U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[redacted]

Nancy C.,[1]
Complainant,

v.

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

Appeal No. 2024004182

Agency No. 4E-956-0136-23

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 4, 2024, final decision 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., the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k), and the Pregnant Workers Fairness Act of 2022 (PWFA), 42 U.S.C. § 2000gg et seq. For the following reasons, the Commission REVERSES in part the Agency's final decision.

ISSUE PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination and harassment on the bases of sex or pregnancy.

[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 City Carrier, Q-01, at the Agency's Berkeley Post Office (also referred to as "Station A" in the record) in Berkeley, California.

On November 27, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against and harassed her based on sex (female/pregnancy) when:

1. Beginning on or about June 26, 2023, and continuing, management would not accommodate her medical restrictions;
2. On or about August 18, 2023, Manager Customer Services (MCS)[2] asked her, "Who authorized you to sit down," which Complainant felt was a negative comment; and
3. On or about August 18, 2023, and ongoing, Complainant was harassed daily and required to write down whenever she took a restroom and/or comfort break.

At the conclusion of the investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation (ROI)[3] and notice of her right to request a hearing before an EEOC Administrative Judge.[4] When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency concluded that Complainant failed to prove that it had subjected her to discrimination as alleged. The instant appeal followed.

[2] The record is unclear regarding what level of supervisor MCS was in relation to Complainant.

[3] Citations to the ROI reference the number located at the bottom center of the page.

[4] Complainant failed to submit an affidavit in support of her complaint during the investigation. The investigator emailed the affidavit form to Complainant, who acknowledged receipt of it, and eventually to Complainant's attorney. Despite an extension of time from the investigator, Complainant never submitted the completed affidavit. As a result, the Agency initially dismissed the complaint, pursuant to 29 C.F.R. § 1614.107(a)(7), but ultimately rescinded the dismissal decision. ROI at 5-8.

The record reflects that Complainant was pregnant during the relevant period, with an expected due date of October 17, 2023. On August 7, 2023, Complainant sent a letter to the Postmaster requesting temporary light duty for her pregnancy-related medical restrictions "up until the tentative date of" September 15, 2023, when Complainant planned to begin her maternity leave. ROI at 119. As part of this request, Complainant submitted medical documentation from a medical provider, dated July 13, 2023. The medical documentation prescribed limitations on Complainant's work activity (arising from her pregnancy) to allow only intermittent (up to 50% of her shift) standing, walking, squatting/kneeling, and knee bending; occasional (up to 25% of her shift) bending at the waist and twisting her torso/spine; and no climbing ladders or working at a height. ROI at 118. Complainant was also restricted from lifting, carrying, pushing, or pulling more than 10 pounds or from working more than eight hours per workday. Id. The doctor further noted that Complainant may require frequent bathroom breaks and "more comfort stops" along her delivery route. Id. The medical documentation indicated that these restrictions had been in effect from May 17, 2023, and would remain in effect until October 17, 2023.[5]

Two days after Complainant's request, the Postmaster sent Complainant a letter purporting to approve light duty through October 17, 2023, listing the same restrictions as noted by Complainant's medical provider. However, the Postmaster's letter did not specify what the light duty would entail in practice, and only stated "[y]our reporting schedule and the work assigned to accommodate your medical limitations will be based on the needs of the service and the work that is available within your limitations. This light duty assignment does not guarantee eight (8) hours of work per day or forty (40) hours of work per week." ROI at 120. Although Complainant stated in her complaint that MCS "on several occasions . . . would not accommodate [her] medical restrictions," ROI at 12, the record does not clearly indicate how Complainant's duties were modified or whether Complainant was expected to perform duties outside of her medical restrictions during this time, and Complainant did not come forward during the investigation with specific evidence regarding this issue. Complainant also did not present evidence that

[5] The operative date for Complainant's PWFA claims is August 7, 2023, the date of Complainant's request for pregnancy-related accommodations. As we note below, the Agency incorrectly used May 17, 2023 (as listed by the medical provider) in its PWFA analysis.

she was provided fewer than her normal work hours during her light duty assignment.

According to a statement Complainant submitted as part of a union grievance, on August 18, 2023, her supervisor (S1) informed Complainant that, "since [she] g[a]ve 3 hours of [her] route away (per [her] current medical restriction)," upper management (including MCS) expected her to complete the other three hours of the route "in exactly" three hours. ROI at 130. Complainant stated that S1 then instructed her to "triple case" (i.e., sort mail for three separate delivery routes) that day and still complete her own mail route within the three-hour timeframe. Id. Complainant stated that this instruction caused her to feel "pressure[,] anxiety, and stress" about returning "in a timely matter." Id. This was also the day that MCS allegedly asked Complainant, "[w]ho authorized you to sit down," but MCS averred that this interaction did not occur as Complainant described and that MCS did not "recall [the] conversation." ROI at 106.

The next day, according to Complainant's grievance statement, on August 19, 2023, S1 approached her with a stack of Postal Service (PS) 1260 Forms. The record indicates that PS Form 1260 is used by Agency employees to track certain time transactions, such as lunch breaks. Complainant stated that S1 told her to fill out a 1260 form every time she took a comfort stop or restroom break so that management could adjust her time accordingly, which she had not been expected to do before. The EEO Counselor recounted in her report that Complainant told her it was MCS who instructed S1 to have Complainant "write down her break times and to complete her assignment within 3 hours," the latter of which Complainant told the EEO Counselor she could not do because of her need to take frequent breaks. ROI at 19.

The record indicates that Complainant filed a union grievance about the instructions S1 had given her on August 18 and 19, 2023. This resulted in a Step B Decision issued by a Dispute Resolution Team on December 13, 2023. The decision found that management violated the collective bargaining agreement when it required Complainant to submit a "PS Form 1260 to document any extra comfort stops needed due to medical . . . conditions." ROI at 135. However, other than the required submission of 1260 forms for each break, Complainant did not explain during the investigation what she meant in her complaint when she said she was harassed, and the record does not specify what allegations, if any, in addition to the 1260 form requirement, constituted the claim of "daily" harassment.

The record shows Complainant continued working until September 14, 2023, at which point she went on leave without pay. This aligned with additional documentation completed by Complainant's medical provider on August 22, 2023, which stated Complainant was to be "placed off work from" September 15, 2023, through November 28, 2023. ROI at 37.

In its final decision, the Agency found that, regarding claim 1, Complainant could not establish her PWFA claim. First, the Agency determined that the evidence showed Complainant was unable to perform the essential functions of her City Carrier job (her placement on light duty notwithstanding), which required the ability to carry mail weighing up to 35 pounds and to load/unload mail containers weighing up to 70 pounds. As to whether Complainant would be able to perform the essential functions of her position in the near future, as permitted under the PWFA to be qualified, the Agency found that Complainant's medical provider did not give an opinion regarding this issue. The Agency reasoned, however, that Complainant's medical documentation provided date ranges for Complainant's medical restrictions, including light duty from May 17, 2023, to October 17, 2023, and later placing Complainant off work from September 15, 2023, through November 28, 2023. The Agency concluded that, since the evidence showed Complainant was unable to perform the essential functions of her position for over six months, Complainant failed to show that she would be able to perform her essential job functions in the near future and therefore was not entitled to a reasonable accommodation under the PWFA.

The Agency further found that, even assuming Complainant could show an ability to perform her essential functions in the near future, Complainant failed to establish that management refused to accommodate her medical restrictions. The Agency concluded that Complainant did not present any sworn affidavit statements or other evidence explaining how her medical restrictions were not accommodated. The Agency reasoned that, because the record showed that management approved Complainant's light-duty request on August 9, 2023, Complainant failed to prove that management in fact required her to exceed her medical restrictions.

Next, the Agency analyzed both claims 1 and 3 under a disparate treatment framework for sex discrimination, finding that Complainant's claims of failure to accommodate (claim 1) and that she was forced to write down whenever she took a restroom or comfort break (claim 3) involved discrete acts. The Agency first found that Complainant could not establish a prima facie case for either claim. The Agency concluded that Complainant could not prove she was subjected to an adverse employment action for claim 1 because, as it had

already concluded, she failed to establish that management did not accommodate her work restrictions. As to claim 3, the Agency also found that Complainant failed to show that management in fact treated her breaks as being off-the-clock; thus, Complainant did not suffer a loss in terms of work hours or compensation. The Agency also found for both claims that Complainant could not show she was treated differently than similarly-situated employees outside of her protected bases or otherwise present evidence from which an inference of discrimination could be drawn.

Assuming Complainant could establish a prima facie case of sex discrimination for both claims, however, the Agency found that management articulated legitimate, nondiscriminatory reasons for its actions. Regarding claim 1, the Agency found that Complainant's modified-duty request was approved and therefore the claim did not occur as alleged. Regarding claim 3, which was assumed to encompass only the 1260 form requirement, the Agency concluded that Complainant's spike in break times interfered with her ability to complete her assignments on time and that management wanted the breaks documented so that it could consider whether any such breaks should be unpaid. The Agency next found that Complainant could not establish that these reasons were pretextual or that similarly situated employees were treated more favorably.

Because the Agency found that claims 1 and 3 were not based on Complainant's sex/pregnancy, the Agency declined to consider them as part of Complainant's harassment claim. The Agency therefore analyzed only claim 2 under the hostile work environment framework.[6] The Agency found that Complainant provided no affidavit statements or other documentation corroborating the comment allegedly made by MCS. However, the Agency found that, even assuming the comment occurred as alleged, Complainant failed to present evidence showing that the incident was motivated by her sex or pregnancy or that the comment, standing alone, was sufficiently severe or pervasive to establish her harassment claim.

CONTENTIONS ON APPEAL

Neither Complainant nor the Agency submit a brief on appeal.

[6] We note that the Agency's final decision did not analyze claims 2 or 3 under the PWFA.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

There is no dispute that Complainant asserted her claims as a pregnant worker, seeking an accommodation due to her pregnancy. All of Complainant's claims fall squarely under the PWFA, as well as Title VII.[7] We will analyze Complainant's claims under the PWFA and then under Title VII.

Claim 1 – Reasonable Accommodation Under PWFA

The PWFA took effect on June 27, 2023,[8] and requires agencies to make reasonable accommodation to the known limitations of a qualified employee related to pregnancy, childbirth, or related medical conditions, absent undue hardship. 42 U.S.C. § 2000gg(1). Under the PWFA, in order to establish that she was denied a reasonable accommodation under the PWFA, Complainant must show: (1) she has a known limitation (42 U.S.C. 2000gg(4)); (2) she is "qualified" (42 U.S.C. § 2000gg(6)); and (3) the Agency failed to provide a reasonable accommodation (42 U.S.C. 2000gg-1(1)).

[7] Because the complaint as defined does not allege discrimination based on disability, we will not analyze claim 1 under Section 501 of the Rehabilitation Act, as amended, 29 U.S.C. § 791 et seq.

[8] We note that the time period alleged in claim 1 begins one day before the PWFA took effect (June 26, 2023). However, according to the record, Complainant asked for a reasonable accommodation on August 7, 2023, which is after the PWFA went into effect.

(1) Complainant Has a Known Limitation.
Here, Complainant had known limitations related to her pregnancy, a fact that the Agency does not dispute and that is reflected in Complainant's medical documentation she submitted to the Agency. See ROI at 118; Final Agency Decision at 13.

(2) Complainant is Qualified.
Under the PWFA, the term "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position. 42 U.S.C. § 2000gg(6). An employee can still be qualified even if they are unable to perform one or more essential functions of the position if the following conditions are met: any inability to perform an essential function is for a temporary period; the essential function could be performed in the near future; and the inability to perform the essential function can be reasonably accommodated. Id. § 2000gg(6)(A)-(C).

We note that the Complainant does not challenge the employers' definition of the essential functions of her position. Here, there is no dispute that Complainant's known limitations related to her pregnancy prevented her from being able to perform essential functions of her position, as described in the reports completed by her medical provider and submitted to management. Because Complainant could not perform all the essential functions of her position, with or without a reasonable accommodation, and instead requested that one on more of her essential duties be temporarily suspended, we must analyze whether Complainant is qualified under the PWFA's second definition of "qualified." To determine if she was qualified under the second definition, we analyze whether: her inability to perform an essential function is for a temporary period; the essential function could be performed in the near future; and the inability to perform the essential function can be reasonably accommodated. 42 U.S.C. § 2000gg(6). Applying the proper analysis, we find that the Agency erred when it found that Complainant was not qualified under the PWFA.

First, given that the Agency did not analyze the first element of the second definition of "qualified," we find there is no dispute that Complainant's inability to perform the essential functions was temporary.

Next, we consider whether Complainant would be able to perform the essential function(s) of her position in the near future. Because pregnancy is a temporary condition with a cognizable end date, we interpret "in the near future" to mean generally 40 weeks from the start of the temporary suspension of the essential function(s). To define "in the near future" as less

than the duration of a full-term pregnancy would be contrary to one of the stated goals of the PWFA to enable pregnant employees to remain in the workforce.[9]

We emphasize that an agency is not required to always suspend an essential function for 40 weeks. The actual length of the suspension of an essential function(s) will depend on the employee's needs with regard to a reasonable accommodation. An agency also may have an undue hardship defense. However, the mere fact that a pregnant employee needs an essential function suspended for up to and including 40 weeks does not, on its own, render the employee unqualified under the PWFA. Further, the time when an employee is on leave as a reasonable accommodation (e.g., for recovery from pregnancy, childbirth, or related medical conditions or any other purpose) does not count as time when an essential function(s) is suspended.

Here, the Agency relied on the date ranges Complainant's doctor put in Complainant's medical reports, finding that Complainant was unable to perform the essential functions of her position from May 17, 2023, though November 28, 2023 (a little over six months, including when Complainant would be on leave). However, the record shows that Complainant did not request light duty until August 7, 2023, and sought it until September 15, 2023, the tentative start of her parental leave. Either the 6 weeks at issue or the 6 months would qualify as "in the near future" because the complainant was pregnant and the suspension of an essential function would be for less than 40 weeks.

Third, the inability to perform the essential function(s) could be reasonably accommodated through putting Complainant on light duty.

(3) The Agency Provided a Reasonable Accommodation.
However, we find that Complainant has failed to come forward with any evidence to establish that the Agency failed to provide her a reasonable

[9] See H.R. Rep. No. 117-27, pt. 1, at 5 ("When pregnant workers do not have access to reasonable workplace accommodations, they are often forced to choose between their financial security and a healthy pregnancy. Ensuring that pregnant workers have access to reasonable accommodations will promote the economic well-being of working mothers and their families and promote healthy pregnancies."); *id.* at 33 ("The PWFA is about ensuring that pregnant workers can stay safe and healthy on the job by being provided reasonable accommodations for pregnancy, childbirth, or related medical conditions.").

accommodation under the PWFA. 42 U.S.C. 2000gg-1(1). Without further explanation from Complainant, as possibly would have been provided in a sworn affidavit, see supra note 4, the record is insufficient to show that Complainant was not provided with light duty or was otherwise forced to work outside of her medical restrictions. In her EEO complaint, Complainant merely states that "[MCS] on several occasions from 6/26/23 would not accommodate my medical restrictions, made negative comments, caused me anxiety by indirectly and directly harassing me." ROI at 12. The complaint contained no further detail about how Complainant's medical restrictions were not accommodated. Moreover, the record contains Complainant's request for light duty in August 2023, as well as the Agency's approval of light duty two days later. While the record contains unsworn statements Complainant made as part of her union grievance and in the EEO Counselor's report about feeling pressure to complete her tasks within a strict three-hour time frame, she has not alleged with sufficient detail in the record how she was not accommodated.[10] We also note that the same Step B decision that found the Agency violated the collective bargaining agreement when it required Complainant to submit a PS Form 1260 for every break also stated that Complainant "is pregnant and working under a light duty status." ROI at 135.

Complainant asserts that she was informed by S1 (on behalf of Agency leadership), to complete the remaining three hours of her route on time. Complainant states that she was instructed to "triple case" and "and still carry [her] [three] h[ou]rs within the instructed timeframe." ROI at 130. Complainant states that this caused her "a ton of pressure[,] anxiety, and stress." Id. Complainant provides no other information regarding this instruction (including whether this was a daily expectation of management), and it is not clear whether these instructions required Complainant to work beyond her limitations. If the record further evidenced that these instructions did require Complainant to work beyond her limitations, such evidence could have called into question whether the accommodation Complainant received was effective.

While Complainant was required to submit the 1260 forms for each break—which will be discussed in more detail herein—there is no evidence that

[10] Statements in an EEO Counselor's Report are not actual statements by the witnesses and are instead conversations summarized by an EEO counselor. Such unsworn statements are therefore not as persuasive evidence as an affidavit. See Complainant v. Gen. Servs. Admin., EEOC Appeal No. 0120130973 (Apr. 22, 2015) (declining to consider statements made in an EEO Counselor's Report).

Complainant was not in fact allowed to take such breaks. Without more evidence, we find that the record fails to establish that Complainant's medical restrictions were not accommodated. We therefore find that, upon review of the record, claim 1 must fail under the PWFA.

Claim 1 – Disparate Treatment Under Title VII

The PDA amended Section 701 of Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination "on the basis of pregnancy." 42 U.S.C. § 2000e(k). Congress enacted the PDA to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII. Thus, the PDA extended to pregnancy Title VII's goals of "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

It is unlawful for an employer to "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e(k). "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." Id.

A complainant alleging that the denial of an accommodation for a pregnancy-related condition constituted disparate treatment sex discrimination may state a prima facie case by showing that (1) she belongs to the protected class; (2) she sought accommodation; (3) the agency did not accommodate her; and (4) that the agency did accommodate others "similar in their ability or inability to work." Young v. United Parcel Serv., 575 U.S. 206, 229 (2015). An agency may then seek to justify its refusal to accommodate the complainant by relying on "legitimate, nondiscriminatory" reasons for denying her accommodation. Id. (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)). "[T]hat reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." Id.

The complainant may then show that the agency's reasons are pretextual, which can be done "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the

employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination." Young, 575 U.S. at 229; see Elease S. v. U.S. Postal Serv., EEOC Appeal No. 0120140731 (Dec. 27, 2017).

We find that, upon review of the record, Complainant has failed to establish a prima facie case under the PDA because she has not shown by preponderant evidence prongs three or four, as described above. Because Complainant neglected to submit a sworn affidavit to the investigator or otherwise participate in the investigation, the record fails to indicate how the Agency did not accommodate her or whether the Agency accommodated others with similar ability or inability to work. See supra pp. 8-9.

Because the Agency's final decision determined that the complaint alleged discrimination based on Complainant's sex (in addition to pregnancy) with regard to claim 1 when the Agency failed to accommodate her medical restrictions, we will next analyze this claim as one of sex discrimination. To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas. Complainant must initially establish a prima facie case by demonstrating that Complainant was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978).

To establish a prima facie case of disparate treatment based on sex, Complainant must show that: (1) she is a member of the protected class; (2) she was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) she was treated differently than similarly situated employees outside her protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nannette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (Mar. 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008), req. for recons. denied, EEOC Request No. 0520080545 (June 20, 2008). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13; Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant

bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency's explanation was pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). Complainant can do this by showing that the proffered explanations were unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons were not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

Here we find that Complainant cannot establish a prima facie case of sex discrimination under Title VII. Although Complainant can establish the first element of a prima facie case, we find that she cannot meet the other prongs. As we have explained, the record does not show by preponderant evidence that Complainant's medical restrictions were not accommodated. Even assuming that she was not properly accommodated, Complainant has not by preponderant evidence shown a link between her sex and the Agency's actions or that similarly situated employees outside her protected class were treated more favorably.

Claim 2 – MCS's Comment (PWFA and Title VII)

As stated above, all of Complainant's claims should be analyzed under both Title VII and the PWFA. The Agency analyzed claim 2 under Title VII, using the hostile work environment framework. The Agency was in error to not also analyze it under the PWFA.

Under the PWFA, there are three potential violations based on the allegations of claim 2: (1) a violation of the anti-coercion provision in 42 U.S.C. § 2000gg–2(f)(2); (2) a violation of the anti-adverse action provision in 42 U.S.C. § 2000gg–1(5) and;(3) a violation of the anti-retaliation provision in 42 U.S.C. § 2000gg–2(f)(1). Each of these provisions are analyzed as follows:

The PWFA makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the PWFA]." See 42 U.S.C. § 2000gg–2(f)(2).

The PWFA anti-coercion provision uses the same language as the anti-interference provision of the ADA. 42 U.S.C. § 12203(b). EEOC has said of the ADA provision that it reaches those instances "when conduct does not

meet the 'materially adverse' standard required for retaliation.". See EEOC, Enforcement Guidance on Retaliation and Related Issues (Enforcement Guidance on Retaliation), No. 915.004 at (III) (Aug. 25, 2016). EEOC has also stated that while the interference provision does not apply to any and all conduct or statements that an individual finds intimidating, it prohibits conduct that is reasonably likely to interfere with the exercise or enjoyment of ADA rights. Id. The same analysis applies to the PWFA anti-coercion provision.

Regarding claim 2, we find that Complainant's evidence does not establish a claim of coercion under the PWFA. Complainant did not submit an affidavit or other proof of the alleged comment by MCS, and MCS stated she did not recall the conversation.

The PWFA prohibits a covered entity from taking adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee. 42 U.S.C. § 2000gg–1(5). The PWFA also prohibits retaliation against any employee because that person has opposed acts or practices made unlawful by the PWFA or has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the PWFA. 42 U.S.C. § 2000gg–2(f)(1). A request for reasonable accommodation constitutes protected activity and therefore retaliation for such requests is unlawful. See Enforcement Guidance on Retaliation at (II.A.2.e).

Here, after Complainant requested a reasonable accommodation, claim 2 alleges that MCS asked her, "[w]ho authorized you to sit down?" MCS averred that she was aware Complainant was pregnant and was aware that Complainant did request light duty. When asked about claim 2, MCS asserted that she did not recall a conversation about Complainant sitting down. As previously acknowledged, Complainant submitted no sworn affidavit, and the record is devoid of any response from Complainant regarding the testimony of MCS, as provided via her sworn affidavit. However, even if Complainant had submitted corroborating evidence that MCS did in fact ask her the question, this fact alone would not be sufficient to establish an adverse action, or a materially adverse action, in order to establish a claim of retaliation under the PWFA. Summarily, the record does not evidence a violation pursuant to 42 U.S.C. § 2000gg–1(5) or 42 U.S.C. § 2000gg–2(f)(1), in regard to claim 2.

Claim 3 - Requirement that Complainant Submit Forms for Each Break (PWFA and Title VII)

Similar to claim 2, the Agency analyzed Claim 3 under Title VII, using hostile work environment and disparate treatment frameworks. The Agency was in error to not also analyze it under the PWFA.

In regard to claim 3, Complainant states that she was presented with a stack of forms and told to write down whenever she took a restroom and/or comfort break. MCS asserts that she does not recall the conversation about Complainant completing forms. No other managers provided a sworn affidavit attesting to their knowledge of Complainant's claim regarding the requirement to complete forms prior to taking a restroom and/or comfort break. And as previously noted, Complainant has no sworn affidavit on the record. However, Complainant's grievance, as resolved in her favor, corroborates that the events did take place, as Complainant states.

Therefore, we find that Complainant has established that the Agency violated the coercion provision of the PWFA with regard to claim 3. The medical documentation Complainant submitted to the Agency stated that Complainant "may require frequent bathroom breaks and more comfort stops," ROI at 118, and the need for such breaks is in fact a typical accommodation for pregnant workers. Although the Agency may have approved Complainant's request to take such breaks, forcing Complainant to submit a 1260 form for each and every break she took (and, by extension, implying that she may not be paid for those breaks) would be reasonably likely to interfere with the exercise of her PWFA rights.

Whether or not Complainant took the breaks she needed is not relevant to our finding, as the requirement that she submit such forms created a sufficient hurdle for Complainant and would be reasonably likely to interfere with Complainant's exercise or enjoyment of her rights under the PWFA. We also find that it is not relevant whether the submission of these forms in fact resulted in a loss of pay, as the provision does not require a tangible employment action to be actionable. Moreover, Complainant believed—and the Agency even admitted in its final decision—that management documented the breaks in order to determine whether the breaks should be unpaid. Final Agency Decision at 18.

Because we find that Complainant established that she was subjected to coercion, intimidation, threats, or interference under the PWFA, it is not necessary to address a claim of retaliation. s To determine the merits of a

claim of retaliation would require the Commission to make determinations and conclusions that are beyond the scope of this record. Moreover, a finding of retaliation here would not alter the remedies available to Complainant pursuant to the finding of coercion.

Similarly, because we find that Complainant established that she was subjected to coercion, intimidation, threats, or interference under the PWFA, we will not address the claim that she was also subjected to harassment based on her sex under Title VII, as the additional basis would not alter the remedies available to Complainant. See, e.g., Stephany K. v. Dep't of Def., EEOC Appeal No. 2021003668 (Nov. 6, 2023). We also do not address whether Complainant established a claim of disparate treatment for claim 3, as that also would not alter her remedies. See, e.g., Bertram K. v. Dep't of Agric., EEOC Appeal No. 2019001793 (Aug. 19, 2020).

With regard to remedies, in her complaint Complainant requested as relief monetary compensation and that MCS receive training. Complainant has not indicated that she took any leave due to discriminatory acts and has not requested reimbursement for such leave.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is AFFIRMED in part and REVERSED in part. We REMAND the matter to the Agency to take corrective action in accordance with this decision and the Order herein.

ORDER

The Agency shall take the following remedial actions:

1. Within **60 calendar days** of the date this decision is issued, the Agency shall conduct and complete a supplemental investigation to determine whether Complainant is entitled to compensatory damages for this violation of the PWFA. In so doing, the Agency shall:

    a. Issue a notice to Complainant of her right to submit evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993) and request evidence from

Complainant in support of compensatory damages.[11] The Notice shall provide Complainant with **30 calendar days** to respond (with an option and instructions to request an extension in the case of extenuating circumstances). Complainant has a duty to cooperate with Agency's investigation to determine compensatory damages, including responding to agency requests for documentation or completing agency forms.

b. Issue a new final agency decision ("Compensatory Damages FAD") based on the findings of the supplemental investigation. The Compensatory Damages FAD shall state the amount (if any) of compensatory damages owed to Complainant and explain how the Agency determined that amount. The Compensatory Damages FAD shall include appeal rights to the Commission.

Within **60 calendar days** of the date the Compensatory Damages FAD is issued, the Agency shall pay Complainant the amount of compensatory damages it determined are owed. If there is a dispute over the exact amount of compensatory damages owed, the Agency shall pay the undisputed amount to Complainant. If Complainant disagrees with the Agency's award, they may challenge the Agency's decision on the amount of compensatory damages by filing an appeal of the Compensatory Damages FAD with the Commission. Instructions on how to appeal, including the deadline to file, will be included in the appeal rights portion of the Compensatory Damages FAD.

[11] To establish entitlement to compensatory damages, the evidence must show a causal relationship between the Agency's discriminatory action and any pecuniary (monetary) or non-pecuniary losses/harm experienced by Complainant. For more information on evidence to determine compensatory damages: EEOC Management Directive 110, Ch. 11 § VII (Aug. 5, 2015), available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm (provides the types of compensatory damages available under EEOC statutes and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at https://www.eeoc.gov/federal/digest/xvi-1.cfm#article (explaining Carle v. Dep't of the Navy under the subsection "Proof of Damages").

2. Within **90 calendar days** of the date this decision is issued, the individuals identified in this decision as MCS and S1 shall complete four hours of online or live training on the Agency's obligations under the PWFA. For assistance in obtaining the necessary training, the Agency may contact the Commission's Outreach, Training and Engagement Division via email, at FederalTrainingandOutreach@eeoc.gov. The Agency shall provide the Compliance Officer with proof of attendance, as well as the contents and materials it used for the training. If MCS or S1 have left the Agency's employment, then the Agency shall furnish documentation of his/her/their departure date.

3. Within **120 calendar days** from the date this decision is issued, the Agency shall consider disciplining MCS and S1 for requiring Complainant to submit forms for each of her breaks in violation of the PWFA found to have occurred in this decision. *The Commission does not consider training to be disciplinary action.* The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

4. Within **30 calendar days** of the date this decision is issued, the Agency shall post a notice in accordance with the section listed below, entitled "Posting Order." The Agency shall provide the Compliance Officer with the original signed and dated notice, reflecting the dates that the notice was posted, along with evidence that the notice was physically posted at the facility and electronically.

POSTING ORDER (G0617)

The Agency is ordered to post at its Berkeley Post Office (Station A) facility in Berkeley, California copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the

Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated**. See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (T0124)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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:

/s/Raymond Windmiller
_____
Raymond Windmiller
Executive Officer
Executive Secretariat

January 8, 2025
_____
Date