



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

[REDACTED]
Kecia C.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal Nos. 2023004449 and 2023004450

Hearing Nos. 530-2019-00274X; 530-2021-00220X

Agency Nos. IRS-18-0519-F; IRS-20-0278

DECISION

On August 3, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's July 7, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.

ISSUE PRESENTED

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not subjected to discrimination and harassment regarding non-selection for career

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.

advancement opportunities, leave, discipline, and terms and conditions based on her race (African-American) and reprisal (for prior EEO activity).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Tax Law Specialist, GS-0987-9 at the Agency's Accounts Management, Wage and Investment division in Philadelphia, Pennsylvania. Complainant, African-American, has worked for the Agency since 1991. Beginning in 2016, Complainant has participated in EEO activity. IRS-18-0519-F Report of Investigation (ROI 1) at 2 and 77; and IRS-20-0278-F ROI (ROI 2) at 226.

Complainant's first-line supervisor (Supervisor 1A) was a Program Manager. Beginning in October 2019, Complainant's first-line supervisor (Supervisor 1B) was a Supervisory Contact Representative. He was unaware of Complainant's prior EEO activity. ROI 2 at 173-74. Her second-line supervisor (Supervisor 2A) was a Department Manager. ROI 1 at 77, 94, and 105. Beginning in February 2019, her second-line supervisor (Supervisor 2B) was another Department Manager. She was aware of Complainant's prior EEO activity. ROI 2 at 186-88. Complainant's third-line supervisor (Supervisor 3) was the then Operations Manager. ROI 1 at 122 and ROI 2 at 199. Supervisors 1A, 2A, 2B, and 3 were aware of Complainant's protected bases. ROI 1 at 94-5, 106, and 122-23.

Complainant initiated EEO contact on May 7, 2018, and February 12, 2020. On August 9, 2018, and April 30, 2020, Complainant filed two separate EEO complaints alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

EEOC No. 530-2019-00274X (IRS-18-0519-F [Case 1])

1. On April 20 and July 2, 2018, Complainant was passed over for career development opportunities in favor of White employees; and
2. On May 23, 2018, Complainant was accused of not adhering to her Tour of Duty's phone schedule.

EEOC No. 530-2021-00220X (IRS-20-0278-F [Case 2])

Management took various actions, including but not limited to:

3. Issuing Complainant an Absent Without Leave (AWOL) warning memoranda on February 11 and February 27, 2020; and
4. On numerous dates in 2019 and 2020, leaving Complainant's name off of lists of employees that were recognized for National Quality Review System (NWRS) reviews.

The Agency conducted an investigation into the complaints. Regarding Case 1, the investigation revealed that following a request in early April 2018, Supervisor 1A solicited all Tax Law Specialists, including Complainant, for a volunteer to work on a project providing Tax Reform information to field phone calls (Subject Matter Expert for International Monetary Fund [IMF]-International Tax Law (phones and account [SME International Tax Law Project])). ROI 1 at 147-48. Supervisor 2 forwarded the solicitation to Supervisor 1A and requested that he provide her with the entry on duty (EOD) dates for all volunteers. Complainant volunteered for the project and Supervisor 1A forwarded her name and EOD to Supervisor 2. ROI 1 at 147. Complainant's name was sent to the Chief of Planning & Analysis who was the selecting official for the project, (Selecting Official). Selecting Official was not in Complainant's chain of command, but she was aware of Complainant's protected bases. ROI 1 at 133-35. Selecting Official selected two White employees (Selectee 1 and Selectee 2) for the SME International Tax Law Project. ROI 1 at 136. Supervisor 1A notified Complainant that she was not selected on April 18, 2018. See ROI 1 at 149, noting that the assignment was a collateral duty assignment.

In or around July 2018, Supervisor 2, the selecting official, made the selection for an opportunity to field questions from tax professionals during the Tax Law Symposium, an annual event in which tax professionals discuss trending tax matters. During the Tax Law Symposium, Agency employees in a variety of specialties are selected to be on-call to field questions from the tax professionals as they arise. ROI 1 at 110. In or around July 2018, Supervisor 2 selected a White employee (Selectee 3) for the opportunity. ROI 1 at 111.

Pursuant to Internal Revenue Manual (IRM) 6.735.1.3(1), agency employees "must observe duty hours and be punctual in reporting for work and returning from lunch and breaks." ROI 2 at 175. On or about May 21, 2018, Supervisor 2 sent an email to Complainant notifying her that she was missing from her phone line for about 22 minutes according to the phone monitoring system. At the time of the email, Complainant's tour of duty was from 4:00pm to 12:30am and Complainant was scheduled to staff the phones beginning at 4:06pm – 6 minutes after her tour of duty began.

The time period allowed Complainant to sign on to the computer in preparation for answering the phones. ROI 1 at 85 and 112.

Regarding Case 2, the Agency's investigation revealed that Complainant's tour of duty during the time at issue was 3:30pm to 1:00am. ROI 2 at 234. On February 10, 2020, Complainant was tardy returning from her lunch break. ROI 2 at 91. See also ROI 2 at 233, noting that Complainant began her lunch break at 8:00pm but by 8:38pm had not updated her phone from lunch status. She informed Supervisor 1B that she was late because she needed to mail something at the post office. ROI 2 at 89 and 176. Supervisor 1B issued Complainant an AWOL warning memorandum regarding her tardiness. ROI 2 at 233. Complainant was again tardy reporting for her tour of duty on February 24, 2020, arriving at her desk at approximately 3:35pm or 3:36pm. ROI 2 at 92-93. Supervisor 3 observed Complainant speaking to a coworker in the lobby of the building on the date at issue when she should have been at her desk. ROI 2 at 92-4, 176, and 200-01. As a result, Supervisor 1B issued Complainant another AWOL warning memorandum on February 27, 2020. Neither of the AWOL warning memoranda resulted in a charge of AWOL nor in Complainant losing pay. ROI 2 at 233-34.

Pursuant to IRM 21.10.1.7(1), the Agency uses a National Quality Review System ("NQRS") for national product reviews. ROI 2 at 593. The NQRS is a database used by quality reviewers of national products. Id. The results of the NQRS reviews are never used for evaluation of individual employees. The NQRS is distinct from the Agency's Embedded Quality Review System (EQRS) in that the NQRS is non-evaluative and the EQRS is evaluative Managerial/CER reviews, which are prepared on EQRS, measure employee performance" and "national and local quality review results are never used for evaluation of individual employees." ROI 2 at 528-29. Employees whose work is reviewed as part of the NQRS are randomly selected for review by a computer program. ROI 2 at 202 and 216. If an employee's work is randomly selected for review and contains no errors, the employee is acknowledged for their contributions to the department. ROI 2 at 203 and 217.

From January 1, 2019, to December 31, 2020, Complainant's work was randomly selected for review three times as part of the NQRS. Her calls were reviewed on August 15, 2019; October 9, 2019; and November 18, 2020. Complainant's call on October 9, 2019, contained a defect or error. ROI 2 at 217. Complainant was recognized for the other two calls (August 15, 2019, and November 18, 2020) in emails dated August 28, 2019 and November 24, 2020, respectively. ROI 2 at 217 and 221-25.

At the conclusion of the investigations, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On December 12, 2022, the Commission issued a Scheduling Order that consolidated Cases 1 and 2. The parties engaged in discovery. On March 24, 2023, the Agency filed its motion for summary judgment and exhibits (Agency's motion). Complainant served her opposition with exhibits (Complainant's response) on April 17, 2023. On April 24, 2023, the Agency filed its reply.

The AJ found that even viewing the record in the light most favorable to Complainant, the facts were insufficient to establish actionable race discrimination, harassment, or reprisal. The AJ concluded that there were no issues of material fact in dispute and that judgment in favor of the Agency was appropriate. On June 12, 2023, the AJ issued a decision granting the Agency's motion on all claims.

The AJ adopted and incorporated the Agency's Statement of Undisputed Facts as recited in its motion. Regarding Claim 1 in Case 1 and Complainant's non-selection for the SME International Tax Law Project and the Tax Law Symposium, the AJ found that Complainant failed to show that the Agency's legitimate, non-discriminatory reasons for not selecting her were pretextual. As for the non-selection for the SME International Tax Law Project, the Agency explained that Complainant had limited account experience. For the Tax Law Symposium, the Agency explained that Complainant lacked the specific qualification requirements.

Noting Complainant's assertion that the selection process was unfair, the AJ found that Complainant failed to provide evidence of this theory, she offered no evidence of discriminatory intent, and she failed to establish that she was plainly superior to the selectees.

Regarding Claim 2 in Case 1, the AJ found that Complainant failed to show how the May 2018, email about her failure to adhere to her tour of duty phone schedule was adverse. Complainant also failed to identify similarly situated employees outside of her protected bases who failed to follow the phone work schedule and were treated more favorably (i.e., not counseled). The AJ also found that Complainant failed to offer evidence that the Agency's legitimate, non-discriminatory reason for counseling her about her admitted failure was a pretext for discrimination.

In the same vein, the AJ concluded that Complainant failed to produce evidence regarding her claims of retaliation and hostile work environment. According to the AJ, Complainant did not produce evidence that the Agency's actions were because of her prior activity; and Complainant failed to produce evidence of pretext. As for Complainant's claim of being subjected to a hostile work environment, the AJ observed that there was no evidence of a causal link between Complainant's race and the Agency's conduct; other than conjecture and speculation, there was no evidence of a nexus between Complainant's protected bases (including her prior EEO activity) and the incidents of which she complained. Similarly, observed the AJ, there was no evidence of unwelcomed verbal or physical conduct involving Complainant's protected class; and there was no evidence that the Agency's actions constituted severe or pervasive conduct.

Regarding Case 2, the AJ concluded that there was no evidence of a nexus between Complainant's prior EEO activity and the Agency's actions with respect to the AWOL warning memoranda on February 2020, and not recognizing Complainant on the NQRS review that would establish a claim of retaliatory harassment. The AJ observed that Complainant merely put forward her conjecture and speculation that the alleged incidents were connected. Similarly, asserted the AJ, Complainant failed to show that she could establish any of the other prima facie elements of a retaliatory harassment claim.

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

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant contests the AJ's decision, asserting that hers is a case that illustrates institutional racism and how racism and discrimination can be caused by a multitude of events, culminating in discriminatory actions; and that she was discriminated against for exercising her rights. She reiterates her allegations, arguing that the AJ ignored her long history of EEO complaints, a number of which resulted in settlements, that she believes led to a pattern of discrimination in which she was subjected to increased scrutiny. Complainant's Appeal Statement at 2-3. Complainant also argues that the AJ erred as a matter of law by adopting the Agency's statement of material facts; and states that she established her prima facie cases of discrimination, retaliation and harassment as a result of the challenged management actions in Case 1. Complainant's Appeal Statement at 8 and 11-3.

For Case 2, Complainant argues that she established her claim of retaliatory harassment for the two AWOL warning memoranda she received in February 2020 for her admitted tardiness on two occasions and not being recognized by the NQRS review. She contends that the Agency did not follow its own rules regarding discipline which require a warning prior to an adverse action being taken. As for the NQRS review, on appeal, Complainant states that her complaints about the randomized selection for the review were ignored and she was given a terse, hostile response. Complainant's Appeal Statement at 16-9.

In response, among other things, the Agency expresses agreement with the AJ's decision and asserts that Complainant's arguments are insufficient to demonstrate error in the grant of summary judgment regarding her claims. Citing to applicable Commission precedent, the Agency asserts that Complainant's contention that her prior complaints were resolved by settlement does not evidence wrongdoing. Therefore, states the Agency, Complainant's references to the resolution of her prior cases do not establish that the Agency was found to have discriminated against her in the prior complaints. According to the Agency, the only proposition that those prior complaints established is that Complainant exercised her right to complain of what she believed was discrimination.

Regarding Complainant's contention that the AJ erred in adopting the Agency's statement of material facts, the Agency states that Complainant failed to specify which material facts relied on by the AJ were in dispute. According to the Agency, although Complainant provided a lengthy statement of facts in her response to the Agency's motion, those putative facts were either not genuine or not material as explained in detail by the Agency in its summary judgment reply brief. The Agency requests that the AJ's decision and its final order be affirmed, and Complainant's appeal be denied.

STANDARD OF REVIEW

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

parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

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

To support her allegations and the basis for contesting the AJ's decision, Complainant outlines the facts of her previous EEO filings. Complainant's Appeal Statement at 2. However, those facts were not included in the record for the instant complaints. Nor do they support a conclusion that discrimination, retaliation or harassment occurred here. Moreover, the record, does not reflect that Complainant was treated less favorably than other employees for exercising her rights to file EEO complaints or that institutional and systemic racism existed.

Furthermore, that the Agency resolved previous complaints by Complainant through settlement agreements does not evidence wrongdoing or prove that any subsequent management action violates Title VII. In the two instant complaints, management provided nondiscriminatory explanations for the challenged actions.

Complainant admitted to her own misconduct, including in being tardy. The fact that Complainant engaged in prior EEO activity does not preclude management from addressing Complainant's misconduct. Complainant's contention that the Agency did not follow its own rules regarding discipline which require a warning prior to an adverse action being taken is also undermined by her own statements that she had previously received a reprimand for similar conduct.

In that regard, an agency is not required to refrain from non-discriminatory personnel actions it would otherwise take simply because the employee has engaged in EEO activity. See Sotomayer v. Dep't of the Army, EEOC Appeal No. 01A43440 (May 17, 2006) citing Carter v. Dep't of Education, EEOC Appeal No. 01842314 (Aug. 25, 1986).

As for the NQRS review, on appeal, Complainant states that her complaints about the randomized selection for the review were ignored and she was given a terse, hostile response. Complainant's Appeal Statement at 16-9. Yet, Complainant did not dispute that she was not the target of the computerized random selection for NQRS reviews. Other employees were also randomly selected; and the process sometimes favored Complainant herself as she received recognition for her work.

Complainant argued that the AJ did not view the facts in a light favorable to her despite Complainant's detailed response to the Agency's statement of material facts. Complainant's Appeal Statement at 8-10. Yet, Complainant did not identify any issues of material fact in dispute. Complainant's appeal arguments and contentions only reiterate her allegations and her stated beliefs for which she provided no corroborating evidence.

Given that Complainant had access to the ROI concerning her complaint and the opportunity to develop the record significantly during the EEO investigation and discovery before the AJ, we find that summary judgment was appropriate in this case. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Disparate treatment based on race and reprisal (all claims)

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).

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 race and reprisal.

Complainant meets the elements to establish her prima facie case of reprisal because she had engaged in protected EEO activity beginning in 2016; management, except Supervisor 2B, was aware of Complainant's prior EEO complaints; and the Agency took adverse actions against her when Complainant was not selected for career advancement opportunities, for example. However, the record is devoid of any evidence that the challenged management actions were connected to Complainant's prior protected EEO activity.

Likewise, Complainant established prima facie of discrimination to the extent that she is African-American. 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, the record reflects that in making the selections for the SME-International Tax Law Project, the volunteers needed to have International Tax Law and Account Telephone/Paper experience as well as course development experience. Selecting Official also stated that the opportunity required individuals with strong technical expertise in the International Tax Law and Accounts program for both telephone and paper. ROI 1 at 135-36.

The record reflects that both Selectees 1 and 2 were highly skilled in international tax law and course development, were resident experts in International Tax Law and Accounts, had prior training and course development experience, and they were prior participants in the Subject Matter Expert cadre. Complainant did not meet the criteria for selection because she was required to staff the phones as a Tax Law Specialist during peak filing season. Complainant also had limited account experience. Although Complainant's EOD was earlier than those of the selectees, Selecting Official stated that she did not use EOD to make the selections. ROI 1 at 136-37.

As for the Tax Law Symposium, that opportunity required that employees be on-call to field questions from tax professionals as they arose during the symposium. It also required full knowledge of International Tax Law and International Accounts. The most important criteria in making the selection was the ability to research and respond to International Accounts and Tax Law inquiries in a professional and prompt manner. Supervisor 2 did not select Complainant for the opportunity because she was not skilled in the full breadth of International Accounts.

Complainant's experience with International Accounts was limited to the processing of Form 1040X and was even limited in that area. Supervisor 2 selected Selectee 3 because he had the required knowledge, skills, and abilities. Supervisor 2 did not utilize EOD for this selection because EOD is a measure of length of service; it does not address the knowledge or abilities of an employee in any particular area. ROI 1 at 110-11.

Complainant did not present any evidence to refute management's explanations that they chose candidates who were better qualified for the opportunities. Nor did she present any evidence to demonstrate that she was better qualified than the selectees.

Regarding Claim 2, Complainant herself admitted that she stepped away from her desk shortly after logging on to her computer at the start of her tour of duty to go to the snack bar to get something to eat and drink as she was unable to purchase these items before her tour of duty began. She also stated that her desk partner had not vacated the desk timely. ROI 1 at 85 and 113-14. Complainant asserted that her White team members (current and past) were not monitored as she was when they arrived, but she did not identify those employees. ROI 1 at 86. Complainant also failed to dispute Supervisor 2's assertion that management intervenes to ensure adherence when employees are not adhering to their phone schedules. ROI 1 at 115.

The record includes IRM 6.610.1.1.3(7), requiring that all IRS employees "must observe designated duty hours and comply with hours of duty rules, regulations, and established business procedures." In accordance with IRM 6.735.1.3(1), employees "must observe designated duty hours and be punctual in reporting for work and returning from lunch and breaks." ROI 2 at 175. Moreover, employees who answer taxpayer phone calls are allowed 6 minutes of time at the beginning of their tour of duty to log on to the computer to begin staffing the phones. ROI 1 at 112.

Complainant's own admission that she began staffing the phones at approximately 4:30pm – 30 minutes after her tour of duty started is justification for management's alleged action. See ROI 1 at 112. Complainant was also one of only three Tax Law Specialists who worked the swing shift. Therefore, adherence to the phone schedule is monitored more closely for all of the Tax Law Specialists than it is for Contact Representatives because there are so few specialists available to staff the lines. ROI 1 at 115.

Regarding Claim 3, Supervisor 2 issued Complainant the memoranda because the reasons Complainant gave for being tardy were within her control and did not preclude, prevent, nor alter her tardiness. ROI 2 at 176. Complainant did not deny that she failed to adhere to her phone schedule in May 2018; and that she was tardy on two occasions in February 2020, in violation of Agency rules. ROI 2 at 91-3. Complainant argued that it was not unreasonable to seek something to eat or drink; and that she sent a "Skype" explaining her extenuating circumstances so management should have been reasonable and understanding. ROI 1 at 85 and ROI 2 at 91. She however failed to demonstrate that the alleged management actions were taken due to her protected bases.

Regarding Claim 4, the record reflects that the selection of employees to be reviewed for the NQRS is a computer-generated, random process such that no employee is always selected to have their work reviewed for the NQRS every time the reviews are conducted. ROI 2 at 202-03 and 216-17. Complainant was not acknowledged for the review conducted on October 9, 2019, because her work on that date contained a defect or error. ROI 2 at 217. Complainant was however acknowledged in an email on August 28, 2019, for achieving a 100% review in the randomized NQRS review for her work the week ending August 17, 2019. ROI 2 at 221-22. She was also recognized in an email dated November 24, 2020, for a 100% review for the week ending November 21, 2020. ROI 2 at 223-25. Complainant failed to demonstrate that the lack of recognition one time out of three was in violation of any applicable agency policy or due to her protected bases.

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 Melissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015)).

Here, Complainant failed to show pretext because she failed to establish a link between the challenged management actions and any of her protected bases. Nor did she dispute management's explanations or demonstrate that their actions were motivated by discriminatory or retaliatory animus.

We note Complainant's assertions, comparing her qualifications and EOD to those of Selectees 1, 2, and 3. In that regard, we have held that in a non-selection case, the complainant may establish pretext by showing that his or her qualifications were plainly superior to those of the selectee. Becki P. v. Kerry, Appeal No. 0120152856 (Mar. 24, 2016). Having more years of experience than the selectee does not necessarily make an individual more qualified to meet an agency's needs. Kandi M. v. Esper, Appeal No. 2020001785 (Aug. 10, 2020) (citing Collins v. Snow, Request No. 05A41248 (Oct. 5, 2004)).

The Commission has also held that agencies may select candidates with fewer years of experience if they believe that such candidates are best qualified to meet the needs of the organization. Complainant v. Dept. of Justice, EEOC Appeal No. 0120131151 (Feb. 25, 2015). They may even preselect a candidate as long as the preselection is not premised upon a prohibited basis. Complainant v. Dept. of Homeland Sec., EEOC Appeal No. 0120132858 (Mar. 9, 2015).

Complainant also failed to show that she was subjected to intense scrutiny due to any of her protected bases. We note Complainant's assertion that she was not aware of any other employees, under her management, who had similar conduct within the past year and were accused of not adhering to their tour of duty's phone schedule. She testified she did not have a list of names that may fall under this topic as it is handled at the lower level of management. ROI 1 at 189. These assertions support, and do not refute, Supervisor 2's statements that Complainant's team consisted of people of a variety of races, including Caucasian; and that race was not a factor in the placement of employees in teams. She also stated that all employees are monitored for adherence to their phone schedules, regardless of race; and that an entire staff of telephone systems analysts existed for this purpose alone. According to Supervisor 2, systems analysts could not possibly know the race of the hundreds of employees they monitored, making it terribly unlikely that race could play a factor in this regard.

She also stated that it would be impossible to track every instance as she received multiple emails from multiple individuals on a regular basis, in addition to the deviations that she made note of herself. ROI 1 at 62-3, 73, and 116.

Moreover, management was acting within their supervisory and managerial authorities to address Complainant's admitted tardiness, and absence without authorized leave especially when Complainant was only one of a few employees who performed the same duties.

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is precluded by the determination above that the Agency's explanations demonstrate that Claims 1-4 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Complainant may have felt that her managers' knowledge or even involvement in her prior protected EEO complaints motivated the challenged actions in Cases 1 and 2. However, none of these alleged actions amount to adverse treatment that can reasonably be viewed as taken to "dissuade a reasonable worker from making or supporting a charge of discrimination." See Carroll R. v. Yellen, EEOC Appeal No. 2020002891 (February 14, 2022); EEOC, Enforcement Guidance on Retaliation and Related Issues § II-B-3 (Aug. 25, 2016).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision and the Agency's final order adopting it.

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 20, 2024
Date