



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

[REDACTED]
Celeste P.,¹
Complainant,

v.

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

Appeal No. 2023003744

Agency No. FS-2022-00634

DECISION

On June 16, 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 May 16, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

Whether the Agency's final decision properly found that Complainant was not subjected to discrimination as alleged.

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

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Teacher, GS-1710-09, at the Agency's Blackwell Job Corps Civilian Conservation Center in Laona, Wisconsin. Complainant began working at the Agency effective September 27, 2021, and was subject to a one-year probationary period. During the relevant time, the Academic Manager was Complainant's first level supervisor (S1) and the Director was Complainant's second level supervisor (S2).

Complainant suffered a nonwork related car accident in February 2022, and was out of work for approximately six months. As a new employee, Complainant did not have much leave. After exhausting her available leave, while off work recovering, S1 informed Complainant her employment may be terminated because the Agency had reached its limit of what they could do to help her. S1 noted thereafter Complainant was placed on unpaid extended leave so she would not be terminated. S2 acknowledged S1 communicated to Complainant that management needed to figure out leave for her because if not, she would be Absent Without Leave (AWOL), and would be terminated after a certain number of days being AWOL. S2 noted Complainant was granted 104 hours of advanced sick leave. Additionally, Complainant was approved for Leave Without Pay (LWOP) from March 8, 2022, until August 5, 2022. Moreover, she was permitted to telework 10 hours per pay period to keep her in a pay status while she recovered from the accident.

The Agency sent Complainant information on applying for donated leave under the Voluntary Leave Transfer Program (VLTP). Complainant provided medical documentation to S1 on February 22, 2022, in support of her application for VLTP. The documentation reflected that Complainant had a history of diabetes and epilepsy.

Complainant returned to work at the Agency on July 6, 2022.

When Complainant initially began her employment with the Agency in September 2021, she moved into government housing. She agreed to pay rent of \$779.93 per month, which was to be deducted from her paycheck. Rent payments were not deducted. Complainant claimed she told S1 after she received both her first and second paychecks that rent had not been deducted. She stated S1 responded dismissively and told her it might take a few weeks to begin.

Complainant stated she contacted Human Resources about the rent payments not being deducted but they were not responsive. Complainant stated she paid off her rent balance on June 15, 2022.

Paychecks Withheld

Complainant claimed management withheld several of her paychecks and did not issue a "Notice of Intent to Repay" (NIR). Specifically, she stated on June 2, 2022 (2022 Pay Period 10), the Agency withheld \$437.66 as a "salary advance collection." Report of Investigation (ROI) at 000124. She noted she asked Human Resources about the matter but that they could not tell her the reason for the action. Complainant acknowledged that rent money was not initially deducted from her paycheck as it should have been. However, she stated she fully paid arrears by June 15, 2022. Further, Complainant stated she was not paid for the six hours she worked on August 17, 2022, the day she was terminated.

S1 stated regarding the rent owed, he believed the Agency was going to garnish Complainant's paycheck due to nonpayment for government housing, but he thought Complainant wrote a check for the back rent owed. S1 reported he was not sure if Complainant's last paycheck was garnished but stated he had nothing to do with it. Regarding payment for work done on August 17, 2022, S1 stated he never before had an employee released during the middle of the pay period. He stated he did not submit a timesheet on her behalf for hours worked from August 16, 2022, through August 28, 2022. S1 thought the Agency would handle the matter given it was a termination. S2 recalled Complainant being advanced sick leave, but stated he had no knowledge of any pay being withheld because of the hours advanced. S2 acknowledged Complainant worked on August 15, 16, and 17 (a portion), 2022, but explained Complainant would have had to submit her timesheet for her supervisor's approval to be paid. S2 noted a supervisor or administrative officer could submit the timesheet on behalf of an employee. S2 stated if management had been aware this needed to happen, they would have taken care of it.

Not Paid for Overtime

Complainant claimed that since February 2022, management had not paid her for 30 hours of overtime from October 2021 to February 2022. She stated the overtime involved hosting after school remediation for students. She stated she and Teacher 1 took turns hosting the program each week.

Complainant stated Teacher 1, who was not a probationary employee, was paid for overtime worked.

S1 stated although Complainant's tour-of-duty (TOD) was from 7:30 a.m. to 4:00 p.m., she voluntarily reported to work 30 to 45 minutes earlier. S1 noted Complainant sometimes assisted with the afterschool program where teachers stayed beyond their TODs for 30 to 45 minutes. S1 stated he told Complainant she could "flex" her time on those days by reporting to work at 8:00 a.m. S1 stated Complainant never submitted requests to be paid overtime in any of the circumstances at issue. S1 stated that employees who were paid overtime requested it in advance and completed the necessary documentation to process such requests. S2 stated he was not aware of Complainant ever requesting overtime.

Non-issuance of Performance Appraisal

Complainant stated management did not issue her a Performance Appraisal. Complainant claimed that under Agency policy, otherwise known as "three strikes, you're out," as long as a teacher has not received three documented counseling sessions concerning any employment deficiencies during any one employment quarter, their performance should be considered "fully successful." ROI at 000134. Complainant stated that since she had not received such a documented counseling (i.e., in writing and signed off by Complainant), her performance could only be deemed "fully successful." Complainant claimed she received three quarterly performance evaluations from S1 that were all "satisfactory."

S1 stated he did not issue Complainant a performance rating for one quarter because she was hospitalized and on unpaid leave most of the time. He stated under these circumstances, he was unable to evaluate her performance for that quarter.

The record indicates Complainant received performance progress reviews for quarter 1, quarter 2, and quarter 3. For quarter 1 it was noted Complainant "is finding her groove" and when her classroom was observed, her students were engaged and participating. ROI at 000214. For quarter 2, it was noted Complainant only worked the first two months of quarter 2 and that in January her performance was acceptable. For quarter 3 it was noted Complainant had been on LWOP for most of the last quarter and had been working about 10 hours per pay period doing training.

Termination

On August 8, 2022, S1 sent a memorandum to S2 recommending Complainant be terminated based on conduct and performance. In part, S1 noted during her initial training, he spent a massive amount of time training and re-training Complainant in the basics of being a Job Corps teacher. He stated she would often "blank out" and become almost "catatonic" after just a few minutes of instruction. ROI at 000508.

On August 17, 2022, management issued Complainant a Termination Notice. The Notice stated that when Complainant was spoken to regarding her responsibilities she reacted as if she did not understand what was being said or became agitated. The Notice stated Complainant still used her personal laptop to conduct work, despite instruction to only use her government-issued laptop. After five weeks of employment, Complainant still did not understand the Job Corps academic program and continually asked the same questions and did not listen when her supervisor attempted to assist. The Notice mentioned a July 15, 2022 altercation with a student. Further, it was noted between July 12, 2022 – August 3, 2022, several students were removed from Complainant's classroom due to the students having reported they were harassed, mocked, and ignored by Complainant.

Complainant claimed she was fired in retaliation for complaining about not being paid overtime, which she states resulted in an August 1, 2022 grievance. Complainant stated she could not speak to S1's motivations; however, his discrimination started in September 2021. Complainant stated S1 and S2 tried to ensnare her in a "computer security trap" on February 19, 2022, regarding the use of her government computer while she was recovering. She stated immediately thereafter, S1 learned of her membership in a protected class and then the discrimination intensified. She stated S1 and S2 worked together to terminate her based on lies.

S1 noted he spoke with Complainant in person many times about her classroom management skills and ways she could improve. He stated he gave Complainant suggested resources to improve her classroom management and allowed her time to find and review other resources. He noted she had been counseled for lack of classroom management skills and failure to follow guidelines for overtime/compensatory time/credit hours. S1 stated Complainant was terminated due to her unprofessional conduct and failure to follow directions.

S2 stated Complainant had been counseled about using her personal laptop to conduct work, her approach with students, and her classroom management but her performance did not improve. S2 stated Complainant had difficulty working with students and it got to the point that they decided to terminate her.

Coworker Interference/Lack of Management Support

In her affidavit Complainant stated on July 28, 2022, she emailed S1 and S2 to notify them Coworker had removed a female student from Complainant's classroom on the grounds the student (Student 1) was being taken to Guidance. Complainant stated instead Coworker left the student in the Academic Building foyer, unsupervised-exposing Complainant to liability. Complainant stated she did not know the student was sitting there until Complainant went to pick up a print job. Complainant stated several hours later, Coworker showed up again to take the same student to Guidance. Complainant stated she informed S1 and S2 but received no response from them. Complainant also stated on August 3, 2022, S1 accused her of violating a rule by giving an academic software password to a student (Student 2); however, Complainant stated she was never trained on that software and had never been instructed she was not allowed to give passwords to students.

In her rebuttal affidavit, Complainant mentioned a male student (Student 3) showed defiance and would not comply with reasonable requests. Complainant stated Student 3 used profanity when speaking to her. Complainant stated after seven days of being disrespected by this student she began to "lose my patience." ROI at 000329. Complainant stated on July 15, 2022, she told the student several times to go to lunch and he ignored her. She stated she finally removed his laptop from his desk, closed the lid, put it in a metal drawer, and locked the drawer. She then told the student to go to lunch again and she said he got angry and stormed out of the room. Complainant stated she closed the door behind her with more force than usual because she was "beginning to lose my composure." ROI at 000330. Complainant noted during her last few weeks at the Agency, she saw S1 lose his composure with a student after approximately five seconds and start screaming at the student. She stated in contrast, her loss of composure on July 15, 2022, was the result of seven days of disrespect and disregard by a student.

Additionally, Complainant stated she asked S1 if she was receiving the same instructions that other teachers were receiving.

She noted that such directives included keeping students off their phones, encouraging them to focus on their schoolwork and report to class on time, and looking for students who had been gone from the classroom more than five minutes. Complainant noted Student 1 shouted at her, "If I were in [Teacher X's] class or [Teacher 2's] class, I could sit there and use my phone all day long, and they wouldn't say anything to me. The problem is you!" ROI at 000117. S1 told her she was receiving the same directives as other teachers. Complainant stated from July 7, 2022, the day she returned following her prolonged absence, until August 17, 2022, the day she was fired, Student 1 became increasing hostile. Complainant stated she did not receive adequate administrative support.

Teacher 2 stated he was the Acting Supervisor the day of the incident with Student 3. He said he heard Complainant addressing a student loudly and then hearing the door slam. He stated he poked his head out of the classroom and asked if Complainant was alright. Teacher 2 and Complainant went to another classroom to talk about the incident, and he stated Complainant was loud and appeared agitated, but said she was fine. Teacher 2 said he wrote a report regarding the matter and provided it to S1.

The record contained an email from Friday, July 15, 2022, sent by Teacher 2 to S1 regarding the incident between Complainant and Student 3. Teacher 2 noted that Complainant told him Student 3 did not want to leave during lunch because he was taking a test, so she said she took his computer. Teacher 2 stated he told her this was wrong and noted she should not get students started on an exam after 10:00 a.m. because they would not be able to finish before lunchtime. Teacher 2 stated Complainant replied that no one had told her this and said she got frustrated when Teacher 2 told her she needed to figure it out. Teacher 2 said regarding whether she knew this or not, grabbing a student's computer was not right. Teacher 2 said he told Complainant if she asks a student to do something, and they don't comply, she should get another staff member or the principal for backup and issue an "I&D" (undefined) if necessary but not to grab something from them.

S1 stated Complainant did not report a hostile work environment but noted she did not like how Teacher 2 talked to her when she was "out of control" while interacting with students. ROI at 277-78. Regarding the incident with the student needing to reset his password, S1 stated Complainant mocked that student. S1 noted multiple students complained to the counseling department about Complainant's conduct.

On September 2, 2022, Complainant initiated EEO Counselor contact. On December 12, 2022, Complainant filed a formal EEO complaint. The Agency framed Complainant's complaint as alleging that the Agency discriminated against her and subjected her to harassment on the bases of disability, age, and sex when:

1. On August 17, 2022, management issued Complainant a Notice of Termination During Probationary Period, from her GS-1710-09, Teacher position;
2. Ongoing since February 2022, management ignored Complainant's requests to be paid for 30 hours overtime, from October 2021 to February 2022 and she was not paid for overtime hours worked;
3. On several unspecified dates, management withheld several of Complainant's paychecks and did not issue a "Notice of Intent to Repay;"
4. On an unspecified date(s), management did not issue her a Performance Appraisal;
5. On several dates, Complainant was subjected to various incidents of harassment, including but not limited to:
 - a. management did not support her when she reported being subjected to a hostile working environment by a subordinate employee;
 - b. on an unspecified date(s), while she was in the hospital, management informed her verbally and in writing, that she was on the verge of being terminated; and
 - c. management did not support her regarding her efforts to correct students who broke the rules.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency's final decision noted that because Complainant alleged that her termination was based on retaliation for complaining about a "hostile work environment," claim 1 would be analyzed on the basis of retaliation in addition to disability. The Agency analyzed claims 1 - 4 under a disparate treatment analysis. The Agency noted Complainant's claimed disability involved "physical therapy for learning how to walk again" and temporarily being confined to a wheelchair due to an automobile accident. The Agency assumed Complainant was disabled under the Rehabilitation Act. The Agency noted Complainant's EEO activity involved complaining about a hostile work environment, including not being paid for overtime. The Agency noted that during the investigation Complainant stated she did not claim age or sex as bases in any of her claims. Thus, the Agency did not analyze her claims based on sex or age. The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination or harassment as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant argues the record does not support the Agency's claims that she was notified "in writing" not to use her personal computer; that she used her personal computer to complete Agency work; that she received guidelines for claiming overtime; or that S1 documented numerous counseling sessions regarding her alleged poor performance.

Complainant argues S1's sworn statement that he did not evaluate her during one quarter while she was hospitalized was contradicted by the signature page of quarter 1, quarter 2, and quarter 3 evaluations, which she states shows she was evaluated during all three quarters. Complainant also states S1's description of her "yelling and screaming all the time, slamming doors" is not supported by documentation.

Complainant claims she was never provided an Agency Handbook and laments the lack of training for new employees. Additionally, regarding the language about her "blacking out" or "becoming catatonic," she states the job consisted of sitting in a chair and staring at walls for eight hours a day. She stated she was not allowed to teach, despite her title as teacher. Rather, she stated students sat in chairs and stared at computer screens all day. Complainant stated if there was any "blacking out" taking place, it certainly was not exclusively from her.

Regarding her reprisal claim, Complainant states she established a causal relationship since she notified S1 via email on July 31, 2022, that she was not paid for the 30 hours of overtime, which S1 acknowledged on August 1, 2022. She notes sixteen days later, she was terminated.

Regarding nonpayment of overtime, Complainant noted that S1 admitted he paid the non-probationary teacher for her overtime, but he did not pay Complainant. Complainant argues they should both have been paid and states probationary status should not matter.

In response to Complainant's appeal, the Agency argues its final decision should be upheld. The Agency notes Complainant has not identified what protected activity she engaged in to form the basis of her retaliation claim and argues she cannot establish a *prima facie* case of retaliation. The Agency notes she contacted an EEO Counselor on September 2, 2022, after her termination on August 17, 2022. The Agency notes her affidavit and supplemental affidavit do not further identify any prior engagement in protected activity. The Agency states assuming *arguendo* that Complainant established a *prima facie* case of discrimination and retaliation, it articulated legitimate, nondiscriminatory reasons for its actions. The Agency argues Complainant failed to demonstrate pretext. Further, the Agency states Complainant failed to establish an actionable harassment claim.

STANDARD OF REVIEW

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

ANALYSIS

As initial matter we find that Complainant abandoned any claims based on sex or age given her statements during the EEO investigation that she was not pursuing such claims, and her failure to argue about such claims on appeal. Therefore, we will not discuss the bases of sex or age.

For a complainant to prevail on a claim of disparate treatment, they must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A complainant must initially establish a prima facie case by demonstrating that they were 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 804 n. 14.

Disparate Treatment

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539 (August 17, 2023).

To establish a prima facie case of disparate treatment on the basis of reprisal, a complainant must show that: (1) they engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, they were subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132503 (Aug. 28, 2014), citing Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cnty. Aff. v. Burdine, 450 U.S. 248, 253 (1981).

A complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In the present case, the Agency does not dispute that Complainant was disabled or qualified and thus, we find she met prongs 1 and 2 of the prima facie case of disability discrimination. Regarding prong 3, we find Complainant was subjected to adverse action when she was terminated, not paid for overtime, her paychecks were withheld, and she was not issued a performance appraisal. However, we find Complainant has not established prong 4 because she had not shown a causal relationship between her claimed disability and the Agency's actions.

Regarding her claim of retaliation, the Agency does not dispute that Complainant engaged in protected EEO activity when she complained about a hostile work environment or that management was aware of her activity because S1 stated he was aware Complainant complained of harassment. Thus, we find Complainant established prongs 1 and 2 of the prima facie case. Regarding prong 3, we find Complainant established she was subjected to a materially adverse action when she was terminated, was not paid overtime, and her paychecks were withheld. Regarding prong 4, the Agency argued Complainant failed to show a nexus exists between the protected activity and the materially adverse action because she failed to provide an exact date for when she complained of an alleged hostile work environment. On appeal, Complainant argues she established a causal relationship for her termination since on July 31, 2022, she notified S2 in writing that she had not been paid for 30 hours of overtime. Complainant stated S2 responded to her email on August 1, 2022, acknowledging receipt of her communication. She noted she was fired 16 days later. However, we note a complaint about nonpayment of overtime does not constitute protected EEO activity. Moreover, we note Complainant does not argue on appeal that she engaged in other protected EEO activity. Thus, we find Complainant failed to establish a nexus between protected activity and the adverse treatment alleged.

Further, we find the Agency provided legitimate, nondiscriminatory reasons for its actions. Regarding the denial of overtime, S1 states Complainant never submitted requests to be paid overtime on any of the identified dates. S1 asserts Complainant expected to be paid overtime when management had not previously received and approved such requests.

S1 contends Complainant was informed that if she worked outside her TOD or "flex" times, she would not be paid overtime. S1 states other employees who were paid for overtime requested it in advance and completed the necessary documentation to process their overtime requests. Regarding the non-issuance of a performance appraisal, S1 notes that he did not issue Complainant a performance rating for one quarter because she was hospitalized and on unpaid leave for most of that time. S1 states as a result, he was unable to appropriately evaluate her performance. S1 states no other employee was issued an appraisal under similar circumstances. Regarding the termination, the Agency notes it terminated Complainant during her probationary period due to conduct and performance issues. We find that Complainant failed to show that any of the Agency's actions were motivated by her protected bases.

Regarding issues with paychecks, the Agency notes after the government realized rent was not properly being deducted from Complainant's paycheck, it likely garnished her wages to collect payment for the back rent, resulting in a reduced salary. Complainant only identifies one date, June 2, 2022, where money was withheld as a "salary advance collection." She acknowledges she owed rent money that was not initially deducted from her paycheck as it should have been. She states she fully paid arrears by June 15, 2022, thus as of June 2, 2022, she would have still owed money. She also acknowledges that she requested advanced sick leave and in a supplement to the ROI, she notes that she still has not repaid that full amount. Complainant also claims she was not paid for the six hours she worked on August 17, 2022, the day she was terminated. The record shows that for pay period 17-2022 (August 14 – August 27, 2022), Complainant was credited for working eight hours on August 15 and August 16, 2022. Both S1 and S2 state they were not aware of Complainant submitting a timesheet documenting hours worked for August 17, 2022. Upon review, we find that even if the Agency improperly deducted "a salary advance collection" on June 2, 2022, and failed to pay her for the work done on August 17, 2022, she has not presented evidence that the Agency's actions were a pretext for discrimination or retaliation.

Harassment

In order to establish a prima facie case of harassment, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that they are a member of a statutorily protected class; (2) that they were subjected to unwelcome conduct related to that protected class; (3) that the harassment complained of was based on that protected class;

(4) that the harassment had the purpose or effect of unreasonably interfering with their 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. See Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove a hostile work environment claim, a complainant must establish that they were subjected to conduct that was either so severe or so pervasive that a "reasonable person" in their position would have found the conduct to be hostile or abusive. A complainant must also prove that the conduct was taken because of a protected basis. Only if a complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, adverse actions such as reprimands, threats, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation at II.B. Retaliatory harassing conduct is actionable if it is sufficiently material to deter protected activity, even if it is insufficiently severe or pervasive to create a hostile work environment. Id. at II.B.3.

A finding of a hostile work environment on claims 1 - 4 is precluded by our determination that Complainant failed to establish that any of those actions taken by the Agency were motivated by discriminatory or retaliatory animus. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000).

Regarding the incidents alleged in claim 5, the Agency does not dispute that Complainant met the first element of her harassment claim based on her disability and protected EEO activity. The Agency does not dispute that Complainant was subjected to unwelcome conduct as alleged.

Regarding the third element, we find Complainant failed to provide persuasive evidence that the incidents alleged were based on her protected classes. Regarding the fourth element, we find the incidents neither individually nor collectively, are reasonably likely to deter protected activity or rise to the level of severity or pervasiveness to unreasonably interfere with her work performance and/or create an intimidating, hostile, or offensive work environment. Moreover, we note Complainant is unable to establish discriminatory or retaliatory motive in this case.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination or retaliation is AFFIRMED.

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
Carlton M. Hadden, Director
Office of Federal Operations

November 19, 2024

Date