



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

[REDACTED]
Deena B.,¹
Complainant,

v.

Kristi Noem,
Secretary,
Department of Homeland Security
(Immigration and Customs Enforcement),
Agency.

Appeal No. 2023004588

Hearing No. 541-2021-00071X

Agency No. HS-ICE-00165-2020

DECISION

On August 11, 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 19, 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 performance, assignment,

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.

reassignment, discipline, and non-selection on the basis of race (black), color (dark skin), sex (female), and reprisal (instant EEO activity).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Resident Agent in Charge (Resident AC), GS-14 at the Office of Professional Responsibility (OPR) in Denver, Colorado. Complainant is a dark-skinned Black African-American female. Report of Investigation (ROI) at 31. Complainant participated in EEO activity in January 2018, and in September 2019. She also provided a supplemental affidavit in October 2019. ROI at 188.

Around 2017, Complainant's first-line supervisor (Supervisor 1A) was an Assistant Special Agent in Charge (ASAC). Complainant's second-line supervisor (Supervisor 2A) was a Special Agent in charge (SAC). Complainant's third-line supervisor (Supervisor 3A) was an Assistant Director. Between September 2018 and June 2020, Complainant's first-line supervisor (Supervisor 1B) was a second ASAC. Complainant's third-line supervisor (Supervisor 3B) was a second Assistant Director. Complainant had six subordinates who reported to her.

Complainant was on a Temporary Duty (TDY) assignment at OPR Headquarters in Washington DC from September 2019 until February 2020. On that assignment, Complainant reported to the Operations Chief, Investigations Unit (Chief). ROI at 274 and 304-05. From September 29, 2021, to December 31, 2021, Complainant was reassigned to Washington, DC on another TDY. During that time, Complainant reported to a Section Chief (Section Chief). Between October 1, 2020, and September 30, 2021, Complainant's first-line supervisor was a third ASAC (Supervisor 1C). Complainant's second-line supervisor was a second SAC (Supervisor 2B).

Complainant initiated EEO contact on September 27, 2019. On January 31, 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 race (African-American), sex (female), color (dark skin), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. From June 2017 to the present, Complainant's supervisor and responsible management officials nitpicked Complainant's performance and held her to a different standard than her peers and frequently undermined her authority with her subordinates;²
2. On multiple dates from June 2017 to present, Complainant's supervisor failed to support her when she needed assistance with disciplining her subordinates, and failed to respond appropriately when she raised concerns about their conduct;
3. On multiple dates from June 2017 to present, Complainant's supervisor treated her more harshly for allegations made against her, when more serious misconduct engaged in by white male counterparts went unaddressed;
4. On multiple dates from June 2017 to present, Complainant's supervisor was unsupportive of her attempts to provide constructive feedback to her subordinates;
5. On August 22, 2019, Complainant's supervisor required her to submit a request for an extension to extend her report date to HQ (Headquarters) Washington, DC via email, so she could make travel arrangements across the country for herself, her pets, secure a caregiver for her home, and to attend previously scheduled and essential medical appointments;
6. On August 23, 2019, Complainant's supervisor denied her request for an extension until September 30, 2019, to move to Washington, DC, instead only allowing Complainant until September 16, 2019, to report for duty, and denied her request to report to El Paso rather than HQ Washington, DC;
7. On August 30, 2019, Complainant's supervisor informed her she would only be authorized to travel via commercial airline to Washington, DC. even though this was not an option for her due to her detail for an indefinite period, obligations to her pets, and the Agency's decision to

² On appeal, Complainant asserts that she never made a complaint about nitpicking her performance, and she has been trying to get this claim removed since the informal stage of her EEO Complaint. This claim, Complainant asserts, was a copy and paste error that the EEO Investigator made during the informal process. Therefore, this decision will not address that part of Claim 1 that concerns nitpicking Complainant's performance.

deny reimbursement for any expenditures incurred during travel, if she chose to travel via her personal owned vehicle;

8. On April 23, 2020, Complainant was issued a letter instructing her to report directly to a management official, and reiterated she must remain "under direct orders to cease and desist from any contact with OPR (Office of Professional Responsibility) employees in the OPR Central AOR (undefined acronym) until otherwise instructed;
9. On May 19, 2020, Complainant's law enforcement credentials were returned despite the fact her law enforcement authority should have been restored four (4) days earlier;
10. On October 30, 2020, the OPR ASAC advised Complainant that she was not selected for a Resident Agent in Charge position. The ASAC informed Complainant he was told by OPR Management that Complainant would not be selected because she was facing disciplinary action and she had been demoted from her GS-14 RAC (Resident Agent in Charge) position to a GS-14 Program Manager position in OPR. Complainant contends that she was more qualified than the selectee;
11. On or about September 28, 2021, the Agency, through her manager chain, removed Complainant's supervisory duties and reassigned her from her current place of employment, the Denver field office to Headquarters for the second time since the discriminatory acts began; and
12. On or about October 25, 2021, the Agency, through Supervisor 1C issued Complainant an Unsatisfactory 2021 Performance Appraisal.

The Agency conducted an investigation into the complaint. The investigation revealed that on September 3, 2017, Complainant cleaned out the refrigerator in the OPR Denver office. While cleaning the refrigerator, Complainant threw out two expired items: a cup of yogurt and a bottle of hot sauce. ROI at 352. On November 6, 2017, while standing in the front hallway of one of the office suites, one of Complainant's direct reports (Subordinate 1), approached Complainant angrily and exclaimed, "why the fuck did you throw out my hot sauce?!?! That was my fucking hot sauce! That's some fucking bullshit!! Don't touch my shit! How the fuck am I supposed to eat lunch without my hot sauce?" ROI at 193. Complainant replied to Subordinate 1, explaining that she did not know it was his hot sauce and that she thought it was abandoned since it expired over two years ago. ROI at 194.

Later that day, Subordinate 1 went into Complainant's office to apologize and to explain that during his outburst about the hot sauce, he escalated the matter because Complainant responded to him in the same manner that he approached her. Complainant then asked him how he would have reacted had she done something more serious. She asked him if he would have shot her; and Subordinate 1 responded, stating, "No." Then Subordinate 1 stated, "well, maybe." ROI at 194 and 353.

Agency employees are empowered to report harassment allegations through numerous venues. ROI at 1939. Employees can (1) contact their supervisor, (2) contact the Agency's anti-harassment coordinator by phone or email, (3) contact the Agency's Joint Intake Center (JIC) by phone or email, (4) contact the Department's Office of Inspector General (OIG), or (5) file a complaint with the United States Office of Special counsel. ROI at 1386.

Complainant reported the incident to Supervisors 1A and 2A. Supervisor 2A told Complainant to contact Employee & Labor Relations (ELR). When Complainant contacted ELR, an ELR official (ELR Official) advised Complainant that because no one had ever made formal complaints against Subordinate 1 until the November 6, 2017, incident, Complainant could only issue a letter of counseling to Subordinate 1. ROI at 201.

On November 9, 2017, Complainant issued a letter of counseling to Subordinate 1. ROI at 374. As a follow up, Supervisor 2A had a meeting with Subordinate 1 and warned him that the kind of statements that Subordinate 1 made to Complainant would not be tolerated. ROI at 1385. Supervisor 2A also looked into reassigning Subordinate 1 on a TDY to the Agency's Homeland Security Investigations (HSI), but HSI management was unable to accommodate Supervisor 2A's request.

Complainant contended that in response to Subordinate 1's threats to her, Subordinate 1 was never placed on administrative leave; his law enforcement badge and credentials were never suspended; nor was his authorization to carry a firearm or drive a government-owned-vehicle. She asserted that for the next two weeks, Supervisor 2A recommended the agents remain in the office with Complainant in the evenings until they were sure Subordinate 1 cleared the premises, and it was deemed safe for Complainant to leave. ROI at 190-92.

Complainant also contended that in April 2018, Supervisor 2A advised her to conduct Subordinate 1's mid-year performance evaluation with Complainant's office door open.

She was also advised to have Agents staged in the cubicle outside of her office in case Subordinate 1 became violent. As such, asserted Complainant, four Special Security Agents (all Complainant's subordinates) were all staged in one of the SSA's cubicle right outside of Complainant's office door, with their M4 long guns. During the evaluation, Subordinate 1 continued to express his discontent with being counseled. ROI at 190-92.

Complainant asserted that she expressed to management, including Supervisor 2A, that she had a credible fear of Subordinate 1. She asserted that she told management that as Subordinate 1 was coming toward her, Complainant cowered and braced for impact, as she was sure Subordinate 1 would strike her. According to Complainant, during the "attack," no one intervened and asked Subordinate 1 to stop. She asserted that three named witnesses "just stood there and watched." Complainant alleged that she inquired of Supervisor 2A what action would be taken against Subordinate 1. According to her, Supervisor 2A stated that there was no money in the OPR budget to send Subordinate 1 on an extended TDY to OPR HQ. ROI at 192. She asserted that Supervisor 2A stated that Subordinate 1 would need to fail a performance improvement plan (PIP) before he could be terminated. Id.

Around August 2018, Complainant was the acting ASAC because Supervisor 1A had retired. While acting as ASAC, Complainant alleged that the Resident ACs who reported to her were complaining about the Acting Investigative Program Officer (IPO [Acting Program Officer]) contacting them and instructing them to make changes to their "Redbooks." ROI at 204. A Redbook is a closing report for all ICE employee misconduct investigations. It is a document that fully addresses/resolves all allegations made or developed against an employee through testimony and evidence.

The standard procedure for the Redbook review process was, (1) the agency submits a draft Redbook to the RAC for review, (2) the RAC reviews the document and sends it back to the agent requesting edits, (3) the agent makes the corrections and sends the Redbook back to the RAC for review, (4) the RAC forwards the Redbook to the ASAC for review, (5) the ASAC reviews the Redbook and sends it back to the RAC requesting edits. If there are no edits, the ASAC forwards the Redbook to the IPO, (6) the IPO reviews the Redbook and sends it back to the ASAC for edits. If there are no edits, the IPO forwards the Redbook to the Office of the Principal Legal Advisor (OPLA) for legal sufficiency review, and (7) once cleared by OPLA, the IPO returns the Redbook to the ASAC who sends it back down the chain of command to the Resident AC who uploads the document into JICMS. ROI at 205.

According to Complainant, Acting Program Officer was circumventing the standard procedure for the Redbook review process. Complainant contacted Supervisor 2A about Acting Program Officer circumventing the Redbook review process, but Supervisor 2A told Complainant to speak directly to Acting Program Officer. ROI at 205. Complainant called Acting Program Officer to discuss her concerns about Acting Program Officer circumventing the Redbook review process.

During the phone call, Acting Program Officer became defensive and upset. Acting Program Officer eventually hung up on Complainant. ROI at 206. Complainant then sent Acting Program Officer an email. She told Acting Program Officer that her behavior would not be tolerated. She instructed Acting Program Officer to refrain from contacting the Special Agents directly or lecturing them about OPR procedures. Complainant also told Acting Program Officer that she was rude, arrogant, and disrespectful. ROI at 394.

Shortly after Complainant's "discussion" with Acting Program Officer, Supervisor 2A called Complainant. He told Complainant that Acting Program Officer had contacted him, crying about the fact that Complainant and Acting Program Officer had gotten into an argument regarding the Redbook review process. After Complainant explained the details of the phone call with Supervisor 2A, Supervisor 2A instructed Complainant to apologize to Acting Program Officer. ROI at 206.

Complainant told Supervisor 2A that it was his lack of communication that caused the conflict. As such, Complainant refused to apologize to Acting Program Officer. ROI at 207. Complainant believed that Supervisor 2A asked her to apologize to Acting Program Officer because Complainant was the only female acting ASAC in OPR SAC Central. She also asserted that Supervisor 2A had shown a pattern of being extremely supportive of subordinate agents. ROI at 210. She believed that Supervisor 2A's actions were taken against her in reprisal for her prior EEO activity. ROI at 211.

On December 10, 2018, while driving Supervisor 2A from the airport, Subordinate 2 informed Supervisor 2A that he was resigning from the Agency. Subordinate 2 wanted to inform Supervisor 2A before he informed Complainant. ROI at 1387. On December 17, 2018, Subordinate 2 informed Complainant that (1) he was resigning from the Agency and (2) he had already informed Supervisor 2A about the impending resignation. ROI at 194. When Complainant learned that Subordinate 2 would be resigning, she vented her frustration in her office by yelling out loud, "you know what, he fucked me, I'm going to fuck him, I'm not going to grant him his day."

Agency's motion at 70. Complainant believed that Supervisor 2A undermined her authority by empowering Subordinate 2 to violate the chain of command by bypassing her and going straight to Supervisor 2A to inform him about the impending resignation. Complainant believed Supervisor 2A's action was taken because she was the first and only black special agent in the office supervising five white special agents. ROI at 194-95. She also indicated that Supervisor 2A had a pattern of not showing her support as a result of her participation in EEO activity where she pretty much countered what his statements were. Agency's motion at 68.

On August 14, 2019, Complainant reviewed a Redbook that was prepared by another one of her direct reports (Subordinate 3). During her review, Complainant concluded that the Redbook was not complete as it was missing some documents. She instructed Subordinate 3 to re-interview a witness and ask the witness some questions. She also instructed Subordinate 3 to re-interview the witness with another direct report to Complainant (Subordinate 4). On August 15, 2019, a fifth direct report to Complainant (Subordinate 5), informed Complainant that Subordinate 3 re-interviewed the witness with him (instead of Subordinate 4). Subordinate 5 narrated to Complainant that during the re-interview, Subordinate 3 tried to get the witness to authenticate some documents. ROI at 215.

Subordinate 5 did not believe that it was necessary for a witness to "authenticate" documents. Therefore, Subordinate 5 asked the IPO (Program Officer) if it was necessary for witnesses to authenticate documents. ROI at 215. Program Officer also worked for OPR SAC Central, but he reported to Supervisor 2A. Agency's motion at 113. Program Officer told Subordinate 5 that the agents did not have to do what Complainant asked them to do. ROI at 216. Subordinate 5 then communicated to Complainant that according to Program Officer, the witness did not need to authenticate documents. Complainant disagreed with Program Officer. According to Complainant, Program Officer, who reported to Supervisor 2A, had been delegated the Redbook review responsibility. However, Program Officer was not a supervisor and was not in anyone's chain of command. Program Officer did not oversee the OPR investigative process. That responsibility remained with Resident ACs, ASACs, and the SAC. ROI at 215.

Complainant reckoned there had been a miscommunication about the whole issue. ROI at 216. Therefore, Complainant sent an email attempting to clarify her position on the issue. Complainant wanted Subordinate 3 not to authenticate, but to get the witness to initial and date specific documents for the record. Id.

In spite of her explanation, Program Officer continued to advise OPR Denver that they did not have to do what Complainant asked them to do. Id. Therefore, Complainant believed that Program Officer was undermining her authority. Id. According to Complainant, Program Officer's responses were clearly a personal attack against her. Id. Also on August 15, 2019, Complainant sent an email to Program Officer. In the email, amongst other things, she stated, "I find your continuing to challenge me in an open forum on email to be disrespectful. It undermines my decision and authority. And that sir, is not really necessary." ROI at 1449. Complainant copied her supervisors on the email. Id.

On August 16, 2019, Program Officer responded stating that he could also accuse Complainant of being disrespectful. ROI at 1448. Program Officer then sent an email to Supervisors 1B and 2A, where he stated, amongst other things, "If I get another negative response from her...I will assume she is intentionally trying to harass me...." and "I heard...yesterday that the environment there is hostile based on how she is treating folks." Id. Supervisor 1B asked Program Officer to advise him on who reported a hostile work environment in the Denver OPR office, so that he could take appropriate measures. Program Officer referred Supervisor 1B to Subordinate 5. ROI at 1447. Also on August 16, 2019, Supervisor 1B reached out to Subordinate 5 to ask about alleged hostile work environment allegations at OPR Denver. Both gentlemen had a telephonic meeting to discuss the issue. Subordinate 5 invited Subordinates 3 and 4. They all participated in the discussion. ROI at 1552.

On that phone call, the subordinates alleged that Complainant harassed her employees at least 23 separate times; and that they were afraid to report the issue because of Complainant's close relationship with senior management. Complainant's subordinates essentially made an oral complaint to Supervisor 1B, against Complainant, alleging that she caused a hostile work environment. ROI at 1397. That same day, Supervisor 2A reported the allegations of harassment to a named official (Official 1). Official 1 responded stating that management needed to take immediate action. ROI at 1502 and Agency's motion at 115. Supervisor 2A referred the matter to the OIG for investigation. Agency's motion at 117-18.

On August 17, 2019, a second named official (Official 2) advised Supervisor 2A to "move forward administratively." Agency's motion at 117. Supervisor 2A referred the matter to JIC for investigation. ROI at 1696-1711. Also on August 17, 2019, Supervisors 1B and 2A placed Complainant on administrative leave. ROI at 435.

Supervisor 2A also temporarily suspended her authority to carry firearms, credentials, and her use of a government owned vehicle. Id. By a letter dated August 17, 2019, Supervisor 2A notified Complainant that he was putting her on administrative leave because he received information that Complainant created a hostile work environment by engaging in disruptive behavior towards her subordinates while in performance of her supervisory duties as Resident AC at OPR Denver. ROI at 1474. Supervisor 2A also instructed Complainant to cease and desist from any communication with all OPR agents and support staff in the Central AOR (undefined acronym) until otherwise instructed by Supervisor 2A. ROI at 436.

After she received the cease-and-desist letter, Complainant contacted Subordinate 4 and had a discussion with him. ROI at 1567-68. Subordinate 4 reported the matter to Supervisor 1B on August 21, 2019. Id. He informed Supervisor 1B that Complainant contacted him on August 16, and 17, 2019. Id. Supervisor 1B informed Supervisor 2A about the communication. ROI at 1567. On August 21, 2019, Supervisor 2A informed Complainant that she would be on administrative leave until August 30, 2019, and then she would have to report to OPR HQ, Washington DC on September 3, 2019. ROI at 1410. The reason was that Complainant created a hostile work environment at OPR Denver. Id.

On August 22, 2019, Complainant asked Supervisor 2A if she could get an extension to report to OPR HQ on a later date (September 30, 2019) because of medical appointments. ROI at 1412. Supervisor 2A permitted her to report to OPR HQ on September 16, 2019. ROI at 1414. Complainant asked to travel to Washington DC by car. ROI at 1415. Supervisor 2A denied her request and explained that she could travel to Washington DC by commercial airline and that the Agency would not reimburse her for any expenditures incurred during travel if she chose to travel via her personal owned vehicle. ROI at 1416.

Supervisor 2A denied Complainant's request to travel by car because a cost benefit analysis by the financial service center showed that it was more cost effective for Complainant to travel by air. ROI at 1482-87. On August 30, 2019, Supervisor 2A informed Complainant that she would be temporarily relieved of her supervisory responsibilities at the Denver OPR and that she would be assigned to OPR HQ where she would work on policy reviews, executive taskings, fiscal year reporting, and other tasks as assigned. ROI at 891-93.

The JJC investigated the allegations against Complainant. ROI at 1696-1711. By letter dated February 20, 2020, a named employee (Official 3) notified Complainant that the Adverse Action Panel proposed to remove Complainant from her position and from federal service for misconduct. The charges were (1) lack of candor, (2) failure to follow instructions, (3) non-willful misuse of a government vehicle and, (4) conduct unbecoming. ROI at 1712. On April 13, 2020, Complainant submitted a written reply to the proposal to remove her to Supervisor 2B, the deciding official. ROI at 545. On May 5, 2020, Supervisor 2B informed Complainant that she would be returning to OPR Denver. ROI at 1423. By letter dated May 5, 2020, Supervisor 2B informed Complainant that he sustained all but one of the charges. ROI at 446-50. Supervisor 2B mitigated the penalty from a removal to a ten-day suspension. Id.

Complainant's suspension was effective from May 6, 2020, through May 15, 2020. ROI at 473-77 and Agency's motion at 120-21. Upon the conclusion of her suspension, Complainant returned to her regular duties as Resident AC at the Denver OPR on May 18, 2020. Agency's motion at 120-21. On May 19, 2020, Supervisor 2A returned Complainant's credentials back to her because he was awaiting notification from the ELR and Supervisor 2B before returning the credentials back to her. ROI at 1427.

Complainant believed that her suspension was due to her protected bases, stating that other supervisors (e.g., an African American male with EEO activity (ASAC 1); a white male Resident Agent in Charge with EEO activity (Resident AC 1); and Resident AC 2, a Hispanic female with no prior EEO activity who had allegedly caused hostile work environments in the past did not receive ten-day suspensions for similar misconduct. ROI at 321-25.

According to Complainant, ASAC 1 confronted Supervisor 2A, his supervisor, about his lower performance rating and the conversation became heated and volatile. She stated that ASAC 1 was also charged with creating a hostile work environment, placed on administrative leave and his badge, credentials, authorization to carry a firearm and to drive a government-owned-vehicle was suspended and he was banned from all departmental facilities. Complainant asserted that ASAC 1 was on administrative leave for sixty days and no further corrective action was taken. See ROI at 222-23.

Complainant asserted that Resident AC 1 was accused of harassing a named Special Security Agent, which was reported to Supervisor 2A. According to Complainant, Supervisor 2A ordered Resident AC 1 to report to him in San Antonio, Texas for counselling in December 2017.

However, Resident AC 1 was not placed on administrative leave, and did not have his badges, credentials, or authorization to drive a government vehicle suspended. See ROI at 224.

Complainant also asserted that Supervisor 1A had reported to Supervisor 2A that she was being harassed by Resident AC 2. Complainant asserted that Supervisor 2A ordered Resident AC 2 to report to him in San Antonio, Texas for counselling in December 2017, but Resident AC 2 was not placed on administratively leave, and did not have her badges, credentials, firearm, or authorization to drive a government vehicle suspended. See ROI at 224.

On July 30, 2020, Complainant applied for the position of Resident AC, Fairfax, VA (DAL-OPR-10872306-MP- JBS). She made the list of applicants certified as eligible for the position. ROI at 1076. Complainant interviewed for the position on August 31, 2020. The interview panel members were ASAC 1, Supervisor 1C (also an ASAC), and another ASAC (ASAC 2). ASAC 2 was the leader of the interview panel. ROI at 1609. The selecting official for the position was an OPR SAC/SE (Selecting Official). ROI at 1079. At the time that Complainant interviewed for the Resident AC position, she did not have an organizational relationship with Selecting Official, Supervisor 1C or ASAC 2. ROI at 1607, 1615, and 1638. Complainant did have an organizational relationship with ASAC 1. ROI at 1627.

According to ASAC 1, Selecting Official had concerns about Complainant getting interviewed for the position "because ASAC 2 had stated that Selecting Official told him that [Complainant] was no longer a Resident AC, but a program manager assigned to headquarters; and that [Complainant] had a disciplinary action against her." ROI at 1629. Other candidates who interviewed for the Resident AC position were a White Hispanic male (Candidate 1), a White male (Candidate 2) and a White female (Candidate 3). ROI at 1643-44.

Supervisor 1C believed that Candidate 1 provided the best and most complete answers to the panel interview questions. ROI at 1621. ASAC 2 believed that Candidate 1 had more supervisory experience, more OPR experience, and more skills that could be used in the office such as firearms instructor certificate and fluency in Spanish. ROI at 1643. ASAC 1 believed that Complainant had more experience than Candidate 1. ROI at 1630. In ASAC 1's words, "Candidate was not a current permanent...supervisor unlike Complainant. [Complainant] demonstrated years of experience overseeing an OPR Resident AC office and [Candidate 1] did not." ROI at 1632.

As a group, the panel recommended Candidate 1 as the best candidate for the position of Resident AC for the Fairfax, VA office because he "had more supervisor experience, more OPR experience and more skills that could be used in the office such as firearms instructor certification and fluency in Spanish." ROI at 1643. Selecting Official followed the recommendation of the panel and selected Candidate 1 for the position. Complainant cited the incident involving Subordinate 1 from 2017, and the incidents surrounding allegations that she harassed her subordinates in 2019 to support that her protected bases factored into her non-selection for the Resident AC position. ROI at 1611.

On October 21, 2020, Supervisor 1C issued Complainant her performance work plan (PWP). Agency's motion at 160-76. The PWP covered October 2020 through September 2021. Id. The PWP contained the following Core competencies: (1) Communication; (2) Representing the Agency; (3) Teamwork and Cooperation; (4) Technical Proficiency; (5) Assigning, monitoring, and evaluating work; and (6) Leadership. Id. Each Core competency is critical which means that an unacceptable determination in any one competency results in an overall unacceptable rating. Id.

Under technical proficiency, to achieve expectations, Complainant must:

- Successfully apply broad technical knowledge and skills to manage a range of highly complex work activities
- Provide effective and timely guidance to others to help them develop their technical job skills
- Effectively seek and use feedback on own performance to enhance knowledge and skills that facilitate achieving results
- Demonstrate extensive knowledge and understanding of the applicable organizations mission, functions, values, relevant policies and internal controls and how these affect the larger organization and its relationship with external entities
- Demonstrates expert knowledge of and provides guidance to others on available resources and processes to acquire them
- Effectively oversees efforts to define and collect information to address difficult or complex issues
- Assimilates and integrates complex information across multiple areas, evaluating its significance, usefulness and impact on unit objectives
- draws sound conclusions and advises on actions to be taken using a broad perspective
- Anticipates, generates solutions for and efficiently solves unusual or complex problems and
- Makes sound and timely decisions; considers alternative courses of

action and chooses an effective option that takes into consideration future risks and opportunities. Id.

On November 4, 2020, Supervisor 1C sent an email to all the employees that reported to him, explaining his expectations to the group. Agency's motion at 178-257. In the email, he attached a power point presentation regarding OPR Investigative Overview and a Redbook guide. Id. He also set up a Teams meeting where he planned to discuss his expectations as it pertained to OPR cases, documenting investigative findings in Redbooks, and closing Redbooks. Id.

OPR Agents use a guidebook (OPR Guidebook Chapter 2, Investigative Case Management (Chap. 2)) which provides guidance and direction to OPR investigators and supervisors on how allegations of criminal and administrative misconduct are received, processed, investigated, documented, and disseminated. See Agency's motion at 276-77 for Chapter 2.26 of the Chap. 2 guidebook which covers Supervisory Review/Approval of Closing Redbooks. Ch.2.26.1 requires supervisors to ensure that all witnesses are interviewed. Id.

On November 6, 2020, Complainant reviewed JICMS Case 202011121 where Subordinate 5 investigated a matter where the wife of an agent had sent an email to the Agency, claiming that her husband/ICE employee may have been "selling classified information to support a lavish lifestyle." Agency's motion at 280-88. Complainant cleared Subordinate 5's investigation of the case without ensuring that Subordinate 5 interviewed the wife who made the allegation. Id. Complainant decided against questioning the wife because "it was not beneficial for [her] to feed into her medically documented delusions." Id. By not ensuring that the wife was questioned, Complainant failed to ensure that all witnesses are interviewed until Supervisor 1C corrected her. Id. This was contrary to rule 2.26.1 which requires supervisors to ensure that all witnesses are interviewed.

On February 16, 2021, Complainant reviewed Case 202008549 where Subordinate 6 investigated an allegation that an employee was arrested for domestic violence, child abuse, and assault in the third degree. Agency's motion at 292-98. Complainant cleared Subordinate 6's investigation while missing substantive edits indicated by the extensive yellow and red highlights in the documents as edited by Supervisor 1C. Id. Subordinate 6's written work lacked thoroughness, accuracy, clarity, and chronology as required by rule 2.24.2, and Complainant failed to catch it. Id.

On March 28, 2021, Complainant reviewed a Redbook and signed as RAC and ASAC. Agency's motion at 301-02. She knew that she was not authorized to sign the Redbook on behalf of the acting ASAC, ASAC 1. Id. Complainant's signing of the Redbook as ASAC was contrary to rule 2.26.5 which expects the actual ASAC or acting ASAC to concur on a draft Redbook. Agency's motion at 276.

Around April 29, 2021, Complainant allowed some of her special agents to conduct an employee witness interview telephonically without getting prior approval from the ASAC. Agency's motion at 304-06. This was contrary to rule 2.17.6.2 which states that in limited circumstances and with approval of an ASAC, an OPR office may conduct interviews via video teleconferencing. Agency's motion at 261-62. On April 30, 2021, Complainant cleared another investigation by Subordinate 6, where Subordinate 6 "wasted space" on an Absent Without Leave (AWOL) issue that was not part of the charge. Agency's motion at 308-15. Complainant also missed the fact that on an allegation where the conviction is Driving under the Influence (DUI), Subordinate 6 never asked any questions about the DUI issue. Id. Subordinate 6's written work on this case lacked thoroughness, accuracy, clarity, and chronology as required by rule 2.24.2 and Complainant failed to catch it. Agency's motion at 268.

On May 5, 2021, Complainant had a case forwarded to the IPO without clearing it with Supervisor 1C. Agency's motion at 317-21. Failure to clear the document with Supervisor 1C was contrary to rule 2.25.7 which states that "RACs will ensure that all reviews mandated by the SAC or ASAC are completed prior to approving a Redbook in JICMS." Agency's motion at 275-76.

Around August 16, 2021, Complainant assigned Case 202108546 to Subordinate 7 prior to it being reviewed by the ASAC. Agency's motion at 329-30. This assignment was contrary to rule 2.2.3 which states that the file should remain "in an unopened status in JICMS until it is processed by the responsible ASAC...." Agency's motion at 260.

On September 16, 2021, Complainant cleared Subordinate 5's investigation of a case without ensuring that Subordinate 5 requested the sworn statement of a civilian witness for use as a Redbook exhibit. Agency's motion at 334-36. Instead, Complainant cleared Subordinate 5's decision to prepare an investigator affidavit summarizing the interview of the civilian witness. Id. Preparing an affidavit summarizing the interview of civilian witnesses is permissible under certain conditions. Agency's motion at 265.

Complainant's decision to allow Subordinate 5 to summarize the interview of the civilian witness is contrary to Rule 2.22.2 of Chap. 2 which states that "when interviewing a civilian witness in an ...investigation, the investigator should request a sworn statement for use in the Redbook." Id. At the end of the FY2021, due to the various policy violations, Supervisor 1C decided that Complainant would receive an "unacceptable" rating for her Technical Proficiency core competency. Agency's motion at 174-76.

Complainant asserted that she was never placed on a PIP before or after the unacceptable rating. She also asserted that there is no evidence that Supervisor 1C communicated any of her alleged deficiencies to her prior to the unacceptable rating. According to Complainant, Supervisor 1C gave her a positive mid-year review.

The Agency alleged that "Complainant violated numerous policies pertaining to the processing of cases and the development of investigatory material." See Agency's motion at 29. Complainant disagreed, asserting that the policies referenced by the Agency are guidance and not regulations. Complainant's opposition at 45.

According to Complainant, her interpretation and application of those policies was justified because it was in accordance with her training and practice by her previous supervisor. See Complainant's opposition at 45. Complainant asserted that Supervisor 1C applied those policies differently than Complainant was accustomed to. Complainant contended that Supervisor 1C's new method was procedure to follow, and Complainant altered her case processing methods to accommodate Supervisor 1C. See Complainant's opposition at 45-6. However, asserted Complainant, her method was not objectively wrong from an Agency perspective, only different from her supervisor's preferred method. Id. Regrettably, Complainant contended, the Agency did not provide her any formal training to acclimate to Supervisor 1C's differing style. Complainant's opposition at 46. Complainant also contended that Supervisor 1C gave her a positive mid-cycle performance review praising her leadership and had no evidence of Complainant harassing her subordinates. Id.

In September 2021, three employees of the OPR Management Inspections Unit (MIU) were tasked with conducting a routine inspection of OPR Denver. Agency's motion at 123-27. As part of the inspection, they interviewed with Complainant and her subordinates. Id. During their interaction with Complainant, one of the employees (Employee 1) asked Complainant if he could view some personnel folders as part of the review.

Agency's motion at 126. Complainant did not allow them to review the folders. Id. The three employees also spoke to Complainant's subordinates who all alleged that Complainant was subjecting them to a hostile work environment. Agency's motion at 123-41. The subordinates also alleged that Complainant was retaliating against them for past issues. Id. Official 3 was informed about allegations of harassment. Agency's motion at 158. Therefore, she decided to temporary detail Complainant to OPR HQ, pending an investigation into the allegations of retaliation and hostile work environment.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The parties engaged in discovery. On May 30, 2022, the Agency submitted a Motion for Decision without a Hearing (Agency's motion). Complainant filed a response opposing the motion (Complainant's opposition) and the Agency filed a reply.

Upon review of the ROI, the Agency's motion, and all documents the parties had submitted, the AJ assigned to the case concluded that there were no genuine issues of material fact in this case to be decided at a hearing. The AJ granted the Agency's motion; and on June 16, 2023, awarded summary judgment in favor of the Agency on all claims.

The AJ adopted the Agency's motion in its entirety because it identified the accepted claims, undisputed facts, applicable legal standards, and grounds upon which this case should be decided without a hearing. 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 reiterates her allegations, raising the same arguments previously considered by the AJ. She contests the AJ's decision, asserting, without corroboration, that the AJ dismissed her claims; and that the dismissal was erroneous. According to Complainant, both the Agency and the AJ failed to consider the full scope of her claims against the Agency. Complainant alleges that the AJ did not conduct an analysis as to whether she had established a *prima facie* case of disparate treatment, reprisal, or harassment. She also alleges that the Agency failed to include findings of fact and conclusions of law in its final order that adopted the AJ's ruling, thereby depriving her of the ability to meaningfully appeal the decision. Complainant's Appeal Brief at 21-2.

Complainant alleges that the AJ failed to allocate sufficient weight to the reprisal analysis, arguing that she suffered “ongoing adverse employment actions from June 2017 to present;” and that all the alleged adverse employment actions occurred during the pendency of “the ongoing EEO actions.” Complainant also asserts that she established causal connection by showing that similarly situated individuals, who she again identifies, were treated in a more favorable manner. Complainant’s Appeal Brief at 12 and 14-5. In response to the Agency finding that Complainant’s FY2021 performance was unacceptable because she failed in the core competency of technical proficiency, Complainant states that the Agency did not place her on a performance improvement plan (PIP). Complainant also states that her supervisor did not inform her of her deficiencies prior to the rating. Complainant’s Appeal Brief at 16-8.

Complainant reiterates her argument that ASAC 1, a member of the interview panel, believed that she was better than Candidate 1. Complainant’s Appeal Brief at 19. Complainant also alleges that the Agency provided no evidence to support its stated explanations for some of the challenged management actions. Complainant’s Appeal Brief at 20.

In response, the Agency reiterates its stated explanations for the challenged management action, and expresses agreement with the AJ’s decision. According to the Agency, Complainant’s arguments are misplaced because any claims of adverse employment actions prior to January 8, 2018, did not occur due to reprisal. Among other things, the Agency asserts that Complainant failed to identify appropriate comparators; that she failed to demonstrate that the Agency’s explanations were pretextual; and that like her, two of Complainant’s identified comparators had participated in EEO activity in the past and therefore not outside of that protected basis.

Regarding Complainant’s proposition that the AJ’s decision and the Agency’s final order did not include findings of fact and conclusions of law, the Agency cites to the AJ’s decision at 1-4, stating that the AJ identified the issues and the *prima facie* elements that Complainant needed to establish for all her claims; and that the Commission has affirmed other cases where AJs and Agencies have ruled in similar fashion.

Regarding Complainant’s rating of “unacceptable,” the Agency asserts that Complainant knows that at the end of FY 2021, she was placed on a temporary detail in Washington DC based on a second set of allegations that she continued to harass her subordinates. Therefore, Complainant should know that she could not be placed on a PIP while she was on a detail.

Citing to Agency's motion at 17-20, the Agency also asserts that when Supervisor 1C became Complainant's supervisor in 2020, he informed her and her coworkers on the procedures he expected his employees to use to process cases. Supervisor 1C also detailed errors in Complainant's work.

Regarding her non-selection, according to the Agency, ASAC 1's preference for Complainant for the RAC position does not show pretext. Citing to Agency motion at 15, the Agency asserts that (1) two other interviewers preferred Candidate 1 because of his supervisory experience, his skills in firearms, and his fluency in Spanish; and (2) the interviewers, as a group (which included ASAC 1), recommended Candidate 1 and not Complainant for the position. Citing to Agency's motion at 30, the Agency states that while some of its stated explanations required evidentiary support, others were discretionary and based on common practice, not policy. The Agency states that Complainant presents no evidence that Supervisor 2A asking her to work with ELR on a disciplinary matter (or awaiting guidance from ELR before returning credentials to Complainant) was an unequal application of Agency policy or that his articulation inadequately explains inconsistencies in the record.

STANDARD OF REVIEW

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

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

ANALYSIS

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Nor is the Agency required to include findings of fact in its final order in situations where such an order is issued following a decision by an AJ. See C.F.R. 1614.110(a). Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

Disparate treatment based on race, color, sex, and reprisal (Claims 4-11)

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)).

Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). When establishing a prima facie case of retaliation under Title VII, close temporal proximity is sufficient to infer a causal nexus between an employee's protected activity and an adverse action on the part of an employer. See Clark County School Dist. v. Breeden, 532 U.S. 268, 273 (2001) (noting that "cases that accept mere temporal proximity between an employer's knowledge of protected activity and 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'").

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, color, and sex.

Complainant established her prima facie case of reprisal to the extent that she had engaged in protected EEO activity in January 2018, and in September and October 2019.

Subsequent adverse actions also occurred. However, even accepting as true Complainant's assertions that the identified management officials were all aware of her prior EEO activity at the time each took the alleged actions for which they were identified and she presented a *prima facie* case on this basis, she did not demonstrate that the alleged actions were taken based on any such knowledge.

Complainant established a *prima facie* case of race, color, and sex discrimination solely to the extent that she is a Black African-American female. 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 these protected bases. The Agency has also provided legitimate nondiscriminatory reasons for Complainant's non-selection and other actions; and we find no persuasive proof of pretext.

Regarding Claims 4-8, Supervisor 2A reassigned Complainant to Washington, DC, and instructed her to desist from contacting her subordinates at the Denver office because Complainant was under investigation for subjecting all of her subordinates to harassment and a hostile work environment. The record reflects that after Complainant requested an extension for her resumption date in Washington, DC, Supervisor 2A did not deny her request for an extension. Instead, he asked that she resume at her new work location two weeks earlier than Complainant had requested. Complainant did not state that she was unable to attend her medical appointments during that time. Supervisor 2A also approved that Complainant travel via commercial airline because that was more cost effective than Complainant's preference to drive to Washington, DC. There is no record evidence reflecting that the reassignment was for an indefinite period. In fact, Complainant was soon returned to the Denver, Colorado OPR office.

Regarding Claim 9, Supervisor 2A asserted that he did not return Complainant's credentials four days after she returned from suspension because he was awaiting guidance from ELR. Complainant did not dispute this assertion or refute it with any evidence that supports a different explanation.

Regarding Claim 10, Selecting Official and the interview panel agreed to select Candidate 1 for the position of RAC, Fairfax, VA (DAL-OPR-10872306-MP- JBS) because his qualifications were better than Complainant's.

Regarding Claim 11, Supervisor 1C issued Complainant an unsatisfactory 2021 performance appraisal, rating her performance as unacceptable because Complainant was underperforming in the core competency of technical proficiency. The record includes ASAC 1C's detailed explanation of Complainant's performance errors.

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)). We find no such proof here.

Complainant maintained in her original complaint and on appeal that the alleged management actions were based on her race, color, sex, and prior EEO activity. Yet, Complainant did not dispute management's explanations or present any evidence to support her repeated assertions that those explanations lack credence and should not be believed. Nor did Complainant demonstrate, by preponderant evidence, that management's actions were motivated by discriminatory or retaliatory animus; and she failed to establish a link between the challenged management actions and any of her protected bases.

We note Complainant's argument that a race theory should be considered because ASAC 1, also an African-American, is the only other employee who received similar discipline as Complainant. However, we do not find that the challenged management actions that resulted in discipline for Complainant or ASAC 1 stemmed from their protected race class. Rather, ASAC 1 was disciplined for 60 days for engaging in a heated argument with his supervisor over a performance rating he found unacceptable. Complainant received a ten-day suspension for subjecting her subordinates to a hostile work environment. Complainant did not dispute that she engaged in the actions described to management by her direct reports, only alleging that management did not support her actions.

As for Complainant's arguments that Resident ACs 1 and 2 who were White and Hispanic received lesser discipline, Complainant herself conceded that while all her subordinates accused her of creating a hostile work environment, she did not have any evidence that every subordinate that reported to

Resident ACs 1 and 2 (or even ASAC 1) reported them for similar conduct. Also, Complainant did not know the details of any harassment allegations against Resident AC 1 or Resident AC 2. Agency's motion at 69-70 and 72. Notably, Resident AC 2 is within Complainant's protected gender class because she is female.

Regarding reprisal, we note that the incidents that allegedly occurred in 2017 could not be motivated by retaliation because that was prior to January 2018, when Complainant first engaged in protected EEO activity. Likewise, the remaining incidents that allegedly occurred beginning in August, 2019, prior to Complainant's initial EEO contact on September 27, 2019, in the instant complaint cannot be reprisal. For one thing, Complainant presented no evidence to support her assertions that the named management officials knew of her prior EEO activity when they took any of the actions involving them. The August 27, 2019, incident alleged in Claim 4 also occurred about 20 months after Complainant's January 2018, prior EEO activity. Therefore, Complainant's retaliation claims are too attenuated to establish retaliation.

Even accepting as true Complainant's repeated arguments that management was aware of her prior EEO activity, and even assuming that the activity is not too attenuated to be the basis for Complainant's reprisal claim, we find that management acted within their authority in reassigning Complainant to address her alleged conduct of subjecting her subordinates to a hostile work environment. In that regard, the Commission has held that 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); Carter v. Dep't of Education, EEOC Appeal No. 01842314 (Aug. 25, 1986).

Complainant also argued that she was better qualified, and had more years of experience, than Candidate 1 for the Resident AC position in Fairfax, VA (Claim 10). She cited ASAC 1's support for her to allege that discrimination was the reason for her non-selection. However, the Commission has 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). That is the situation here.

Regarding allegations relating to Complainant's performance rating, 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, and Complainant has not shown how she was treated differently than others who were similarly situated and outside of her protected groups. Therefore, Complainant's disparate treatment claims fail.

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 4-11 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Harassment and Retaliatory Harassment (Claims 1-3, and 12)

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

With regard to retaliatory harassment, Complainant need only show that the alleged actions were the type of action that would dissuade a reasonable employee from making or supporting a charge of discrimination. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U. S. 53 (2006); see also EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016); Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Here, Complainant is a dark-skinned Black African-American female. She also engaged in prior EEO activity in January 2018, and September-October 2019. Management alleged they were unaware of Complainant's protected activity when they took any of the actions against Complainant. She also failed to describe any management conduct that is sufficiently tied to her protected bases to constitute actionable harassment.

For example, Supervisor 2A did not tell Complainant about the impending resignation of Subordinate 2 because Subordinate 2 told Supervisor 2A that he would inform Complainant himself (Claim 2). Supervisor 2 asked Complainant to apologize to Acting Program Officer because Complainant made the employee cry and was disrespectful on a phone call to Acting Program Officer (Claim 3). Complainant did not describe any more serious misconduct engaged in by white male counterparts that went unaddressed by Supervisor 2A or any other management official. Nor did she identify any White male counterpart that engaged in her same or similar behavior.

We also note Complainant's description of Subordinate 1's misconduct (Claim 1). However, the record does not support Complainant's allegations that management did not support her. After Supervisor 2A directed her to report Subordinate 1's misconduct, ELR asked that Complainant counsel Subordinate 1, which she did. Complainant alleged that Subordinate 1 disagreed with the counseling but she did not cite to any Agency policy to show that Supervisor 2A erred or acted inconsistently when he asked that Complainant, as the supervisor, conduct Subordinate 1's performance review.

Also, contrary to Complainant's assertions, management did take action to address her allegations against Subordinate 1. Supervisor 2A tried to reassign him but HSI could not accommodate Subordinate 1. Complainant's subordinates also protected her, waiting until Subordinate 1 cleared the building before Complainant left. This may not have been Complainant's preferred cause of action but it was protective action regardless. There is also no evidence to support Complainant's allegation of an "attack" by Subordinate 1. That Complainant "cowered" when Subordinate 1 approached her is no such evidence.

Beyond conclusory and speculative assertions, Complainant has presented no other affidavits, declarations, or unsworn statements from other witnesses nor documents which contradict or undercut the explanations provided by management.

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

March 6, 2025

Date