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

[redacted]
Sheena S.,[1]
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Office of the Comptroller of the Currency),
Agency.

Appeal Nos.	2023001783
	2023004346
Hearing Nos.	570-2021-00119X
	570-2021-01204X
Agency Nos.	OCC-20-0077F
	OCC-20-0574F[2]

DECISION

On February 2, 2023 and July 20, 2023, Complainant filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 20, 2023 and June 27, 2023, final orders concerning her equal employment

[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] The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. See 29 C.F.R. § 1614.606. Accordingly, the Commission exercises its discretion to consolidate the captioned cases.

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 orders.

ISSUES PRESENTED

1. Whether the Administrative Judge properly determined by summary judgment that Complainant failed to meet her burden in proving she was subjected to discrimination and harassment on the bases of race, sex, and reprisal.
2. Whether the Administrative Judge properly determined by summary judgment that Complainant failed to meet her burden in proving she was subjected to discrimination and harassment on the bases of race, disability, and reprisal.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as a Technical Assistant NB-IV in the Agency's Office of Communications at the Office of the Comptroller of the Currency (OCC). Complainant's supervisor and rating official at the time of events was the Manager for Editorial and Design Services (RMO). Complainant's second-level supervisor and rating official at the time of events was the Director of the Office of Communications.

Appeal 2023001783 (Complaint 1)

On February 18, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African American), sex (female), and reprisal for protected EEO activity (instant complaint) under Title VII of the Civil Rights Act of 1964 when:

A. In September 2019, Complainant's new supervisor, RMO, threatened to take away her telework status,
B. In October 2019, Complainant was informed she could no longer utilize a "maxi-flex" schedule.
C. In November 2019, Complainant was informed she would not be allowed to participate in a new telework policy allowing four (4) telework days each pay period.

D. On December 4, 2019, Complainant received a lower performance rating than the prior year.
E. On December 12, 2019, RMO reprimanded her for using her "use it or lose it" annual leave.
F. On February 6, 2020, Complainant was placed on a Performance Improvement Plan (PIP) and her telework privileges were revoked.

The evidence developed during the investigation reveals that the Agency's telework Policy and Procedure Manual (PPM) states that "telework does not change the terms or condition of employment. Employees must be accessible to the office by telephone, voicemail, and/or email at all times during the hours when working at home or other work sites." 2023001783 Report of Investigation (ROI 1) at 799. The Telework PPM further states that supervisors can consider several factors when approving or denying a telework request, including office coverage needs or an "employee's failure to adhere to the requirements of the program." ROI 1 at 799, 801.

RMO testified that he required employees to be available via Skype during work hours and to post signs on their cubicles or offices when they are out of the office and teleworking. RMO testified to having to repeatedly remind Complainant to post an out-of-office sign on her cubicle when she was teleworking.

Complainant's teleworking schedule was comparable to her coworkers' telework schedules. Complainant regularly submitted telework requests via the office's timekeeping system. RMO testified that he denied two of her situational telework requests for office overage reasons and because Complainant did not adequately support her reasons for the requests. RMO testified to denying other employees situation telework requests for similar reasons. RMO testified that Complainant telework privileges were not revoked until she was placed on a Notice of Opportunity to Improve Performance (NOIP) plan for poor performance, consistent with the Telework PPM.

Before Complainant filed an informal complaint, there was an administrative inquiry and fact-finding investigation that concluded that Complainant's claims of harassment and hostile work environment were unsubstantiated. Specifically, it found that RMO attempted to improve Complainant's attendance, she had "reacted defensively" and "has not complied with proper notification of absences from work, and that the "record indicates RMO has been clear in his guidance." ROI 1 at 703-704.

The Office's Alternative work Schedule Program (AWS PPM) states that full-time employees may work alternative work schedules subject to supervisory approval, including a maxi-flex schedule. Complainant worked a 5/4/9 maxi-flex schedule under which employees have a standard work schedule of nine hours per day for eight days per pay period, eight hours for one day each pay period, and one day off during the pay period. Employees who work a maxi-flex schedule are permitted to "glide" meaning that they are allowed to "vary their daily start times and corresponding end times from their standard work schedule," providing employees with the "flexibility to determine, within Agency parameter, when they work their daily scheduled hours." ROI 1 at 604. When Complainant's use of gliding privileges and makeup times began to interfere with office coverage, schedule predictability, and her availability for customer service requests, RMO raised those concerns with Complainant.

In August 2019, RMO requested a holiday leave plan from all his employees with use-or-lose leave, including Complainant. Instead of submitting a leave plan, Complainant submitted a leave request to take leave from December 12, 2019, to January 3, 2020, which was for more than three weeks of consecutive leave. RMO approved Complainant's leave request but also raised the concern with her that she was requesting a lot of leave during the holidays which stresses the entire business unit, and advised she should better manage her leave throughout the year. In the same aforementioned administrative inquiry, it was concluded that Complainant's claims regarding use of lose leave and maxi leave privileges was found to be unsubstantiated. Specifically, it was concluded that Complainant failed to comply with the processes and expectations when using make-up time and requesting leave.

Regarding performance evaluations, RMO became Complainant's supervisor three quarters into the 2019 performance year. RMO testified that he informed the employees, including Complainant, that he would "heavily" consider their former supervisor's performance feedback that was given throughout the quarter of the year before he took over. When assessing Complainant's 2019 performance, RMO testified that he balanced his review of the former supervisor's performance feedback of Complainant for part of the performance year, Complainant's self-assessment of her performance as summarized in her accomplishment report, and his own assessment of Complainant's performance.

RMO's own assessment of Complainant's performance was that she did not consistently meet a majority of the critical skill elements in her performance plan to receive a four-rating in any of the critical skill elements and that her accomplishment report lacked "real substance." Despite disagreeing with the former supervisor's assessment, RMO testified that he still took the former supervisor's prior performance feedback into account when issuing Complainant's 2019 rating when he issued a summary three-rating for Complainant. On December 16, 2019, Complainant challenged her 2019 performance evaluation through the Agency's grievance process. A Step-1 decision denying Complainant's grievance was issued. The grievance decision found that Complainant was given consistent and recurring performance feedback while RMO was her supervisor and concluded that there was no violation of Agency's policy.

Complainant appealed the grievance and Complainant's second-level supervisor issued a Step-2 grievance decision finding that RMO "render[ed] a fair and objective appraisal rating" and that Complainant's grievance was insufficient to warrant a change in her 2019 performance evaluation. Complainant included her performance appraisal in the claims involved in the administrative inquiry and fact finding which were found to be unsubstantiated.

RMO testified that his assessment was that Complainant's performance was unacceptable. He stated that he began informing Complainant of his concerns regarding her performance as early as July 2019 and reached out to Human Resources (HR) about his concerns in November 2019. RMO testified that given these concerns, he doubted that Complainant's prior supervisor accurately assessed Complainant's performance in prior performance years. RMO1 testified that he thought Complainant regularly sought assistance from coworkers on basic core tasks of her job which he corroborated with her coworkers. For these reasons, RMO stated that he issued Complainant a NOIP memorandum to Complainant addressing, in detail, her poor performance with respect to these critical skill elements.

Complainant's telework privileges were revoked when she was placed on the NOIP. Complainant took leave for two months immediately after she was issued the NOIP in February 2020. The Agency initiated remote operating procedures because of the COVID-19 pandemic in March 2020, and therefore, Complainant's telework privileges were reinstated when she returned to work from leave in April 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 (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's August 25, 2021, motion for a decision without a hearing and issued a decision without a hearing on December 21, 2022. 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.

Appeal 2023001783 followed.

Appeal 2023004246 (Complaint 2)

On October 29, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black), disability, and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. A Notice of Opportunity to Improve Performance (NOIP), issued to her in February 2020, was extended to July 24, 2020, then "reactivated" on August 19, 2020;
2. Complainant was denied the reasonable accommodation of telework, beginning on March 20, 2020, and continuing; and
3. On several dates, she was subjected to various acts of harassment, including but not limited to:
    a. RMO was consistently "overly critical" of her work; and
    b. RMO pressured her to work in the office during the pandemic and got angry with her for suggesting alternatives

The evidence developed during the investigation reveals that in early November 2019, RMO contacted HR regarding Complainant's upcoming 2019 performance evaluation and a possible issuance of a NOIP. In November 2019, Complainant filed an informal complaint of discrimination and harassment (complaint 1) in which she named RMO as the responsible management official. On December 5, 2019, during Complainant's 2019 performance review, RMO notified Complainant of his assessment that her performance was unacceptable (Level 1).

On February 5, 2020, RMO issued a formal NOIP to Complainant because he testified that he determined through his observation and assessment of her performance, that her level of performance was unacceptable (Level 1) in three critical elements: (1) Administrative Knowledge and Skills; (2) Technology Skills; and (3) Interpersonal Skills. The NOIP provided specific examples of why her performances were not acceptable level and where improvement was needed.

Beginning on February 7, 2020, and continuing through April 7, 2020, Complainant was on leave under the Family Medical Leave Act ("FMLA"). On or about March 26, 2020, Complainant contacted a HR Specialist to request a reasonable accommodation. Specifically, Complainant submitted a reasonable accommodation form requesting full-time telework from home. Complainant's request stated that she had major chronic depressive disorder, a bleeding ulcer, and post-traumatic stress disorder for which she sought daily telework. Complainant's documentation did not include her functional limitations, nor did it explain how the requested accommodation would enable her to perform the essential functions of her position. As a result, the HR Specialist determined that the request was deficient.

In email correspondence between March 26 and 31, 2020, the HR Specialist explained in detail what supporting medical documentation was needed to process Complainant's request and further explained why the medical documentation Complainant did submit was insufficient. Complainant never submitted the requested additional medical documentation and, therefore, her request was not processed any further.

Since April 2020, due to the COVID-19 pandemic, Complainant teleworked when she was not on leave. RMO testified that Since April 2020, Complainant had not physically visited the office to complete a print task assigned by RMO. Additionally, RMO testified that he only asked Complainant once to go physically go into the office (in October 2020) to manage packing up the work room (a task that cannot be done remotely) due to an office move originally planned for December 2020 but rescheduled to February 2021.

On or about April 8, 2020, Complainant returned to work from FMLA leave. Since Complainant was back to work, the NOIP resumed, though the end date was adjusted to July 6, 2020, to ensure that she had the full time period to improve her performance given that Complainant had been on leave for two months.

During the NOIP period, RMO provided Complainant with feedback on projects including during scheduled bi-weekly, one-on-one virtual meetings over Skye with RMO to discuss her performance and training progress. Complainant testified that some of RMO's feedback was overly critical. As an example, Complainant stated that RMO's feedback was overly critical when he informed her that, while her work product was correct, he would have done it another way. In additional to regular feedback, RMO assigned a coworker to help mentor Complainant on her Technical Skills element during the NOIP period.

In June 2020, Complainant sent RMO a Skype message stating that she did not feel comfortable going into the office. RMO responded by email explaining that she was not being asked to come into the office yet so her concern was premature, but that she should start to research alternatives to accomplish the task they were discussing. In a related email, RMO specifically stated that he "support[ed] alternative methods for getting the job done, preferably ones that don't require trips into headquarters" and that he was "open to any and all ideas." 2023004246 Report of Investigation (ROI 2) at 218.

On July 2, 2020, RMO extended the NOIP to July 24, 2020 due to unforeseen computer and software problems that had prevented Complainant from completing certain assignments. Following the NOIP period, on August 19, 2020, RMO provided Complainant feedback on her performance in a memorandum entitled "Performance Overview." In the memorandum, RMO specifically detailed Complainant's failures to demonstrate a basic proficiency in technologies as well as her need to properly perform assigned tasks and duties. RMO found that "despite considerable training taken and [Complainant's] four year's [sic] experience using InDesign" she had not shown enough improvement. ROI 2 at 268. RMO determined that Complainant did not use "this technology well, resulting in unsuccessful products or extra time to complete assignments. For these reasons, RMO determined that Complainant did not rise above a Level 1 performance in the Technology Skills critical element as required under her NOIP.

On or about August 25, 2020, Complainant submitted a second request for reasonable accommodation of telework, this time due to being at high risk for COVID-19 complications and she provided medical documentation to support the request. On that same day, management approved Complainant's request for fulltime telework due to being high risk for COVID-19 complications.

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). Complainant timely requested a hearing. On May 23, 2022, the Agency's filed a motion for a decision without a hearing and after Complainant failed to file an opposition, the AJ assigned to the case granted the motion and issued a decision without a hearing on May 18, 2023. 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.

Appeal 2023004246 followed.

CONTENTIONS ON APPEAL

In appealing the first complaint, Complainant contends that RMO did not give her written or verbal negative feedback until December 5, 2019. Complainant also shared that she spent months in a "mental ward" due to the emotional stress these actions caused. In opposition, the Agency argues that its Final Agency Decision (FAD) should be affirmed because its findings are fully substantiated by the record contained in the Report of Investigation. More specifically, the Agency contends that Complainant cannot establish a prima facie case of discrimination; the Agency articulated legitimate, nondiscriminatory reasons for its actions; and there is no evidence of pretext.

In appealing the second complaint, Complainant provided additional medical information and a copy of her 2014-2019 performance evaluations. The Agency did not file anything on appeal for the second complaint.

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

Summary Judgment

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. In both of Complainant's appeals, she failed to allege any genuine issues of material fact. In reviewing the records, we do not otherwise find any genuine issues of material fact. Therefore, we find that summary judgment was not precluded by an issue of material fact in either record.

Disparate Treatment (Claims D, E, F, and 1)

To prevail in a disparate treatment or reprisal claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, she must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13.

Prima Facie Case

To establish a prima facie case of discrimination on the bases of race or sex, Complainant must show that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) either that similarly situated individuals outside her protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

It is undisputed that Complainant is a member of protected classes based on her race and sex. It is also undisputed that Complainant alleged adverse actions in claims D, E, F, and 1. Regarding the third element of Complainant's prima facie case, Complainant alleged that other employees, some outside of her protected classes, were treated differently than her. To be considered "similarly situated," all relevant aspects of the comparative employee's work situation must be identical or nearly identical to that of Complainant, including, but not limited to reporting to the same supervisor, performing the same job function, and working the same schedule. See Cantu v. Dep't of Homeland Sec., EEOC Appeal No. 01A60528 (Jul. 14, 2006); Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001) reconsideration denied, EEOC Request No. 05A20020 (Jan. 28, 2002).

In claim D, Complainant alleged that three of the employees supervised by RMO received higher ratings than her on their performance appraisal. A review of the cited employees' job titles reveals that two of the employees were Visual Information Specialists and the other employee was a Printing Services Specialist. ROI 1 at 672. Since Complainant and the cited employees did not have the same job title or perform the same job functions, we do not find that the cited employees are sufficiently similar to Complainant to serve as comparators in this context. With no other evidence in the record to suggest an inference of discrimination in this claim, we find that Complainant has failed to establish a prima facie case of discrimination on the bases of race and sex in claim D.

In claims E, F, and 1, Complainant did not cite any comparator employees. A review of the two records do not reveal any other evidence that would give rise to an inference of discrimination for these claims.

As such, we find that Complainant has not established a prima facie case of discrimination on the bases of race or sex in claims E and F, or a prima facie case of discrimination on the basis of race in claim 1.

A complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A causal link can be inferred where there is temporal proximity between the protected activity and the adverse treatment. The proximity must be "very close" and a period of more than a few months may be too attenuated. See Clark County School District v. Breeden, 532 U.S. 268, 273-4 (2001); see also, Whitmere v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000) (nexus found when agency action followed complainant's participation in protected activity by approximately four (4) months).

Here, Complainant described her protected activity as filing the first complaint which she initiated on November 5, 2019. However, Complainant admitted that RMO was not aware that she initiated the pre-complaint process until December 16, 2019, or later. See ROI 1 at 3, 134 (RMO testified he became aware in "mid-December"). The incidents described in claims D-F and 1 occurred from December through August 2020. Since Complainant's protected activity became known in December 2019, we find that the incidents described in claims D, E, and F occurred close enough to RMO's knowledge of Complainant's protected activity to establish a nexus through temporal proximity. However, the actions that occurred in July and August 2020 in claim 1 are too far removed from December 2019 to establish a nexus through temporal proximity. Complainant does not offer any other evidence to establish a causal link between RMO's knowledge of her protected activity and the incidents described in claim 1. Thus, we find that Complainant has established a prima facie case of reprisal for claims D, E and F only.

Legitimate, Nondiscriminatory Reasons

After establishing a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency's explanation is a pretext masking discrimination.

Reeves v. Sanderson Plumbing Prods., 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 claim D, Complainant alleged that she received a lower performance rating than the prior year while other employees received higher ratings. Complainant stated in the prior year, she received a "4" rating, but with RMO as her supervisor, she received a "3" rating. In response, RMO stated that Complainant's previous supervisor admitted to rating employees, including Complainant, higher for the overall team's results from a customer survey. ROI 1 at 152. RMO testified that with his experiences with Complainant and the quality of her work, he did not believe it justified a "4." ROI 1 at 151. RMO stated that in a December 2019 meeting, he gave Complainant detailed information regarding his decision to rate her a "3" on her performance appraisal, including that she had poor communication, that her coworkers claimed they often ended up doing her work for her at times, she did not follow office procedures, and failed to show progress on work products. ROI 1 at 164-166. RMO stated that he conferred with HR about him changing Complainant's rating from the early close out completed by her previous supervisor to his assessment at the end of the year. Id. RMO stated that he also asked about the fact that he and Complainant had no formal interim feedback session. ROI 1 at 161. In response, HR stated that it supported him giving Complainant a "3" since he found that she did not perform at the "4" level for the last three months of the year. ROI 1 at 161-162. In the correspondence, HR stated that RMO could downgrade Complainant's rating without notifying her beforehand. ROI 1 at 162.

In claim E, Complainant alleged that RMO reprimanded her for using her "use it or lose it" annual leave. More specifically, Complainant stated that she did not take vacations until the end of the year and when she submitted a leave request in October, she was told not to expect to wait to the end of the year to use leave although she has always done this in the past. Complainant claims the restrictions imposed by RMO was contrary to the Agency's past practice regarding "use it or lose it" leave. In response, RMO stated that reprimand was not the correct term for what he did. ROI 1 at 174. He stated that he "set expectations for future use/lose requests and asked [Complainant] to manager her leave better in the future years so that she did not have as much use/lose leave in 2020 and beyond." Id.

RMO stated that Complainant was the only one of his subordinates that had that much use/lose and that he would have said the same thing to anybody with more than two weeks of use/lose leave. ROI 1 at 174.

RMO stated that he also requested a plan from all his employees with use or lose leave on how they wanted to use it before the end of the year. Id. However, instead of providing a plan, Complainant submitted leave requests in the system for nearly four straight weeks around the December holidays. Id. In his email to Complainant, RMO stated, "4 weeks off can be ok. Leave during the holiday is ok. But 4 weeks off during the holiday stresses the entire team." Id. Nonetheless, RMO stated that Complainant's leave request was approved. Id.

In claim F, Complainant alleged that she was placed on a performance improvement plan and her telework privileges were revoked in February 2020. In response, RMO confirmed that he placed Complainant on a NOIP. ROI 1 at 178. RMO stated that a HR Specialist joined the meeting where RMO notifying Complainant about the NOIP and was there to explain what and NOIP was and to answer any questions Complainant had about it. ROI 1 at 179. RMO stated that during the meeting, it was explained to that because of the NOIP her telework privileges were revoked, which was in line with Agency procedures. ROI 1 at 180. However, RMO testified that because of the Agency's max telework protocol due to COVID-19, her privileges were reinstated for the interim. Id. RMO stated that Complainant was notified that her performance needed improvement on October 10, October 17, and December 5, 2019. Id.

Similarly, in claim 1, Complainant alleged that a NOIP was issued to her in February 2020, was extended to July 24, 2020, then "reactivated" on August 19, 2020. In response, RMO testified that he did in fact issue a NOIP and that there are many documented examples of performance issues with Complainant, many which are included in the NOIP. ROI 2 at 125. RMO stated that the NOIP was extended because Complainant was approved for FMLA leave shortly after the issuance of the NOIP. ROI 2 at 126. RMO stated that upon her return from FMLA, he consulted with HR, and it was decided that the same NOIP was to be reissued with a new 90-day time period to allow her ample time to improve her performance. Id.

RMO stated that upon the end of the new NOIP period, Complainant experienced significant and unavoidable technical problems with her issued laptop that prevented her from completing assignments that were necessary for RMO to assess her technology skills under the NOIP. In consultation with HR and with the full agreement of Complainant, the NOIP was extended by 30 days, ending on July 24. ROI 2 at 126. RMO stated that the NOIP was not reactivated, so he does not know the reference Complainant makes to August 19, 2020. Id.

We find that the Agency has proffered legitimate, nondiscriminatory reasons for its actions in claims D, E, F, and 1.

Pretext

Since the Agency provided legitimate nondiscriminatory reasons for its actions, Complainant now bears the burden to prove pretext. Indicators of pretext include, but are not limited to, discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, comparative or statistical data revealing differences in treatment across various protected-group lines, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons, and that the Agency instead was motivated by a prohibited reason.

In an attempt to establish pretext in claim D and E, Complainant argued that the low performance rating and leave reprimand were reprisal because it came only a couple of weeks after she filed a grievance in which RMO was named. We agree with Complainant that temporary proximity was found between Complainant's protected activity and her low performance rating and alleged reprimand, but we note that temporal proximity is not the only factor needed to establish reprisal. Complainant also argued that her performance rating was inaccurate, but as detailed herein, we find that the record contains many examples of Complainant's performance issues and documented feedback from RMO.

In an attempt to establish pretext in claim F and claim 1, Complainant stated that she believed her race and sex was a factor in her NOIP because she was the only African American female under RMO's supervision. Bare assertions, such as Complainant's, are insufficient to prove pretext. See Erby v. U.S. Postal Serv., EEOC Appeal No. 0120064377 (Feb. 12, 2008). Complainant does not allege, and the record does not contain any other evidence to suggest that RMO's proffered reasons were not the real reasons for the management actions, or that they were related to any of her protected bases.

Accordingly, we find that Complainant failed to establish that she was subjected to discrimination on the bases of race, sex, and reprisal for claims D, E, and F, as well as discrimination on the bases of race and reprisal for claim 1.

Failure to Accommodate (Claim 2)

In order to establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002). The Agency does not dispute that Complainant is an individual with a disability and is qualified for her position. As such, an agency is required to make reasonable accommodations to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o), (p).

The term "reasonable accommodation" means, in pertinent part, modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position in question. See 29 C.F.R. §1630.2(o)(1)(ii). Reasonable accommodations may include but are not limited to job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. 29 C.F.R. §1630.2(o)(2)(ii).

In this claim, Complainant alleged that management denied her a reasonable accommodation of telework beginning on March 20, 2020, and continuing. Complainant testified that she made a request for a reasonable accommodation on March 26 and 29, 2020 for telework and working from home. She stated that she needed these accommodations because of the Agency's treatment and the COVID-19 pandemic, working in the office exacerbated her anxiety.

Complainant stated that the accommodation would have allowed her to complete her duties in peace without the threat of harassment.[3]

In a March 30, 2020 letter, Complainant's physician stated, "[Complainant] is currently under my care and she suffers from post-traumatic stress disorder, major depressive disorder and anxiety disorder. It will be beneficial for [Complainant] to work from home indefinitely." ROI 2 at 242. The Commission has held that an agency is not required to provide an accommodation merely because a doctor has stated that the requested accommodation would be beneficial for the employee. See Rose v. Potter, EEOC No. 01A45063, 2005 WL 330565 (Feb. 3, 2005).

Furthermore, the HR Specialist tasked with evaluating Complainant's reasonable accommodation request testified that Complainant provided insufficient medical documentation for her request two separate times on March 26 and 30, 2020. ROI 2 at 231. The HR Specialist stated that to the date of her affidavit (March 10, 2021), the Agency had not received any additional medical documentation in support of Complainant's telework request, so a decision had not been issued. Id. The HR Specialist stated that the status of Complainant's reasonable accommodation request has been on hold since March 30, 2020 due to the lack of medical documentation. Id. The HR Specialist testified that she was unable to determine Complainant's work limitations because of the insufficient documentation. Id.

A review of the medical documentation, Complainant's reasonable accommodation request, and the testimonies of Complainant and the HR Specialist make it clear that Complainant failed to provide sufficient medical documentation to support her request, even after she was notified of the deficiencies with the documentation.

[3] The Commission has held that a complainant's request seeking a stress-free environment as an accommodation is not reasonable and places an undue burden on the agency. See Estelle H. v. Dep't of the Navy, EEOC Appeal No. 0120152839 (Nov. 7, 2017), request for recon. denied, EEOC Request No. 0520180149 (Apr. 3, 2018); Alden v. Dep't of Veterans Affairs, EEOC Appeal No. 0120080620 (June 16, 2011) (finding that complainant's request seeking a stress-free environment was unreasonable).

As a result, we find that Complainant's failure to provide the necessary information for her reasonable accommodation request caused the pause in the interactive process, not any Agency action. Therefore, we find that the Agency did not fail to provide Complainant with a reasonable accommodation.[4]

Harassment

As discussed above, Complainant has not provided sufficient arguments or evidence that claims D, E, F, 1, or 2 were motivated by discrimination or reprisal. As such, we do not find those claims to be supportive of Complainant's harassment claim. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Complainant, therefore, remains with claims A, B, C, and 3 to support her harassment claim on the bases of race, sex (claims A-C), disability (claim 3), and reprisal.

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

[4] The HR Specialist stated that outside of Complainant's reasonable accommodation request, the Complainant requested to telework fulltime on August 25, 2020, due to being at high risk for COVID-19 implications and she provided sufficient medical documentation to support it. ROI 2 at 231. The HR Specialist stated that management approved Complainant's request for full time telework due to her COVID-19 classification when the proper medical documentation was provided. Id.

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

It is undisputed that Complainant was a member of a protected class for her race, sex, disability, and protected activity. However, in this case, we find that the complained of conduct did not occur as Complainant described, or it was related to the management of Complainant's assignments, performance, and conduct.

In claim A, Complainant alleged RMO threatened to take away her telework status. More specifically, Complainant stated that RMO threatened to take away her ability to telework due to her sign on her cubicle not being properly displayed and RMO's inability to reach her on Skype. In response, RMO explained that he required a sign posted outside of everybody's cubicle when teleworking or on leave. TOI 1 at 135. RMO stated that he had to remind Complainant of this requirement several times. Id. In one instance, Complainant stated that she gave her sign to a coworker and in another instance, RMO found the sign filled out and left by her computer instead of properly posted near the entrance of her cubicle. Id. When discussing the incident where Complainant did not properly post the sign on her door and left it at her computer, RMO emailed her stating, "next time you are teleworking and the sign is not posted, your telework privileges may be revoked." ROI 1 at 136. In the email, RMO also stated, "[he] only tell[s] people things one time. After that, mistake or not, it is an attention to detail issue which comes with consequences." ROI 1 at 135. RMO stated that he reminded other employees about the requirement, but Complainant was the only one he had to remind more than once. ROI 1 at 135.

Regarding the allegation of removing Complainant's telework because of Skype issues, RMO stated that never happened. ROI 1 at 137. He stated that he had several conversations about Skype with his team because they did not use Skype before he became their supervisor.

RMO stated that he had two Skype incidents with Complainant where Complainant alleged that he was tracking her whereabouts on Skype, which he stated was untrue. ROI 1 at 137. RMO testified that he never stated that Complainant could not telework if she did not use Skype. Id.

In claim B, Complainant alleged that she was informed that she could no longer utilize a "maxi-flex" schedule. In response, RMO testified that Complainant was not removed from having a maxi-flex schedule. Id. RMO explained that the unwritten but implied expectation of using maxi-flex was that these kinds of flexibilities should be the exception, not the rule. ROI 1 at 143. RMO stated that he discussed this expectation with his Director and HR, and they concurred and stated that if an employee uses these flexibilities routinely, then their core hours may need to be adjusted. Id.

RMO stated that he spoke with Complainant one time about possibly changing the duty hours of her schedule because she was consistently late, but Complainant stated that she could not because of a childcare situation. ROI 1 at 144. RMO stated that after that conversation, he never brought it up again, did not force her to change it, and it was never changed. Id. RMO stated on occasion, he denied a couple of her makeup time requests with HR's concurrence dur to workload, but again never denied her the ability to use maxi-flex privileges itself. ROI 1 at 144. A review of Complainant's schedule as of April 29, 2020, reveals that she was still on a maxi-flex schedule. ROI 1 at 146.

In claim C, Complainant alleged that she was not allowed to participate in a new telework policy allowing four telework days each pay period. In response, RMO stated that Complainant was allowed to participate in the new telework policy. ROI 1 at 148. A review of the employee schedules reveals that Complainant was scheduled to telework four times as allowed by the new telework policy on Thursday and Friday during the first week of the pay period, and on Monday and Thursday during the second week of the pay period. ROI 1 at 149. RMO stated that all employees under his supervision, including Complainant, participated in telework to whatever extent they requested. ROI 1 at 150. RMO stated that if Complainant did not get the schedule she wanted, she never brought it to his attention. Id.

Given the testimony and evidence of Complainant's schedule, we find that the incident described in claims A, B, and C did not occur as Complainant alleged. Further, to the extent that RMO spoke to Complainant about the possibility of her telework status being revoked, we find that it was related to her assignments, performance, and conduct.

The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). In these claims, there is no evidence that the work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class.

In claim 3, Complainant alleged that she was subjected to various acts of harassment. In one incident, Complainant alleged that RMO was consistently overly critical of her work. More specifically, Complainant alleged that RMO scolded her when he was copied in an email to a coworker regarding an assignment Complainant was asked to complete. In response, RMO stated that he did not "scold" her, but he reminded her of his original directions. ROI 2 at 136. RMO explained that Complainant was supposed to turn the assignment into him after coordinating with the coworker for their input on the assignment, but instead Complainant turned in the assignment without any input from the coworker, which made it not finalized. Id. RMO stated that this spoke to Complainant's administrative skills and served as one of many examples where she failed to follow expressed directions. Id. Regarding Complainant's overall allegation of him being overly critical, RMO stated that given her demonstrated lower performance, his routine and frequent feedback, often on the same topic, was necessary. ROI 2 at 139.

In another incident, Complainant alleged that RMO pressured her to work in the office during the pandemic and got angry with her for suggesting alternatives. RMO denied this allegation. He stated that during an exchange regarding a photo printing assignment he showed his support to do everything possible to prevent going into the office, but also stated that if something absolutely required a trip into the office within her job duties, that Complainant could be compelled to do so. ROI 2 at 140. RMO stated that because some of Complainant's job duties could not be done remotely, he wanted to preempt any issue in the future by providing her the Agency policy and instructing her that if she had a legitimate issue preventing her from going to the office, she needed to work with HR on an accommodation.

Id. Nonetheless, RMO testified that Complainant was not required to work in the office during the pandemic, and that the in-office assignments she had were currently on pause. ROI 2 at 142.

Complainant also alleged that RMO moved her to a cubicle outside of his office door and that he looks directly at her all day and does not speak to her. RMO testified that in an effort to move his entire team closer to his office, Complainant was placed across from his office. ROI 2 at 143-144. Complainant's supervisor, the Director of Communications testified that he also asked RMO to move his employees, including Complainant closer to his office. ROI 2 at 246. RMO confirmed that he did not typically speak to Complainant, except through email and cited an incident from October 2019 that made him uncomfortable and tense when he had to give her instructions or feedback which is why he preferred speaking with Complainant through email. ROI 2 at 144.

We also find the incidents in claim C either did not occur as Complainant alleged or were common workplace occurrences. Further, as it relates to the general interactions between Complainant and RMO, we note that anti-discrimination statutes are not general civility codes, and the Commission has found that personality conflicts; general workplace disputes; and trivial and petty annoyances do not rise to the level of harassment. See Jeffrey R. v. Dep't of Justice, EEOC Appeal No. 2022003500 (Aug. 9, 2023); Rita F. v. U.S. Postal Serv., EEOC Appeal No. 2021002876 (Aug. 16, 2022); Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012). In reviewing all Complainant's allegations of harassment, we find no evidence of discriminatory or retaliatory motive. Accordingly, we find that Complainant did not establish that the Agency subjected her to harassment based on race, sex, disability, or in reprisal for protected EEO activity in either complaint.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final orders adopting the AJ's summary judgment decisions in both complaints.

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 18, 2024
Date