



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Hilda A.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Appeal No. 2023004382

Agency No. HS-CBP-00729-2020

**DECISION**

On July 28, 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 June 27, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

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<sup>1</sup> 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.

### ISSUE PRESENTED

The issue is whether the Agency properly issued a final decision (FAD) concluding that Complainant was not discriminated against or subjected to harassment regarding disability accommodation, assignment, duty hours, and discipline based on her sex (female), age (56), disability (physical), and in reprisal for protected EEO activity (requesting reasonable accommodation).

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Customs and Border Protection (CBP) Officer, GS-1895-12, at the Agency's El Paso Port of Entry (POE), El Paso Field Office, Office of Field Operations in El Paso, Texas. Report of Investigation (ROI) at 129. Complainant's first-line supervisor (Supervisor) was a Supervisory Customs and Border Protection Officer. Complainant, age 56, had engaged in prior EEO activity when she filed a claim through the Office of Workers' Compensation Programs (OWCP), and when she requested reasonable accommodation. Complainant was injured on the job. She had cervical myelopathy, cervical fusion with limited neck movement. On April 1, 2019, Complainant was placed on light duty status. She had surgery on July 3, 2019, and was out of work for approximately two months, and then she returned to full duty status. ROI at 66.

On August 26, 2019, Complainant submitted a written request for consideration of a "temporary permanent schedule" of working the 10:00 p.m.-6:00 a.m. schedule, rather than the 4:00 p.m.-12:00 a.m. schedule, when she was returned to temporary light duty on September 8, 2019. Complainant's stated reasons for making the request were that she had neck surgery in July 2019; had a stiff neck with limited motion; would be on pain medication as needed; had difficulty driving; and she would be attending therapy twice a week, for 24 sessions. ROI at 123.

The National Collective Bargaining Agreement between CBP and the National Treasury Employees Union (NTEU) provides, in Section 11.A., that an employee who returns to work after an injury on or off duty will be assigned light duty assignments on the shifts, they occupied immediately prior to assuming light duty. An assignment to light duty appropriate to the specific medical condition will normally be granted for a temporary period, if such work is available and the assignment will not unduly disrupt work operations. Supplemental ROI (Supp. ROI) at 152 and 321. The El Paso Field OWCP Coordinator (OWCP Coordinator) provided the light duty letters for Complainant. Supp. ROI at 28.

OWCP Coordinator stated that Complainant was placed on light duty "per her attending physician" and that the light duty assignments and tasks are based on the medical documentation. The light duty letter specified that Complainant may stand, sit, and walk as directed by her attending physician, but "no reaching above shoulder, bending/stooping, operating a motor vehicle at work, pushing, pulling, squatting, kneeling, and no lifting." Supp. ROI at 43.

The ports provide the scheduling for light duty employees. The process/procedures for placing an employee on light duty status are that the El Paso Field Office sends the Port of El Paso a light duty letter that is presented to the employee, which states the specific restrictions that were provided by the employee's medical provider. Supp. ROI at 99-101. Complainant signed the letter accepting the light duty position. Supp. ROI at 25.

According to a Watch Commander (Watch Commander 1), an employee who is approved for light duty is assigned to cashier duties unless there are restrictions that would keep them from performing those duties. Supp. ROI at 63. Watch Commander 1 also stated that he was not aware of any modifications, adjustments, or changes to Complainant's schedule while she was on light duty status. He identified the Port Director (Port Director) as the official who would have made decisions regarding changes to the schedule. Supp. ROI at 62. A Standard Form 50 (SF-50) reflects that Port Director is deceased. The SF-50 indicates that she died on January 28, 2021. Supp. ROI at 150.

Complainant initiated EEO contact on January 8, 2020. On April 13, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of sex (female), disability (physical), age (56), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 the Age Discrimination in Employment Act of 1967 and Section 501 of the Rehabilitation Act of 1973 when:

1. From September 8, 2019, to January of 2020, Supervisor assigned Complainant regular cashier duties, in addition to issuing I94s, despite the fact Complainant was on light duty;
2. In September of 2019, Supervisor told Complainant's coworker, a CBP Officer (Coworker 1) that she did not want to work with Complainant in Passport Control Secondary because Complainant was on light duty and did not have a weapon;

3. On September 13, 2019, Supervisor told Complainant she did not want to work with her and that Complainant was a liability due to her health issues;
4. From October 2019 to February 2020, on approximately ten to fifteen occasions, Supervisor interrupted Complainant talking with other employees (three CBP Officers [Coworkers 2, 3, and 4]) and asked them to stop talking;
5. On December 24, 2019, Supervisor assigned Complainant passport control duties, despite the fact Complainant was on light duty. When Complainant explained she could help out but could not perform regular duties for a full eight hours, Supervisor replied "it is what it is.";
6. On December 24, 2019, in front of the public, Supervisor yelled at Complainant to start issuing permits, stating Complainant did not want to do her job. Then, Supervisor turned to the members of the public and advised them they could file a complaint against Complainant for not attending to them;
7. On January 1 and January 3, 2020, Supervisor yelled at Complainant, accused her of doing a pat down and processing a case without a weapon, while Complainant was on light duty, and accused her of abusing her light duty schedule;
8. On January 2, 2020, Supervisor accused Complainant of making false statements on a memorandum;
9. On January 3, 2020, Supervisor commented that Complainant did not want to work;
10. On January 3, 2020, after Supervisor called a Chief CBP Officer (Chief CBP Officer 1) regarding Complainant's schedule, Complainant's light duty shift was changed from the 10:00 p.m.-6:00 a.m. shift, to the midnight-8 a.m. shift for two days before Complainant returned to full duty on her regular shift;
11. On January 6, 2020, Supervisor yelled at Complainant over the phone, accusing her of working the wrong schedule and of not wanting to perform her duties;

12. On January 15 and 16, 2020, Supervisor raised her tone, claimed Complainant did not want to do her job, threatened to give Complainant a verbal warning and reprimand for not taking over another officer's duties, and threatened to write Complainant up for insubordination and disobeying a direct order;
13. On January 16, 2020, when Complainant asked a second Chief CBP Officer (Chief CBP Officer 2) to initial an assignment for her, he said "I'm not signing sh\*t for you." Later, after Complainant refused to perform cashier duties, Chief CBP Officer 2 said he did not need a nonproductive worthless person there, and told her to go to the back of the office;
14. On January 31, 2020, Supervisor approached Complainant in a threatening voice and demanded she perform cashier duties when three other officers were available. After Supervisor called Chief CBP Officer 2, he reassigned Complainant to detention log officer duties, raised his voice, and demanded Complainant leave the work area and work from a different location. When Complainant did not, Chief CBP Officer 2 told Complainant to go home on administrative leave. (Complainant did not go home.);
15. On February 6, 2020, Complainant received a Weingarten notice, was informed she was accused by Supervisor and Chief CBP Officer 2 of not wanting to work, disobedience, neglecting duties and disobeying an order, and was asked to provide a written statement to a third Chief CBP Officer (Chief CBP Officer 3); and
16. Complainant was denied reasonable accommodation and subjected to retaliatory harassment after she made a request for accommodation.<sup>2</sup>

On June 11, 2021, the Agency issued a FAD finding no discrimination. On February 6, 2023, the Commission vacated the Agency's FAD and remanded the matter for a supplemental investigation, with an order that it must include affidavits from specified relevant individuals and evidence regarding the interactive process for Complainant's request for reasonable accommodation and evidence, if any, of a reasonable accommodation imposing undue hardship on the Agency. The Commission also ordered the Agency to issue its final decision within 30 calendar days of Complainant's rebuttal opportunity.

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<sup>2</sup> The Agency noted that the reasonable accommodation and retaliatory claims were added as Claim No. 16 under Claims at Issue in its FAD following the Commission's ordered supplemental investigation.

The Agency conducted an investigation, and the Commission's ordered supplemental investigation, into the complaint. The investigations revealed that Complainant was on light duty from April 1, 2019, until her surgery on July 3, 2019. According to Complainant, she was limited to light work, and could not lift, bend, twist, raise her arms, or stand longer than 8 hours. She stated that she returned to full duty on October 13, 2019, but returned to light duty again in December 2019, until January 9, 2020. Complainant asserted that Supervisor assigned her to do regular cashier duty but argued that cashier duties conflicted with her restrictions because it required her to move and sit in an elevated chair. Complainant argued that her sex was a factor because Supervisor did not assign younger males on light duty to the same tasks. Complainant also stated that her disability was a factor but did not explain how. ROI at 67-8.

Complainant alleged that Supervisor made a comment that she did not want Complainant in Passport Controls Services (PCS) as Complainant was starting her shift. Complainant believed that the comment was related to her disability because Supervisor knew Complainant could not make quick movements. According to Complainant, Coworker 1 witnessed the comment being made. Complainant alleged that her sex was a factor because Supervisor did not make similar comments about males. She also argued that Supervisor was kinder and more relaxed toward younger officers. ROI at 68-9. Coworker 1 denied any recollection of the alleged comment. ROI at 302.

Complainant alleged that Supervisor commented that Complainant was a liability because she was in interview room 1. Complainant stated that she was subsequently reassigned to an empty office, and then a conference room. Complainant also alleged that Supervisor commented that she did not want Complainant sitting in the office "because people come into the office through there." According to Complainant, she questioned Supervisor regarding the move; however, Supervisor did not provide to Complainant any written justification for the reassignment. Complainant stated that her disability was a factor because Supervisor wanted officers capable of attending to the public and did not want her. Complainant also stated that Supervisor did not treat younger male officers in the same manner. ROI at 69-70.

Complainant stated that Supervisor interrupted approximately four conversations Complainant was having with other officers and directed them to stop talking. She did not identify any specific dates; however, she alleged that Supervisor directed Coworkers 2, 3, and 4 to stop talking to her or to keep their voices down. Complainant felt that the comments were demeaning, asserting that she felt threatened. ROI at 70.

According to Complainant, Supervisor approached younger officer and males in a different manner. She also stated that her disability was a factor because Supervisor only wanted officers capable of attending to the public. ROI at 71.

Coworker 4 provided supporting statements, confirming that Supervisor interrupted him and Complainant at least five times, but stated he had no reason to believe the incidents were based on discriminatory bias. ROI at 309-10. Coworker 3 also provided statements, recalling that Supervisor asked her to end her personal conversation with Complainant and return to her assigned duties. She stated that she felt Supervisor's tone was rude and lacked professionalism; however, she stated that Supervisor did not swear or use any degrading terms. She also stated her belief that the interruptions were because they were conducting personal business during work hours, adding that she had no information to support Complainant's allegations of discrimination. ROI at 316-17.

Complainant asserted that she was originally assigned to assist with cashier duties; however, she claimed Supervisor reassigned her to issue passport forms for the duration of her shift after an employee showed up on the midnight shift. She stated that the assignment conflicted with her light duty, as it required her to move, turn, and raise her arms to reach for the camera. Complainant stated that she reported her concerns to Supervisor, alleging that in response, Supervisor stated "it is what it is." ROI at 72. Complainant stated that Supervisor considered sex and age as factors because she did not treat younger officers or males similarly. ROI at 72-3.

Complainant alleged that Supervisor yelled at her while she was performing Secondary Processing Management (SPM) duties in an interview room. She did not recall any specific comments, but alleged that Supervisor advised members of the traveling public of Complainant's name and told them they could file a complaint against her. ROI at 73. Complainant argued that Supervisor considered sex and age as factors because she did not treat younger officers or males similarly. ROI at 74-5.

Complainant alleged that Supervisor commented that she did not want Complainant doing pat downs on January 1, 2020. She stated that she reported her concerns of harassment to a Chief CBP Officer (Chief CBP Officer 1) on January 3, 2020; and she submitted a memorandum. According to Complainant, after she finished her shift and went home, a second Chief CBP Officer (Chief CBP Officer 2) called her at home and reported that Supervisor had informed Watch Commander 1 that Complainant was on light duty and making up her own schedule. She stated that Chief CBP Officer 2 also accused

her of performing pat downs and working as a full duty officer. She asserted that Chief CBP Officer 2 refused to listen to her, and maintained she was required to report to work that night in order to avoid any negative consequences. ROI at 75. See ROI at 107 for the memorandum submitted by Complainant on January 3, 2020. Complainant argued that her sex and age were factors because Supervisor favored young and male employees. ROI at 75-6.

Complainant stated that her coworker (Coworker 5) informed her that Coworker 5 overheard Supervisor and Chief CBP Officer 1 discussing the memorandum Complainant submitted regarding Supervisor. According to Complainant, Coworker 5 reported that both Supervisor and Chief CBP Officer 1 made comments and were laughing at the memorandum, but she did not specify what comments were made. ROI at 76. Complainant argued that Supervisor approached male and younger employees differently. Id.

Complainant alleged that Supervisor instructed her that she did not want Complainant talking to the officers performing pedestrian duties, and that she did not want Complainant in "vehicle primary." Complainant stated that she reported her concerns to a third Chief CBP Officer (Chief CBP Officer 3) but did not address whether any action was taken. Complainant again argued that Supervisor approached male and younger employees differently. ROI at 77.

Complainant alleged that she set up a schedule with the Supervisory Mission Support Specialist (SMS Specialist) for her light duty; however, Supervisor accused her of making up her own schedule. She stated that Watch Commander 1 also reported to Chief CBP Officer 1 that Complainant's shift was from 0000 to 0800; and that she was required to show up for the shifts in violation of her light duty agreement. Complainant also alleged that she was subsequently forced to return to her regular shift in full duty. ROI at 78. Complainant argued that management accommodated younger officers with light duty schedules, asserting that the approach toward men was different. She also stated that she was discriminated against because Supervisor wanted a long-term cashier, and her disability impacted the assignment. ROI at 79.

Complainant alleged that Supervisor wanted her to leave her officer duties and attend to the cash register. She asserted that Supervisor assigned her to cashier duties, along with I94 permits and SPM upon her return to full duty on January 9, 2020. She did not identify how Supervisor accused her of working the wrong schedule or not wanting to perform her duties, only alleging that she was treated less favorably than other employees. ROI at 79-80.



Complainant alleged that Supervisor contacted Chief CBP Officer 2 and accused Complainant of not wanting to work and disobeying a direct order. She asserted that she was performing her assigned duty as SPM officer working on a computer, and that she was also assigned to I94 permits and cashier duties. She did not state whether she refused to perform any duties, but maintained she was treated differently because of her disability. ROI at 80-1.

Complainant stated that she asked Chief CBP Officer 1 to initial the daily duty assignment board because she wanted to present it to her union representative as evidence that she was the only officer assigned to three tasks. According to Complainant, Chief CBP Officer 1 refused to initial the assignment sheet and told a second Watch Commander (Watch Commander 2) that Complainant did not want to work. She stated that Supervisor witnessed the interaction. ROI at 82. Complainant argued that she was harassed by the incident because Chief CBP Officer 1 did not speak to males or younger employees in a similar tone. She also argued that her disability was a factor because Chief CBP Officer 1 was responsible for her original injury. Complainant however acknowledged that she did not perform cashier duties. ROI at 83.

Complainant alleged that she overheard a conversation between Supervisor and Chief CBP Officer 1 on January 31, 2020, accusing her of not wanting to work. According to Complainant, Chief CBP Officer 1 then approached her and began asking her questions; in response, she requested a union representative and walked away to grab the phone. Complainant stated that Chief CBP Officer 1 then yelled at her to not walk away from him and told her she was useless and worthless because she refused to perform cashier and SPM duties. According to Complainant, Chief CBP Officer 1 then verbally changed her duty to detention logs and reassigned her duty location. She asserted that she refused to leave the area because the back office had elevated chairs which interfered with her condition; and that she completed the detention log duties. Complainant stated that Chief CBP Officer 1 then instructed her to call Watch Commander 2 and express that she was going home on administrative leave because she did not want to work; however, she stated she completed her shift. ROI at 84-6. Complainant argued that she refused the assigned duties because it was a CBP violation to issue I94 permits and collect the money. She also asserted that management never assigned any other officers the same task, and believed it was harassment due to her protected bases. ROI at 84-5.

Complainant stated that Chief CBP Officer 3 issued her a Weingarten notice and instructed her to provide a written statement to a fourth Chief CBP Officer (Chief CBP Officer 4). She stated that she provided the statement as instructed. She clarified that she did not believe the Weingarten notice was unwarranted, and stated she was willing to provide her version of events; however, she maintained her sex, age, and disability were still factors, reiterating that she did not perceive the notice to be unwarranted. ROI at 86-7. See ROI at 90 for a copy of the memorandum submitted by Complainant.

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

#### CONTENTIONS ON APPEAL

In her appeal statement, Complainant reiterates her allegations, solely focusing on disability as the basis for her contentions.

In response, the Agency reiterates its stated explanation for the challenged management actions.

#### STANDARD OF REVIEW

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

### ANALYSIS

#### *Reasonable accommodation and the interactive process (Claim 16)*

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). 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 term “qualified,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

Once an employer becomes aware of the need for an accommodation of an employee’s disability, the employer may engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3) (2019). An Agency may choose among reasonable accommodations as long as the chosen accommodation is effective, and while the preference of the individual with a disability should be given primary consideration, an Agency has the ultimate discretion to choose between effective accommodations. See Enforcement Guidance, supra, at Q. 9.

Here, Complainant sustained an on-the-job injury that led to her having a physical disability. Management was aware of Complainant’s disability, and she was placed on light duty through the OWCP. With her light duty restrictions, Complainant was able to perform her job functions. For the most part, Complainant performed her essential job functions. In sum, it appears Complainant is an individual with disability who is qualified for her position.

We however note that Complainant did not raise failure to accommodate as an issue in her original complaint.

Even assuming, as did the Agency, that Complainant's January 3, 2020, memorandum was a request for reasonable accommodation, the record is devoid of any evidence that Complainant provided any additional medical records to support her request for continuation of her 2200-0600 hours midnight schedule as she had stated in the memorandum to Watch Commander 1 that she would. ROI at 15. Complainant's failure to provide that documentation before she returned to full duty on or about January 9, 2020, in effect terminated the interactive process. Therefore, Complainant's own action supports a conclusion that the Agency was under no obligation to provide any supporting documentation demonstrating that to approve Complainant's requested accommodation would have constituted a hardship under the Rehabilitation Act.

Moreover, Complainant was temporarily placed on light duty through OWCP because of her workplace injury. To the extent that Complainant was dissatisfied with the processing of her workers' compensation claim, her dissatisfaction should have been raised in the workers' compensation forum. See Dwight v. Department of Justice, EEOC Appeal No. 0120142370 (Dec. 15, 2016).

In that regard, we note OWCP Coordinator's statement that she was not aware of Complainant's claim that her light duty assignment did not meet her needs based on her medical restrictions. She stated that if an employee felt that the medical restrictions are not being met, the employee would usually notify her, and the matter would be addressed with the port so that the medical restrictions are met. Supp. ROI at 101.

Importantly, the Commission has repeatedly held that once an accommodation is in place (as is the case here), but the employee believes the accommodation is ineffective, the onus is on the employee to reengage with management about additional accommodations. See, e.g., Selene M. v. United States Postal Serv., EEOC Appeal No. 0120171824 (Mar. 29, 2019) ("The EEO process for obtaining a reasonable accommodation requires agencies and employees to engage in an "interactive process" regarding reasonable accommodations to determine the best options for both the employee and management. Employees who refuse to cooperate in that process are not entitled to an accommodation.").

While Complainant may not have intended it, it appears that her failure to comply with her supervisors' orders and instructions gave them the impression that Complainant was unwilling to perform any assigned duties during the period of her light duty restrictions.

In that regard, Complainant could have requested reassignment as an accommodation when she felt that performing some of her assigned duties, including twisting to pick up the camera or sitting in high chairs to perform the functions of a cashier, caused physical discomfort or pain. There is no evidence that Complainant made any such request. We also note the EEO Counselor's report that Complainant did not request an accommodation regarding issues with performing her job because she did not want to let Supervisor know about her specific health issues, and that Complainant stated she did not want anyone feeling sympathetic towards her. ROI at 139. Therefore, the record in this case does not support a conclusion that management failed to accommodate Complainant or that they took any actions indicating that to do so would constitute a hardship on the Agency.

*Disparate treatment based on age, sex, disability, and reprisal (Claims 1-15)*

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).

The Commission applies the McDonnell Douglas analysis to complaints involving retaliation claims. Orlando O. v. Department of Health and Human Services, EEOC Appeal No. 0120170253 (Aug. 8, 2018) (citing Hochstadt v. Worcester Found. for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976)). The Commission also applies the McDonnell Douglas analysis to complaints involving disability claims. Kenneth M. v. Dep't of Justice, EEOC Appeal No. 2022004767 (Nov. 17, 2022).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's

actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539, (Aug. 17, 2023).

In order to establish a prima facie case of retaliation, a complainant must demonstrate that: (1) she participated in EEO activity; (2) an Agency official(s) was aware of the protected activity; (3) a subsequent adverse action took place, and (4) there is a causal link between the adverse action and the employer's knowledge of protected activity. Nida R. v. Dep't of Def., EEOC Appeal No. 0120152884 (Apr. 22, 2016) (internal citations omitted); see also EEOC Enforcement Guidance on Retaliation and Related Issues, § II.C.2, n. 154 (Aug. 25, 2016) (citing Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010)). Furthermore, "[t]he cases that accept mere temporal proximity between an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close' [in time]." Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (citing to O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (finding a three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (finding a four-month period insufficient)).

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 age, sex, disability and reprisal.

Complainant meets the four elements to establish her prima facie case of reprisal because she had engaged in protected EEO activity when she requested reasonable accommodation after her on-the-job injury of which management was aware. The Agency also took adverse actions against her, including work assignments. However, Complainant did not demonstrate that the alleged management actions were based on her protected EEO activity.

Complainant also established that she is an individual with disability because Complainant had cervical myelopathy, and cervical fusion with limited neck movement as a result of her on-the-job injury. Management officials were aware of Complainant's disability. Complainant was also able to perform her job functions with or without reasonable accommodation.

Likewise, Complainant established a prima facie case of discrimination based on sex and age to the extent that she is female and over age 40. However, Complainant did not 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 her protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management actions; and we also find no persuasive proof of pretext.

Regarding Claim 1, Supervisor stated that all light duty status officers are assigned administrative duties, to include issuing I94 permits and cashiering. She asserted that she was not provided any information on Complainant's restrictions until Complainant was placed on light duty on or around December 24, 2019. She also stated that Complainant was the only light duty officer working the midnight shift; therefore, Complainant was assigned permits and cashiering duties, like the rest of the light duty officers working the 2400 to 0800 shift. Supervisor expressed disagreement with Complainant's assertion that the duty violated her restrictions, stating that Complainant could perform those duties standing or sitting, and could walk around and take breaks as needed. ROI at 272-73.

Regarding Claim 2, Supervisor denied making the alleged comment, asserting that Coworker 1, the individual Complainant identified as having witnessed the alleged comment being made, left the POE around June 2019. ROI at 275. Notably, the alleged September 2019, incident occurred some three months after Coworker 1 must have left the POE in June 2019. Coworker 1 also denied being a witness.

Regarding Claim 3, Supervisor denied Complainant's allegation, asserting that she was assigned to the Ysleta POE from September 8 through September 14, 2019. She asserted that she never mentioned not wanting to work with Complainant, and noted she only expressed that she could not justify Complainant getting injured while performing regular duties when Complainant was on light duty. She also stated that she informed Complainant that Complainant could perform her duties in the cashiering area and did not have to interact with the subjects brought into the PCS area.

She explained that officers on light duty are not allowed to carry their weapons; accordingly, the proximity to the public needed to be limited. ROI at 276.

Regarding Claim 4, Supervisor explained that she asked Complainant and Coworker 2 to keep their voices down while they were having a conversation in front of her desk and laughing loudly. She stated that she felt their interaction was affecting the public's perception, as there was a room full of travelers being assisted by only two officers. She also recalled asking both Complainant and Coworker 3 to work on their virtual training courses during a slowdown in work, asserting that she also issued the same request to other officers. According to her, upper-level management reviewed Complainant's claim that she interrupted Complainant and found Complainant's claims to be unsubstantiated. She acknowledged that she had to interrupt conversations from time to time as supervisor in order to ensure all work was completed, stating that she did so with everyone on the shift. ROI at 277.

Regarding Claim 5, according to Supervisor, she was not responsible for assigning shifts on the date at issue. She also denied that Complainant was assigned SPM duties on December 24, 2019, asserting that Complainant completed one SPM closeout before Supervisor began her shift. She also asserted that she was unaware of Complainant's light duty status until after her shift. Supervisor stated that the assignments issued to Complainant did not conflict with her restrictions. ROI at 279.

Regarding Claim 6, Supervisor asserted that the alleged incident occurred on January 14, 2020. She stated she asked Complainant to issue permits for travelers waiting in the lobby; however, Complainant refused and asked that Supervisor email her clarifying what her duties were. According to Supervisor, Complainant continued to refuse to follow her direct order, then made a phone call and walked out of the PCS area. She stated that she advised the travelers that she was working on getting them help; however, she noted three of the travelers expressed they wanted to file a complaint. Supervisor stated that she apologized and provided a complaint sheet. She also noted that the travelers asked for Complainant's name, and indicated they perceived Complainant to be insubordinate and unprofessional. She stated that she provided Complainant's name at their request. ROI at 281.

Regarding Claim 7, Supervisor denied accusing Complainant of performing pat downs. She stated that she would not have allowed Complainant to perform pat downs on her shift, asserting that she advised Complainant on multiple occasions that Complainant needed to refrain from conducting interviews



while she was on light duty. She asserted that she was aware that Complainant accused her of screaming and yelling at her in the memorandum submitted to Chief CBP Officer 1; however, she stated that upper-level management reviewed audio from the incident and held that Complainant's claims were unfounded. ROI at 282.

Regarding Claim 8, Supervisor asserted that Chief CBP Officer 1 forwarded her Complainant's memorandum for her to respond. She denied Complainant's allegations, asserting that she did not discuss the memorandum. She also asserted that management review of the incident confirmed the information in her statement. ROI at 283-84.

Regarding Claim 9, According to Supervisor, she has never commented that any officer did not want to work. She noted that she repeatedly advised Complainant that she was not to interview travelers while Complainant remained on light duty. ROI at 285.

Regarding Claim 10, Supervisor explained that officers on regular status are mandated to work from 2200-0600; and that light duty status employees are scheduled from 0000-0800. She asserted that the SMS Specialist and the Administrative Officer asked her to contact Chief CBP Officer 1 and report that Complainant was not working the correct scheduled shift, as he was the Duty Chief at the time. She stated that Complainant was contacted and advised that she needed to work the correct hours for light duty; however, Complainant then took some days off and had her doctor remove her from light duty status. She explained that Complainant's failure to work the correct shift could have led to grievances, adding that Complainant's protected bases were not factors. ROI at 285-86. Chief CBP Officer 1 stated that he had no involvement in Complainant's shift assignment. He stated that Complainant was directed to work 0000 to 0800 as per the collective bargaining agreement (CBA) and denied discriminating against Complainant. ROI at 342.

Regarding Claim 11, Supervisor denied accusing Complainant of working the wrong schedule, stating that Chief CBP Officer 1 contacted Complainant. She also denied stating that Complainant did not want to perform her duties. ROI at 288.

Regarding Claim 12, Supervisor noted that she issued Complainant a direct order and wrote her up on January 14, 2020, but stated she did not threaten Complainant.

She stated that Complainant was not listed on the schedule on January 15, 2020; and that she had no specific recollection of any encounter on January 16, 2020, with Complainant. She denied yelling at Complainant. ROI at 288.

Regarding Claim 13, Chief CBP Officer 1 recalled that Complainant insisted that he initial an assignment form; he however stated that the form did not require any initialing. He asserted that he informed Complainant that he would not be signing the sheet, and that she needed to do the job she was told to do. He also noted that Complainant failed to perform the cashier duties that were assigned by Supervisor. ROI at 249. Supervisor denied any knowledge of the alleged incident. ROI at 289.

Regarding Claim 14, Supervisor recalled that she asked Complainant to begin cashiering at the beginning of her shift; however, she denied yelling at Complainant. She stated that Complainant had been assigned SPM duties, to include cashiering, by the duty supervisor of the previous shift. She asserted that Complainant demanded that she put the directive in writing; in response, Supervisor agreed, but advised that she needed Complainant to commence work immediately. She stated that Complainant did not do as directed, and instead asked for the Standard Operating Procedure (SOP) outlining her specific duties. Supervisor stated that she contacted Chief CBP Officer 1; in response, Chief CBP Officer 1 entered the PCS area and instructed Complainant to take over the Detention officer duty. She asserted that Complainant refused to follow the directive and failed to complete her duties. ROI at 290.

Regarding Claim 15, according to Chief CBP Officer 4, Chief CBP Officer 3 issued Complainant a Weingarten notice, along with a memorandum from him to Complainant. He stated that the notice was issued pursuant to Article 22, Section 6 of the CBA in order to obtain information from Complainant regarding allegations that could lead to disciplinary action. He stated that he requested Complainant submit a memorandum to address incidents on January 14 and 31, 2020, in order to determine whether misconduct occurred. He stated that Complainant presented a response statement. He maintained that the notice and request were standard practice and denied discriminating against Complainant. He also stated that he was unaware of any subsequent actions, and noted the case was transferred to the Port of Ysleta. ROI at 324-25 and 331.

Supervisor asserted that she was unaware of any notice issued to Complainant but stated that she submitted memoranda to Chief CBP Officer 4 regarding Complainant's refusal to follow direct orders. ROI at 291.

Chief CBP Officer 1 also stated that he reported his concerns to Chief CBP Officer 4 regarding Complainant's behavior and asserted that her behavior created a hostile work environment and warranted disciplinary action. ROI at 252.

Chief CBP Officer 1 stated that Supervisor contacted him and informed him that Complainant wanted her to put in writing that Complainant was to perform cashier duty. He stated that he directed Supervisor to send Complainant an email memorializing the assignment; however, Supervisor subsequently called him again and reported that Complainant now wanted to see a SOP. He stated that he mobilized to the area and reassigned Complainant to be the Detention Officer, as she refused to perform cashier duties; however, he later learned that Complainant also failed to perform the duties of a Detention Officer. He denied raising his voice at Complainant, or demanding she leave the work area; however, he stated he directed Complainant to the detention area, as the detention log officer worked from that area. He stated he told Complainant that if she refused to perform her duties, that she could go home and that he would place her on administrative leave. However, he stated Complainant refused to go home and worked the rest of her shift from the interview room. ROI at 250-51.

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))).

Here, Complainant failed to show pretext because she failed to demonstrate that the challenged management actions were taken because of her protected bases. She also failed to dispute management's explanations, including that at least one of the challenged actions attributed to Supervisor occurred before Supervisor was aware of Complainant's protected EEO activity. Nor did Complainant demonstrate that management's actions were motivated by discriminatory or retaliatory animus. Notably, Complainant sole contentions on appeal focused on her disability basis. She however provided no evidence that would support a conclusion that Complainant's disability played a role in management's alleged conduct.

In her original complaint, Complainant provided the names of four witnesses to the alleged discrimination. However, Complainant's own identified witnesses either could not corroborate her allegations against Supervisor or they provided statements that supported Supervisor's explanations for taking the challenged actions. For example, Coworker 1 denied witnessing the alleged incidents, stating that she was not present and/or had no knowledge of Complainant's allegations. ROI at 121-24. Coworker 2 did recall one occasion when Supervisor interrupted Complainant while Complainant was talking and told her to stop. ROI at 131-33.

A third witness, Coworker 3, did not recall any discrimination against Complainant, but she stated that Complainant, while on light duty, put herself and Coworker 3 in harm's way by escorting a subject into PCS and not conducting a pat down for officers' safety. Coworker 3 also stated that Complainant interviewed subjects in custody and interfered with full duty officers' daily duties. ROI at 137-39.

A fourth witness, Coworker 4, recalled that Supervisor interrupted Complainant while she was talking "at least five times." He stated that Supervisor sounded frustrated, but he did not think that Supervisor was discriminating against Complainant. Supp. ROI at 562-64. We note the EEO Investigator's statement that a fifth witness, Coworker 5, listed by Complainant in her original complaint, and again identified in Complainant's appeal statement, did not provide an affidavit.

Coworker 5 reportedly had no valid government email address; and a Labor and Employee Relations Specialist informed the EEO Investigator that Coworker 5 was on Leave Without Pay (LWOP), with no anticipated return to duty date. ROI at 148. While the EEO Investigator did not contact Coworker 5 (and should have made every effort to do so), Complainant did not describe any additional information that Coworker 5 could have provided that would lead to a different conclusion in this case.<sup>3</sup>

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<sup>3</sup> EEOC Regulation 29 C.F.R. § 1614.108(b) and EEO MD-110 at Chapter 6, § I require agencies to develop an impartial and complete factual record. An appropriate factual record is one that allows a reasonable factfinder to draw conclusions as to whether discrimination occurred. EEO MD-110 at Chapter 6, § I. An investigator must be thorough. "This means identifying and obtaining all relevant evidence from all sources regardless of how it may affect the outcome." Id. at § V.D. "To ensure a balanced record, it is necessary only to exhaust those sources likely to support the complainant and the respondent. An investigation conducted in this manner might reveal that

Notably, the record includes two memoranda submitted to management by Coworker 5 in which she described an incident that occurred in March 2019, involving Coworker 5, Complainant, and Supervisor. The incident, which occurred before Complainant was placed on light duty, did not demonstrate that Supervisor took any action against Complainant besides trying to assist Complainant and Coworker 5 with a noncooperative passenger.

Having reviewed the record, we find that the Agency correctly analyzed the facts and law of this case to determine that Complainant did not establish that the Agency subjected her to disparate treatment as alleged. 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 to otherwise manage the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (Jun. 16, 2017). We find that many of the allegations stated in Complainant's complaint fall within these types of management prerogatives. Complainant repeatedly asserted that younger employees and males received more favorably treatment. Yet, she has not presented any evidence to show how she was treated differently than others who were similarly situated and outside of her protected groups.

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 Claims 1-16 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Moreover, employees will not always agree with supervisory communications and actions, but absent discriminatory motives, these disagreements do not violate EEO law. Steven T. v. Dep't of the Treasury, EEOC Appeal No. 2020003020 (Sept. 19, 2020).

We note that Complainant reportedly yelled out and stated that Supervisor did not know how to be a supervisor.

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there is ample evidence to support the complainant's claims and no evidence to support the agency's version of the facts, or vice versa. The best type of investigation allows for complainant to provide rebuttal evidence with sufficient time for the investigator to address any issues raised within the regulatory time frames." Id.

We also note that Complainant's behavior was reportedly prejudicial to good order and discipline, warranting disciplinary action as it created a hostile environment for all PCS workers. ROI at 260-61. In that regard, an employer is not barred from imposing discipline or terminating an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and is consistent with business necessity. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002 at Question 36 (Oct. 17, 2002).

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

### 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 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).

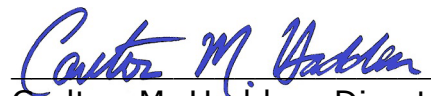
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

January 13, 2025  
Date