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

[redacted]
Leonarda S.,[1]
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture,
Agency.

Appeal No. 2023005022

Hearing No. 570-2020-01727X

Agency No. OIG-2020-00465

DECISION

On September 7, 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 August 9, 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.

ISSUES PRESENTED

Whether the AJ correctly found that Complainant was not entitled to relief despite the entry of default judgment against the Agency on grounds that she did not establish a prima facie case of discrimination or unlawful harassment.

[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 a Director, Human Resources Management Division at the Agency's Headquarters in Washington, D.C.

On March 21, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), color (Black), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On February 27, 2020, management escorted her from the Jamie L. Whitten Building without explanation and required her to relinquish her government badge, cell phone, computer and keys for five business days or until notified by her immediate supervisor;
2. On January 3, 2020, management instructed her to change the performance levels of six (6) employees, and thereafter since January 21, 2020, requested status updates every three to four days; and
3. On several dates, management subjected her to various acts of harassment, including but not limited to:
   a. On January 29, 2020, management questioned her in a passive-aggressive manner whether she nominated herself for a SAMMIE award;
   b. On January 9, 2020, management advised a manager to falsify a timecard for an employee who was out on holiday leave contrary to her guidance; thereafter management directed her to provide (sic) "creative alternative" to make the employee whole, despite her expressed concerns regarding the legality and validity of the proposed action, questioned her regarding a prohibited personnel practice; and after she provided proper Human Resources guidance said manager informed her that he would not heed her advice; and
   c. On January 6, 2020, management questioned why she needed eight (8) hours of sick leave for January 24, 2020, and stated, "I saw your eight-hour leave request for your medical appointment on January 24. Since it's a full day of leave I wanted to make sure you needed eight (8) hours for the

> appointment, transportation to and from, and recovery versus taking a mix of sick and annual leave."

Complainant stated that her prior EEO activity was filing an EEO complaint in January 2018. See Report of Investigation (ROI) at 80. She stated that on 29, 2020, the Assistant Inspector General for Management (Assistant Inspector) stopped by during a meeting to ask if she was aware that she had been nominated for a "Sammie" award for government employees and she told him that she was not aware of that. See ROI at 93-94. She asserted that the incident caused her emotional distress because she did not know what was happening. See ROI at 95. Thereafter, she stated that when she arrived at the office on February 27, 2020 for her normal work day, she was met by her Supervisor, the Deputy Assistant Inspector General for Management (Supervisor) and the Assistant Inspector and told that she was being placed on Administrative Leave for five days during an investigation conducted by the Office of Compliance and Integrity into an issue regarding Complainant's nomination for a "Sammie" award for employees. See ROI at 80-81. She stated that she was made to turn in her government badge and escorted out of the building. See ROI at 81. She took issue with the incident because she asserted that the allegations were false and she should have been allowed to continue working while the investigation was going on. See ROI at 82. She claimed that her Supervisor and the Assistant Inspector treated Caucasian male employees more favorably than her because two male employees were not placed on leave while they were being investigated for alleged misconduct. See ROI at 84-85.

The Supervisor explained that the investigation was not into Complainant's actions specifically but rather was initiated after another employee came forward with a concern that her name and email address had been falsely used by another employee to nominate Complainant for the Samuel J. Heyman Service to America medal (known as a "Sammie" award). See ROI at 155-56. She stated that in fact, the Assistant Inspector confirmed early on that Complainant stated she was not aware of having been nominated so Complainant herself was not the subject of the investigation. See ROI at 157. The Assistant Inspector asserted that he only asked Complainant if she were aware who had nominated her for the award but not if she had nominated herself. See ROI at 259. She further explained that officers in the Office of Compliance and Integrity were the ones who determined that it would be best to place Complainant on administrative leave during the investigation and only informed the Supervisor of it as Complainant's manager. See ROI at 149.

She asserted that the decision was made because it would be necessary to interview HR employees who reported to Complainant and it was thought there could be a conflict of interest if Complainant herself were present. See ROI at 148-49. The Assistant Inspector affirmed that that it was determined to be best if Complainant were placed on leave during the investigation because of concerns that Complainant's presence might have a "chilling effect" on talking to her subordinate employees in her presence. See ROI at 252. He stated that Complainant was not disciplined in any way and returned to work following the administrative leave. See ROI at 252. The Supervisor's and the Inspector General's explanations as to the reason for the investigation are supported by the contemporaneous emails regarding the issue that are in the record. See ROI at 172-92.

Complainant further stated that on January 3, 2020, the Assistant Inspector asked her to change the performance levels of six employees who previously competed for a GS-12 to a GS-13 and then when she told them that she believed that was a prohibited personnel practice, the Assistant Inspector did not listen to her and both he and the Supervisor questioned her about it at meetings afterward, wanting to know why she had not done what they told her to do. See ROI at 87-88. She asserted that she refused to do it because she believed it was a prohibited personnel practice and that management "did not want to hear from a Black woman that she refused to follow their directives." See ROI at 89. She asserted that she was harmed because her relationship with management never recovered after she refused to follow their directives. See ROI at 91.

The Assistant Inspector explained that the issue with the performance levels arose after a series of errors made years earlier regarding the Full Performance Levels the employees had applied for and that documentation was found that clearly indicated that five of the six had competed for the GS-13 level. See ROI at 255. He asserted that after consulting with officials at the Office of Personnel Management (OPM) it was decided that the "cleanest way" to go forward was to have the last of the six employees compete for the GS-13 level and that rather, if they had forced the five employees who had already competed for the GS-13 to compete a second time, that would have been a prohibited personnel practice. See ROI at 256. He stated that Complainant reported that she would have her staff take care of it and he only questioned her about it because it was a priority with upper management at the time. See ROI at 255-57.

Complainant stated that on January 9, 2020, when they had a new auditor who had just started work, the new auditor wanted to take some personal time off during the Christmas and New Year holidays and requested to be allowed to be given advanced leave to supplement the leave he had already accrued since he started working. See ROI at 100. She explained that an employee could not be advanced more leave than he was allowed to accrue during a calendar year and she explained as much to the auditor's manager (Manager 1), saying that either Manager 1 could grant sick leave if there was documentation for sick leave lasting more than three days or place the employee on Leave Without Pay. See ROI at 100. She stated that Manager 1 then went to her Supervisor for a "better answer," and her Supervisor authorized Manager 1 to use regular hours worked on the timecard. See ROI at 100. Complainant stated that the Supervisor suggested that she come up with a "creative solution" to resolve the matter because incurring a debt for the auditor was not an option as management had acted on incorrect information from a staff member. See ROI at 100. She asserted that she told the Supervisor that changing the auditor's time card would be falsification of a timecard and was prohibited. See ROI at 100-101. She took issue with it because she stated that her Supervisor should simply have accepted her advice and guidance. See ROI at 101.

The Supervisor explained that HR staff initially advised management that advanced leave was fine as long as the system accepted the leave requests but that only after the employee followed HR staff's advice did they realize that the advice was incorrect. See ROI at 159. She asserted that inaccurate guidance provided by HR staff created an unfair situation where the employee took leave in good faith and was then in a situation where he was not going to be paid so she only told Complainant to look for possible solutions to issues that occurred when an employee took actions based on guidance from HR that turned out to be inaccurate. See ROI at 159-60. She denied that she ever instructed Complainant or any other HR employee to falsify a timecard. See ROI at 160-61.

When the Agency failed to complete its investigation more than six months after Complainant filed her complaint, Complainant requested a hearing on September 28, 2020 and filed a Motion for Sanctions and a Default Judgment against the Agency for its failure to complete an investigation in a timely manner as required by 29 C.F.R. §1614.108(e). On October 14, 2021, the Agency was ordered to submit the complaint file, including the Report of Investigation. The Agency did not do so.

On June 28, 2021, the Administrative Judge (AJ) assigned to the case issued an Order to Show Cause why judgment should not be entered for Complainant because the Agency had yet to submit its report of investigation. The Agency opposed the motion, arguing that it had failed to timely complete the investigation because of employee turnover, a misunderstanding over who was responsible for processing formal complaints, and a delay in obtaining outside investigative services. Ultimately, the Agency completed and issued a report of investigation on July 15, 2021, well over a year since Complainant had filed her formal complaint. on August 3, 2023, the AJ issued default judgment against the Agency, finding that the Agency had not shown good cause for the untimeliness in issuing the investigation, noting that the Agency's failure to obtain a contract investigator did not absolve the Agency of its obligation to timely investigate complaints. The AJ found, however, that Complainant was not entitled to relief notwithstanding the default judgment because she had not established a prima facie case of discrimination because she was not aggrieved by any of the Agency's actions. The AJ ordered the Agency to post a notice regarding its failure to comply with EEO regulatory timelines and ordered the Agency to provide training to its EEO office employees on their obligations concerning the processing and deadlines of EEO complaints. The Agency subsequently issued a final order adopting the AJ's order.

Complainant appealed.

## CONTENTIONS ON APPEAL

Neither Complainant nor the Agency filed a brief on appeal.[2]

## STANDARD OF REVIEW

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 . . .").

[2] We note that neither Complainant nor the Agency have challenged the AJ's decision to issue default judgment against the Agency for its failure to complete the investigation in a timely manner. We therefore decline to address the AJ's issuance of a default judgment as it is unchallenged on appeal. See Coleman H. v. Dep't of the Army, EEOC Appeal No. 2023001066 (April 8, 2024).

This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

In a default judgment case such as the instant matter, complainants may be entitled to remedies, including reinstatement, if they establish their right to relief by "evidence that satisfies the court." Matheny v. Dep't of Justice, EEOC Request No. 05A30373 (Apr. 21, 2005). For example, the establishment of the elements of a prima facie case of discrimination would be sufficient to establish such a right. Cox v. Social Security Admin., EEOC Appeal No. 0720050055 (Dec. 24, 2009); Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009).

In this case, the AJ concluded that Complainant was not entitled to remedies because she had not established a prima facie case as she was not aggrieved by the incidents and had not established that she was subjected to harassment.

Complainant may establish a prima facie case of discrimination by providing evidence that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) either that similarly situated individuals outside her protected class were treated differently, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination. McDonnell Douglas, 411 U.S. at 802 n.13; Reeves v. Sanderson Plumbing, 530 U.S. 133, 142 (2000); Bodett v. CoxCom, Inc., 366 F.3d 736, 743-44 (9th Cir.2004) (internal quotation marks omitted).

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"').

We find that Complainant did not establish a prima facie case with respect to her race, color, or sex. While Complainant alleged that male employees who were accused of misconduct were treated more favorably in that they were permitted to continue to work while under investigation, the evidence in the record does not support Complainant's assertions nor does the evidence indicate that the named male employees are similarly-situated to Complainant because they held different titles than Complainant, worked in different divisions, and were alleged to have committed very different kinds of misconduct. With respect to the other incidents, Complainant herself does not claim to have suffered any concrete harm, only asserting that her relationship with management deteriorated as a result. We find that these bare assertions are not sufficient to establish that Complainant established a prima facie case. See Sheldon M. v. Dep't of Veterans Affs., EEOC Appeal No. 2023001605 (Aug. 20, 2024).

We further find that Complainant did not establish a prima facie case of reprisal because her protected activity occurred almost two full years before the incidents at issue here. See Salisbury v. U. S. Postal Serv., EEOC Appeal No. 0120072505 (August 16, 2007) (a five-month time period was too much time to establish a causal nexus). Moreover, there is no other evidence in the record from which to infer any nexus between Complainant's protected activity and the incidents at issue here. We therefore affirm the AJ's finding that Complainant did not establish a prima facie case of reprisal. See Miller v. Dep't of the Treasury, EEOC Appeal No. 0120062130 (Dec. 12, 2007).

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 the 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). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 at § III.B.3.d (Apr. 29, 2024).

In other words, to prove her hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis; in this case, her disability and/or reprisal. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

We agree with the AJ that Complainant did not establish a prima facie case of harassment. There is simply no evidence in the record to indicate that any of the alleged incidents of harassment were due to any of Complainant's protected classes. Complainant's subjective beliefs alone are not sufficient to establish that discriminatory animus played any role in any of the alleged incidents of harassment. We therefore affirm the AJ's conclusion that Complainant did not establish a prima facie case of harassment. See Evelina M. v. U.S. Postal Serv., EEOC Appeal No. 2023002009 (Oct. 2, 2024).

We therefore find that the AJ correctly found that Complainant was not entitled to any relief.

## 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 order which fully implemented the AJ's finding that Complainant is not entitled to relief. Default judgment against the Agency is also AFFIRMED.

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

February 4, 2025
Date