



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

[REDACTED]
Ayanna B.,¹
Complainant,

v.

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

Appeal No. 2023004278

Hearing No. 531-2021-00334X

Agency No. 2004-0460-2019105897

DECISION

On July 22, 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 July 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.

ISSUES PRESENTED

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not discriminated against and subjected to a hostile work environment regarding discipline, reassignment, leave, and consequent removal on the bases of her race (Black/Indian) and sex (female).

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 Nursing Assistant at the Agency's facility in Wilmington, Delaware. Complainant is a Black female of Indian descent. She had several first-line supervisors during the period at issue. Complainant's second-line supervisor (Supervisor 2) was the Associate Chief Nurse Ambulatory and Extended Care. Report of Investigation (ROI) at 189. Complainant's third-line supervisor (Supervisor 3) was the Associate Director Patient Care Services. ROI at 202.

Complainant's Community Living Center (CLC) Functional Statement provides: "Assignments are made by the Nurse Manager/designee, the Registered Nurse (RN), or Licensed Practical Nurse (LPN). The Nurse Assistant (NA) GS-5 performs all duties under the direction of the RN." ROI at 368.

The Nursing Assistant functional statement outlines the following requirements: (1) "Demonstrates appropriate communication and interpersonal skills with patients, families, interdisciplinary team and other personnel"; (2) "Interact in a courteous/respectful manner with patients, co-workers, families and visitors. Contribute positively to the morale of the unit. Demonstrate self-control in emergency and difficult situations with minimal assistance."; and (3) "The NA accepts direction and demonstrates effective interpersonal relationships flexibility and cooperation while performing duties." ROI at 369, 371, and 372.

Complainant's Emergency Department Functional Statement provides that "Assignments are made by the Nurse Manager/designee or the RN. Ancillary service supervisors may provide direction in completion of selected duties." ROI at 365.

National VA policy, VA Handbook 5021 provides the following regarding the "Status of Employee Pending Inquiry or Investigation": Detail, Leave or Paid Non-Duty Status. In those instances where it is determined that the employee's continued presence at his or her worksite during an inquiry or investigation might pose a threat to the employee or others, result in loss of or damage to government property, or otherwise jeopardize legitimate government interests, the following alternatives may be considered: Detailing the employee to other duties where he or she is no longer a threat to safety to VA's mission, or to government property; allowing the employee to take leave, (annual, sick, leave without pay), or carrying him or her in an absent without leave status if the employee has absented himself or herself from the work-site without requesting leave); and as a last resort, placing the employee

in a paid non-duty status pending completion of the inquiry or investigation. ROI at 757.

Complainant initiated EEO contact on September 25, 2019. On January 6, 2020, Complainant filed an EEO complaint (with subsequent rescission and revision on May 18, 2020; and amendment on June 1, 2020) alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (Black/Indian) and sex (female) when:

1. In January 2019, Complainant submitted a request for leave; however, the request was not approved in a timely manner;
2. On February 7, 2019, Supervisor 2 detailed Complainant to the CLC after being accused of patient abuse and neglect;
3. On April 25, 2019, Supervisor 2 detailed Complainant to Supply Chain Management Service because she was accused of being hostile;
4. On July 26, 2016, Supervisor 2 detailed Complainant to the Release of Information Office; she was accused of rushing a veteran and being rude to him;
5. On September 24, 2019, the Acting Assistant Director for Patient Care Services (Acting Assistant Director) threatened Complainant that she would be escorted out by VA Police after a verbal confrontation;
6. On September 24, 2019, Acting Assistant Director sent Complainant home for using foul language and not following directions;
7. On September 24, 2019, Supervisor 2 detailed Complainant to Facilities Management pending the outcome of the Whistleblower and EEO complaints;
8. On September 26, 2019, the Chief of Staff (Chief of Staff) detailed Complainant from the Emergency Department to Facilities Engineering Service, pending the outcome of a fact-finding investigation;
9. On January 14, 2020, Supervisor 3 presented Complainant with a proposed removal for inappropriate conduct; and

10. On May 28, 2020, the Medical Center Director (the Director) removed Complainant from federal employment for inappropriate conduct; effective May 30, 2020.

The Agency dismissed Claims 1-4 as independently actionable for failing to comply with the regulatory time limits. See ROI at 38-9. As did the AJ, this decision will only address timely filed allegations as claims of disparate treatment. As Complainant initiated contact with an EEO counselor regarding the instant complaint on September 25, 2019, this includes only Complainant's claims regarding being detailed to the facilities management department and the later amended issues regarding her proposed removal and removal. See ROI at 16 and 32-5.

The Agency conducted an investigation into the complaint. The investigation revealed that Complainant submitted her leave request on January 28, 2019 for December 12, 2019, but she did not realize that the request had not been acted upon until September 2019. The Associate Chief Nurse Perioperative Services and Acute Care (Associate Chief Nurse 1) who oversaw the Emergency Department (ED) where Complainant was working in September 2019, stated that Complainant and her Union Representative had come to her late in September 2019 to ask if she could approve the time Complainant requested earlier in the year. According to Associate Chief Nurse 1, she looked in VA Time and Attendance System (VATAS) and saw that Complainant's request was there, and she approved it. ROI at 183-84. Associate Chief Nurse 1 also asserted that a named individual (Nurse Manager 1) was Complainant's Nurse Manager from January 2018 to February 28, 2019, the date Complainant was detailed/re-assigned to Food and Nutrition Services. She stated that after February 28, 2019, she had never interacted with Complainant.

Nurse Manager 1 explained that the delayed leave request approval "was an unintentional oversight." ROI at 820. While she could not remember specifics about the request, Nurse Manager 1 noted that they receive a high volume of requests, as they had 50 direct reports, and oversights can happen because of that. Additionally, Complainant was detailed to another unit, which likely caused confusion about approving her leave. ROI at 276-77 and 820.

After receiving complaints from staff on four different occasions in January 2019, from various staff members about Complainant, management reached out to a Human Resources Officer (HR Officer) for guidance. ROI at 281. HR Officer explained that based on these allegations, further investigation or inquiry was necessary.

Because patient safety was at issue, Supervisor 3 detailed Complainant away from direct patient care within the CLC pursuant to VA Handbook 5021. ROI at 284.

On February 7, 2019, Supervisor 3 detailed Complainant away from direct patient care regarding reported incidents that involve Complainant at work that occurred on Tuesday, January 15, 2019, Thursday, January 17, 2019, and Tuesday, January 22, 2019, which may have put patients at risk of injury and/or abuse. ROI at 481. For example, on January 18, 2018, two named employees approached Nurse Manager 1 to express their concern that Complainant was having frequent emotional outbursts directed at both staff and patients; and that they felt she was creating a hostile work environment. They were very upset about Complainant's response to a veteran the day prior when his catheter fell off and leaked. ROI at 469. Nurse Manager 1 asked the employees to write down their concerns.

On April 24, 2019, Complainant spoke with her detail supervisor, the Chief of Nutrition and Food Service (Chief 1) about her detail and wanting to be moved. ROI at 270. Chief 1 documented this conversation in an email to Supervisor 2, to address Complainant's request. See Agency's motion at 37 for email. On April 25, 2019, Complainant was detailed out of the Food and Nutrition Department as requested. ROI at 116.

On July 26, 2016, Complainant was detailed by a second Nurse Manager (Nurse Manager 2) to the Release of Information Office, pending the outcome of an investigation into an allegation that on July 22, a veteran voiced a complaint with his social worker that on the evening of July 19, 2016, while he was getting ready for bed, Complainant as his caregiver, rushed him into getting changed. The same veteran complained that on July 23, 2016, while assisting him in getting off the toilet, Complainant was rough and hurt his leg while pulling up his pants. ROI at 113-14, 299, and 319.

Complainant's removal was proposed in May 2019, based on the results of the investigation for which she had been previously detailed. In June 2019, in his decision, the Director highlighted the seriousness of the misconduct, but decided to give Complainant one more chance, and only issue her a suspension. He ordered Complainant to take training "on appropriate veteran service, critical communication skills, and anger management." ROI at 454-57.

He also reassigned her out of the CLC. Finally, he noted "Disrespectful conduct toward Veterans, colleagues, and staff cannot be tolerated, and I want you to understand that any further instances of such behavior on your part may result in further discipline up to and including termination." ROI at 452. Complainant was assigned to the Emergency Department on July 28, 2019. ROI at 450.

On September 24, 2019, a named RN (RN 1), a Nurse on Duty (NOD), asked Complainant to go to the Intensive Care Unit (ICU) for a sitter assignment. Complainant then asked for a personal email for the assignment. RN 1 explained that NOD's do not send emails whenever staff are shifted around. RN 1 stated that Complainant persisted that RN 1 should send her email; RN 1 told Complainant that she was with Complainant's manager; and Complainant's manager also stated that Complainant did not need email for pulling to another unit. According to RN 1, Complainant stated that she "will talk to the union." ROI at 450 and 562. Complainant's manager eventually interjected, telling Complainant that the NOD was in charge and that an email was not necessary. She heard RN 1 repeat that Complainant needed to report to the ICU. RN 1 also twice stated to Complainant that Complainant needed to stop yelling at RN 1. ROI at 558.

After Complainant eventually went to the ICU, there was a second incident. Acting Assistant Director, and an ICU Nurse Manager (Charge Nurse), provided contemporaneous reports of contact detailing Complainant's refusal to report to the ICU when a sitter cancelled. According to Charge Nurse, Complainant stated that she was not going to take orders from Charge Nurse and that she would only take them from Acting Assistant Director. ROI at 569. Acting Assistant Director was on the phone but overheard what happened. He "hung up the phone and told [Complainant] that she was to follow Charge Nurse's directions as to going to another unit to cover their sitter." ROI at 569. Acting Assistant Director who witnessed the incident gave the orders to Complainant himself. He then heard Complainant state "this is crazy BS, that is why this place is like that, crazy people, they do not know what they are doing they just open their mouth" and she again stated "Bullshit." ROI at 564-65. Complainant kept talking and shouting at the nurse's station and talking to Acting Assistant Director in a loud voice. He had to find another sitter.

An ICU Nurse Manager (Nurse Manager 3) overheard the argument between Complainant and Acting Assistant Director and Complainant's refusal to take direction. After Acting Assistant Director instructed Complainant to go home, she repeatedly refused to leave the ICU after several requests and continued to be argumentative and aggressive in her demeanor and physical stance.

According to Nurse Manager 3, Complainant refused to lower her voice and would not take direction from Nurse Manager 3 or Acting Assistant Director. She was making accusatory statements that "we were all corrupt and this is what they did to her in other areas of the hospital." ROI at 267. She then began to raise her voice to Nurse Manager 3. Nurse Manager 3 also repeated Acting Assistant Director's instructions multiple times for Complainant to leave the ICU and facility property. She would not leave until she had Nurse Manager 3's name, and the names of the ICU nurses. Nurse Manager 3 stated that she provided Complainant with Nurse Manager 3's business card and advised her that if she would not leave, Nurse Manager 3 would have no choice but to call the VA Police. Id.

On September 26, 2019, Complainant was given a letter stating that she was being detailed from the Emergency Department and patient care duties to the Facilities and Engineering Service effective immediately, pending the completion of an administrative investigation into her conduct involving Nurse Manager 3 and Acting Assistant Director. ROI at 579. HR Officer explained that the "detail from the Emergency Department to Facilities Management initially had nothing to do with either a Whistleblower or EEO complaint" and they were detailing Complainant in accordance with VA Handbook 5021. ROI at 288.

Management enlisted the authority of the Chief of Staff's office because Supervisor 3 was unavailable due to an extended detail away from the facility, and because Acting Assistant Director, acting in her stead, was involved in the incident. ROI at 288. The detail was extended, however, when Complainant filed a Whistleblower complaint on February 5, 2020. ROI at 289.

On January 14, 2020, the Agency proposed Complainant's removal under 38 U.S.C. 714 for three instances of inappropriate conduct, two of which were based on the incidents occurring on September 24, 2019. ROI at 538-42. The third incident involved Complainant's issues with taking instructions from the Senior Health Technician and her disrespectful conduct (e.g. rolling eyes, talking over them, etc.) when they attempted to discuss these matters which were documented in reports of contact by two witnesses. ROI at 543 and 553-56. On May 28, 2020, the Agency terminated Complainant's employment. ROI at 589-93. In the removal letter, the Director noted that this is the second time Complainant had been before him in the past year with similar conduct. See ROI at 591 for the Director's explanations regarding Complainant's termination.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ).² Complainant timely requested a hearing. The parties were given an opportunity to engage in discovery. On December 16, 2022, the Agency filed a Motion for Summary Judgment (Agency's motion). Complainant submitted a series of emails to constitute her response to the Agency's motion between January 3 and 8, 2023.

The AJ examined the facts in the light most favorable to Complainant and determined that Complainant could not prove, by a preponderance of the evidence, that the Agency discriminated against her on the basis of her race or sex regarding the accepted claims. The AJ granted the Agency's motion; and on July 20, 2023, issued a decision without a hearing pursuant to 29 C.F.R. § 1614.109(g) in favor of the Agency.

The AJ agreed in all material respects with the Agency's articulation of the undisputed facts. The AJ incorporated by reference into their decision the Agency's statement of facts. According to the AJ, Complainant failed to establish a prima facie case of disparate treatment based on her race or sex regarding her detail to the facilities management department because she failed to identify any evidence of a causal connection between her protected classes and that incident. The AJ asserted that Complainant provided no evidence either during the EEO investigation or in response to the Agency's motion to indicate that anyone outside of her protected classes was also under investigation for alleged misconduct yet was not placed on a detail assignment per Agency policy. Further, observed the AJ, other than her own self-serving statements, Complainant provided no evidence to demonstrate a causal connection between her race or sex and the challenged action.

Even assuming, arguendo, that Complainant could establish a prima facie case of race or sex-based disparate treatment, the AJ observed that the Agency had articulated legitimate, non-discriminatory reasons for placing her on a detail assignment to the facilities management department.

² The AJ noted that the Agency moved to dismiss Claims 1 and 10 based on the fact that Complainant's removal from the Agency is a mixed issue within the jurisdiction of the Merit Systems Protection Board (MSPB). Given that this matter had been pending before the Commission for a lengthy period of time, however, the AJ cited to applicable Commission precedent, finding that it has become firmly enmeshed in the EEO process.

Accordingly, Complainant's claims of disparate treatment regarding her detail assignment to the facilities management department failed.

The AJ also determined that Complainant failed to establish a prima facie case of disparate treatment based on her race or sex regarding the alleged proposed removal and removal actions because she failed to identify any evidence of a causal connection between her protected classes and those actions. The AJ observed that Complainant provided no evidence to indicate that anyone outside of her protected classes also engaged in conduct similar to hers yet was not subjected to similar disciplinary action. Further, observed the AJ, other than her own vague, self-serving allegations of race and sex-related bias against her by Agency management, Complainant provided no evidence to demonstrate a causal connection between her race or sex and the disciplinary action at issue.

Assuming for the purposes of their decision that Complainant could state a prima facie case on all bases, the AJ determined that the Agency had articulated legitimate, non-discriminatory reasons for its proposed removal and removal actions. In an attempt to rebut the Agency's articulated reasons for the proposed removal, the AJ observed that Complainant offered only self-serving recharacterizations of the charged conduct, which demonstrated that she engaged in inappropriate and insubordinate behavior. Accordingly, Complainant's claims of disparate treatment regarding these issues failed.

Regarding Complainant's claims of hostile work environment harassment, the AJ found that she established the first element of her prima facie case regarding her claims of discrimination on the basis of race and sex. The AJ found that Complainant had not, however, established the second and third elements of her prima facie case: that she was subjected to unwelcome verbal or physical conduct involving the protected classes, and that the alleged harassment was based on the protected classes.

The AJ found that the requisite link between the acts of alleged harassment and a discriminatory motivation was missing in this case. Specifically, the AJ found that there was no evidence that the incidents in question "involved" or were "based on" Complainant's race or sex, as the second and third elements of a prima facie case require. According to the AJ, Complainant's allegations did not include any derogatory reference (or, for that matter, any reference at all) to her race or sex. The AJ asserted that Complainant provided nothing other than conclusory speculation regarding her managers' possible motivations to demonstrate any connection between the incidents that she alleged and her race or sex.

The AJ also observed that Complainant failed to produce even circumstantial evidence of a connection between the Agency's actions and her race or sex, such as evidence of similarly situated comparators outside of her protected classes who were treated more favorably than she was regarding the actual incidents at issue (as opposed to vague and generalized statements that others were treated more favorably). The AJ also cited to applicable Commission precedent, stating that not every unpleasant or undesirable act which occurs in the workplace constitutes an EEO violation. Accordingly, Complainant's claims of hostile work environment harassment also failed.

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

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates her allegations, restating her previously raised arguments that the AJ had addressed. Complainant also includes in her appeal statement a copy of her response to the EEO Investigator's interview questions that were previously reviewed and considered by the AJ.

In response, the Agency reiterates its stated reasons for the challenged management actions. According to the Agency, Complainant has failed to explain why the AJ's decision should be overturned, nor has she explained how any of the alleged incidents related to her protected bases. The Agency requests that the Commission affirm its final order adopting the AJ's decision.

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

In order 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. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

Ultimately, we find that Complainant failed to establish the existence of a factual dispute sufficient to give rise to a genuine issue of material fact. Given that Complainant had access to the ROI concerning her complaint, the opportunity to develop the record significantly during the EEO investigation, and before the AJ, we find that summary judgment was appropriate in this case.

Disparate treatment based on race and sex (Claims 7-10)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently

than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

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

Complainant is a Black female of Indian descent. However, Complainant failed to identify any other similarly situated employees outside of her protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on any of her protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management actions; and we find no persuasive proof of pretext.

Regarding Claims 7 and 8, the record reflects that Complainant was placed on the detail assignment to the facilities management department because she was under investigation for alleged misconduct in connection with her actions on September 23-24, 2019. ROI at 579. Complainant also failed to dispute that applicable Agency policy called for the challenged management action. ROI at 288. See also ROI at 757 for VA Handbook 5021 of the National VA policy which supports management's decision to place Complainant on the detail.

Regarding Claims 9 and 10, the record includes the decision letter imposing the removal penalty, reflecting that the Agency charged Complainant with a series of incidents of inappropriate conduct involving disrespectful and insubordinate conduct occurring on September 23-24, 2019. See ROI at 97-8 and 589-90.

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

In this case, Complainant believed that the alleged management actions were due to her protected bases because "everything was always directly targeted towards me. Therefore, leaving me to believe it was racially biased." ROI at 101. Complainant also alleged that Supervisor 2 "is known to go after Black professional women." See ROI at 98 and 109-10. However, the record is devoid of any evidence to demonstrate that management's actions, including the decision to issue the proposed removal and removal decision (Claims 9-10), were motivated by discriminatory animus based on Complainant's race or sex.

Importantly, as to Claims 7-8, we note Complainant's own admission in her affidavit that the Agency policy was in place and applicable. ROI at 100. Nowhere in her complaint did Complainant demonstrate that the policy was inconsistently applied to her based on any protected basis.

While Complainant argued that her detail assignment prior to her termination was too long and therefore eventually contradicted Agency policy, the AJ observed, and we agree, that Complainant failed to meet her burden to produce evidence of a causal link between her race or sex and that detail assignment.

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is also precluded by the determination above that the Agency's explanations demonstrate that Complainant's alleged incidents in Claims 7-8 and 9-10 did not involve discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Harassment based on race and sex (Claims 1-6)

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994)

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 and sex. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Complainant belongs to protected classes based on her race and sex. She was also subjected to unwanted conduct. However, Complainant did not show a connection between any protected basis and the alleged harassment.

Regarding Claim 1, Nurse Manager 1's explanation that the delayed leave request approval was likely caused by confusion is corroborated by Supervisor 2. See ROI at 812 for Supervisor 2's assertion that "the failure of the nurse manager to address this leave request was an oversight and was not intentional. There may have been confusion by the nurse manager as to who was to approve this leave, since [Complainant] was no longer in the CLC but in another area of the hospital." Complainant herself acknowledged that as soon as she let the Agency know about the pending leave request, it was approved "immediately." Agency's motion at 30.

As for the detail alleged in Claim 2, the record includes reports of contact from front line staff and National VA policy, VA Handbook 5021 that support management's stated explanations and actions. See ROI at 460, 464, 468-70, 472-73, 475, and 757.

Regarding Claim 3, Complainant herself acknowledged that she asked to be moved. Therefore, the move was voluntary. ROI at 272 and Agency's motion at 33-4. For Claims 5 and 6, Management took the alleged action because Complainant failed to follow instructions and became disruptive within a patient care environment. Id.

Based on the record, we find that Complainant has failed to describe any management action that was taken based on her protected bases or that is sufficient to prove objective harassment or hostility. See Abe K. v. Dep't of the Air Force, EEOC Appeal No. 0120181761 (Feb. 19, 2020) ("The Commission recognizes that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures, monitoring subordinates, scheduling the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and otherwise managing the workplace."); Aracely J. v. Dep't of Agric., EEOC Appeal No. 0120171749 (Feb. 15, 2019) (affirming that a supervisor's accusations of misconduct against the complainant, questioning about her leave, making negative comments about her, and belittling her in front of others, was insufficient to prove objective hostility); Bret B. v. Dep't of the Interior, EEOC Appeal No. 0120161504 (Mar. 5, 2018) (affirming that a supervisor's disparagement, criticisms, and disrespect, as well as his failure to acknowledge the complainant's accomplishments, was insufficient to prove objective hostility).

Beyond conclusory and speculative assertions, and even assuming that additional statements by the parties would have favored Complainant, Complainant has presented no other affidavits, declarations, or unsworn statements from other witnesses nor documents which contradict or undercut the explanations provided by her supervisors or which would cause us to doubt their veracity as witnesses.

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

CONCLUSION

Accordingly, we AFFIRM the Agency's final action adopting the AJ's decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden
Carlton M. Hadden, Director
Office of Federal Operations

December 31, 2024
Date