance of such conflicts. EEO MD-110, Chap. 1, § IV.A. The Commission has recognized that, in the federal sector process, agency heads must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency decisions as to whether discrimination has occurred and defending the agency against claims of employment discrimination. EEO-MD-110, Chap. 1, § IV. The Commission maintains that a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process. Id. at § IV.D. In Junior M. v. Central Intelligence Agency, EEOC Request No. 2019003175 (Sept. 26, 2019), the Commission stated that an effective EEO program must be impartial, both in appearance and in existence, and reflect EEOC's endeavor to keep the advocacy function out of federal sector EEO offices due to their unique obligations and responsibilities. Here, Complainant has not alleged discrimination by Deputy-1, and there is no evidence that Deputy-1 played

any role in defending the Agency in response to Complainant's EEO complaint. Accordingly, we find no indication of a conflict of position or conflict of interest, or the appearance of such a conflict.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we DISMISS claims (a)(1) through (a)(5) and AFFIRM the Agency's final order adopting the AJ's decision without a hearing finding no discrimination with respect to the remaining claims.

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

February 5, 2025
Date