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

[redacted]
Belinda K.,[1]
Complainant,

v.

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

Appeal No. 2023004792

Agency No. 200P-691-2022-145841

DECISION

On August 24, 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 26, 2023, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

1. Whether the Agency properly dismissed Complainant's claims for failure to state a claim.
2. Whether the Agency properly determined that Complainant did not meet her burden of proving she was subjected to discrimination and harassment based on race, sex, age, and reprisal.

[1] This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Intensive Care Unit (ICU) Nurse Manager at the Agency's Greater Los Angeles VA Healthcare System (GLAVAHCS) facility in California. Complainant reported to several first level supervisors: S1A, Acting Chief Nurse Acute Care; S1B, Chief Nurse; S1C, Chief Nurse Acute Care.[2] During the relevant period, S1B became Complainant's second- level supervisor (S2) in the role of Deputy Associate Director for Patient Care.

On May 23, 2022, Complainant filed an EEO complaint alleging that the Agency subjected her to a hostile work environment on the bases of race (Black), sex (female), age (40), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 when:

1. On October 30, 2020, Complainant's second level supervisor (S2) questioned Complainant about why Complainant's coworker (CW1) and direct report (Registered Nurse), failed to walk a patient after an open-heart surgery.
2. On December 2, 2020, S2 told Complainant that he would probably block her from getting the job after Complainant informed him of her intent to apply for a Catheterization Laboratory Nurse Manager position.
3. On December 2, 2020, S2 accused Complainant of using jargon or slang when speaking to staff members.
4. On January 6, 2021, Complainant learned that the certificate for the Catheterization Laboratory Nurse Manager position was canceled.
5. On December 27, 2021, Complainant was not selected for a Chief Nurse – Critical Care position, Announcement No. CBSX-11290030-22-PAB.
6. On February 7, 2022, Complainant was informed that the reason a colleague hung up on her was because Complainant sounded stupid.
7. On March 29, 2022, leadership questioned Complainant about a conversation Complainant had with CW1 regarding a practice concern and/or any decision made in the ICU.
8. On April 21, 2022, Complainant was not selected for a Chief Nurse-Critical Care position, Announcement No. CBSX-11421763-22-PAB.
9. On July 8, 2022, Complainant was not selected for a Chief Nurse-Critical care position, Announcement No. CBSX-11501684-22-PAB.

[2] Complainant reported to S1A from August 2020 – June 2021 and October 2021 – November 2021; S1B from June 2021 – October 2021; and S1C from December 2021 to October 2022.

10. On September 15, Complainant's first level supervisor (S1C) gave Complainant a direct order to submit a fact-finding inquiry report with proposed disciplinary action and/or counseling regarding CW1's alleged actions occurring on August 23, 2022, or words to that effect.

In Notice of Partial Acceptances, the Agency procedurally dismissed several of Complainant claims (and additional claims added through amendments). The following claims were dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim:

A. In January/February 2021, a coworker rescinded a supervisor position in the Rehabilitation Center;
B. In April 2021, S2 asked Complainant not to hire an employee for the position of Assistant Nurse Manager in the ICU;
C. In January/February 2021, Complainant's coworker was not selected for a Case Manager position, and to an Assistant Nurse Manager position in April 2021;
D. On January 3, 2022, management initiated a FFI inquiry (FFI) regarding two coworkers;
E. On April 6, 2022, a coworker told Complainant of an accusation against the coworker;
F. Complainant knew that nurses were afraid to lodge complaints against a coworker.

The Agency dismissed the following claims pursuant to 29 C.F.R. § 1614.107(a)(2) for failure to raise matters to the attention of the EEO counselor and failure to comply with regulatory time limits:

G. In August 2020, S1 told Complainant that Complainant's subordinate reported that Complainant was not willing to help him on a project;
H. On May 11, 2022, Complainant was notified that her subordinate stated that he was "coming after" Complainant and would report Complainant to the Associate Director for Patient Care Services.

The Agency also dismissed claims 4 and 5 as separately actionable claims, pursuant to 29 C.F.R. § 1614.107(a)(2) for failure to comply with regulatory time limits but accepted the claims as part of Complainant's underlying hostile work environment harassment claim.

During the investigation, Complainant testified that on October 28, 2020, a doctor notified her that her subordinate coworker (CW1) failed to walk a patient after a medical procedure as required.

Complainant stated that on that same day, she met with CW1 in her office and explained the reasons for ambulating the patient. On October 30, 3030, S1A questioned Complainant about her encounter with CW1, and notified Complainant that S2 had an "issue" with how Complainant spoke to CW1.

Complainant testified that prior to December 2, 2020 she applied for a Catheterization Laboratory Nurse Manager position. On December 2, 2020, Complainant told S2 that she applied for the position and S2 commented, "Okay, but I will probably block you." S2 denied stating this to Complainant. On January 6, 2021, Complainant received notification that the position announcement Certificate of Eligibles (CERT) was returned, canceled, and/or unused. Complainant states that a coworker, CW2 was later detailed to the position despite not having prior management experience.

Complainant testified that on December 2, 2020, Complainant discovered that S2 left a note on her Teams calendar stating, "avoid jargon or slang and look the staff into the eye when speaking." Complainant testified that she felt S2's comment referenced her race and considered her to be "ghetto" and unqualified for her position. When Complainant met with S1A and S2 to discuss the remarks, S2 told Complainant that staff members reported those remarks to him during a 2020 FFI. The record contains a meeting invite from S2 to Complainant and S1A for a meeting with an objective to discuss management's communication style to staff, but S2 testified that he did not recall having a discussion or sending a message regarding "jargon or slang."

From November 8-23, 2023, the Agency posted a vacancy for the Chief Nurse position (CBSX-11290030-22-PAB). Complainant applied and interviewed for the position. S2 was the Selecting Official and there were three interview panel members, one of which was S1A. S1A testified that Complainant did not score well on her interview because she did not thoroughly answer the interview questions. On December 27, 2021, Complainant was notified that the position was cancelled and, therefore, no selection was made. S1A stated that a selection was not made for the position because the other candidates also did not score well. S2 testified that there was also no selection because the posting needed to be corrected due to an error in the position posting.

On February 7, 2022, Complainant participated in a TEAMs conference call discussing the implementation of a Critical Care project. Complainant testified that within minutes, the meeting turned "negative," and the Chief Nurse hung up on her via Teams. Complainant stated that she later learned from a colleague that the Chief Nurse hung up on her because Complainant sounded "stupid."

The Chief Nurse stated that the meeting was ended after the discussion became unproductive and Complainant allegedly began to fabricate events. S2 and Complainant later agreed that the incident was a miscommunication issue.

On February 11, 2022, Complainant learned from a coworker that during a staff meeting, a Manager (not in her direct chain of command) called Complainant "crazy." The Manager later acknowledged that speaking negatively about coworkers was unprofessional and unacceptable.

On March 28, 2022, CW1 met with S1A to discuss the progress of an assigned project. Unbeknownst to Complainant, CW1 later sent an email to S2 further inquiring about the project status. Complainant asserted that CW1 did not follow the chain of command by directly going to S2 with his concerns. On March 28, 2022, S1A directed Complainant to submit a full report and action plan on the project. In response, Complainant told S1A that he inappropriately allowed his friendship with CW1 to dictate workplace issues which created a hostile work environment in the department.

Complainant applied for the Chief Nurse – Critical Care position (CBSX-11421763-22-PAB) and was interviewed on April 8, 2022. The Resume Screening Panel consisted of three panel members, including S1C. The panel screened nine applicant resumes, including Complainant, considering education; Agency experience; leadership experience; project experience; Critical Care/ICU experience; and Certification. Four applicants, including Complainant, were referred for an interview and one of the four applicants withdrew from the interview process. The applicants received the following resume scores from an overall total score of 90 points: Complainant 59; Selectee 65; Applicant1 67; and Applicant2 70 (declined interview). The interview panel consisted of three panel members. Out of an overall interview score of 150, the Selectee received 137; Complainant 124; and Applicant1 113. S2 was the Selecting Official for the position and chose Selectee (White, Male, Early 40s, Unknown prior EEO). The Selectee later declined the position for another offer. An interview panel member stated that while both Complainant and Selectee were qualified, Selectee responded better to the standardized interview questions. Another panel members stated that the Selectee provided complete answers to all questions with examples and outcomes/results. The last panel members stated that Complainant did not discuss all aspects of the interview questions, provided short answers and/or failed to give examples.

Complainant and the Selectee were referred to a Meet and Greet session with Nurse Managers and Services Chief Nurses. The Meet and greet committee concluded that Complainant was not able to articulate knowledge, skill or experience (KSE) in skill presentation, management theory, financial account/business acumen, or processes improvement, but the Selectee was. As a result, the Selectee was recommended for the position based on his high interview score and the Meet and Greet committee's high recommendation. On April 12, 2022, Complainant was notified that she was not selected for the position.

Complainant states that it was clear that S2 did not want her for the position because, after Selectee declined the position, S2 reposted the position instead of offering the position to Complainant. Complainant asserts that the Selectee was younger than her, had less experience as an ICU nurse, and never managed a unit.

Complainant testified that she applied but did not interview for the Chief Nurse – Critical Care position (CBSX-11501684-22-PAB). On July 8, 2022, the staffing office notified Complainant that she was not selected for the position. Complainant was listed as one of eleven applicants on the Certificate for the position. The Resume Screening Panel (RSP) consisted of three members including S1C. From a total overall resume score of 96, Complainant scored 54 and the Selectee for this position scored 76. Applicants who scored 65 points or higher were referred for an interview. Based on the resume scoring matrix, Complainant scored lower than Selectee in Education; VA Management Experience; and Certification. The interview panel's recommendation sheet noted that Selectee was recommended because she has the highest resume score (76/96) and the highest interview score (95/100). S2 was the Selecting Official for the position. S2 stated that Complainant was not referred for an interview because the other applicants' resumes ranked higher than Complainant in experience and credentials.

Complainant stated that on August 23, 2022, CW1 made a medication error and falsified Agency documentation. CW1 was removed from Complainant's supervision. Complainant stated that Human Resources (HR) directed her to conduct a FFI regarding the incident and give CW1's new supervisor the FFI report to take further action, if necessary. Complainant stated that upper management attempted to "entrap" her and retaliate against her knowing the CW1 would file a union grievance because Complainant was no longer CW1's supervisor.

S1C stated that she, along with upper management, agreed that Complainant should complete the FFI because she was CW1's supervisor when the alleged act occurred. S1C also stated that Complainant failed to timely complete the FFI and, as of September 26, 2022, there was no information regarding whether disciplinary action was warranted. An HR Specialist advised Complainant that it was a possible conflict for her to conduct the FFI but told her to comply with her manager's (S1C) instructions.

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

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency incorrectly dismissed her claims because of procedural issues. Complainant also contends that the Agency misapplied the law by finding that Complainant failed to prove that the Agency had illegal motivations.

The Agency did not submit a brief on appeal.

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").

ANALYSIS

Procedural Dismissals

On appeal, Complainant contests the Agency's procedural dismissal of claims A-H. However, we note that Complainant did not include any arguments in support of her contention.

The Agency dismissed claims A and B for failure to state a claim. More specifically, the Agency found that claims A and B involve claims of prohibited personnel practices over which the Commission does not have jurisdiction. The Agency asserted that the Office of Special Counsel's jurisdiction which is a separate federal agency that investigates and prosecutes prohibited personnel practices and can bring charges to the Merit System Protection Board (MSPB). We agree with the Agency. In reviewing claims A and B, we find that it states a claim outside of the Commission's jurisdiction and must be dismissed pursuant to 29 C.F.R. § 1614.107(a)(1).

The Agency dismissed claims C-F for failure to state a claim as well. More specifically, the Agency found that Complainant was not aggrieved in the alleged claims. We agree. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). When the complainant does not allege she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). In these claims, we find that Complainant's coworkers are aggrieved, but Complainant does not present any arguments to establish that she, herself, is aggrieved in these claims involving her coworkers. As such, we find that the Agency properly dismissed these claims for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

The Agency dismissed claim G and H for failure to raise matters to the attention of the EEO counselor and failure to comply with regulatory time limits.

More specifically, the Agency found that although the Commission has held that hostile work environment claims are all encompassing, Complainant was obligated to raise all harassing events to the EEO counselor that occurred before the counseling period concluded. We agree with the Agency again. EEOC Regulation 29 C.F.R. §1614.107 (b) provides that an agency shall dismiss a portion of a complaint "that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter than has been brought to the attention of a Counselor. It is clear by the record that claim G and H were not brought to the attention of the EEO Counselor. See ROI at 20-24. We also note that these incidents from August 2020 and May 11, 2022 occurred before the EEO Counselor issued Complainant a Notice of Right to File. We find that Complainant had ample opportunity to include these claims in her informal complaint process. Therefore, we find that the Agency properly dismissed claims G and H pursuant to 29 C.F.R. §1614.107(a)(2).

Disparate Treatment – Nonselection (Claims 8 and 9)

The Commission has found that a discrete action states a claim outside of the framework of a harassment analysis and can also be reviewed within the disparate treatment context. See Moylett v. U.S. Postal Serv., EEOC Appeal No. 0120091735 (Jul. 17, 2012); Sedlacek v. Dep't of Army, EEOC Appeal No. 0120083361 (May 11, 2010). Reviewing the record, we agree with the Agency in finding that incidents 8 and 9 involve timely discrete acts that independently state claims outside of the harassment framework. Accordingly, we will analyze incidents 8 and 9 in the context of disparate treatment.

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

Prima Facie Case

To establish a prima facie case of discrimination on the bases of race, sex, and age in a nonselection context, Complainant must show that: (1) she is a member of the protected class; (2) she applied for and was qualified for the position; (3) she was not selected despite his qualifications; (4) someone

outside her protected class was selected. Williams v. Department of Education, EEOC Request No. 05970561 (August 6, 1998).

It is undisputed that Complainant is a member of a protected class for race, sex, and age. It is undisputed that Complainant applied for and was deemed qualified for the positions listed in claims 8 and 9, but ultimately not selected. The Selectee for claim 8 (Selectee 1) was described as White Male in his early 40s. ROI at 600. Given Complainant's characteristics, we find that Selectee 1 is outside of Complainant's protected class for race and sex. However, given that Selectee 1 is in his early 40s and Complainant is 40, we do not find Selectee 1 to be outside of Complainant's protected class for age. Therefore, we find that Complainant has established a prima facie case of race and sex in claim 8, but not age.

In claim 9, Complainant alleges discrimination based on race and reprisal only. The Selectee for claim 9 (Selectee 2) was described as a being an unknown race, female, in her mid-50s. ROI at 600. We note that while Complainant bears the burden of establishing a prima facie case of discrimination on her alleged bases, it is the Agency's duty to investigate and collect information, such as the race of a selectee in a nonselection claim based partly on race. As such, we will infer against the Agency, that Selectee 2 is outside of Complainant's race. Therefore, we find that Complainant has established a prima facie case of race in claim 9.

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

Complainant identified her protected activity as EEO complaint initiated on May 6, 2022, involving S2 and the responsible management official.

S2 testified that he was not aware of Complainant's protected activity until he was notified by an EEO officer of the allegation in the instant complaint. ROI at 258. In stating this, S2 did not provide a specific day of when he became aware of the instant complaint. Id. In a May 18, 2022 EEO Counselor Report, it is clear that the EEO Counselor reached out to S2 for a response to the allegations. ROI at 20-24. Therefore, we find that S2 had knowledge of Complainant's activity starting in May 2022.

The nonselection described in claim 8 occurred in April 2022, before Complainant initiated the instant complaint and before S2 had knowledge of her protected activity. As such, we find that Complainant has not established a prima facie case of reprisal in claim 8. However, the nonselection described in claim 9 occurred in July 2022, just two months after Complainant initiated the instant complaint and S2 became aware of Complainant's protected activity. Given the close timing between the two dates, we find that a nexus exists between Complainant's protected activity and her nonselection in claim 9. Therefore, we find that Complainant established a prima facie case of reprisal in claim 9.

Legitimate, Nondiscriminatory Reasons

After establishing a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Should the Agency carry its burden, Complainant must then prove, by a preponderance of the evidence, that the Agency's explanation is a pretext masking discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

In claim 8, Complainant was not selected for a Chief Nurse position. In response, S2, the selecting official for the position stated that Complainant interviewed for the position but did not score high enough against the other candidates to be offered the position. ROI at 269. More specifically, S2 found that Selectee 1 was able to provide responses and examples of his experiences and qualifications as a leader over the other candidates. ROI at 271. An interview panel members stated that Complainant responded well to the interview questions, but that Selectee responded better to the standardized questions. ROI at 206.

Nonetheless, a review of the record reveals that Complainant and Selectee were the top two candidates to move forward in the selection process and participate in a Meet and Greet with the Nurse Manager and Chief Nurses. ROI at 282. The Nurses involved in the Meet and Greet found that Complainant was not able to articulate her knowledge, skill, or experiences on skill presentation, management theory, business acumen/financial, and processes improvement. ROI at 283. In comparison, the Nurses involved in the Meet and Greet found that Selectee 1 was able to articulate his knowledge, skill, and experience in the cited areas as well as articulate the human resources processes applicable on diverse cases. Id. As a result, the Nurse involved with the Meet and Greet recommended Selectee 1 to the Selecting Official for the position. Id.

In claim 9, Complainant was not selected for a Chief Nurse position. From a total overall resume score of 96, Complainant scored 54 and Selectee 2 scored 76. ROI at 367. A resume panelist states that candidates who scored 65 points or higher were referred for an interview. ROI at 584. Based on the resume scoring matrix, Complainant scored lower than Selectee 2 in Education; VA Management Experience; and Certification. ROI at 367. The interview panel's recommendation sheet noted that Selectee 2 was recommended because she has the highest resume score (76/96) and the highest interview score (95/100). ROI at 370. S2, the selecting official for this position, stated that Complainant's resume was scored against ten other candidates with high experiences and credentials and her resume did not score high enough to be referred for an interview. ROI at 273.

We find that the Agency proffered legitimate, nondiscriminatory reasons for its nonselections.

Pretext

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

In a non-selection case, pretext may be found where the complainant's qualifications are plainly superior to the qualifications of the selectee. See Wasser v. Dep't of Labor, EEOC Request No. 05940058 (Nov. 2, 1995); Bauer v. Bailar, 647 F.2d 1037, 1048 (10th Cir. 1981). At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons, and that the Agency instead was motivated by a prohibited reason.

In claim 8, Complainant asserted that Selectee 1 is younger than her, and that she was plainly superior to him as Selectee 1 had less experience as an ICU nurse, and never managed a unit. However, the Commission has found that number of years of experience does not establish an applicant's qualifications are observably superior. See Kopkas v. U.S. Postal Serv., EEOC Appeal No. 0120112758 (Oct. 13, 2011). Additionally, an employer has greater discretion when filling management level or specialized positions, such as a Chief Nurse position. Wrenn v. Gould, 808 F.2d 493, 502 (6th Cir. 1987).

Similarly in claim 9, Complainant asserted that Selectee 2 did not have more experience than her. In her appellate statement, Complainant even stating, "the qualification of [Complainant and Selectee 2] were sufficiently close enough so that Complainant should have at least been interviewed. In arguing this, we note that Complainant is not arguing that she was more qualified than Selectee 2. The Commission has previously found that an Agency has the discretion to choose among candidates whose qualifications are relatively equal as long as the decision is not premised on an unlawful factor. Devance-Silas v. U.S. Postal Service, EEOC Appeal No. 0120110338 (March 23, 2011), citing Texas Dept. of Community Affairs, 450 U.S. at 248, 252-259; Mitchell v. Baldridge, 759 F.2d 80 (D.C. Cir. 1985); Canham v. Oberlin College, 555 F.2d 1057, 1061 (6th Cir. 1981). In the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications. Texas Dept. of Community Affairs, 450 U.S. at 259.

Despite Complainant's assertions in claims 8 and 9, we find that Complainant has not demonstrated that her qualifications were plainly superior to the selectees in such a way that the disparities in her qualifications and those of the selectees were of such weight and significance that no reasonable person could have chosen them over her. See Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 1197-1198 (2006). As such, we find that Complainant has not established that the Agency subjected her to discrimination based on race, sex, age, or in reprisal for protected activity.

Harassment/Hostile Work Environment

As discussed above, Complainant has not provided sufficient arguments or evidence that claims 8 and 9 were motivated by discrimination or reprisal. As such, we do not find those claims to be supportive of Complainant's harassment claim. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Complainant, therefore, remains with claims 1-7 and 10 to support her harassment claim on the bases of race, sex, age, and reprisal.

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

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

The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010).

Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). In this case, we find that the complained of conduct did not occur as Complainant described, or it was related to the management of Complainant's assignments, performance, and conduct.

In claim 1, Complainant alleged that S2 questioned her about why Complainant's coworker and direct report failed to walk a patient after an open-heart surgery. Complainant stated that she viewed this incident as harassment because there was no explanation offered as to why S2 questioned her about a coworker's conduct. In response, S1A stated that her immediate supervisor, S2, brought the incident to her attention so she asked Complainant about the incident so she could determine whether there was any risk to patient safety. ROI at 547. S1A stated that after talking with Complainant, all actions were deemed appropriate, and that Complainant properly talked with her subordinate in order to ensure excellent care for the patient. Id. S2 testified that he did not recall having a discussion with Complainant about this issue, but that as Service Chief Nurse and Deputy, he is responsible to maintain customer service internally and externally. ROI at 258-259.

In claim 2, Complainant alleged that S2 told her that he would probably block her from getting a position after Complainant information him of her intent to apply for a Catheterization Laboratory Nurse Manager position. S2 denied the allegation and stated that this is a false statement from Complainant. ROI at 260. Complainant did not provide any evidence, besides her testimony, to support that the allegation occurred as alleged. We note that Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant fails to meet that burden. See Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (Aug. 23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where complainant requested a final decision and an Administrative Judge did not make credibility determinations). Relatedly, in claim 4, Complainant alleged that the certificate for the Catheterization Laboratory Nurse Manager position was canceled after she applied. S2 testified that he was not responsible for the position being canceled. ROI at 266. S2 stated that no one was responsible as correction was needed on the position posting. Id.

In claim 3, Complainant alleged that S2 accused her of using jargon or slang when speaking to staff members. In response, S2 testified that he did not recall having discussions or email correspondence with Complainant about using jargon or slang when speaking to staff members. ROI at 261. However, S1A testified that she received a calendar invite to meet with S2 and Complainant to discuss the outcome of a FFI investigation and that the invite description included that Complainant's conduct in using slang or jargon was going to be part of the meeting. ROI at 548-549.

In claim 5, Complainant alleged that she was not selected for a Chief Nurse-Critical Care position. Complainant alleged that she was interviewed for the position in question but later received that no selection was being made and the position was being canceled. S2 stated that he was the selecting official for this position and that there was no selection because there was a need for the position posting to be corrected and reposted. ROI at 267. Nonetheless, an interview panelist for the position testified that Complainant did not score well as she did not thoroughly answer the interview questions. ROI at 553.

In claim 6, Complainant alleged that she was informed that the reason a colleague hung up on her was because Complainant sounded stupid. Complainant stated that she got the impression that her colleague did not want to collaborate with her and coordinated a meeting to discuss the issues and requested that a Chief Nurse (not in her chain of command) join the meeting. Complainant stated within five minutes, the meeting turned negative as the Chief Nurse sided with the colleague. Complainant stated that the Chief Nurse ended up hanging up on her and stating that she sounded stupid. In response, the Chief Nurse stated that the meeting was not productive and so he said goodbye to Complainant and ended the call. ROI at 479. The Chief Nurse testified that he did not voice to anyone after the meeting that he hung up on Complainant because she sounded stupid. Id. A Deputy Executive Nurse, who filled in for S2 while he was out on leave, stated they addressed the Chief Nurse's behavior and that the Chief Nurse verbalized understanding that speaking about anyone including a colleague with others was not professional or acceptable. ROI at 515-516.

In claim 7, Complainant alleged that leadership questioned her about a conversation Complainant had with CW1 regarding a practice concern. Complainant alleged that because CW1 was friends with S2, he jumped the chain of command to get S2 to question Complainant's actions. In response, CW1 stated that he did not skip over Complainant and take issues directly to S2. ROI at 158. Also, CW1 and S2 both stated that they did not have a personal relationship with each other outside of work. ROI at 158, 263.

In reviewing the allegation in claims 6 and 7, we note that anti-discrimination statutes are not general civility codes, and the Commission has found that personality conflicts; general workplace disputes; and trivial and petty annoyances do not rise to the level of harassment. See Jeffrey R. v. Dep't of Justice, EEOC Appeal No. 2022003500 (Aug. 9, 2023); Rita F. v. U.S. Postal Serv., EEOC Appeal No. 2021002876 (Aug. 16, 2022); Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012).

In claim 10, Complainant alleged that S1C gave her a direct order to submit a FFI report with proposed disciplinary action and/or counseling regarding CW1's actions. Complainant stated that CW1 made a medication error and falsified documentation, and subsequently, was transferred to another team and was no longer under Complainant's supervision. Complainant stated that after talking with HR, she was encouraged to submit her FFI to CW1's new supervisor for action, however, S1C directed Complainant to act against CW1 herself. In response, S1C stated that Complainant allegation is inaccurate. ROI at 494. S1C stated that Complainant did not timely complete the FFI as instructed and therefore was not complete before CW1 transferred teams. Id. The Deputy Executive Nurse also found that Complainant failed to provide timely communication to her supervisor about CW1's conduct issues and conduct a FFI. ROI at 517. The Deputy added that it was best for Complainant to propose the action following the FFI as she was the individual with the evidence to support any proposed action. Id.

In reviewing Complainant's allegations of harassment, we find no evidence that the work-related incidents were abusive or offensive, or taken in order to harass Complainant on the basis of a protected class. Accordingly, we find that Complainant did not establish that the Agency subjected her to harassment based on race, sex, age, or in reprisal for prior protected EEO activity.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's Final Decision finding no discrimination.

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

December 31, 2024
Date