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

[redacted]
Alba H.,[1]
Complainant,

v.

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

Appeal No. 2023004232

Hearing No. 480-2022-00311X

Agency No. 200P-0346-2021104662

DECISION

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 June 27, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final order finding no discrimination and retaliation.

ISSUES PRESENTED

(1) Whether the EEOC Administrative Judge's (AJ) grant of summary judgment in favor of the Agency was appropriate, or whether genuine disputes of material fact exist that require 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.

(2) Whether the Agency's final order properly found that Complainant was not subjected to discrimination and harassment based on sex, race, and/or reprisal for prior protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Authorization Quality Review Specialist (AQRS), GS-0996-12, at the Agency's Seattle Regional Office in Seattle, Washington.

On September 2, 2021, Complainant filed an EEO complaint alleging that the Agency subjected her to a hostile work environment based on race (Black), sex (female), and in reprisal for prior protected EEO activity when:

A. On March 1, 2021, Complainant's second-line Supervisor (Supervisor-2) ignored Complainant's suggestions concerning an Office of Administrative Review site visit and did not allow her to discuss policy issues, ignored her emails and shut her down;
B. On March 3, 2021, Coworker-1 was disrespectful and chastised Complainant at a meeting;
C. On or about March 4, 2021, Complainant's first-line supervisor (Supervisor-1) shut down her suggestions in a team meeting;
D. On March 10, 2021, Supervisor-2 took Coworker-1's side when Complainant reported him for being disrespectful;
E. On May 11, 2021, Supervisor-1 yelled at Complainant and spoke to her in a condescending tone;
F. On June 17, 2021, Supervisor-2 did not include Complainant's suggestions in the team meeting agenda; and
G. On July 1, 2021, Complainant was issued a written counseling letter.[2]

Claims (A) and (C) are discussed together as both relate to Complainant's suggestions related to site visits. Complainant stated that she met with Supervisor-2 on March 1, 2021, to discuss what Complainant could and could not say during a site visit to the Office of Administrative Review. Complainant stated that Supervisor-2 told her the site visit was to discuss Complainant's day-to-day work and not to discuss any issues Complainant had with management. Complainant stated that during another meeting on

[2] The record shows that the Agency procedurally dismissed three additional claims. Complainant does not challenge the procedural dismissal of these three claims on appeal, and as such, they are not addressed herein.

March 4, 2021, she suggested discussing topics, such as AQRSs being included on overtime notices and receiving recognition for work, when they conducted a site visit to the Office of Administrative Review, but that Supervisor-2 shut her down by saying "no, we should not mention that." Report of Investigation (ROI) at 98. Complainant reported that Supervisor-2 did not respond to two of her emails. Complainant stated that Supervisor-2 treated her White, Male counterparts better, in that he listened to their suggestions. Supervisor-2 denied engaging in the alleged behavior. Supervisor-2 generally denied shutting down Complainant or her recommendations, but he also stated that he would have told anyone not to discuss the topic of overtime because it had already been addressed on multiple occasions.

Regarding claim (B), Complainant stated that at a meeting amongst all the Authorization Quality Review Specialists on March 3, 2021, she made a comment to the effect of, "if we agree on something, lets agree. And if we don't agree, let's discuss." ROI at 106. Complainant stated that Coworker-1 responded, "you're being totally unprofessional and I don't appreciate you or what you said. I'm reporting [you] to [Supervisor-2]." ROI at 106. Complainant stated she considered Coworker-1's behavior to be chastising and rude. Coworker-1 did not participate in the investigation.

Regarding claim (D), Complainant stated that she reported Coworker-1's negative behavior discussed under claim (B) to Supervisor-2 on the day the behavior occurred. Complainant stated that Supervisor-2 met with her about the conduct on March 10, 2021. Complainant stated that Supervisor-2 reported having interviewed the employees who attended the March 3rd meeting and that there were mixed stories about what happened. Complainant stated that Supervisor-2 offered mediation for Complainant and Coworker-1. Complainant reported a belief that she received a written counseling letter related to the conduct during the March 3, 2021, meeting but that Coworker-1 did not receive such a written counseling letter.

Supervisor-2 stated that Supervisor-1 investigated the conduct of Complainant and Coworker-1 from the March 3rd meeting. Supervisor-2 stated that Supervisor-1 determined that both Complainant and Coworker-1 were at fault, in that they both were unprofessional and argumentative with each other. Supervisor-2 stated that he and Supervisor-1 took the results of the investigation to Complainant's third-line supervisor, and that they collectively determined that offering mediation, rather than any disciplinary action, was the proper course to address the conduct from the meeting.

Regarding claim (E), Complainant stated that she had a disagreement with Coworker-2 over what must take place regarding the processing of a claim. Complainant stated that she called Supervisor-1 on the phone to discuss the issue and that Supervisor-1 talked down to her in a condescending tone, yelled at her, and talked over her. Complainant stated that the condescending statement from Supervisor-1 was Supervisor-1 asking Complainant if Complainant had read the manual reference because the manual reference clearly addressed the topic. Supervisor-1 denied yelling at or being condescending to Complainant. Supervisor-1 stated that Complainant emailed her about the disagreement Complainant had with Coworker-2. Supervisor-1 stated that Supervisor-1 responded via email and told Complainant what needed to be done to process the claim while citing to the manual that explained the process. Supervisor-1 stated that Complainant disagreed with the process and that Supervisor-1 and Complainant then had a conversation about the issue. Supervisor-1 described Complainant as being condescending and combative during the phone call. Supervisor-2 stated that Supervisor-1 reported Complainant for being condescending and combative during the phone call. Supervisor-1 stated that Complainant still disagreed with Supervisor-1 following the conversation and refused to follow the procedure Supervisor-1 outlined.

Regarding claim (F), Complainant stated that she suggested that the team discuss what they should do with regard to a claim processing issue. Complainant stated Supervisor-2 told her that he was going to add the topic to a meeting agenda, but that it did not happen. Complainant stated that this was part of Supervisor-2 continuing to ignore her while her White, male colleagues were not ignored. Supervisor-2 stated that he did not add the topic to the next meeting because the agenda had already been set for that meeting and the meeting, being scheduled for the next day, was too close to support changing the agenda. Supervisor-2 reported adding it to the meeting next month.

Regarding claim (G), Complainant stated that Supervisor-2 explained that employees perceived Complainant as being harassing, confrontational and bullying in nature and that such conduct supported the counseling letter. Complainant stated Supervisor-2 told her that she could receive disciplinary action if Supervisor-2 received more complaints about her conduct. Complainant denied being harassing, confrontational or bullying in nature at meetings or within emails she sent to others. Complainant stated that Supervisor-2 was unable to identify where she engaged in the alleged behavior.

Supervisor-2 stated that Complainant's negative conduct from claim E, along with reports from multiple other coworkers that Complainant engaged in rude and disrespectful behavior, supported issuing Complainant a written counseling letter.

Regarding Complainant's prior EEO activity supporting the basis of reprisal, Complainant identified the filing of the instant complaint as well as Complainant having filed one EEO complaint per year in 2018, 2019, and 2020.

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. Complainant requested a hearing. On May 23, 2023, the AJ issued a Notice of Intent to Issue Summary Judgment. After both parties submitted responses, the AJ assigned to the case issued a decision without a hearing finding no discrimination on June 20, 2023. The Agency subsequently issued a final order fully implementing the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant recounts the content of the instant and previous complaints. The Agency requests affirmation of its final order.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. §1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of 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 fact is "material" if it has the potential to affect the outcome of the case. 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*).

ANALYSIS

To successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus.

To prevail in a disparate treatment claim such as this, complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he or she 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.

To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No.

0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

To establish a prima facie case of disparate treatment on the basis of reprisal, Complainant must show that: (1) Complainant engaged in a 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. Nicki D. v. Equal Emp. Opportunity Comm'n, EEOC Appeal No. 0720180023 (Sept. 18, 2021). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. Douglas F. v. Equal Emp. Opportunity Comm'n, EEOC Appeal No. 0120122183 (Dec. 4, 2015).

Once Complainant has established a prima facie case, 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). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant must prove that the employer's reasons are not only pretext but are pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 and 516 (1993). A factual issue of pretext cannot be established merely on personal speculation that there was discriminatory intent. Complainant v. U.S. Postal Service, EEOC Appeal No. 01A11110 (May 22, 2002); Springer v. Durflinger, 518 F.3d 479, 484 (7th Cir. 2008). Pretext means that the reason offered by management is factually baseless, is not the actual motivation for the action, or is insufficient to motivate the action. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000).

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work

environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (April 29, 2024).

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, her race, sex, 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.

We find Complainant failed to establish a prima facie case of disparate treatment on the basis of reprisal. The instant complaint was filed after, rather than prior to, the adverse event in claim (G). Furthermore, the record does not contain any evidence to establish a connection between Complainant's previous EEO complaints from 2018, 2019, and 2020, and the written counseling letter.

We find Complainant established a prima facie case of disparate treatment on the bases of sex and race. Specifically, Complainant, a Black female, was issued a written counseling letter while Coworker-1, a White male, did not receive a similar adverse action for also engaging in negative behavior.

We find that the Agency articulated a legitimate, nondiscriminatory reason for the personnel action at issue. Specifically, Supervisor-2 stated that Complainant's rude and disrespectful behavior towards Supervisor-1 during a phone call as well as Complainant's similar behavior towards multiple coworkers supported the issuance of the written counseling. Supervisor-2 also explained why Coworker-1 did not receive a counseling letter for negative behavior. Supervisor-2 noted that an investigation into Complainant and Coworker-1's behavior from the March 3 meeting determined that both Complainant and Coworker-1 were unprofessional and argumentative towards each other so neither party received any discipline related to that incident.

After a review of the record, we find Complainant failed to show that the Agency's articulated reason for the discrete adverse employment action was a mere pretext for discrimination or retaliation. Complainant's only argument meant to demonstrate pretext were alleged procedural defects with the written counseling such as Supervisor-2's failure to identify the specific behavior that supported the counseling, Supervisor-2's failure to provide her with the result of the investigation into her conduct, or that she had not received prior notice of her poor conduct. The foregoing alleged procedural defects do not contain any evidentiary value in demonstrating that a discriminatory or retaliatory motive existed. Furthermore, the fact that Coworker-1 did not receive a written counseling letter cannot demonstrate pretext because the record establishes only one instance where he engaged in negative conduct whereas Supervisor-2 noted that Complainant had engaged in multiple instances of disrespectful behavior towards colleagues and her supervisor.

Regarding the alleged harassment, we find that Complainant failed to establish a prima facie case of harassment. We find that Complainant has not linked in any way her race, sex, or prior protected activity with the alleged harassing incidents. We note that the discrete incident (the letter of counseling) cannot be considered part of this harassment claim because of our finding of no discrimination and retaliation for this claim. Complainant relies solely on her belief of discriminatory and retaliatory motive. For example, she makes the conclusory statement that White males are treated better than her, a Black female, but the record does not contain any evidence of such preferential treatment.[3] Complainant also states that the behavior represents a pattern of Supervisor-2's discriminatory or harassing treatment towards Complainant but this statement fails to address discriminatory or retaliatory motive.

Furthermore, we find that Complainant cannot establish a prima facie case of race, sex, or retaliation for the alleged harassment, because the conduct of which Complainant complains fails to be sufficiently severe or pervasive to show that a hostile work environment existed.

[3] Claim (B) and the dispute between Coworker-1 and Complainant cannot establish such preferential treatment. As explained above, Complainant and Coworker-1 were both found to have been argumentative with each other and received the same recourse, an offer of mediation, instead of any disciplinary action.

Anti-discrimination statutes are not general civility codes designed to protect against the "ordinary tribulations" of the workplace. See Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); see also Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between an alleged harasser and a complainant do not rise to the level of harassment). Instead, EEO laws address discriminatory conduct that alters the work environment. See Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

CONCLUSION

Accordingly, the Agency's final order finding no discrimination and 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, Director
Office of Federal Operations

November 21, 2024
Date