



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

[REDACTED]
Rosina L.,¹
Complainant,

v.

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

Appeal No. 2023005060

Hearing No. 440-2020-00079X

Agency No. 6U-000-0006-21

DECISION

On September 5, 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 2, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 order.

ISSUES PRESENTED

Whether the AJ correctly issued a decision without a hearing concluding that Complainant did not establish that she was subjected to discrimination and harassment 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 worked as a Senior Field Sales Representative at the Agency's Sales – Chicago Main Post Office in Chicago, Illinois.

On May 29, 2019, Complainant filed an EEO complaint (Agency No. 6U-000-0006-21) alleging that the Agency discriminated against her on the bases of sex (female), disability (anxiety, depression, PTSD), age (YOB: 1965), and reprisal for prior protected EEO activity when:

1. On June 1, 2020 and again on January 5, 2021, she requested reasonable accommodation, but her request was ignored;
2. On September 24, 2020, she was issued a Proposed Letter of Warning in lieu of a 14-Day Time Off Suspension which was upheld via a Letter of Decision dated December 29, 2020;
3. On June 1, 2021, her most recent earned sales submissions were rejected, in addition, while management claims that her most recently rejected sales submissions were "Out of process," as of July 4th, sales she submitted in April and May still have not been approved;
4. On June 1, 2021, her submitted leave request was denied and management's reply included a directive to complete P&R activities;
5. On or about June 1, 2021, management is "stacking and connecting" dated Performance Review (P&R) emails to her most recent P&R notes which negatively depict her performance; and
6. On June 7, 2021, management issued her a "Notice of Interview."

Thereafter, on May 19, 2021, Complainant filed another EEO complaint (Agency No. 6U-000-0011-19) alleging that the Agency discriminated against her on the bases of sex (LGBT)², disability (anxiety, depression, PTSD), and reprisal for prior protected EEO activity when:

1. In June 2018, her request for a detail to a vacant EAS-23 position was denied;
2. On an unspecified date, the District Sales Manager (Manager) posted a photo of a former employee on her cubicle wall in order to upset and intimidate her;
3. On unspecified dates, the Manager participated in providing false information to her former manager which resulted in her receiving poor performance evaluations;
4. On January 31, 2019, she was informed that she was not selected for the position of Sales Executive Sr. (Shipping) on Job Posting # 10266760;

² In Bostock v. Clayton County, 590 U.S. ___, 140 S. Ct. 1731 (2020), the U.S. Supreme Court held that Title VII prohibits employment discrimination on the basis of sexual orientation or gender identity. See also Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

5. On February 19, 2019, her request to detail to the vacant EAS-23 Shipping position was denied;
6. On February 20, 2019, the Manager refused to provide her with her KSA scores for the application she submitted for the Sales Executive Sr (Shipping) position; and
7. On an unspecified date, the Manager rejected some of her sales for Quarter 2 of 2019.³

Complainant identified her sexual orientation as “gay.” See Report of Investigation (ROI) 1 at 100. She further asserted that she previously filed EEO complaints in 2017, 2019, 2020, and in 2021. See ROI 1 at 100. She stated that her supervisor, the District Sales Manager (Manager) has been subjecting her to harassment making her work environment intolerable since the Manager assumed her position in 2016. See ROI 1 at 101-102.

Complainant stated that she has PTSD after she was sexually assaulted by a coworker in July 2017. See ROI 1 at 104. She asserted that she requested a reasonable accommodation in June 2020 which was inadequate and so she requested another accommodation in January 2021 which was denied by the Manager. See ROI 1 at 105-106. The record includes a letter of decision dated February 25, 2021, responding to Complainant’s request for a reasonable accommodation, stating that Complainant had been invited to a meeting for the interactive process on August 25, 2020, to discuss Complainant’s request for a change in supervisor, a change in cubicle location, and reassignment to another position in the Southern area. See ROI 1 at 140. The letter denied Complainant’s request for a new supervisor because a request for a new supervisor is not considered a reasonable accommodation and also denied her request for reassignment because reassignment is an accommodation of last resort and Complainant had not demonstrated that it was necessary. See ROI 1 at 140-41. The letter further stated that Complainant’s request for a new cubicle was granted, and she was now assigned to cubicle 21/50 but further noting that due to the pandemic, Complainant had been teleworking full-time, so it was generally not necessary for her to work in the cubicle. See ROI 1 at 140-41. The letter further noted that there were no other available cubicles. See ROI at 140-41.

The Manager acknowledged that she received Complainant’s request for a reasonable accommodation on August 17, 2020, and the Reasonable Accommodations Committee evaluated the request. See ROI 1 at 194-95. She stated that Complainant’s request was granted in part, and they also agreed that because Complainant was teleworking at the time, they could revisit Complainant’s request for a change in her cubicle when Complainant returned to the building full-time. See ROI 1 at 196. She asserted that Complainant rejected the new cubicle she was offered but that when Complainant does work in the building, she has worked out of the new cubicle. See ROI 1 at 197. The Manager of Disability Programs (Disability Manager) stated that Complainant was granted a cubicle change but was dissatisfied with the location, but no other cubicles were available. See ROI 1 at 247. She further asserted that Complainant’s requests for a new supervisor and for reassignment to another position were denied as unreasonable. See ROI 1 at 247.

³ The Agency dismissed two of the claims Complainant raised in her complaint because they were identical to claims that had been raised in previous complaints. See ROI 2 at 77-82.

Complainant's second request for a reasonable accommodation dated December 30, 2020, again requested reassignment to a different position. See ROI 1 at 262-63.

Complainant stated that she received a Letter of Decision confirming the Proposed Letter of Warning for alleged inappropriate conduct during a work Zoom meeting which she stated was unfair because it did not consider her side of the story and the fact that her behavior at the meeting was "triggered" by the Manager and one of her coworkers (Coworker 1) who had previously been harassing her. See ROI 1 at 110-12. She asserted that at the very least, Coworker 1 should also have been disciplined for his role in provoking her, but he was not. See ROI 1 at 112-13. The record includes the letter Complainant sent in response to the Proposed Letter of Warning which stated that the letter was untrue and the punishment unfair because the allegations were not true and did not take into account the mitigating circumstances that her behavior had been provoked by others, for example noting that at the work Zoom meeting, she had only asked three times if face to face meetings were required because she was unclear as to the expectations and she had not been disruptive and also noting that the other alleged incidents were "subjective & made in retaliation by individuals who continue to make [her] appear to be something [she is] not." See ROI 1 at 142-44.

The Manager stated that she issued the Proposed Letter of Warning after she had notified Complainant of her unacceptable behavior on several occasions because of repeated incidents of unprofessional, disruptive, hostile and threatening behavior. See ROI 1 at 201. She asserted that Coworker 1 has not behaved inappropriately but has always been professional in meetings. See ROI 1 at 202. The Proposed Letter of Warning stated that it was being issued for unprofessional, hostile and threatening behavior after Complainant repeatedly disrupted a Zoom meeting by continually interrupting the Manager in an elevated voice and also because she had deliberately demeaned Coworker 1 and other employees by accusing them of writing lies about her and stating that their interest in golf was offensive. See ROI 1 at 237-40. The Letter of Warning considered Complainant's prior disciplinary record including multiple letters of warning for failure to follow instructions and failure to perform the essential duties of her position. See ROI 1 at 237-40. The Area Sales Director (Director) who was the Manager's supervisor at the time, stated that she issued the Letter of Decision upholding the Proposed Letter of Warning and after Complainant filed an appeal, the Vice President of Labor Relations also upheld the Letter of Warning. See ROI 1 at 268-72.

Complainant further alleged that the Manager has inappropriately rejected sales which she submitted to the Manager in May 2021 and had still not begun to process sales which she had submitted to the Manager in April 2021. See ROI 1 at 121-22. She stated that she should have earned the sales credit for all sales categories because the customer was onboarded because of his decision to use USPS rather than UPS but the Manager objected to allowing her to earn the sales credit to be fully successful for the fiscal year. See ROI 1 at 122. She asserted that she believed the Manager rejected her sales out of sequence to ensure that she would not be consistent in earning sales revenue so the Manager could allege that Complainant had not earned her sales credit for the third quarter of FY 2021. See ROI 1 at 122.

The record includes the emails exchanged between Complainant and the Manager in which the Manager reminded Complainant that Media Mail is not sold, and Complainant needed to provide supporting documentation with a valid label and data. See ROI 1 at 157-64.

In other emails, the Manager reminded Complainant that they had reviewed the Sales Approval Process several times, but that Complainant continued to work out of process and was failing to include the Manager on customer meetings as she'd been told to do. See ROI 1 at 163-64.

The Manager stated that she has repeatedly discussed the importance of the Sales Approval Process with Complainant, but that Complainant consistently moves sales opportunities to stage 5 out of process and that is why they are rejected with notes of the action that is needed. See ROI 1 at 209. She asserted that Complainant also consistently fails to update her rejected sales opportunities within the 24-hour timeframe as required and that Complainant's sales in April and May were rejected because Complainant failed to follow the directions in the Sales Approval Process. See ROI 1 at 209.

Complainant stated that the Manager did not return a signed copy of her form requesting Administrative (Personal) Leave on June 3, 2021, and instead she received an email from the Manager directing her to complete action items from her Performance Review conducted on June 1, 2021, which the Manager had told her to perform on that day. See ROI 1 at 126. She asserted that she believed this was a continuation of the Manager's trying to retaliate against her by triggering her PTSD. See ROI 1 at 127. The Manager stated that she denied Complainant's request for personal leave because personal leave is at the discretion of the manager and at the time Complainant had not completed her work duties. See ROI 1 at 210-11. She explained that Complainant consistently failed to follow instructions regarding leave, not providing sufficient notice such as submitting a request for leave right as Complainant was about to leave and without completing her work. See ROI 1 at 211. She stated that she told Complainant that if she completed her required tasks, her request for personal leave would be approved but that Complainant took leave without it being approved. See ROI 1 at 211.

Complainant further alleged that she believed the Manager was inappropriately "stacking and connecting" arbitrary P&R (Performance Review) dates together to give an appearance that action items from those periods have not been managed, saying that the periods from previous quarters were irrelevant. See ROI 1 at 130. She stated that the Manager conducted an unannounced P&R on June 1, 2021, and connected four P&R dates worth of email strings to the bottom of the June 1 email to give the appearance of an outstanding list of unmanaged action items over several months. See ROI 1 at 130; 173-79. She asserted that holding an inconsistent performance review during a Sales Reorganization without considering her high performance during the weeks prior was clearly an attempt to set her up. See ROI 1 at 131.

The Manager stated that Complainant's P&R emails are notes of action items which Complainant needed to execute by a due date in order to keep Complainant on track with daily/weekly expectations. See ROI 1 at 214. The Manager asserted that Complainant consistently has past due action items from past P&R and the activities are discussed and provided to Complainant as coaching and guidance to assist with getting on track for success. See ROI 1 at 214.

Complainant stated that on June 7, 2021, the Manager issued her a Notice of Interview which informed her that she needed to appear for an interview regarding a possible violation of Postal Policy and/or regulation which would be an opportunity to inform her of the specific charges of possible improper conduct. See ROI 1 at 134; 172. She asserted that this Notice of Interview was unjustified and unfair because she performs her duties very well, comes to work daily, and serves the Postal Service loyally. See ROI 1 at 134. The Manager stated that she issued the Notice of Interview to discuss Complainant's failure to properly request leave and her taking leave without approval on June 3. See ROI 1 at 215. She asserted that the interview was scheduled for June 11, 2021, but because Complainant was on leave, it did not take place. See ROI 1 at 216.

Complainant stated that the Manager denied her request for a detail to a vacant EAS-23 position in June 2018 and in February 2019 for on the job training. See ROI 2 at 120-21; 135. She stated that the Manager told her that someone else had already asked for the detail and she could not give her the detail at the time. See ROI 2 at 121. She asserted that the detail in February 2019 was not advertised, and the Manager again denied her request for the detail because of her attendance and only having made her sales goals successfully. See ROI 2 at 136. She stated that she believed the Manager denied her detail request out of retaliation. See ROI 2 at 137-38.

The Manager explained that the EAS-23 position requires a level of expertise and knowledge that Complainant has not demonstrated. See ROI 2 at 250. She asserted that Complainant continues to struggle with meeting the directed activities of her current position. See ROI 2 at 250. She further stated that there is a USPS Sales and Customer Relations detail pool which lists the employees that are ready for specific details and Complainant is not on that list. See ROI 2 at 251. The Manager asserted that there was no detail posted or advertised in February 2019 and ultimately no one was selected for the detail. See ROI 2 at 260. The email the Manager sent to Complainant denying the detail in June 2018 also noted that Complainant struggled with meeting the administrative requirements of her position, often arriving late to work and incurring unscheduled absences. See ROI 2 at 269.

Complainant asserted that the Manager was asked to remove a political mail piece which contained a photo of a candidate running for office in Chicago and one day, the Manager called her over and asked who the candidate looked like. See ROI 2 at 122-23. She stated that the candidate looked like the person who had assaulted her (Coworker 2) and the Manager wanted to upset her because she was friends with Coworker 2 and was upset that Coworker 2 was removed because of the assault. See ROI 2 at 123-24. The Manager denied ever asking Complainant about the photo of the candidate. See ROI 2 at 252-53. The Manager asserted that rather Complainant was by her desk and saw the flyer on it and asked about it. See ROI 2 at 298.

Complainant stated that the Manager provided false information for her performance evaluation, and she discovered it when she opened her evaluation and discovered the input of her former supervisor who had been removed after she had filed a complaint of harassment against him. See ROI 2 at 125. She stated that the comments regarding her workplace professionalism were inaccurate and untrue. See ROI 2 at 126.

The Manager denied that she provided false information, stating that Complainant's former supervisor entered Complainant's performance evaluation accurately because he was Complainant's supervisor at the relevant time, during three quarters of the fiscal year, and she had no input in it. See ROI 2 at 253.

Complainant stated that the Sales Executive Sr. (Shipping) position was posted on the Postal Service careers website on January 8, 2019 and she applied for it. See ROI 2 at 128-29. She asserted that she met all the requirements and qualifications but was not interviewed and received an email from the Manager stating she had not been selected. See ROI 2 at 130-31. She stated that she sent an email to the Manager asking for the KSAs resulting in the non-selection to understand how to improve her future applicants and the Manager denied her request saying the scores are confidential. See ROI 2 at 139-40. The Manager stated that Complainant did not demonstrate experience with negotiations and contract development to meet the requirements of the position. See ROI 2 at 256. She explained that because Complainant was not minimally qualified, no further consideration was necessary and in fact, no one was hired for the vacancy announcement because only Complainant and one other candidate applied and neither of them were qualified. See ROI 2 at 256-59. The Manager explained that she denied Complainant's request for the KSAs for the non-selection because the scores are confidential as they contain information about the other candidates. See ROI 2 at 262. The Director stated that based on her knowledge of Complainant's performance, she would agree that Complainant was not qualified for the Sales Executive Sr. position but that she was not involved in the decision. See ROI 2 at 309.

Complainant stated that she submitted all political opportunities for approval for all of the candidates she met and collected data to propose postal solutions for and were processed through the entire sales cycle, but the Manager rejected her sales. See ROI 2 at 142. She asserted that the Manager said that it was because the customers had not provided sales confirmation and did not return the Manager's calls. See ROI 2 at 142. The Manager denied unfairly rejecting any of Complainant's sales, asserting Complainant was credited for the sales to which she was entitled based on her activity. See ROI 2 at 263. She explained that for three customers, she rejected the sales because in all three of those cases, when she spoke to the customer, they told her that mailing had not been completed. See ROI 2 at 263-64. She asserted that Complainant consistently submits opportunities for approval saying she wants credit for time and effort spent regardless of whether the customer mails or ships even though Complainant has been told repeatedly that Complainant is only credited for confirmed mailing or shipping customers. See ROI 2 at 264.

At the conclusion of the investigation into each complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing in both her complaints. The two cases were consolidated before the AJ under a different hearing number, 440-2020-00079X. Over Complainant's objections, the AJ assigned to the case granted the Agency's December 5, 2022, motion for a decision without a hearing and issued a decision without a hearing on July 27, 2023.

The AJ found that there were no genuine issues of material fact in dispute and that the Agency articulated legitimate, nondiscriminatory reasons for its actions and Complainant offered no evidence beyond her own subjective beliefs to support her claims of discriminatory or retaliatory animus. The AJ further found that the alleged acts of harassment were all routine workplace occurrences such as supervisor instructions and admonishments that were not sufficiently severe or pervasive to constitute unlawful harassment. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant appealed.

CONTENTIONS ON APPEAL

On appeal, Complainant insists that the AJ was biased because she accepted the Agency's statement of facts.⁴ On the merits, Complainant argues that the evidence demonstrates that Complainant has been subjected to harassment and there are material facts in dispute as to the Manager's motives in her actions.

In response, the Agency contends that the AJ correctly issued summary judgment because Complainant did not establish that she was subjected to discrimination or harassment.

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 . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). 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,

⁴ To the extent Complainant argues that the AJ erred by permitting the Agency's untimely motion, we reject Complainant's argument. Complainant's own response to the Agency's motion for summary judgment acknowledged that the AJ gave the parties until December 14, 2022, to file a motion for summary judgment and the Agency filed its motion on December 5, 2022. Filing a motion before the deadline does not make it premature.

and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

ANALYSIS

Issuance of Summary Judgment

We determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant insists that there are material facts in dispute because the Manager was not truthful, but she offered no evidence to support her assertions. It is well settled that mere assertions of a factual dispute without more are not sufficient to defeat a motion for summary judgment. See Darrell C. v. U.S. Postal Serv., EEOC Appeal No. 10200181833 (July 12, 2019); Quartermain v. U.S. Comm’n on Civil Rights, EEOC Appeal No. 0120112994 (May 21, 2013). Upon our review of the record, we find that the AJ correctly determined that Complainant failed to establish a dispute of material fact. Accordingly, we find that the AJ properly issued a decision without a hearing.

Denial of Reasonable Accommodation

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (2012) (as amended) requires that an Agency make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the Agency can demonstrate that doing so would impose an undue hardship. 29 C.F.R. § 1630.9(a) (2017); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance) (revised Oct. 17, 2002).

Once an employer becomes aware of the need for an accommodation of an employee's disability, the employer may engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3) (2019). An Agency may choose among reasonable accommodations as long as the chosen accommodation is effective, and while the preference of the individual with a disability should be given primary consideration, an Agency has the ultimate discretion to choose between effective accommodations. See Enforcement Guidance, supra, at Q. 9.

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 a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See, e.g., Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016).

In this case, Complainant argues that the Agency denied her a reasonable accommodation because it did not grant her request to be moved to a different supervisor and to be reassigned to a different position. We reject Complainant's argument. The Commission has long held that a request for reassignment to a new supervisor does not constitute an actionable request for reasonable accommodation, as such a request is on its face unreasonable. See Coleen M. v. Dep't of Defense, EEOC Appeal No. 2020003100 (Sept. 16, 2020); see also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Q. 33 (rev. Oct. 17, 2002) ("An employer does not have to provide an employee with a new supervisor as a reasonable accommodation"). In addition, it is well settled that reassignment is the reasonable accommodation of last resort and should be considered only when: (1) there are no effective accommodations that would enable an employee to perform the essential functions of his or her current position; or (2) accommodating the employee in the current position would cause an undue hardship. 29 C.F.R. Part 1630, App. § 1630.2(n); Enforcement Guidance on Reasonable Accommodation, "Reassignment." While Complainant argues that the new cubicle the Agency assigned her was not effective because it was too close to her old cubicle and therefore not far enough to avoid triggering memories of her assault, we note that the record indicates that Complainant is still teleworking full-time and therefore does not actually work in the office on a regular basis. The Agency also offered that when Complainant is required to return to the office on a regular basis, Complainant could resubmit her request for a reasonable accommodation, and they would revisit the issue of her cubicle at that time. Complainant has therefore not demonstrated that the offered accommodation was not effective. While we are not unsympathetic to Complainant's wish to be moved to a different supervisor due to the contentious relationship she has with her supervisor, she is not entitled to a new supervisor through the reasonable accommodation process. See, e.g., Belton v. Dep't of Veterans Affs., EEOC Appeal No. 0320120052 (April 2, 2013) (finding that the complainant was not entitled to be reassigned to a new supervisor as a reasonable accommodation even where the complainant established that he had a mental impairment that was exacerbated by his hostile interactions with his supervisor). We therefore find that Complainant did not establish that she was denied a reasonable accommodation.

Disparate Treatment

Applying the McDonnell Douglas burden-shifting standard defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a complainant initially must establish a prima facie case of discrimination by presenting facts which, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affs. v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Burdine, 450 U.S. at 253. Once the agency has met its burden, the complainant has the responsibility to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

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 do not find that Complainant established a prima facie case with respect to her sex, sexual orientation, disability, or her age. She did not identify any similarly situated individuals who were treated differently. The mere assertion that she is "different" because she is the only gay person in the office is not sufficient to establish a prima facie case. We find, however, that Complainant established a prima facie case of reprisal. The record is clear that Complainant has filed numerous EEO complaints in the last several years and the Manager acknowledged that she was aware of Complainant's prior complaints as some of them were against her.

We find that the Agency articulated legitimate, nondiscriminatory reasons for all of its actions. The Manager stated that she issued the Proposed Letter of Warning after she had already spoken to Complainant numerous times because of repeated incidents of unprofessional, disruptive, hostile and threatening behavior. See ROI 1 at 201. She asserted that Complainant had been disruptive in a meeting by continually interrupting her in a loud voice and had also been derogatory towards other employees. See ROI 1 at 237-40. The Manager further explained that she denied Complainant's request for personal leave because Complainant had not completed her work duties and she later issued Complainant a Notice of Interview to discuss Complainant's failure to follow leave procedures and taking unapproved leave after her request for personal leave was denied. See ROI 1 at 210-11; 215. The Manager asserted that she denied Complainant requests for a detail to an EAS-23 position because Complainant has not demonstrated the level of skill and expertise required for the position. See ROI 2 at 250. Similarly, the Manager stated that she did not select Complainant for the Sales Executive Sr. position because Complainant did not demonstrate the necessary experience with negotiations and contract development to be qualified. See ROI 2 at 256.

We find that Complainant did not establish that any of the Agency's reasons are a pretext for discrimination. We emphasize that there is no evidence in the record beyond Complainant's own subjective assertions to indicate that the Manager was motivated by any discriminatory or retaliatory animus. The Commission has repeatedly stated that mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination are insufficient because subjective belief, however genuine, does not constitute evidence of any unlawful motive. See Leif S. v. Dep't of the Treasury, EEOC Appeal No. 2021004037 (April 28, 2022); Juliet B. v. U.S. Postal Serv., EEOC Appeal No. 0120182519 (Oct. 8, 2019). In addition, while Complainant clearly disagrees with the Manager's assessment of her own performance and her qualifications for the EAS-23 detail and the Sales Executive Sr. position, she cannot establish pretext based solely upon her subjective assessment of her own performance or her qualifications. See Palmer N. v. Dep't of Defense, EEOC Appeal No. 0120140070 (March 18, 2016). The Commission will not second-guess the business judgment of Agency officials regarding personnel decisions absent evidence of some discriminatory motive, which is not present here. See McKinley P. v. Dep't of Defense, EEOC Appeal No. 2021005017 (Nov. 7, 2022); Billi D. v. Dep't of Justice, EEOC Appeal No. 0120170193 (Sept. 12, 2017).

Hostile Work Environment

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 he is a member of a statutorily protected class; (2) that he was subjected to unwelcome conduct related to his protected class; (3) that the harassment complained of was based on his protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with his 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). 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 sex, sexual orientation, age, disability, and/or engagement in prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

We find that Complainant’s harassment claim fails because there is no evidence in the record beyond Complainant’s bare beliefs to link any of the alleged incidents of harassment to any of her protected bases. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120113647 (Dec. 6, 2013). While it is clear that Complainant and the Manager had a tense interpersonal relationship and Complainant clearly took issue with all of the Manager’s actions, there is no evidence in the record beyond Complainant’s bare assertions to indicate that the Manager was motivated by discriminatory or retaliatory animus. The Commission has repeatedly stated that Title VII is not a civility code and personality clashes and other common workplace grievances “while sometimes unpleasant, do not constitute harassment, even if done in a confrontational manner.” Felton M. v. Dep’t of Agric., EEOC Appeal No. 0120171203 (June 23, 2017). Moreover, we agree with the AJ that all the alleged incidents of harassment amount to nothing more than common workplace occurrences, such as routine work assignments, instructions, and admonishments, which do not rise to the level of harassment. See Ashely S. v. U.S. Postal Serv., EEOC Appeal No. 0120162643 (Feb. 13, 2018); see also Elfrieda R. v. United States Postal Serv., EEOC Appeal No. 2022000085 (Dec. 21, 2021) (incident where supervisor yelled at the complainant about her work duties and accused her of “stealing time” described a common workplace occurrence and failed to state a claim of harassment). We therefore affirm the AJ’s finding that Complainant did not establish that she was subjected to an unlawful hostile work environment.

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 finding that Complainant did not establish that she was subjected to discrimination as alleged.

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).

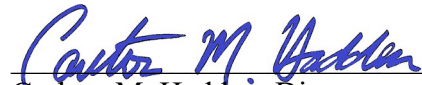
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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

July 30, 2024
Date