



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

[REDACTED]  
Priscilla H.,<sup>1</sup>  
Complainant,

v.

Martin J. O'Malley,  
Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2023005125

Hearing No. 490-2022-00120X

Agency No. ATL-21-0181-SSA

DECISION

On September 15, 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 16, 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. 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 order.

ISSUES PRESENTED

The issue is whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing concluding that Complainant was not subjected to disparate treatment and a hostile work environment regarding non-selection,

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<sup>1</sup> 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.

unrequested additional time for work completion, increased scrutiny, discipline, and telework denial based on her race (unspecified), sex (female), color (brown), national origin (unspecified), disability (mental) and reprisal (for prior protected activity).

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Claims Specialist, GS-11 at the Agency's Nashville Field Office in Nashville, Tennessee. Report of Investigation (ROI) at 168. Complainant became an Operations Supervisor, GS-12, at the same office. ROI at 153-54 and Agency's motion at 22-6. Complainant is a Black/Brown African-American female. She has a mental disability. The record includes an alternative reasonable accommodation (RA) approval for Complainant in the form of telework for three days a week from September 7, 2022, through March 13, 2023. See RA Approval Decision Memorandum at 1-3.

Complainant had engaged in prior EEO activity, having filed five previous complaints that includes a May 13, 2020, complaint challenging, among other management actions, a 14-day suspension for Absence Without Leave (AWOL). See ROI at 286; Agency's motion at 62 for the Commission's Decision in EEOC Appeal No. 2021001678 [Jan. 18, 2022] affirmed in part and den'd in part in Request No. 2022001994 [Jun. 30, 2022]).

Complainant's first-line supervisor (Supervisor 1 [White, male, American]) from September 19, 2019, through March 1, 2021, was an Operations Supervisor. He was unaware of Complainant's disability. ROI at 182-83 and Agency's motion at 30. Complainant's second-line supervisor (Supervisor 2 [Black, female, African American]) through February 2021, when she became Complainant's first line-supervisor, was the Assistant District Manager. She was also unaware of Complainant's disability. ROI at 199-200 and 203. Complainant's third-line supervisor (Supervisor 3 [White, male, American]) until March 1, 2021, when he became Complainant's second-line supervisor was the District Manager. He was unaware of Complainant's national origin or disability. ROI at 190-91 and 196.

On April 1, 2021, Complainant filed an EEO complaint (with subsequent amendment on October 27, 2022) alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American), national origin (not specified), sex (female), color (Black/Brown), disability (mental), and reprisal for prior protected EEO activity

under Title VII of the Civil Rights Act of 1964 and Section 501 of the Rehabilitation Act of 1973 when:

1. On February 8, 2021, Complainant was made aware that she was not selected for vacancy announcement HR Specialist (Staffing) (COTA) SG10958408-21-BDH/ GS-11/Atlanta, GA.
2. Between December 29, 2020 and January 8, 2021 Complainant was subjected to unrequested increased time for work assignments, scrutiny and demanding calls and emails, overall working conditions, etc.
3. On March 8, 2022, management permanently banned Complainant from telework; and
4. The Agency did not grant Complainant a reasonable amount of official time to prepare for her deposition.

The Agency conducted an investigation into the complaint. The investigation revealed that on November 6, 2020, the Agency announced the vacancy of GS-11/GS-12 Human Resources (HR) Specialists through a Career Opportunity Training Agreement (COTA) Announcement. ROI at 58-66. The vacancy announcement stated that because the position was being filled through a COTA vacancy, "[t]his GS-11/GS-12 COTA position can only be filled by lateral reassignment or change to lower grade." ROI at 59.

Complainant applied for the position and indicated on her application that the lowest grade she would accept was at the GS-12 level. ROI at 61-78 and 169. On November 30, 2020, Complainant was notified that she was eligible and referred for the GS-11 position, but she was ineligible and not referred for the GS-12 position because this was a lateral reassignment and not a promotion. ROI at 89-90 and 178. A black, female, American (Selecting Official) was the selecting official for the HR Specialist position. ROI at 178. At the time of the vacancy and selection, Selecting Official was a Supervisory Management Analyst in the Human Resources Atlanta Regional Office. ROI at 177.

The HR Specialist position was on the Staffing team and would be responsible for posting and filling agency vacancies. Agency's motion at 43-6.

Selecting Official determined that it was important that the selectee have strong communication skills as the position requires extensive communication with different offices within the agency, other agencies, applicants, and the public, as well as the ability to learn and apply applicable policies and procedures regarding applicant eligibility and the filling of vacancies. Id.

When making her selection, Selecting Official considered the strength of the write-up in the applicant's SSA-45 (application) and looked for recent experience with interviewing, communicating with the public, and application of policy and procedures, which were all important to the HR Specialist position. ROI at 179 and Agency's motion at 43-5. Selecting Official was also looking for applicants with details and developmental assignments and awards that were recent and relevant to the duties of the HR Specialist position. Id.

There were nearly 100 applicants for the position and Complainant's application was not strong enough to put her in the top few candidates. ROI at 179 and Agency's motion at 43-5. Selecting Official only solicited recommendations for the top few candidates and did not solicit a recommendation for Complainant. Id. Selecting Official did not know the management team in the Nashville office and she did not speak with management about Complainant. ROI at 179. None of Complainant's supervisors was contacted for a recommendation and they did not contact any selection official to provide a recommendation. ROI at 186 and 193; Agency's motion at 48.

On February 8, 2021, Complainant was notified that she was not selected for the HR Specialist position. ROI at 88. Selecting Official selected four HR Specialists, three at the GS-12 level and one at the GS-11 level. ROI at 178. A GS-11 Claims Specialist in the Villa Rica Field Office, (Selectee 1 [Hispanic, female]), applied for and was selected for the position at the GS-11 level. ROI at 178, 243, 252, and 274-82. At the time of the selection, Selecting Official did not know Complainant or Selectee 1 and was not aware of their race, color, national origin, disability status, or prior EEO activity. ROI at 178 and Agency's motion at 43-5.

Selecting Official did not select Complainant because her application lacked specific examples of her personal experience in her most recent position as a Claims Specialist that were important to the HR Specialist position. Selecting Official also did not select Complainant because she did not have any recent relevant details or developmental assignments or awards. Agency's motion at 43-5.

Selecting Official selected Selectee 1 because her application indicated she had extensive recent experience as a Claims Specialist screening applications, interviewing the public, communicating with other agencies, and applying agency policies and procedures. Selecting Official also selected Selectee 1 because she had a recent detail as a Technical Expert, which included experience serving as a policy expert and working closely with offices outside of the agency. Selecting Official also selected Selectee 1 because her application indicated she had many recent awards. Agency's motion at 43-5.

On January 8, 2021, Supervisor 3 emailed Complainant a list of cases that needed action and indicated he arranged for additional time for her to work on those cases. ROI at 93. It is common practice for management to offer all employees additional time to focus on certain workloads based on operational needs. ROI at 183-84, 191-92, and 200.

On December 29, 2020, Supervisor 1 sent Complainant an instant message (IM) asking her to help with BLITZ (undefined acronym). ROI at 97. "BLITZ" is when all employees without scheduled interviews are asked to work the phones to handle the large volume of calls when the office opens. Agency's motion at 30. Complainant responded "[j]ust a second" because she was wrapping up other work. ROI at 97. It is common practice for management to IM employees during periods of heavy call volume, including "BLITZ," to ask anyone not in an interview to assist with the phones. ROI at 184, 192, and 200.

On December 20, 2019, Complainant was suspended for 14 days for accruing over 200 hours of AWOL between June 6, 2019 and July 19, 2019, while she was stationed in Agency Headquarters in Woodlawn, Maryland. Agency's motion at 50-6. On March 8, 2022, Complainant was issued a notice indicating she was no longer eligible to telework due to being disciplined for AWOL, pursuant to the Telework Enhancement Act of 2010 and the 2012 SSA-AFGE National Agreement. ROI at 334.

The Telework Enhancement Act of 2010 provides that an employee may not telework if "the employee has been officially disciplined for being absent without permission for more than 5 days in any calendar year." See 5 U.S.C. § 6502(a)(2)(A). Article 41, Section 3(H) of the AFGE contract provides that to be eligible for telework, an employee must "[n]ot be excluded from participation by law, or by government-wide rule or regulation." ROI at 350.

On October 18, 2022, Complainant, through her representative, requested "45 plus" hours of official time to prepare for her deposition and respond to an Agency motion. Agency's motion at 84. On October 20, 2022, Supervisor 2 responded to the request by approving 16 hours to prepare for Complainant's deposition, and approving 8 hours to attend the deposition, noting that the amount of time requested exceeded the time necessary based on the complexity of the complaint. Agency's motion at 84-5. The Agency noted that it had no motions pending at the time of Complainant's request.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. The parties were afforded the opportunity for discovery. On November 23, 2022, the Agency filed a motion for decision without a hearing (Agency's motion).

Complainant filed an untimely motion for summary judgment on November 28, 2022 (Complainant's motion). Subsequently the Agency filed a response to Complainant's motion combined with a motion to strike for it being untimely. While there was no question that Complainant's motion was untimely, and it could be stricken, the AJ assigned to the case found that striking the motion would not be the best alternative. As such, the AJ allowed Complainant's motion to remain unstricken. The AJ fully considered the motion in rendering their decision. The AJ determined that there were no genuine issues of material fact to be resolved at hearing. Therefore, on August 5, 2023, pursuant to 29 C.F.R. § 1614.109(g), the AJ granted the Agency's motion in its entirety.

The AJ reviewed the Agency's motion as well as the ROI. According to the AJ, the Agency's motion identified the accepted claims, undisputed material facts, applicable legal standards, and grounds upon which the case should be decided without a hearing. The AJ agreed in all material respects with the Agency's articulation of the undisputed facts and legal analysis. The AJ set forth in their decision any caveats, or areas where the AJ must expound on, or differentiate facts or law. The AJ also incorporated by reference into their decision the Agency's motion.

After a full review of the ROI and the Agency's motion, the AJ concluded that there was insufficient evidence from which a reasonable fact-finder could return a verdict in Complainant's favor if the case were to go to hearing.

Viewing the evidence as a whole and in the light most favorable to Complainant, the AJ determined that the undisputed evidence established that the Agency was entitled to summary judgment on Complainant's complaint.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

### CONTENTIONS ON APPEAL

Neither Complainant nor the Agency submitted an appeal statement.

### STANDARD OF REVIEW

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

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

### ANALYSIS

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

#### *Disparate treatment based on race, color, sex, disability and reprisal (Claim 1)*

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The Commission applies the McDonnell Douglas analysis to complaints involving retaliation claims. Orlando O. v. Department of Health and Human Services, EEOC Appeal No. 0120170253 (Aug. 8, 2018) (citing Hochstadt v. Worcester Found, for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976)). The Commission also applies the McDonnell Douglas analysis to complaints involving disability claims. Kenneth M. v. Dep't of Justice, EEOC Appeal No. 2022004767 (Nov. 17, 2022).

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, (Aug. 17, 2023).

In order to establish a prima facie case of retaliation, a complainant must demonstrate that: (1) she participated in EEO activity; (2) an Agency official(s) was aware of the protected activity; (3) a subsequent adverse action took place, and (4) there is a causal link between the adverse action and the employer's knowledge of protected activity. Nida R. v. Dep't of Def., EEOC Appeal No. 0120152884 (Apr. 22, 2016) (internal citations omitted); see also EEOC Enforcement Guidance on Retaliation and Related Issues, § II.C.2, n. 154 (Aug. 25, 2016) (citing Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010)). Furthermore, "[t]he cases that accept mere temporal proximity between 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' [in time]." Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (citing to O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (finding a three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (finding a four-month period insufficient).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race, color, sex, disability and reprisal.

Complainant meets the elements to establish her prima facie case of reprisal to the extent that she had filed five previous EEO complaints of which management was aware. These includes a May 13, 2020, complaint. Complainant may also have had at least one other complaint that was pending in the EEO process at the time the instant complaint was filed. The Agency also took adverse actions against her when she was not selected for a position to which she applied.

As such, we do assume that Complainant presented a prima facie case. However, Complainant did not demonstrate that the non-selection was based on any protected activity.

Likewise, Complainant established that she is an individual with disability to the extent that she had a mental disability. Supervisor 2 was however unaware of Complainant's disability. Complainant was also able to perform her job functions with or without reasonable accommodation because the Agency had approved, and Complainant had accepted, an alternative accommodation in the form of telework three days a week.

Complainant is also a Black/Brown African-American female. However, Complainant did not identify any other similarly situated employees outside of her protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on these protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the challenged non-selection; and we find no persuasive proof of pretext.

Regarding Claim 1, Selecting Official did not select Complainant because her application did not show that she had extensive recent experience that was important for the HR Specialist position. ROI at 179 and Agency's motion at 33-41. Specifically, the explanation of Complainant's most recent experience as a Claims Specialist lacked specific examples of personal experience that is relevant to the HR Specialist position, including extensive internal and external communications and policy application. While Complainant had GS-12 experience, her experience was focused on technical and systems-related work, which was not important for the HR Specialist position. ROI at 67-8. Complainant also lacked any recent or relevant details, developmental assignments, or awards. Notably her most recent detail was in 2013 and her most recent award was in 2016. ROI at 71-2.

Selectee 1, on the other hand, gave specific examples that highlighted her extensive relevant experience as a Claims Specialist, including communicating with the public, other agency components, and other agencies, and knowledge and application of various policies and procedures, all of which were important for the HR Specialist position. See Agency's motion at 33-5 and 48. Selectee 1 had many recent details and developmental assignments, including a detail as a Technical Expert in 2018, which included serving as a policy expert and working closely with offices outside of the agency. Agency's motion at 37-8 and 48.

Selectee 1 also had many recent awards, including a Recognition of Contribution Performance Award in 2020, which is a performance-based award, and a Humanitarian Award in 2019, which is one of the most prestigious awards in the Agency. Agency's motion at 40-1 and 48. A copy of Selectee 1's application is also found in Agency's motion at 33-41. The record reflects that at the time of the selection, Selecting Official worked in the Atlanta Regional Office, did not know Complainant or Selectee 1, and was not aware of their protected classes.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

In an effort to show pretext, Complainant asserted that the Agency was motivated by discrimination and retaliation with respect to the challenged non-selection. Complainant suspected, but had no evidence, that members of her management team contacted Selecting Official and influenced her selection. ROI at 169-70. However, Complainant did not refute, with any corroboration, record evidence reflecting that Selecting Official did not solicit a recommendation regarding Complainant, did not know Complainant's management team, and was not contacted by anyone in Complainant's supervisory chain regarding Complainant during the selection process. Complainant herself admitted that she had no evidence to prove that management provided any recommendations to Selecting Official. ROI at 179, 186, and 193; Agency's motion at 33 and 48.

In that regard, Complainant failed to show pretext. The Commission has repeatedly held that pretext requires more than a belief, assertion, or suspicion that the Agency was motivated by discrimination or retaliation. Kathy D. v. Environmental Protection Agency, EEOC Appeal No. 0120171318 at p.5 (Aug. 14, 2019); Vickey S. v. U.S. Postal Serv., EEOC Appeal No. 0120171004 (Jul. 12, 2018); Letty K. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019003570 (Feb. 21, 2020). Moreover, here, Complainant admitted that she has no evidence to prove that management provided any recommendations to Selecting Official. ROI at 170.

The Agency has also met its burden of production as it has provided a specific, clear, and individualized explanation for the treatment accorded Complainant in this case. See Barbar R. v. Dep't of the Treasury, EEOC Appeal No. 0120161059 at \*4 (Nov. 29, 2017) (stating the required explanation that the Agency must provide, and that its burden of production is not onerous).

Complainant contended that she was more qualified because she believed she has a better understanding of how to apply for jobs and had worked more jobs, in more regions, and in more components. Agency's motion at 76-80. Complainant however failed to demonstrate that her qualifications were "plainly superior" to those of Selectee 1. Even assuming that Complainant's beliefs were true, Selecting Official did not base her selection of Selectee 1 on the number of different jobs, regions, and components in which any applicant had worked. The bar to demonstrate pretext through qualifications is high, as the difference in qualifications must be so glaring that no reasonable impartial person could have chosen the candidate selected for the position in question over the complainant. See Jacqueline G. v. Dep't of Agriculture, No. 0120143096at \*2 (Oct. 14, 2015).

Moreover, "Only personnel decisions that are idiosyncratic or suspect are subject to heightened scrutiny because deviations from standard procedures without explanation or justification are sufficient to support an inference of pretext." Justin P. v. Soc. Sec. Admin., EEOC Appeal No. 0120172087at \*4 (Nov. 21, 2018). Complainant has failed to show that Selecting Official's selection was discriminatory or premised on any protected basis. Notably, Selectee 1 is, like Complainant, female. Therefore, Complainant's allegations fail.

Complainant's disability claim with respect to her non-selection also fails because none of her supervisors (or Selecting Official) were aware that Complainant had a disability at the time of the non-selection. ROI at 196, 203, and Agency's motion at 30.

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is also precluded by the determination above that the Agency's explanations demonstrate that Claim 1 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

*Harassment and Retaliatory Harassment (Claims 2 and 3)*

Complainant alleged that she was harassed when she was given additional time to complete tasks, when she was denied telework, and when she was not given enough official time to prepare for her deposition. Complainant asserted her belief that these alleged incidents are examples of management trying to establish a “paper trail” of evidence that she was a poor performer. ROI at 171.

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep’t of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg’l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser’s conduct should be evaluated from the objective viewpoint of a reasonable person in the victim’s circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994)

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 race, color, sex, disability 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.

At the onset, we find that Complainant’s disability claim fails because the record reflects, and Complainant did not dispute, that none of her supervisors were aware that Complainant had a disability at the time of the alleged incidents. ROI at 196, 203, and Agency’s motion at 30.

Complainant belongs to protected classes based on her race, color, sex, and prior protected EEO activity, and she was subjected to unwanted conduct.

However, Complainant did not show a connection between any protected basis and the alleged harassment.

Regarding Claim 2, management explained that providing additional time is something that is done for all employees based on operational needs. ROI at 183, 191-92, and 200. Complainant herself admitted that other employees outside of her protected classes were advised that they were allowed more time to complete assignments. ROI at 171. The record reflects that the additional time charges is a common practice in the Agency and was not directed at Complainant for any discriminatory reason based on any of her protected bases. ROI at 186, 193, and 201.

Likewise, Supervisor 1 sent the IM on December 29, 2020, to Complainant because several employees were on leave and they needed assistance on the phones, and not because of any of Complainant's protected bases. This was something management routinely did with all employees based on operational needs. ROI at 184-86, 192, and 200. The record is devoid of evidence of any calls or emails besides the one IM sent from Supervisor 1 between December 29, 2020 and January 8, 2021. ROI at 97.

Regarding Claim 3, the record reflects that consistent with the applicable statute and national agreement, the Agency denied Complainant telework because Complainant had a previous AWOL issue that led to a suspension, and not due to any protected class. ROI at 203-04 and 334. See Agency's motion at 50-6 for the decision to suspend Complainant. We note that the Agency referred to a prior Commission decision dated January 18, 2022, which found that the Agency did not discriminate against Complainant on the basis of any protected class or protected activity when it charged her with AWOL and suspended her for 14 days. See Agency's motion at 66 for the Commission's decision regarding the discipline. We have come to the same conclusion in the instant complaint as Complainant has failed to prove that any of her protected bases played a role in the challenged management actions.<sup>2</sup>

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<sup>2</sup> As did the Agency, we note that to the extent Complainant attempts to raise the merits of the underlying AWOL charge and suspension, such issues are barred from re-litigation here due to issue preclusion. See Zonia C. v. Dep't of Vet. Affairs, EEOC Appeal No. 2021001587at \*2 (Apr. 14, 2021) ("issue preclusion bars the re-litigation of issues actually adjudicated and necessary to the judgment in a prior litigation between the parties").

Importantly, a single email from Supervisor 3, a single IM from Supervisor 1, and Complainant's telework ban may have left her feeling aggrieved but these incidents, without more, lack the requisite severity and pervasiveness to constitute actionable harassment or hostile work environment. Instead, the alleged incidents are ordinary supervisory oversight of work performance. In that regard, the Commission has repeatedly recognized that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures, monitoring subordinates, distributing the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings, and otherwise managing the workplace. Erika H. v. Dep't of Transp., EEOC Appeal No. 0120151781 (Jun. 16, 2017). Employees will not always agree with supervisory communications and actions, but absent discriminatory motives, these disagreements do not violate EEO law. Steven T. v. Dep't of the Treasury, EEOC Appeal No. 2020003020 (Sept. 19, 2020).

Regarding Claim 4, a separately cognizable claim under 29 C.F.R. § 1614.605(b), the AJ found, and we agree, that consistent with EEO-MD-110, ch. 6, § VII.C.3 (Aug. 5, 2015), the Agency granted Complainant a reasonable amount of official time to prepare for her deposition under the circumstances in this case. Importantly, there were no pending motions at the time of Complainant's official time request on October 18, 2022. The Agency also noted, and Complainant did not dispute, that since the request at issue, it has approved all requests from Complainant and her representative for official time, which include 8 hours to respond to discovery and 24 hours to prepare a motion.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the AJ's decision and the Agency's final order adopting it.

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

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

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

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

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

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

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

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

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

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

December 30, 2024  
Date