



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Ela O.,¹
Complainant,

v.

Scott Bessent,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2024001331

Hearing No. 460-2023-00034X

Agency No. IRS-22-0174-F

DECISION

On December 8, 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 November 8, 2023, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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 issues presented are: (1) whether four claims were properly dismissed on procedural grounds; (2) whether it was an abuse of discretion for the EEOC Administrative Judge (AJ) to deny Complainant's motion to strike and request for sanctions; (3) whether Complainant has shown that the AJ

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.

exhibited reversible bias; and (4) whether substantial evidence supports the AJ's decision that Complainant did not establish that she was subjected to discrimination based on disability and/or reprisal as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked for the Agency as a GS-1101-12 Senior Bankruptcy Specialist in the Small Business/Self Employed Division, Specialty Collection – Insolvency, in Houston, Texas. Report of Investigation (ROI) at 157, 443; Hearing Transcript (HT) at 48-49. Complainant's first-line supervisor was a Supervisory Bankruptcy Specialist (Supervisor-1), and her second-line supervisor was the Territory Manager (Manager-1). ROI at 158, 349; HT at 47, 118.

Complainant alleged that she was subjected to discrimination based on disability and in reprisal for prior protected EEO activity. Complainant stated that she had filed multiple EEO complaints. ROI at 164-68. According to Complainant, management, including Supervisor-1 and Manager-1, was aware of her prior EEO complaints and her disability. ROI at 158-59, 164-68; HT at 33-37, 64-66.

Complainant identified her disabling medical conditions as acute stress disorder, major depressive disorder, generalized anxiety disorder, complex post-traumatic stress disorder, somatic symptoms disorder, described as physical symptoms resulting from psychological stress. ROI at 158; HT at 26-27. According to Complainant, her disability affected the major life activities of standing, sitting, walking, bending, lifting objects, climbing stairs, sleeping, performing manual tasks, and operation of the neurological and musculoskeletal systems. ROI at 158-64; HT at 14-17, 26. Complainant averred that, as a result of the psychological stress caused by management, she experienced worsening depression and anxiety, severe fatigue, back pain, shoulder pain, leg pain, severe headaches, and muscle spasms. ROI at 158-63; HT at 17-18. Complainant stated that she had a transient ischemic attack (TIA), or mini stroke, on August 13, 2020. ROI at 160; HT at 43-45. According to Complainant, management minimized her disability. HT at 45, 67-71.

According to Complainant, on November 4, 2021, her mobile hotspot became inoperative and needed to be replaced, so she was unable to work and placed on "computer downtime" from November 5, 2021, until December 14, 2021. ROI at 171; HT at 59-63. On December 15, 2021,

Supervisor-1 emailed Complainant two Form 6067 reviews.² ROI at 170, 207; ROI Supplemental (Supp.) at 31; HT at 75. One Form 6067 dated December 8, 2021, contained positive information, stating that, based on a Proof of Claims Follow-Up Report, Complainant did not have any cases over 30 days old without claims acknowledged. ROI Supp. at 32, 43; HT at 132-34. The second Form 6067 dated December 13, 2021, contained negative information. ROI Supp. at 33-35; HT at 75. According to Supervisor-1, based on Complainant's Case Assignment Report, Complainant had 32 cases with past due follow-ups and 20 cases without a follow-up. ROI Supp. at 34-35, 37-40; HT at 134-35.

A Revenue Officer (Coworker-1) retired on June 19, 2021. ROI at 169; HT at 55-56, 120-21. On June 25, 2021, Supervisor-1 assigned herself Coworker-1's inventory of approximately 90 cases so Coworker-1's account could be deactivated. ROI at 169; ROI Supp. at 12; HT at 55-56, 120-22. According to Supervisor-1, she later reassigned Coworker-1's cases to the three GS-12 Bankruptcy Specialists based on case grade. ROI Supp. at 12; HT at 122-23. Complainant stated that, on July 29, 2021, Supervisor-1 assigned her 29 cases from Coworker-1's inventory, including the majority of Coworker-1's complex cases. ROI at 169-70; HT at 55-56.

Complainant alleged that, because the Agency classified her as an "ad hoc telework" employee, she should not have had a regular workload and should have been working on special projects. ROI at 169, 171; HT at 50, 53, 58. Complainant averred that Supervisor-1 assigned her 25 new receipt cases between May 2021 and July 28, 2021, so she had 25 total cases in her inventory. ROI at 169; HT at 54-55. Complainant testified that, when Supervisor-1 said she would be reassigning Coworker-1's cases, Complainant reminded Supervisor-1 she was classified as an ad hoc telework employee and had also requested that her inventory be reduced as a reasonable accommodation.³ HT at 56. The Director of Collections (Director-1) testified that a reasonable inventory for a GS-12 Senior Bankruptcy Specialist would be 40-50 cases but that, due to staffing, it was not uncommon for these Specialists to have more than 100 cases or, in some circumstances, over 200 cases. HT at 204-05.

² According to the record, Form 6067 is an Employee Performance Folder Record that will be placed in the employee's performance folder, and the form has space for the evaluator to check off whether the review contains positive or negative information. ROI Supp. at 32.

³ Complainant's request for a reduced inventory as a reasonable accommodation was denied. HT at 59, 216.

According to Complainant, the negative review from December 13, 2021, reflected the majority of the cases assigned to her on July 29, 2021. ROI at 170. Complainant averred that Coworker-1 had not taken appropriate actions on his cases before retiring. ROI at 170; HT at 79. Complainant testified that she was written up for issues that Coworker-1 had not taken on his cases. HT at 79-80. Complainant alleged that Supervisor-1 knew Coworker-1 was retiring and, as his supervisor, had a responsibility to review his inventory with him to identify cases that could have been resolved prior to his retirement. ROI at 176. Complainant also noted that Coworker-1's cases had been sitting in Supervisor-1's inventory for more than a month before they were assigned to Complainant. ROI at 169; HT at 61. Supervisor-1 testified that, once Coworker-1's cases were in Complainant's inventory for a while, it became Complainant's responsibility to perform whatever action Coworker-1 had not done. HT at 142. Supervisor-1 stated that Complainant should have had enough time between July 29, 2021, and November 4, 2021, to take these actions. HT at 142-43.

Complainant averred that the December 8 and 13, 2021, reviews were the only performance reviews she received from Supervisor-1 during the appraisal period. ROI at 171-72. Complainant alleged that, because her performance appraisal period ran from February 1, 2021, to January 31, 2022, her mid-year review should have been conducted by July 31, 2021. ROI at 169-71; HT at 61, 76-77. Complainant testified that normally Supervisor-1 would tell her she was going to do a midyear review, and Complainant would pull 13 or 14 cases for Supervisor-1 to review. HT at 61. Complainant alleged that she was worried that Supervisor-1 was going to lower her performance appraisal because she evaluated 52 cases. HT at 80-81. According to Complainant, between July 29, 2021, and December 13, 2021, Supervisor-1 had not discussed her performance with her. HT at 78.

Supervisor-1 testified that she did not conduct a midyear review for Complainant in 2021, explaining that her significant other underwent major surgery and, as a result, she did not conduct a midyear review for the majority of her employees. HT at 123-24. According to Supervisor-1, she completed the Form 6067 reviews in December 2021 as part of her review of Complainant's work before the end of her rating period. ROI Supp. at 9-11; HT at 125. Supervisor-1 averred that, per Manager-1's expectations, she was required to complete at least 13 case reviews per year for each specialist. ROI Supp. at 12-13; HT at 125-27, 140-41. Manager-1 stated that Supervisor-1 was responsible for reviewing at least 13 cases for all employees in her group. ROI at 355; HT at 234.

For the appraisal period from February 1, 2021, through January 31, 2022, Complainant submitted a self-assessment, which explained that she signed her performance plan on April 27, 2021, was reassigned Coworker-1's cases on July 29, 2021, and had no computer access from November 5, 2021, to December 14, 2021. ROI at 123-26. Complainant testified that Supervisor-1 contradicted herself in Complainant's performance appraisal by stating that it was based on Supervisor-1's review of Complainant's work, the Form 6067s, and Complainant's self-assessment, which explained the negative issues in the December 13, 2021, Form 6067. HT at 82-85. Supervisor-1 stated that she rated Complainant Outstanding, which reflected that she exceeded expectations for every critical job element. HT at 128-29. Supervisor-1 testified that the negative Form 6067 reviews had no impact on Complainant's rating because the standard in the performance plan for exceeded expectations was that the employee "almost always" performed the aspects of the critical job elements. HT at 129-30. Supervisor-1 added that, because she had not conducted a midyear review with Complainant or counseled her regarding performance, she could not lower Complainant's rating. HT at 129-30.

According to Complainant, in 2012 or 2015, she was reassigned to a different office than the other Houston-based Bankruptcy Specialists as a reasonable accommodation. ROI at 182; HT at 88-89. Complainant stated that, after she was reassigned, a rotating Officer of the Day at the main Houston office who would process any checks that were received for Complainant's assigned cases and mail them to the Service Center for processing. ROI at 182; HT at 88-91. Complainant alleged that, during a March 21, 2022, meeting, some coworkers expressed that they did not want to do other people's work, in reference to processing Complainant's checks. HT at 93-94. Complainant averred that, on March 23, 2022, the procedure changed, and Supervisor-1 directed Complainant to process scanned copies of her own checks. ROI at 182-83; HT at 87-91. Complainant testified that she did not know what the procedure was and had not been trained on changes to the program. HT at 91-92, 256, 267. Complainant averred that she had just come out of a meeting with the U.S. Attorney's Office and had been asked to look something up, but she could not complete that work because of the directive to process the checks. HT at 94, 98-100.

Manager-1 testified that she initiated the change to the Specialist of the Day procedures because, with employees teleworking as a result of Covid-19, some days the mail volume would be so heavy that the Specialist of the Day would spend the entire day processing mail for others who were teleworking. HT at 237.

According to Manager-1, they changed the procedures so the Specialist of the Day would scan the check and send it to the assigned Specialist, who would process the check and return the document to the Specialist of the Day for mailing. HT at 237-38. Supervisor-1 stated that, during a March 21 or 22, 2022, meeting, she explained the new Specialist of the Day procedures, which stated that, if a check was received for a case assigned to a Bankruptcy Specialist who was not in the office, the Bankruptcy Specialist would pull this information from a scanned image of the check, generate the forms, and email them to the Specialist of the Day. ROI Supp. at 13; HT at 147-49, 155-56, 180-81. Supervisor-1 testified that Complainant was in the meeting where she described the new procedures. HT at 150-55. Supervisor-1 averred that, prior to the implementation of the new procedures, the Specialist of the Day processed whatever checks came in that day. HT at 147-48.

According to Complainant, on March 22, 2022, Supervisor-1 approved Complainant's request to glide from 6 a.m. to 2:30 p.m. on March 23, 2022, so she could attend a doctor's appointment. ROI at 183; HT at 87-88, 94-95, 98. Complainant stated that she planned to work through her two 15-minute breaks and her lunch break to leave for the appointment at 1:30 p.m. HT at 95-96. Complainant alleged that she could not complete the assignment to process the checks because of her disability, explaining that the appointment was related to her disability and that she was not dressed for her doctor's appointment when she started work that morning. HT at 94-95, 98-100. Complainant testified that she told Supervisor-1 that she had not been trained on how to process checks and had to leave for her doctor appointment. HT at 99-101, 267-69. Complainant averred that she did not process the checks that day as directed and that Supervisor-1 trained her on the steps for processing checks a couple days later. HT at 99-101, 267. Supervisor-1 testified that, if Complainant was starting her workday at 6 a.m., she would have completed her workday at 2:30 p.m. HT at 193-94. According to Supervisor-1, if Complainant wanted to leave earlier than 2:30, she would have needed to take leave. HT at 194-95.

According to Supervisor-1, on March 23, 2022, Complainant was directed to process some checks, but Complainant indicated that she could not complete the assignment in the time frame provided by the Specialist of the Day. ROI Supp. at 13-14; HT at 156-57. Supervisor-1 testified that Complainant mentioned something about her disability but did not explain why she could not process the checks. HT at 157, 159-61. On March 23, 2022, a Bankruptcy Specialist (Coworker-2) emailed Complainant copies of checks. HT at 92-93.

According to Complainant, at first the check images were cut off and sideways. HT at 101-02. At 10:35 a.m., Coworker-2 emailed Complainant a rescanned image of the check and, at 10:40 a.m. and 10:45 a.m., Complainant emailed Supervisor-1, stating that she would not be able to provide the documents to Coworker-2 by 12:30 p.m. and that the writing on the check was small and would take more time for her to process. ROI Supp at 21. Supervisor-1 suggested that Complainant increase the size of the image. ROI Supp. at 20. Complainant responded at 10:52 a.m.:

I am processing the check, however, due to my disability not be able [sic] to be accommodated, it will take me more time to work on the checks. I have informed you as my manager, that I will not be able to process the checks today by 12:30 PM, again, due to my disability. There was an accommodation and you took it away. Due to my illness, as I explained to you on [sic] yesterday, I have to write everything down and then work the cases.

ROI Supp at 20. When Supervisor-1 asked what accommodation was taken away, Complainant replied that previously the Officer of the Day had processed the checks received. ROI Supp. at 19-20. At 11:01 a.m., Complainant stated that she was working on processing the check but that due to her disability, it would take her longer to process it, and she would not be able to meet the 12:30 deadline. ROI Supp. at 19. At 11:16 a.m., Supervisor-1 directed Complainant to process the checks and provide the appropriate documents to Coworker-2 by 1:00 p.m. ROI Supp. at 19; HT at 162.

Supervisor-1 testified that Complainant should have been familiar with how to complete the required form for processing checks. HT at 176-77. Supervisor-1 testified that processing checks required inputting the tax identifying number, the amount of the check, the check number, and the date the check was received into a system to generate a voucher and a document that would be attached to the check when it was sent to the Service Center for processing. HT at 144, 146-47. Supervisor-1 stated that, because Complainant did not have a printer at home, she would need to write down the tax identifying number, the amount of the check, and the check number. HT at 160-61. Supervisor-1 testified that the Agency offered Complainant two printers, but Complainant declined both of them. HT at 195-96. According to Director-1, they attempted to provide Complainant a printer, but Complainant stated that she would be unable to lift the printer, which was 29 pounds.

HT at 213-14. Director-1 testified that they ordered a seven-pound printer to accommodate Complainant's needs, but Complainant canceled the IT ticket to have it delivered to her home. HT at 213-14. Director-1 stated that Complainant indicated that she did not want to be responsible for the printer. HT at 214-15. Complainant denied declining a printer or canceling a ticket, stating that she informed the Agency that she would not be able to physically lift the printer. HT at 250-52.

On December 16, 2022, Complainant initiated contact with an EEO counselor. On March 8, 2022, Complainant filed an EEO complaint, which she subsequently amended, alleging that the Agency discriminated against her on the bases of disability (physical and mental) and reprisal for prior protected EEO activity when:

1. Complainant's supervisor wrote negative 6067 performance reviews of her work on December 8 and 13, 2021,⁴ which she received on December 16, 2021;
2. On March 23, 2022, Complainant's supervisor directed her to complete an assignment that she could not complete due to her disability;
3. On June 20, 2021, Complainant's supervisor provided an inaccurate assessment of her ability to work, which resulted in the Office of Personnel Management (OPM) denying her request for disability retirement by correspondence dated December 16, 2021;
4. On July 29, 2021, Complainant's workload was doubled when her supervisor reassigned to her all of the 28 cases that were assigned to her former colleague who had retired months earlier;
5. On May 6, 2021, Complainant requested a reasonable accommodation, which the Agency had denied; and
6. On February 28, 2022, Complainant learned that an attorney from the Office of Chief Counsel had been assigned to her informal EEO complaint.

The Agency dismissed allegation (3) for not being like or related to any issue raised with an EEO counselor pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency dismissed claim (4) for untimely EEO counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency dismissed claim (5) pursuant to 29 C.F.R. § 1614.107(a)(1) because Complainant had a failure to accommodate

⁴ Complainant clarified that the December 8, 2021, performance review was positive and that she was not challenging this review.

claim in an EEO complaint filed on September 17, 2021, Agency No. IRS-21-0662-F, which was pending before an EEOC AJ. The Agency dismissed allegation (6) for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

According to the record, the contract EEO investigator completed the investigative report and submitted it to the Agency on December 1, 2022. ROI at 142. The EEO investigator noted that Supervisor-1 had not provided an affidavit. ROI at 144. According to the EEO investigator, Supervisor-1 had initially been asked to provide a completed affidavit by August 15, 2022, and had subsequently been sent a reminder email on November 30, 2022, and a phone call on December 1, 2022. ROI at 146. The EEO investigator stated that Supervisor-1 responded that she would complete and return the affidavit as soon as possible and that it would be made part of the record once received. ROI at 146.

On December 5, 2022, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an EEOC AJ. Complainant timely requested a hearing.

At the Initial Conference, the AJ assigned to the case affirmed the Agency's partial dismissals on procedural grounds. The AJ also ordered the parties to supplement the record, including by ordering the Agency to supplement the ROI with an affidavit or sworn testimony from Supervisor-1 and the two forms 6067 referenced in claim (1), no later than June 5, 2023. On June 5, 2023, the Agency supplemented the record with an affidavit from Supervisor-1 and the two forms 6067. Supervisor-1's affidavit is dated December 8, 2022, and the record contains an email showing that Supervisor-1 emailed the affidavit to the EEO investigator on December 8, 2022. ROI Supp. at 1-17.

On June 16, 2023, Complainant filed a Motion to Strike Untimely Affidavit and Request for Sanctions. Complainant argued that Supervisor-1 had failed to cooperate in the EEO process and that allowing Supervisor-1's affidavit was prejudicial to Complainant because it was likely prepared with the benefit of information contained in the completed ROI. Complainant questioned why, if Supervisor-1 completed an affidavit in December 2022, it was not provided until the AJ ordered the Agency to provide one. Complainant requested that the AJ strike Supervisor-1's untimely filed motion and draw an adverse inference that Supervisor-1's failure to submit a timely affidavit meant that her responses would have been against the Agency's interests.

On June 22, 2023, the AJ acknowledged Complainant's filing by email and stated, "The Agency shall respond to the Motion to Strike within 10 days." On August 24, 2023, the AJ issued a Notice of Inactivity to the Agency, which stated that the Agency had failed to remain active in the defense of the referenced case and that neither assigned attorney had responded to the Motion to Strike or filed a motion for summary judgment by the deadline. The Agency filed a Request for Leave to File an Untimely Response in Opposition to the Complainant's Motion to Strike.

The AJ issued an Order on Complainant's Motion to Strike Untimely Affidavit and Request for Sanctions and the Agency's Motion for Leave. The AJ denied Complainant's Motion to Strike, finding that the Agency had not violated any order of the Commission and that the AJ had timely supplemented the record with Supervisor-1's affidavit and other evidence as ordered by the AJ. To the extent that Complainant questioned whether Supervisor-1's affidavit was executed in December 2022, Complainant could challenge the veracity of the affiant at hearing. The AJ denied the Agency's Motion for Leave as untimely and admonished Agency counsel for filing the motion in response to the Notice of Inactivity that did not contain any deadlines or invitations for belated filings.

The AJ held a hearing on October 17, 2023, and issued a bench decision on October 18, 2023. The AJ found that Complainant was an individual with a disability and qualified within the meaning of the Rehabilitation Act. The AJ also found that the Agency did not discriminate against Complainant based on disability and/or reprisal. According to the AJ, Complainant failed to show a connection between the alleged discriminatory acts and her disability and/or prior protected EEO activity. For claim (1), the AJ noted that Complainant conceded the accuracy of the Form 6067 reviews and that the negative review did not impact Complainant's performance appraisal. The AJ determined that, for claim (2), Complainant did not suffer a concrete harm or loss due to Supervisor-1's directive and that Complainant did not establish that the legitimate, nondiscriminatory explanation for the directive was discriminatory.

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. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ committed reversible error by subjecting Complainant to judicial bias. As an example, Complainant stated that, during the processing of four EEO complaints, the AJ would tell Complainant that she was not going to award Complainant punitive damages. Complainant also asserts that the AJ erred in denying her Motion to Strike and for Sanctions. According to Complainant, based on the AJ's bias and the Agency's willful disregard of the Commission's regulations, a default judgment in her favor is appropriate. Complainant argues that the AJ erred in denying her request to reinstate the dismissed claims. Complainant contends that the AJ erred in addressing the Agency denying Complainant reasonable accommodation and forcing her to work without accommodations. According to Complainant, her constitutional rights were denied, and she was forced to work a full inventory while in an ad hoc telework status in violation of the NTEU National Contract.⁵ Complainant requests that the Commission reverse the final order adopting the AJ's decision finding no discrimination.⁶

In response to Complainant's appeal, the Agency contends that the AJ's decision thoroughly explained the evidence relied on in reaching the findings of fact and conclusions of law.

⁵ The Commission does not have jurisdiction over alleged violations of the U.S. Constitution or violations of the collective bargaining agreement. See Michelle G. v. Dep't of Veterans Affs., EEOC Appeal No. 2022001792 n.3 (April 18, 2023) (the Commission does not have jurisdiction over the Constitution); Michale S. v. Dep't of Veterans Affs., EEOC Appeal No. 2021004448 n.2 (June 29, 2022) (the Commission does not have jurisdiction over violations of the collective bargaining agreement or the agency's policies).

⁶ Complainant submitted 61 exhibits with her appellate brief, some of which are not part of the record. As a general rule, no new evidence will be considered on appeal absent an affirmative showing that the evidence was not reasonably available prior to or during the investigation or during the hearing process. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VI.A.3 (Aug. 5, 2015). Complainant has offered no explanation as to why she is providing these documents for the first time on appeal or why she could not have raised them during the processing of her case by the AJ. Accordingly, we will not consider this new evidence provided for the first time on appeal.

According to the Agency, Complainant failed to show that the AJ abused their discretion in any rulings or demonstrated bias against Complainant.⁷

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 9, at § VI.B. (Aug. 5, 2015).

⁷ The Agency challenges the timeliness of Complainant's appellate brief, noting that the Commission extended the deadline to January 29, 2024, and stated that no further extensions would be granted. Around 12:11 a.m. on January 30, 2024, Complainant's attorney sent emails, stating that she had been having trouble accessing the Commission's Public Portal to file the brief. The Commission's records reflect there was a system-wide error affecting the Public Portal on the date in question and, as a result, we will consider the brief.

Administrative Judges have full responsibility for the adjudication of the complaint, including overseeing the development of the record, and have broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a), (e). This gives an AJ wide latitude in directing the terms, conduct, or course of EEO administrative hearings. EEO MD-110 at Chapter 7, § III.D; Chere S. v. Gen. Serv. Admin., EEOC Appeal No. 0720180012 (Nov. 30, 2018) (citations omitted). Accordingly, such determinations by the AJ are reviewed based on an abuse of discretion standard.

ANALYSIS

Procedural Dismissals and AJ Denial of Request to Reinstate Claims

Complainant challenges the dismissal of allegations (3) through (6) on procedural grounds. Complainant also alleges that it was an abuse of discretion for the AJ to deny her request to reinstate these claims and that the AJ erred in failing to address the Agency's failure to accommodate her disability.

The Agency dismissed allegation (3) for not being like or related to the matters raised with the EEO counselor. The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint that raises a matter that has not been brought to the attention of an EEO counselor and is not like or related to a matter on which the complainant has received counseling. A later claim or complaint is "like or related" to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original complaint during the investigation. See Scher v. U.S. Postal Serv., EEOC Request No. 05940702 (May 30, 1995); Calhoun v. U.S. Postal Serv., EEOC Request No. 05891068 (Mar. 8, 1990).

The sole issue Complainant raised with the EEO counselor was Supervisor-1 issuing her the Form 6067 reviews in December 2021. In allegation (3), Complainant alleged that, in June 2021, Supervisor-1 provided an inaccurate assessment of her ability to work, which resulted in OPM denying Complainant's application for disability retirement. We find that the Agency properly dismissed this allegation pursuant to 29 C.F.R. § 1614.107(a)(2) for not being like or related to any issue raised with an EEO counselor.

The Agency dismissed claim (4) for untimely EEO counselor contact. EEOC regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the Agency extends the time limits in accordance with § 1614.604(c). EEOC regulation 29 C.F.R. § 1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. EEOC regulation 29 C.F.R. § 1614.105(a)(2) allows the Agency or the Commission to extend the time limit if the complainant can establish that Complainant was not aware of the time limit, that Complainant did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence Complainant was prevented by circumstances beyond her control from contacting the EEO counselor within the time limit, or for other reasons considered sufficient by the Agency or Commission.

Claim (4) concerns the reassignment of Coworker-1's cases to Complainant, which occurred on July 29, 2021. Complainant did not initiate contact with an EEO counselor until December 16, 2021, and she has not provided any justification for the delay. We affirm the Agency's dismissal of this claim pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact.

The Agency dismissed claim (5), Complainant's reasonable accommodation claim, because Complainant had filed an EEO complaint on September 17, 2021, raising a failure to accommodate claim, which, at the time, was being adjudicated by an AJ. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides that the agency shall dismiss a complaint that states the same claim that is pending before or has been decided by the agency or the Commission. In claim (5), Complainant alleged that the Agency denied her May 6, 2021, reasonable accommodation request. In Agency No. IRS-21-0622-F, the complaint filed on September 17, 2021, Complainant alleged that, on August 24, 2021, her final appeal of a requested reasonable accommodation was denied.⁸ Upon review of the records for both cases, the Complainant's May 6, 2021, reasonable accommodation request was the same reasonable accommodation request for which her August 24, 2021, appeal was denied. Accordingly, the Agency properly dismissed this claim for

⁸ In Nicki B. v. Dep't of the Treasury, EEOC Appeal No. 2022004953 (Sept. 12, 2024), the Commission affirmed the Agency's final order adopting an AJ decision without a hearing finding no discrimination.

stating the same claim as a claim that was pending or had been adjudicated by the Agency or the Commission.

The Agency dismissed claim (6) for failure to state a claim. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disability. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

In claim (6), Complainant alleged that, on February 28, 2022, she learned that an attorney from the Office of Chief Counsel had been assigned to her informal EEO complaint. Complainant has not shown that she suffered a present harm or loss when the Office of Chief Counsel assigned an attorney to represent the Agency during the informal EEO process. Accordingly, the Agency properly dismissed this claim for failure to state a claim.

Finally, given the wide latitude given to AJs in directing the terms, conduct, and course of administrative hearings, we find that it was not an abuse of discretion for the AJ to deny Complainant's request to reinstate these claims. We further find that the AJ did not err in failing to address whether the Agency denied her a reasonable accommodation. As discussed, the denial of accommodation claim was properly dismissed for stating the same claim as one at issue in a pending complaint. Accordingly, there was no reasonable accommodation claim for the AJ to adjudicate.

Denial of Motion to Strike and for Sanctions and Allegations of AJ Bias

Complainant contends on appeal that the AJ erred in denying her Motion to Strike and for Sanctions. An AJ has the authority to sanction either party for failure without good cause shown to fully comply with an order. 29 C.F.R. § 1614.109(f)(3). Such sanctions may include an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information, exclusion of other information offered by the party refusing to provide the requested information, or issuance of a decision fully or partially in favor of the opposing party, or other actions, as appropriate. Id.

The Commission has held repeatedly that sanctions must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. See Ward B. v. U.S. Postal Serv., EEOC Appeal No. 2019001570 (May 12, 2020); Gray v. Dep't of Def., EEOC Appeal No. 07A50030 (March 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 13, 2001); Hale v. Dep't of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000).

In denying Complainant's Motion to Strike and for Sanctions, the AJ found that the Agency had not violated any Commission orders. AJs have full responsibility for overseeing the development of the record. 29 C.F.R. § 1614.109(a). In accordance with the AJ's order, the Agency supplemented the record with the affidavit from Supervisor-1 and other evidence. The AJ determined that, although Complainant questioned whether Supervisor-1 executed and submitted the affidavit in December 2022, Complainant could challenge the veracity of the affiant at hearing. We find that it was not an abuse of discretion for the AJ to deny Complainant's motion to strike Supervisor-1's affidavit and deny Complainant's request for sanctions against the Agency.

Complainant also alleges that the AJ exhibited bias against her. An AJ generally should recuse himself or herself from real and perceived conflicts of interest and should not participate in conduct that presents the appearance of or demonstrates actual bias in favor of one of the parties. See Equal Employment Opportunity Commission Handbook for Administrative Judges, Ch. 7, § III.A. (July 1, 2002). Simply ruling against a party does not support a finding of bias. See Clinton M. v. Dep't of the Treasury, EEOC Appeal No. 0120160649 (Apr. 18, 2018). In order to prevail on her contention that the AJ was biased, Complainant must make a substantial showing of personal bias by the AJ and show that such bias prejudiced her in this matter. In Catheryn P. v. U.S. Postal Serv., EEOC Appeal No. 2021002386 (Feb. 28, 2022), the Commission found that, to prevail on a claim of bias on the part of an AJ, a complainant "must show that the AJ's bias against her so permeated the process, that it would have been impossible to receive a fair hearing, or that the process was so tainted by substantial personal bias that she did not receive a fair and impartial hearing."

Complainant argues that she was prejudiced when, on August 24, 2023, the AJ issued a Notice of Inactivity to the Agency. According to Complainant, the AJ's Notice of Inactivity jeopardized the integrity of the EEO process.

However, Complainant does not explain how the AJ's issuance of the Notice of Inactivity was prejudicial or jeopardized the integrity of the EEO process. Moreover, in the AJ's September 7, 2023, Order on Complainant's Motion to Strike and for Sanctions and the Agency's Motion for Leave, the AJ denied the Agency's Motion for Leave "as untimely and being a presumptuous effort of Agency counsel that burdened the Judge" and admonished Agency counsel.

As additional evidence of the AJ's bias, Complainant states that the AJ informed her that the AJ would not award punitive damages. When Complainant requested punitive damages during the hearing, the AJ stated that she could not award punitive damages. HT at 306. We note that punitive damages are not available to federal employees. See Jones v. Dep't of Health & Human Servs., EEOC Request No. 05940377 (Jan. 23, 1995) (citing Graham v. U.S. Postal Serv., EEOC Request No. 05940132 (May 19, 1994)). We find that the record reflects that the AJ was explaining the law to Complainant, not prematurely denying Complainant a remedy.

Upon thorough review of the hearing transcript, the hearing record, and Complainant's contentions on appeal, we find that Complainant has not made a showing that the AJ exhibited bias against her that so permeated the process that it would have been impossible to receive a fair hearing or that the process was so tainted by substantial personal bias that she did not receive a fair and impartial hearing. We find that Complainant's bare assertions are not sufficient to establish a substantial showing of personal bias, and there is no evidence that the AJ was biased in favor of the Agency such that Complainant did not receive a fair evaluation of her case.

Discrimination Based on Disability and Reprisal

Complainant alleged that she was subjected to discrimination based on disability and reprisal. In order to prove her complaint of employment discrimination, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thereafter, to ultimately prevail, complainant must prove, by a preponderance of the evidence, that the agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993).

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. Dep't of the Air Force, EEOC Appeal No. 2021004539 (Aug. 17, 2023). We agree with the AJ's determination that Complainant established that she was an individual with a disability and "qualified" within the meaning of the Rehabilitation Act.

Complainant can establish a prima facie case of reprisal by showing that: (1) Complainant engaged in protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). Complainant can establish a prima facie case of reprisal by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas, 411 U.S. at 802). In general, a complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus). The AJ's findings that Complainant engaged in protected activity and that the Agency was aware of the protected activity are supported by substantial evidence.

Regarding the negative December 13, 2021, Form 6067 review, substantial evidence in the record supports the AJ's finding that there was no evidence of a discriminatory or retaliatory motive on the part of Supervisor-1. The AJ found that Supervisor-1 credibly testified that she conducted the review based on Manager-1's directive to review Complainant's cases prior to the end of December 2021, which was supported by Manager-1's credible testimony.

We agree with the AJ that Complainant did not establish that the Agency's legitimate, nondiscriminatory explanation for issuing the Form 6067 reviews was pretextual. Although Complainant challenged the fairness of the review because of the number of assignments she received from Coworker-1, Coworker-1's failure to work on the cases before retiring, Supervisor-1 holding onto Coworker-1's cases for more than a month, and Complainant being on computer downtime for more than a month, Complainant acknowledged the accuracy of the data in the review in her self-assessment. The AJ found that, after the negative review, Supervisor-1 provided Complainant sufficient time to work on the cases and that the negative review did not affect Complainant's annual performance appraisal. We agree with the AJ that Complainant did not establish that the Agency's legitimate, nondiscriminatory explanation was a pretext for discriminatory and/or retaliatory motive.

The AJ determined that Complainant did not establish that she suffered an adverse action or harm when she was directed to process the checks on March 23, 2022. The AJ found that the record was devoid of any evidence that Supervisor-1 issued the directive based on Complainant's disability or prior protected activity, and we find that this conclusion is supported by substantial evidence. The AJ determined that Supervisor-1 directed Complainant to process the checks for cases that were assigned to Complainant in accordance with Manager-1's new Standard Operating Procedure for the Specialist of the Day. Supervisor-1 attempted to help Complainant process the checks, but the AJ found that Coworker-2 processed the checks that day. We find that the AJ's determination that Complainant did not establish that the Agency's legitimate, nondiscriminatory reason was a pretext designed to mask discriminatory and/or retaliatory animus is supported by substantial evidence of record.

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 adopting the AJ's decision finding no discrimination.

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

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

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

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

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

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

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

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

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

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

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

February 26, 2025
Date