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

[redacted]
Debroah C.,[1]
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2023004847

Agency No. 4J400013022

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission ("EEOC" or "Commission"), pursuant to 29 C.F.R. § 1614.403, from a July 12, 2023 Final Agency Decision ("FAD") concerning an 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 Section 501 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether Complainant established, by preponderance of the evidence, that she was denied a reasonable accommodation and subjected to discrimination as alleged.

[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 was employed by the Agency as a City Carrier, Q-01, for the Agency's Louisville-Saint Matthews Branch in Louisville, Kentucky.

On January 28, 2023, Complainant filed a Formal EEO Complaint alleging that the Agency subjected her to discrimination, including a hostile work environment, on the bases of race (African-American), sex (female, LGBT[2]), color (Black), and disability (panic disorder and anxiety). The Agency, in its FAD, framed Complainant's claims as follows:[3]

1. On March 11, 2022, she was issued a Letter of Warning ("LOW");

2. On May 13, 2022, she was issued a 7-Day Suspension;

3. On November 22, 2022, [Postmaster] yelled at her, called her a derogatory racial term, jumped in her face, and disregarded her seniority;

4. On January 15, 2022, [Postmaster] changed her clock rings;

5. On October 4, 2022, she was instructed to submit medical documentation;

6. Between October 4, 2022, and December 29, 2022, she was not accommodated when [Postmaster] denied her doctor's restrictions;

7. From October 4, 2022, through January 29, 2023, as well as on November 23, 2022 her leave requests were denied; and

8. On September 23 and 29, 2022 she was denied overtime.

[2] Complainant checked "LGBT" as a basis for discrimination in her Formal EEO Complaint but did not respond when the EEO Counselor or the EEO Investigator requested clarification.

[3] The FAD identified the dates in Claims 3 – 8 as "to be specified." We inserted dates for these claims based on the record evidence.

Procedural Background

At the conclusion of its investigation, the Agency provided Complainant with a copy of the report of investigation ("ROI") and notice of her right to request a FAD or a hearing before an EEOC Administrative Judge ("AJ"). Complainant opted for a FAD. In accordance with Complainant's request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Complainant filed the instant appeal.

Factual Background

During the relevant time frame, Complainant reported to several first level supervisors. She initially reported to a Supervisor, Customer Service, EAS-17 (African American, Black, male, LGBT and disability status not specified) ("Supervisor 1"). Supervisor 1 was subsequently promoted to a manager position in another station. Complainant also reported to an Opening Supervisor, EAS-17 (Caucasian, white, male, straight, disability status not specified) ("Supervisor 2"). Supervisor 2 was promoted and left the facility in November 2022. At some point prior to October 4, 2022, Complainant began reporting to another Supervisor, Customer Service, EAS-17, ("Supervisor 3") (Caucasian, female, straight, disability). Supervisor 1, Supervisor 2, and Supervisor 3 all reported to a Manager Customer Service, EAS-22 (white, male, straight, disability status not specified) ("Postmaster").

On March 11, 2022, Supervisor 1 issued a Letter of Warning ("LOW") to Complainant for "failing to maintain regular attendance." Postmaster signed the LOW as the concurring official. The LOW reveals that Complainant used 96 hours of unscheduled leave between November 2, 2021 and February 15, 2022, including multiple days in conjunction with holidays. Prior to issuing the LOW, Supervisor 1 met with Complainant for pre-disciplinary interviews ("PDI") on February 8, 2022, and on March 5, 2022 so she could explain her absences and provide supporting documentation. During the PDIs, Complainant acknowledged that Management previously addressed her irregular attendance, and that she was aware of the Agency's attendance policies. Complainant furnished documentation to support only 2 of the days she used unscheduled leave. Complainant attributed much of the unscheduled leave to "wasn't feeling good" and "don't recall," although 4 days (32 hours) were because she needed to care for her son. Complainant hinted that a work-related medical issue impacted her attendance, stating "The workload is tiring the workers out; that can make one sick and not able to perform their duties."

On April 30, 2022, Supervisor 2 met with Complainant for a PDI because she used 83 hours of unscheduled leave between March 15, 2022 and April 28, 2022. Based on the PDI notes, Complainant's leave usage was mostly due to lack of childcare, and, in one instance, Complainant lacked transportation. However, Complainant attributed the 32 hours between April 21 through 28, 2022 to "mental health days." She explained that she was trying to get a therapist and she was unable to reach the Employee Assistance Program. Supervisor 2 testified that prior to the PDI, he was not aware that Complainant had a medical condition. Supervisor 2 testified that during the PDI, "I tried to thoroughly assist her and make sure she understood what was needed for FMLA coverage."

On May 13, 2022, Supervisor 2 issued Complainant a 7 day (no time off) suspension due to "unsatisfactory attendance." The Suspension Notice reasoned that Complainant was aware of her attendance deficiencies, and the Agency's attendance policies. Supervisor 2 stated that Complainant's answers during the PDI were "insufficient to relieve [Complainant] of [her] responsibility to maintain [her] assigned schedule." Complainant was provided an opportunity but did not provide documentation to support her attendance deficiencies.

On or about August 30, 2022, Complainant submitted a Certification of Health Care Provider for Employee's Serious Health Condition under the Family and Medical Leave Act ("FMLA") regarding Complainant's Generalized Anxiety with Panic Symptoms. The FMLA certification explains that Complainant's condition is chronic and "permanent or long term." The paperwork also explains that during an episode of panic or anxiety, it may be medically necessary for Complainant to be absent from work. According to Complainant's treating psychiatrist, who signed the FMLA certification paperwork, "When anxious, patient will be unable to communicate with others and will have outburst of panic and irritability. She will not be able to focus enough to complete tasks safely." Complainant's treating psychiatrist estimated on the FMLA certification that the estimated duration of an episode was 8 hours, with a frequency of about twice a week.

On October 4, 2022, Complainant provided Supervisor 3 with a doctor's note, signed by another treating medical provider that stated: "due to current health care conditions [Complainant] can only work 8-9 hours a day." Supervisor consulted Postmaster, who told Supervisor that the note was a "medical suggestion" and not to treat it as a restriction.

Supervisor informed Complainant that the note was "written as a suggestion" and therefore not sufficient to establish a restriction and instructed Complainant to obtain a revised note. Supervisor testified that because she was aware of Complainant's anxiety, she honored the October 4, 2022 note for 10 days to give Complainant time to obtain updated medical documentation. Postmaster provided conflicting statements regarding whether he forwarded the October 4, 2022 note to the nurse for review, and the record does not explain why Complainant's note was considered a "suggestion." Although Complainant did not submit a revised doctor's note, Complainant did not work over 8-9 hours after she submitted the October 4, 2022 note.

Complainant recalls that for about 6 weeks after providing the October 4, 2022 doctor's note, her anxiety was exacerbated because Supervisor 3 and Postmaster harassed her about obtaining additional documentation. Supervisor 3 and Postmaster were aware of her disability from her FMLA paperwork, yet did not believe her October 4, 2022 doctor's note was legitimate. Complainant testified that Supervisor 3 and Postmaster would not explain why the note was insufficient nor would they provide Complainant with the nurse's contact information so she could obtain clarification. The week prior to Thanksgiving 2022, Postmaster allegedly pressured Complainant to work overtime on multiple days even though she repeatedly reminded him of her 8-hour restriction. Complainant asserts that Postmaster adheres to work restrictions and never questions doctor's notes submitted by white employees.

On November 23, 2022, the day before Thanksgiving, Complainant testifies that Postmaster asked her to work 2 hours of overtime. Complainant reminded Postmaster that she had a "doctor's restriction" of 8 hours, referring to the October 4, 2022 note. Postmaster allegedly responded by yelling at Complainant for making videos for social media while on the job, to which Complainant replied, "what does that have to do with now?" Complainant became anxious, and said she was leaving for the day and would apply her FMLA. Complainant alleges that Postmaster yelled at her, stating that she needed to provide a doctor's note and would not let her use her FMLA. Complainant responded by telling Postmaster that he was racist, and that he did not treat white employees this way. Postmaster allegedly replied, "that's what all you [N-words] say."

Complainant notified an Acting Supervisor and the Union Steward about Postmaster using the N-word and the alleged ongoing harassment. Acting Supervisor and Union Steward allegedly assured Complainant that they would keep Postmaster away from her and convinced Complainant to finish her shift. The Agency investigated Complainant's harassment allegation, including, but not limited to, the N-word incident on November 23, 2022. The Manager, Labor Relations for the Agency's Kentucky-West Virginia District, issued an Initial Management Inquiry Process ("IMIP") Findings and Conclusions Report on April 5, 2023. According to the Report, "[t]he minorities who work at the St. Matthews Post Office were interviewed. No one could confirm that they witnessed [Postmaster] harassing [Complainant]." Complainant, Postmaster, and approximately 20 witnesses were interviewed.

The bulk of the IMIP Report "findings" summary describes Postmaster's denial that he ever used the N-word in any setting and his feelings of offense that he would be accused of using the N-Word. The Report acknowledges that one witness heard Postmaster use the N-word when discussing a film, which Postmaster denied. Upon review of the witness statements, we note that three of the witnesses alleged that Postmaster favored white employees over non-white employees with respect to assignments and his communication style. One of these witnesses claimed that both black and white employees have submitted statements about Postmaster's alleged discriminatory bias, but nothing has been done.

In her Formal EEO Complaint, Complainant attributes all of the alleged discriminatory acts to Supervisor 3 and to Postmaster because they were aware of her health conditions. She recounts that is the primary source of her anxiety, stating, "I have random panic attacks when he is around" and "sometimes I can't even think." Complainant testified that Postmaster's tone and demeanor toward white employees is markedly different than with her and other black employees. He allegedly yells and speaks to her using an argumentative tone or does not speak with her at all. He also selectively disciplines her for attendance issues while white employees who engaged in the same conduct (or worse) are not disciplined.

Postmaster worked with Complainant since he became Postmaster for St. Matthews Station in 2019. He testified that he does not issue discipline unless the employee's supervisor is unavailable and denies initiating the LOW in Claim 1 and the 7-Day Suspension in Claim 2.

Postmaster avoids interacting with Complainant, instead speaking with her immediate supervisor or Union Steward, ever since Complainant initiated a harassment complaint. Postmaster states that Complainant calls him "racist," but he speaks with Complainant in a respectful manner. Postmaster emphatically denies ever using the N-word toward Complainant or in general. Postmaster also denies telling Complainant that she could not use her FMLA, explaining that he said she needed to update her medical documentation.

Supervisor 3 recalls that she worked with Complainant since 2017 and was aware that Complainant experienced anxiety. Supervisor 3 recalled, "Both of us are in therapy and we have had conversations with each other about how helpful therapy is." Supervisor 3 asserts that she did not initiate and was not involved with the decision-making behind the LOW in Claim 1 and the 7-Day Suspension in Claim 2. Supervisor 3 testified that on a few occasions she met with Complainant to discuss an error with Complainant's scanning, but it did not result in a disciplinary action. Supervisor 3 testified that she explained to Complainant that the October 4, 2022 doctor's note was not sufficient, and that Complainant understood she needed to provide more documentation.

In its FAD, the Agency found that Complainant failed to prove discrimination as alleged. For Claims 1, 2, 4, 6, 7, and 8, the Agency reasoned that it provided legitimate nondiscriminatory reasons for all of the alleged discriminatory actions, while Complainant did not provide any evidence to contradict its stated reasons. For instance, the Agency concluded that Complainant's assertions that white employees received more favorable treatment was a "subjective belief" insufficient on its own to establish that the Agency's reasons for its actions were pretext for discrimination. For Claim 3, the Agency determined that Complainant failed to establish that she was subjected to a hostile work environment because the record did not reflect that events happened as alleged.

The FAD determined that for Claims 5 and 6, Complainant failed to establish that she was denied a reasonable accommodation. The October 4, 2022 Doctor's Note indicated that Complainant could not work for more than 9 hours per day. Complainant's attendance reflects that she did not work for more than 9 hours per day after she submitted the October 4, 2022 Doctor's Note. The FAD also determined that Postmaster's request for additional medical documentation rather than accepting the October 4, 2022 as a medical restriction was permitted under the Rehabilitation Act because Complainant's disabilities were not obvious.

Moreover, the FAD explained that even if Complainant was instructed to work beyond 8 or 9 hours, it did not constitute denial of reasonable accommodation because Complainant was not entitled to an accommodation of her choice.

The instant appeal followed.

CONTENTIONS ON APPEAL

Neither party filed a brief or statement regarding Complainant's appeal.[4]

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to *de novo* review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, ("EEO MD-110") 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

Issues of Credibility – Claims 3 and 4

By choosing not to request a hearing before an AJ, a Complainant waived the opportunity to develop the record through discovery and to cross examine witnesses. See Tommy O. v. United States Postal Serv., EEOC Appeal No. 0120152090 (Jun. 8, 2017), See Complainant v. Dep't of Health & Human Serv., EEOC Appeal No. 0120122134 (Sept. 24, 2014).

[4] The Commission denied Complainant's request for an extension of the deadline to file a supporting brief because Complainant did not provide a reason for why she required the additional time.

Claims 3 and 4 amount to a "he said she said" scenario based on the conflicting sworn testimony provided by Complainant and Postmaster. In such instances, without an AJ's credibility determination, the Commission is unable to reach a decision as to whose testimony is more credible. See Wiley G. v. Dep't of Homeland Sec., EEOC Appeal No. 0120181972 (Nov. 27, 2019) citing Lore v. Dep't of Homeland Security, EEOC Appeal No. 0120113283 (Sept. 13, 2013) (Complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made) and Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (August 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).

For Claim 3, Postmaster provided sworn testimony where he denies yelling at Complainant, calling her the N-word, or denying her FMLA on November 23, 2022 or any other date. Complainant references "letters of proof" from other carriers that support her assertion that Postmaster subjects her to a hostile work environment. However, Complainant did not provide these letters for the record. While she did provide a text message exchange with another carrier ("Coworker 1"), the texts reveal Complainant and coworker's impression that Management exhibits favoritism. The texts do not reference race, color, sex, sexual orientation, gender identity, disability, and/or prior protected EEO activity. Moreover, Coworker 1 was also interviewed for the IMIP Report. According to the IMIP Report, Coworker 1 has not witnessed any others being discriminated against by the current management." Complainant's only other evidence to support Claim 3 is her sworn testimony.

For Claim 4, Postmaster provided sworn testimony where he denies changing Complainant's clock rings, stating that the attendance records reflect her correct scheduled and non-scheduled day off for the week of January 15, 2022. Postmaster explains that a Form 3189 must be completed by an employee who seeks to change their time records, and a Form 3189 was not completed for that day. The record reflects that Complainant was compensated. Complainant also states that Supervisor 1 corrected the clock rings. Supervisor 1 did not corroborate Complainant's assertion that Postmaster changed her clock rings. Complainant's only evidence to support Claim 4 is her sworn testimony.

The allegations in Claims 3 and 4 are addressed in the Initial Management Inquiry Process ("IMIP") Findings and Conclusions Report, provided in the ROI. The Report corroborates Postmaster's testimony to an extent, as none of the 20 witnesses interviewed (all clerks and city carriers at the St. Matthews Post Office) witnessed Postmaster use the N-word when addressing Complainant, and there was no evidence to support Complainant's claim that Postmaster improperly changed her clock rings. The IMIP Report indicates that some employees also witnessed Postmaster favor white employees, none of the witnesses refer to Complainant or describe any of the events in the instant complaint.
Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged reasons for the alleged discriminatory acts were pretext for discrimination. When the evidence is at best equipoise, as is the case with Claims 3 and 4, Complainant fails to meet that burden. See Brand.

Reasonable Accommodation – Claims 5 and 6

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). In order to establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002).

The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). The term "position" is not limited to the position held by the employee but may also include positions that the employee could have held as a result of reassignment. Therefore, in determining whether an employee is "qualified," an agency must look beyond the position which the employee presently encumbers. Enforcement Guidance on Reasonable Accommodation.

Complainant meets the requirements under Prongs (1) and (2) of the analysis. Complainant has a diagnosis of Generalized Anxiety with Panic Symptoms, and the condition is long term or permanent. It is undisputed that Complainant can perform the essential functions of her position, casing and delivering mail, with or without an accommodation. At issue is Prong (3), whether the Agency failed to provide Complainant with a reasonable accommodation (Claim 6). We also address whether Postmaster's request for additional medical information (Claim 5) was an impermissible medical inquiry regarding an accommodation.

Complainant's October 4, 2022 Doctor's Note constitutes a request for a reasonable accommodation. Under the Rehabilitation Act, an employee is not required to use the "magic" words "reasonable accommodation" when making a request. Instead, the employee or the employee's representative need only inform the Agency that they need an adjustment or change at work for a reason related to a medical condition. See Triplett-Graham v. United States Postal Serv., EEOC Appeal No. 01A44720 (Feb. 24. 2006).

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the requesting individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See Enforcement Guidance on Reasonable Accommodation; see also, Abeijon v. Dep't of Homeland Sec., EEOC Appeal No. 0120080156 (Aug. 8, 2012). When an employee's disability or need for an accommodation is not known or obvious, an employer may ask an employee for reasonable documentation about their disability, limitations, and accommodation requirements. See Reasonable Accommodation Enforcement Guidance at Question 6. Protected individuals are entitled to reasonable accommodation, but they are not necessarily entitled to their accommodation of choice. Castaneda v. United States Postal Serv., EEOC Appeal No. 01931005 (Feb.17, 1994).

Regarding Claim 5, Postmaster's request for supporting medical documentation does not constitute discrimination or an impermissible medical inquiry. It is not obvious, and the medical information provided does not explain how an 8-9 hour work day would accommodate Complainant's disability. Complainant's October 4, 2022 Doctor's Note states that "due to current health care conditions [Complainant] can only work 8-9 hours a day." Complainant disclosed to Postmaster and Supervisor 3 that the referenced "condition" was her Generalized Anxiety with Panic Symptoms, documented in the FMLA certification she submitted on August 30, 2022.

However, the FMLA documents do not address the duration of Complainant's shift as impacting her anxiety.

FMLA documentation of a disability is not always sufficient to support a reasonable accommodation request where the need for the requested accommodation is not known or obvious. For instance, in Dixie B. v. Department of Veterans Affairs, the Commission found that the agency's request for additional documentation to support a shift change as a reasonable accommodation reasonable because the FMLA medical documents the complainant provided indicated a need for time off to attend medical appointments but did not address the complainant's requested accommodation of switching from the night shift to the day shift. EEOC Appeal No. 0120170175 (Mar. 26, 2019). Similarly, for the instant complaint, the FMLA documents Complainant provided support that Complainant may require unscheduled leave to treat her periodic anxiety symptoms but does not address her requested accommodation of shifts lasting no more than 8 to 9 hours.

For Claim 6, Complainant has not established denial of reasonable accommodation because it is undisputed that Complainant has not worked more than 8-9 hours per day since submitting the October 4, 2022 note. However, the Commission looks askance at Postmaster's characterization of the October 4, 2022 note as a "suggestion" and at his testimony about how he handled Complainant's request.

Postmaster's request for additional medical information, while reasonable in the accommodation context, did not initiate or contribute to the interactive process. Complainant was not provided guidance about what additional information she needed to obtain. The Agency offers no evidentiary support that Postmaster consulted the Agency's medical unit or even that the October 4, 2022 note was reviewed by the medical unit. Postmaster testified that he "never said those words" when the EEO Investigator asked if he told Complainant he was not approving her doctor's restrictions. However, when asked "what circumstances led to management's decision to allegedly not approve Complainant's doctor's restrictions," Postmaster responded, "the documentation was sent [to the] medical unit." He later states that the documentation was not sent to the medical unit. Postmaster does not explain why the note needed to be sent to the medical unit, why it was deficient, and why he did not engage in the interactive process with Complainant.

Although the Agency correctly points out that Complainant is not entitled to the accommodation of her choice, the Agency offered no alternative options (e.g. additional breaks or, if possible, working in an area or on a tour that is less likely to trigger her anxiety).

Commission precedent establishes that an agency cannot be held liable solely for a failure to engage in the interactive process. Rather, we look at whether the failure to engage in the interactive process results in the agency's failure to provide reasonable accommodation. Broussard v. United States Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002), recon. den., EEOC Request No. 05A30114 (Jan. 9, 2003). The sole purpose of the interactive process is to facilitate the identification of an appropriate reasonable accommodation, and an agency's failure to engage in this process does not give rise to a separate cause of action because the interactive process is not an end in itself. Broussard, EEOC Request No. 05A30114.

The Agency erred when it did not engage Complainant in the interactive process upon receipt of her October 4, 2022 Doctor's Note. However, the Agency is not liable for its deficient response, because Complainant was not denied her requested accommodation to work no longer than 8-9 hours.

Disparate Treatment - Claims 1, 2, 4, 6, 7, and 8

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). See also Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979). For a complainant to prevail, they must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, that is, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden 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). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact-finder, by a preponderance of the evidence, that the agency acted on the basis of a prohibited reason (i.e. discrimination). St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

In order to establish a *prima facie* case of discrimination based on race, color, sex, sexual orientation, or gender identity, a complainant may show: (1) that they are a member of a protected group; (2) that they were subjected to an adverse employment action; and (3) that they were treated less favorably than other similarly situated employees outside of their protected group(s). We note that it is not necessary for a complainant to rely strictly on comparative evidence to establish the inference of discriminatory motivation required to support a *prima facie* case. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996); EEOC Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp., EEOC Notice No. 915.002, n. 4 (Sept. 18, 1996).

Complainant can establish a *prima facie* case of reprisal by showing that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Department of the Air Force, EEOC Appeal No. 01A00340 (September 25, 2000). Complainant can establish a *prima facie* case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802).

In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus).

To establish a *prima facie* case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539 (August 17, 2023).

For Claims 4, 6, and 7, Complainant has not established a *prima facie* case of discrimination or reprisal because the evidence does not reflect that she was subjected to an "adverse action" or "adverse treatment."

As previously discussed, Complainant did not provide sufficient evidence that Postmaster changed her clock rings (Claim 4), and she did not establish that she was denied a reasonable accommodation (Claim 6). The record reflects that Complainant worked on November 23, 2022 (the day before Thanksgiving), because she withdrew her leave request (Claim 7). Both the Agency and Complainant testify that she was asked for additional medical documentation to support her leave request, which does not equate to a denial. To the extent that Complainant also asserts that her leave requests between October 4, 2022 and January 29, 2022 were denied, she has not provided specific dates for the denials. The record reflects that Complainant regularly used FMLA leave throughout this time frame.

For Claims 1, 2, and 8, Complainant identified comparator employees outside her protected classes who she argues were treated more favorably. Comparative evidence relating to other employees is considered relevant when they are "similarly situated." See Anderson v. Dep't of Treasury, EEOC Appeal No. 01A22092 (Mar. 13, 2003). In other words, all relevant aspects of the employees' work situation are identical or nearly identical, i.e., the employees report to the same supervisor, perform the same job function, work during the same time periods, and, in instances where the Agency is responding to "problem conduct" (e.g. attendance deficiencies), engaged in the same conduct. See Stewart v. Dep't of Defense, EEOC Appeal No. 01A02890 (Jun. 27, 2001); Jones v. United States Postal Serv., EEOC Appeal No. 01983491 (Apr. 13, 2000); See Grappone v. Dep't of the Navy, EEOC No. 01A10667 (Sept. 7, 2001) reconsideration denied, EEOC Request No. 05A20020 (Dec. 28, 2002).

For Claims 1 and 2, Complainant acknowledged that she has poor attendance, but claims that white employees with worse attendance are not penalized. In particular, she asserts that "Comparator 1" (Caucasian, White, Female, Heterosexual, FMLA Condition), who is also a mother, told Complainant that she is not penalized for using unscheduled leave related to childcare issues, or for absences related to her FMLA condition. The EEO Investigator did not obtain testimony from Comparator 1. However, even assuming Complainant's account of Comparator 1's statements is accurate, Comparator 1 is not "similarly situated" to Complainant. At the time of her absences, Comparator 1 had her FMLA paperwork approved, so the leave at issue was FMLA protected. In addition, Comparator 1 was issued a LOW for failure to maintain regular attendance.

The record reflects that Complainant's other proffered comparator for Claim 1, "Comparator 2" (Caucasian, white, male, heterosexual, disability status not specified) received a LOW for failure to be regular in attendance on February 10, 2022. It does not appear from the record that his attendance deficiencies were worse than those of Complainant.

For Claim 8, the record reflects that Comparator 2 worked 2 hours and 51 minutes of overtime on September 23, 2022 and was on leave Sunday, September 29, 2022. Comparator 2 is not "similarly situated" to Complainant because Comparator 2 is on the Overtime Desired List. However, "Comparator 3" (Caucasian, white, male, heterosexual, FMLA) who worked on both days with 2 hours and 1 hour and 51 minutes of overtime respectively, was not on the Overtime Desired List.

The burden now shifts to the agency to articulate a legitimate, nondiscriminatory reason for its action. While the burden upon the agency to articulate a reason is not an onerous one, Commission precedent holds that the agency must set forth with sufficient clarity, reasons for complainant's involuntary detail such that he has a full and fair opportunity to demonstrate that those reasons are pretext. See Parker v. United States Postal Service, EEOC Request No. 05900110 (April 30, 1990); Lorenzo v. Department of Defense, EEOC Request No. 05950931 (November 6, 1997).

For Claims 1 and 2, the Agency's legitimate nondiscriminatory reason for issuing the March 11, 2022 LOW and the May 13, 2022 7-Day Suspension was that Complainant violated the Agency's attendance policy. As evidence, the Agency provided attendance records for the relevant dates, and the relevant policies within the Agency's Employee and Labor Relations Manual ("ELM"). Complainant argues, "all of my attendance was justified due to my FMLA," and that she needed the days off because the discrimination and harassment at work exacerbated the symptoms of her anxiety. The absences identified in the LOW and 7-Day Suspension predate Complainant's FMLA paperwork by several months. Although she was provided the opportunity following the PDI, there is no evidence that Complainant submitted medical documentation to support her assertion that her attendance deficiencies were due to her disability.

For Claim 8, the Agency's legitimate nondiscriminatory reason for denying Complainant's overtime requests on September 23 and 29, 2022, is that Complainant was not on the Overtime Desired ("OTD") List.

Complainant does not dispute that she was not on the OTD List, but asserts that Postmaster granted overtime based on request, regardless of whether the requesting employee was on the OTD List. Postmaster's testimony is consistent with Complainant's claim that he approved overtime for reasons other than an employee's presence on the OTD List. Postmaster testified that he determined all overtime on Sundays. He states that one employee is granted overtime on Sundays to "avoid a grievance." Postmaster asserted that he denied Complainant's requests because when he granted Complainant's past requests for overtime on Sundays, she demonstrated a pattern of using her FMLA leave to call out on her scheduled days the following week.

While Complainant successfully casts doubt on the Agency's proffered legitimate nondiscriminatory reason, she has not set forth sufficient evidence that Postmaster's denial of her requests for overtime on September 23 and 29, 2022 was motivated by discriminatory animus or reprisal. She does not dispute Supervisor's claim about her calling out later in the week when she was granted overtime on Sundays in the past. Also, such a pattern is consistent with Complainant's testimony that she needed to use her FMLA leave in order to recover from anxiety arising from her time at work.

The focus on the pretext inquiry is not on whether the Agency made a mistake or exercised poor judgment. Pretext does not require an agency's actions to be impeccable. Rather, the focus is on whether there was discriminatory animus on the part of the Agency when it engaged in the challenged conduct. At all times, Complainant has the burden of persuasion that they were subjected to discrimination. Oakley v. United States Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000), Becki P. v. Dep't of the Treas., EEOC Appeal No. 0120170696 (Jul. 26, 2018). Complainant has not done so here.

Complainant has not established, by a preponderance of the evidence, that the alleged actions in Claims 1, 2, 4, 6, 7, and 8 constitute discrimination on the bases of race, color, sex, sexual orientation, gender identity, disability, and/or prior protected EEO activity.

Hostile Work Environment

In order to establish a *prima facie* case of harassment on the bases of sex, sexual orientation, race, color, disability and reprisal, a complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that they are a member of a statutorily protected class and/or engaged in protected EEO activity; (2) that they were subjected to unwelcome conduct related to their protected classes and/or EEO activity; (3) that the harassment complained of was based on their protected classes and/or EEO activity; (4) that the harassment had the purpose or effect of unreasonably interfering with their 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. Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020).

For reasons previously discussed, the record does not support a *prima facie* case for a hostile work environment. For Claims 3, 4 6, and 7, Complainant did not set forth sufficient evidence that the alleged acts occurred. For Claims 1, 2, 5, and 8, Complainant did not set forth sufficient evidence that the alleged acts were motivated by discrimination or reprisal.

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**.

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

https://publicportal.eeoc.gov/Portal/Login.aspx

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(f).

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

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title.

Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

January 14, 2025
Date