



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

████████████████████
Linn A.,¹
Complainant,

v.

Ryan D, McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120171148

Hearing Nos. 560-2010-00156X,
560-2012-00315X

Agency Nos. ARFTLEAV07NOV04479,
ARFTLEAV11MAY01906

DECISION

On February 6, 2017, 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 January 4, 2017, final decision concerning her equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issues presented are: (1) whether the Commission should sanction the Agency for its delay in issuing its final decision; (2) whether the decision of the Merits Systems Protection Board (MSPB) concerning Complainant's removal precludes Commission review of the allegedly discriminatory events leading up to her removal; (3) whether the preponderance of the evidence in the record establishes that the Agency referring Complainant for fitness-for-duty examinations was job-related and consistent with business necessity; (4) whether the preponderance of the evidence in

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.

the record establishes that Complainant was subjected to disparate treatment and/or a hostile work environment based on race, color, disability, and/or reprisal; and (5) whether Complainant has established a prima facie case of disparate impact discrimination.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as a Parole Analyst, GL-0303-7, at the Agency's United States Disciplinary Barracks (USDB)/Military Correctional Center (MCC) in Fort Leavenworth, Kansas. In March 2008, Complainant was detailed to an Office Automation Technician position in the Pastoral Care Directorate for 120 days. Complainant's detail was extended three times. On June 10, 2009, Complainant was reassigned to a Supply Technician, GL-2005-7, position.

Complainant is African-American and black. According to the record, Complainant filed an EEO complaint in or around 2002. Complainant averred that she has back problems that constitute a disability. According to Complainant, she was diagnosed with depression and post-traumatic stress disorder (PTSD) as a result of work stress, particularly after the events that took place November 15, 2007, as discussed herein.

As a Parole Analyst, Complainant's first-line supervisor was a Supervisory Correctional Program Specialist (S1). Around December 2006, Complainant moved into the office space of a former Parole Analyst (C1), which had a door. Previously, Complainant had worked in a cubicle in an open office space. Complainant alleged that around that time S1 began excluding her when he would provide updates about policies or procedures to the other Parole Analysts. S1 denied excluding Complainant from important updates. S1 stated that he always included Complainant in emails but stated that sometimes he would share information verbally to his subordinates located in the open office area on an impromptu basis. According to S1, Complainant had a habit of closing her door and not coming out of her office when asked to.

On August 9, 2007, Complainant submitted a request for annual leave for September 14, 2007. According to Complainant, S1 told her that he would not approve her leave request until she found a coworker who could cover her duties. S1 averred that one of Complainant's assigned inmates was being released on parole that day and that he required all of his subordinates to arrange coverage for these duties when requesting leave. Complainant alleged that S1 found replacement coverage for her coworkers instead of making them find their own replacements. A Parole Analyst (C2) (white) states that S1 asked her to find coverage for her duties when she requested leave.

Complainant worked a half-day on September 13, 2007, and then left on sick leave. According to Complainant, after she left on sick leave, S1 called her and required her to return to the office to prove that she had approved leave for September 14, 2007. S1 denied that he required Complainant to return to the office. S1 stated that he called Complainant to ask where the approved leave slip was for the next day and that Complainant volunteered to have her husband go to the office and show him a copy.

Complainant and her husband subsequently came to the office and showed S1 the approved leave slip. S1 awarded Complainant one hour of compensatory time for returning to the office, which was subsequently adjusted to two hours of overtime.

Complainant averred that she had been using the same name while working for the Agency since 1999 but that on September 18, 2007, S1 questioned her about it. According to S1, he noticed that on some documents, Complainant used a hyphenated last name, whereas on other documents she did not. S1 stated that he asked an Agency attorney whether this discrepancy could present an issue that could lead to parole decisions being reversed. S1 averred that the attorney told him to ask Complainant about it. Complainant alleged that other employees with different versions of their names were not questioned about how they signed documents.

In the fall of 2007, a recently terminated Parole Analyst (C3) requested a copy of her personnel file from S1. According to S1, he copied her file, which contained about 500 pages, including a misfiled SF-50 for Complainant and a misfiled doctor's note for another Parole Analyst (C4). C3 called Complainant and told her that she had received one of her documents with her personnel file. Complainant stated that the SF-50 contained her Social Security number and date of birth, which could lead to identity theft issues. S1 stated that the inclusion of Complainant's SF-50 and C4's doctor's note was a mistake and that he asked C3 to return the documents.

On November 15, 2007, Complainant placed a completed assignment in S1's inbox. S1 accused Complainant of not having the assignment peer-reviewed. Complainant showed S1 a sticky note post-it note signed by C2 that indicated that she had reviewed the document, but that Complainant needed to see her regarding a change. According to S1, Complainant grabbed the post-it note off his desk. S1 stated that he asked for the note back because it could be evidence for a potential disciplinary action because Complainant had failed to follow up with C2 to incorporate the change into the assignment before turning it into S1. Complainant alleged that S1 followed her into her office and grabbed her arm(s) and/or wrists in an attempt to retrieve the note.² S1 denied touching Complainant. According to S1, he was standing in the entryway to Complainant's office and left. The record reflects that S1 did not obtain the note from Complainant. Complainant remained at work for the remainder of the day on November 15, 2007.

Beginning on November 16, 2007, Complainant took extended sick leave. Complainant had spinal surgery in December 2007. According to the record, Complainant was experiencing severe neck and back pain prior to November 15, 2007. Complainant alleged that S1 neglected her caseload while she was on sick leave. According to S1, he asked C1 to return to the department to cover Complainant's work while she was on sick leave. C1 stated that she completed most of the work that needed to be done on Complainant's cases during her absence. Complainant returned to work on February 8, 2008.

² Complainant's description of the alleged assault varied between written accounts, her testimony at the fact-finding conference, and her hearing testimony. No eyewitnesses observed the alleged action.

Complainant averred that she was supposed to receive a pin commemorating her ten years of civilian service in February 2008. S1 stated that Complainant received her pin in the summer of 2008. According to a Human Resources Specialist (HR1), the Civilian Personnel Advisory Center (CPAC) was understaffed at the time, and the position that was responsible for tracking years of service was vacant, leading to delays in providing commemorative pins to employees. C4 stated that she was due her 25-year pin in the spring of 2008 and that she did not receive it in a timely manner.

On February 22, 2008, S1 met with Complainant. According to S1, the purpose of the meeting was to discuss Complainant's achievements from December 16, 2006, to December 15, 2007, so that he could prepare her performance evaluation. S1 averred that Complainant noticed that he had a memorandum and notes regarding her performance and demanded a copy of the documents. S1 stated that he advised Complainant to request the documents through Human Resources. Complainant stated that S1 gave her copies of the documents in question in March 2008.

On March 4, 2008, S1 issued Complainant her performance evaluation for December 2006 to December 2007, with an overall rating of Successful, Level 2, which is the second-highest rating. According to Complainant, she should have received the highest possible rating because she did extra work during the evaluation period. Complainant had received the highest possible rating, Excellent, Level 1, after grieving her performance evaluation for the previous year. S1 averred that Complainant needed to improve her awareness of deadlines and improve her relationships with her coworkers, as well as her relationship with him.

After her reassignment as a Supply Technician in June 2009, Complainant's first-line supervisor was the Supply Management Officer (S2), and her second-line supervisor was a Supervisory Correctional Program Specialist. The Supply Technician position description indicates that employees are required to lift up to 50 pounds and that the incumbent "shall possess a high degree of maturity and emotional stability." According to Complainant and S2, she had a lifting restriction that varied from five to ten pounds, which S2 "informally" accommodated by asking Complainant's coworkers to lift heavy items for her.

According to the record, the Supply Technician position is covered under the primary/rigorous category for Law Enforcement Officer (LEO) retirement coverage. The record reflects that in August 2010 the Under Secretary of Defense, Personnel and Readiness notified the MCC that an annual medical examination would be required for primary LEO employees. On October 19, 2010, HR1 sent Complainant an email that stated that the Department of Defense had approved her position for continued LEO coverage, that she needed to submit to a medical screening, and that she needed to sign a Statement of Understanding (SOU) to remain in a LEO position. The SOU stated that if an Agency Medical Officer determined that the employee was unable to safely perform in a LEO position, the employee could be removed from their position and/or federal service for failure to meet a condition of employment. On October 19, 2010, Complainant responded to HR1 that she wanted a written guarantee that the Agency would continue to accommodate her medical restrictions.

On February 24, 2011, Complainant had a physical examination and completed the Patient Health Questionnaire-Somatic Anxiety and Depressive Systems (PHQ-SADS) questionnaire. According to the record, the other MCC Supply Technicians also completed physical examinations and the PHQ-SADS questionnaire in late 2010 and early 2011. On April 13, 2011, Complainant was examined by another physician (DR1), who recommended that she be separated from her position due to her lifting restriction. DR1 also noted that Complainant was very emotional, anxious, and depressed during the exam. At the hearing, DR1 testified that he did not ask Complainant about appearing emotional, anxious, or depressed. DR1 also testified that he did not intend for the remark regarding Complainant's emotional state to lead to her removal. According to Complainant, she likely appeared emotional, anxious, and depressed while being examined because she was worried about losing her job as a result of the physical examination.

On April 27, 2011, S3 issued Complainant a letter indicating that she was being placed on paid administrative leave effective immediately because a physician found that she was not medically qualified for the Supply Technician position. Complainant alleged that she asked to have a union representative present while she received this letter but that S2 and S3 denied her request. HR1 and S3 stated that Complainant was not entitled to union representation because being placed on paid administrative leave does not constitute an adverse action. S3 stated that he asked Complainant to log off her computer and give him her badge and Agency credit card but that she refused. S3 averred that he called Agency police to report that Complainant was being combative and refusing to leave the premises. Complainant averred that four police officers escorted her off the premises. According to Complainant, other employees and some inmates could see her being taken away by the police officers.

On May 5, 2011, Complainant met with S3, HR1, her union representative, and her husband, and she was told that she had been placed on paid administrative leave because of her physical and mental medical conditions. During the meeting, S3 also told Complainant that he planned to propose removing her from federal service. At the meeting, Complainant requested a copy of the medical documentation that was used to reach the determination that she was not qualified for her position. Complainant alleged that the Agency delayed in providing her with the documents.

Complainant subsequently provided the Agency with medical documentation from her personal physicians, which indicated that she was physically and mentally fit for her position. Because there was conflicting medical information, the Agency referred Complainant for a consultation with a contract psychologist (DR2). On September 12, 2011, DR2 submitted a Fitness for Duty Psychological Evaluation form to the Agency, which stated that he could not certify Complainant as mentally fit for duty based on her defensiveness during the psychological testing, which prevented an independent evaluation of her mental health. According to DR2, Complainant's answers to the PHQ-SADS questionnaire that she took in February 2011 indicated that she had anxiety, depression, difficulty concentrating, fatigue, and loss of ability to experience pleasure. Complainant alleged that the PHQ-SADS was scored incorrectly by the Agency and provided a letter from a Licensed Clinical Social Worker to support her contention that the questionnaire was not scored correctly.

On October 11, 2011, S3 issued Complainant a Notice of Proposed Removal for failure to meet a condition of employment. Effective December 14, 2011, the Agency removed Complainant from federal service for failure to meet a condition of employment.³ HR1 testified at the hearing that the Agency looked for positions within the MCC to which Complainant could be reassigned prior to her removal.

Procedural Background

On May 21, 2008, Complainant filed an EEO complaint (Complaint 1) alleging that the Agency discriminated against her on the bases of race (African-American), color (black), and in reprisal for prior protected EEO activity⁴ when:

1. Between December 16, 2006, and March 1, 2008, S1 excluded her from receiving updates on office information;
2. On August 9, 2007, S1 told her that her leave would not be approved until she found a coworker to cover her duties;
3. On September 13, 2007, Complainant was required to come into the office while on sick leave to provide S1 with proof that she had been approved for leave on September 14, 2007;
4. On September 18, 2007, S1 questioned her regarding the names she used in her signature block for official documents;
5. On or about October 9, 2007, S1 sent a document containing her Social Security number and date of birth to a former employee;
6. On November 15, 2007, S1 grabbed her wrist in an attempt to retrieve a piece of paper from her hand;
7. Between November 15, 2007, and March 21, 2008, S1 neglected her caseload when she was on sick leave;
8. On or about February 13, 2008, Complainant was not given her 10-year Civilian Service anniversary pin;
9. On February 22, 2008, S1 denied her request for a copy of a September 13, 2007 memorandum related to her performance evaluation; and
10. On March 4, 2008, Complainant received her Base System Civilian Evaluation Report for the period from December 16, 2006, to December 15, 2007, with an overall rating of successful.

³ Complainant's removal is not part of the instant appeal. Complainant appealed her removal to the Merit Systems Protection Board (MSPB), which reversed her removal because it found that the Agency violated 5 C.F.R. Part 339 in ordering her to submit to a psychiatric fitness-for-duty examination. The MSPB either did not reach her affirmative defenses of disability and reprisal discrimination or found that they were not established by the preponderance of the evidence. As relief, the MSPB ordered that Complainant be reinstated and provided with back pay.

⁴ Complainant withdrew the following additional bases for Complaint 1: sex, religion, and age.

On June 7, 2011, Complainant filed an EEO complaint (Complaint 2), which she subsequently amended, alleging that the Agency discriminated against her on the bases of disability (physical: lifting and carrying restrictions; mental: depression and PTSD), and in reprisal for prior protected EEO activity⁵ when:

1. On various dates in 2011, Complainant was required to submit to physical and psychiatric fitness for duty examinations (FFDE);⁶
2. On April 27, 2011, the following occurred:
 - a. S2 and S3 issued Complainant a notice placing her in a non-duty, paid administrative leave status;
 - b. S2 and S3 attempted to deny Complainant the right to have a union representative present at the meeting when the notice was issued to Complainant;
 - c. S2 and S3 demanded in a hostile tone that Complainant turn in her work badge and instructed her to turn off her computer;
 - d. S2 and S3 humiliated Complainant by arranging for her to be escorted out of the office and off the premises by four police officers in front of staff members and inmates; and
3. On May 5, 2011, the Agency delayed in providing specific information to Complainant regarding her alleged emotional and mental instability to present to her personal physician to evaluate her mental and emotional stability.⁷

At the conclusion of the investigations, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing for both complaints, and, over Complainant's objections, the AJ assigned to the cases consolidated the matters. The AJ held a hearing from June 17-19, 2013. During the hearing, the AJ stated on the record that she did not see evidence of intentional discrimination but that she saw evidence of disparate impact discrimination.⁸ On August 7, 2013, the AJ notified the parties that she intended to issue a finding of discrimination with respect to Complaint 2 and requested that Complainant submit a fee petition for attorney's fees and costs. This notice did not specify the bases or issues on which the AJ intended to base her finding of discrimination. Complainant timely submitted a fee petition.

⁵ Complainant withdrew age as a basis for this complaint.

⁶ The Commission has added this claim to those accepted by the Agency based on a fair reading of the EEO Counselor's report and Complainant's formal complaint.

⁷ The Agency dismissed an additional claim from 2009 for untimely EEO Counselor contact. Complainant does not challenge this procedural dismissal on appeal, and the Commission exercises its discretion to address only those issues specifically raised on appeal.

⁸ Complainant did not specifically allege disparate impact discrimination.

Complainant requested a status update from the AJ in the fall of 2014, but the record does not reflect that she received a response. On March 15, 2016, prior to the issuance of a decision by the AJ, Complainant withdrew her hearing request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency's final decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The Agency found that Complainant failed to establish that she was subjected to discrimination as alleged in Complaint 1. The Agency's final decision found that the claims in Complaint 2 were inextricably intertwined with the claims in Complainant's appeal to the MSPB concerning her removal. The Agency therefore concluded that collateral estoppel prevented further review of the claims in Complaint 2. In the alternative, the Agency also considered the merits of Complaint 2, concluding that Complainant failed to establish that she was subjected to discrimination as alleged in these claims.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency should be sanctioned with a default judgment for its delay in issuing its final decision. According to Complainant, the Agency's final decision was issued 229 days late. Complainant argues that collateral estoppel does not bar her claims regarding the events leading up to her removal. According to Complainant, she established that she was subjected to disparate impact discrimination and a hostile work environment.

In response to Complainant's appeal, the Agency contends that it should not be sanctioned, noting that the cases were pending before the AJ for a longer time than they were pending before the Agency. According to the Agency, the delay in issuing the final decision was attributable to the size of the case files. The Agency contends that Complainant is collaterally estopped from bringing the claims in Complaint 2. According to the Agency, its final decision properly found that Complainant failed to establish that she was subjected to discrimination. The Agency argues that no compensatory damages or attorney's fees should be awarded to Complainant.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing,⁹ 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 Chap., 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

⁹ Although the AJ held a three-day hearing, we will review the record and the Agency's final decision de novo because Complainant withdrew her hearing request prior to the issuance of the AJ's decision.

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").

Complainant's Request for Sanctions

We turn now to Complainant's request for sanctions against the Agency for its delay in issuing a final decision on the merits of her complaint. Generally, our regulations require an agency to issue a final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. 29 C.F.R. § 1614.110(b).

In the instant case, we agree with Complainant that the Agency's issuance of its final decision was untimely, as the record shows that the Agency issued a final decision approximately 229 days after the AJ dismissed the complaint and remanded it back to the Agency for a final decision on the merits. While we find that the delay exceeded the Commission's regulatory timeframes for issuing final decisions, we find that sanctions are not warranted under the circumstances of this case. Jocelyn R. v. Dep't of Def., EEOC Appeal No. 0120152852 (Mar. 11, 2016) (citing Vunder v. U.S. Postal Serv., EEOC Appeal No. 01A55147 (May 12, 2006) (declining to sanction an agency that issued a decision after approximately 371 days)). We take this opportunity, however, to remind the Agency of its obligation to adhere to the Commission's regulatory timeframes and issue final decisions in accordance with 29 C.F.R. § 1614.110(b).

Collateral Estoppel

The Agency contends that Complainant is collaterally estopped from bringing the claims in Complaint 2 by the MSPB decision regarding her removal. Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Bowles v. U.S. Postal Serv., EEOC Request No. 0520080571 (July 11, 2008). Upon review, the Commission finds that a fair reading of the allegations in the EEO complaint reveals that Complainant alleged that she was denied a reasonable accommodation, that she was unlawfully subjected to fitness for duty examinations, and that she was subjected to harassment and disparate treatment and that these claims are separate from the removal that was decided by the MSPB AJ. The Commission concludes that these matters were not before the MSPB and should be processed separately as an EEO complaint. Notably, all claims other than her removal are not mixed-case claims and therefore not subject to the jurisdiction of the MSPB. As such, the Commission is not persuaded by the Agency's argument that Complainant is collaterally estopped from raising these claims in her EEO complaint. Consequently, the Commission determines that it has jurisdiction over Complainant's reasonable accommodation, fitness for duty examination, harassment, and disparate treatment claims, even if these claims encompass incidents that are related to Complainant's ultimate removal from employment. See King D. v. Dep't of the Army, EEOC Appeal No. 0120162282 (Dec. 29, 2016); Complainant v. Inter-American Foundation, EEOC Appeal No. 0120132968 (Jan 8, 2014); Jones v. U.S. Postal Serv., EEOC

Appeal No. 0120110192 (June 10, 2011); Hubble v. Dep't of the Interior, EEOC Appeal No. 0120092453 (Feb. 18, 2011). Therefore, the Commission will review the merits of Complaint 2.

Fitness-for-Duty Examinations

Employers may require a medical examination or make disability-related inquiries of an employee only if the examination is job-related and consistent with business necessity. See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) EEOC No. 915.002 (July 27, 2000) (Inquiry Guidance), at 5. This requirement is met when the employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform the essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. See Inquiry Guidance at 14.

This means that the employer must have a reasonable belief based on objective evidence that an employee will be unable to perform the essential functions of his/her job because of a medical condition. Objective evidence is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with his ability to perform essential job functions or will result in a direct threat. Id. at 7. Where the employer forms such a belief, its disability-related inquiries and medical examinations are job-related and consistent with business necessity, if they seek only the information necessary to determine whether the employee can perform the essential functions or work without posing a direct threat to self or others. Id. It is the burden of the employer to show that its disability-related inquiries and requests for medical examination are job-related and consistent with business necessity. See Cerge v. Dep't of Homeland Security, EEOC Appeal No. 0120060363 (Oct. 9, 2007).

Regarding the physical examination, we find that it was job-related and consistent with business necessity because it was necessary for positions with LEO retirement coverage. We also consider whether the Agency has established that referring Complainant for the follow-up psychological examination with DR2 was job-related and consistent with business necessity. The Agency justifies sending Complainant to the psychological examination with DR2 based on conflicting medical documentation. Namely, the Agency contends that DR1's statement that Complainant was emotional, anxious, and depressed during the April 2011 physical examination and the results of her PHQ-SADS questionnaire were in conflict with the documentation from her personal physicians, which indicated that she was mentally fit for duty. However, Complainant has presented evidence that the PHQ-SADS questionnaire was incorrectly scored by the Agency, and the Agency has failed to rebut this evidence. The Agency has not even addressed this evidence on appeal. Complainant even notified the Agency in June 2011 that it had incorrectly scored the questionnaire, but the Agency continued to rely on the results as a justification for sending Complainant for the psychological FFDE without presenting evidence that the results of the questionnaire were accurate. Moreover, Complainant completed this questionnaire in February 2011, yet she was permitted to remain on the job for more than two months, suggesting that the Agency was not seriously concerned about Complainant's mental or emotional stability.

Furthermore, DR1 indicated that his statement about Complainant's emotional state was an offhand comment and that it was not meant to serve as the basis for disqualifying Complainant from her position. Complainant stated that she was nervous during the physical examination with DR1 because she was worried about losing her job, which she had successfully performed since 2009. Neither S2 nor S3 stated that there was an issue with Complainant's performance or her mental or emotional stability prior to placing her on administrative leave on April 27, 2011. We therefore find that the Agency has failed to establish by the preponderance of the evidence in the record that the psychological FFDE with DR2 was job-related and consistent with business necessity.

Disparate Treatment

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 Corp. v. Green, 411 U.S. 792 (1973). She must generally 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 Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, *supra*; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

Complainant alleged that she was subjected to discrimination when she was excluded from office updates by S1. The Agency's legitimate, nondiscriminatory explanation for its actions is that S1 would occasionally share information with his subordinates on an impromptu basis, but Complainant tended to keep her door closed and would not come out when someone knocked. Complainant contends that a coworker also had a tendency to keep her door closed but was not excluded from S1's updates. We note that this allegation concerns conflicts with witness testimony, and Complainant did not produce any additional evidence to support her assertions. Complainant withdrew her request for a hearing before an EEOC AJ before the AJ could issue her decision. As a result, we do not have the benefit of an Administrative Judge's credibility determinations of the witnesses in this case. Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant has failed to meet that burden. See Lore v. Dep't of Homeland Security, EEOC Appeal No. 0120113283 (Sept. 13, 2013) (complainant failed to establish that witnesses made false statements where he withdrew his request for a hearing and credibility determinations were unable to be made); Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (Aug. 23, 2012) (complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where complainant requested a final decision and an

Administrative Judge did not make credibility determinations). We find that the preponderance of the evidence does not establish that this legitimate, nondiscriminatory reason is pretextual.

Complainant alleged that she was subjected to discrimination when S1 told her that she needed to find a coworker to cover her duties before he would approve her annual leave. The Agency's legitimate, nondiscriminatory reason is that S1 required employees taking annual leave when one of their inmates was being released to arrange for their duties to be covered. Complainant has failed to establish by the preponderance of the evidence in the record that this legitimate, nondiscriminatory reason is a pretext designed to mask discrimination or retaliation.

According to Complainant, she was discriminated against when she was required to come into the office while on sick leave to show S1 her approved leave slip for the following day. The Agency's legitimate, nondiscriminatory reason for S1 asking for Complainant's leave slip was because he could not find Complainant's approved leave slip. We do not find that Complainant has established that this legitimate, nondiscriminatory reason is pretextual.

Complainant alleged that she was subjected to discrimination when S1 sent a copy of her SF-50 to a coworker. The Agency's legitimate, nondiscriminatory reason for sending out the copy was that the document had been misfiled in C3's personnel file. The preponderance of the evidence in the record does not establish pretext with respect to this claim.

Complainant alleged that she was discriminated against when her caseload was neglected while she was on sick leave. Here, we find that Complainant has failed to establish a prima facie case of discrimination because the preponderance of the evidence in the record establishes that C1 handled Complainant's caseload while she was out on extended sick leave.

Complainant alleged discrimination with respect to not receiving her 10-year commemorative pin in a timely manner. The Agency's legitimate, nondiscriminatory reason for the delay is that the CPAC position that was responsible for tracking years of service was vacant, leading to delays in recognizing civilian employees. We find that the preponderance of the evidence in the record does not establish that the Agency's proffered reason is a pretext for discrimination.

Complainant alleged that she was subjected to discrimination when S1 refused to give her documents related to her performance evaluation. However, the record reflects that Complainant received the documents, so she has failed to establish a prima facie case with respect to this claim.

Complainant alleged that she was discriminated against when S1 rated her as Successful, Level 2. The Agency's legitimate, nondiscriminatory reasons for the rating were that Complainant had issues with deadlines and with interpersonal relationships. Complainant argued that she should have received a higher rating because she completed extra work. However, this does not rebut the Agency's legitimate, nondiscriminatory reasons, and the preponderance of the evidence in the record does not otherwise establish pretext for discriminatory or retaliatory information.

Finally, Complainant alleged that she was subjected to discrimination in May 2011 when the Agency delayed in providing information that she had requested. The Agency's legitimate, nondiscriminatory explanation for the delay was that it took time for HR to collect the documents and provide them to Complainant. Although Complainant contends that the delay was unreasonable, this subjective belief is insufficient to establish that the Agency's legitimate, nondiscriminatory reason is pretextual.

Hostile Work Environment

To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

Here, Complainant has failed to establish by preponderant evidence that some of the alleged harassment occurred as alleged. For example, with respect to S1 allegedly grabbing Complainant's wrist(s), S1 denied touching Complainant, there were no eyewitnesses, and Complainant's testimony was inconsistent. Therefore, Complainant has not established by the preponderance of the evidence in the record that this incident occurred.

We further find that, with the exception of the psychological FFDE, there is no evident connection between the alleged harassment and Complainant's membership in any protected class. For example, the record reflects that S1 questioned Complainant about the names she used in her signature block because he was concerned that the changing names on official documents could present an issue with respect to the validity of documents related to parole and not because of discrimination. The preponderance of the evidence in the record also establishes that S2 and S3 called the police on April 27, 2011, because Complainant was ignoring their repeated commands rather than because of her membership in any protected class. Accordingly, Complainant has failed to establish that she was subjected to a hostile work environment.

Disparate Impact

To establish a prima facie case of disparate impact, Complainant must show that an agency practice or policy, while neutral on its face, disproportionately impacted members of the protected class. This is demonstrated through the presentation of statistical evidence that establishes a statistical disparity that is linked to the challenged practice or policy. Watson v. Fort Worth Bank & Trust,

487 U.S. 977, 994 (1988) (class agent must present “statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion”). Despite the AJ’s statement on the record that she saw evidence of disparate impact, upon review, we find that Complainant has failed to establish a prima facie case of disparate impact. Complainant has not identified how she was subjected to disparate impact, and she has failed to identify a specific policy or practice that resulted in a disparate impact on the members of a protected class.

CONCLUSION

We REVERSE the Agency’s final decision finding no discrimination regarding the fitness for duty examination. We AFFIRM the remainder of the Agency’s final decision finding no discrimination. We REMAND the matter for to the Agency for compliance with the remedies specified in the ORDER herein.

ORDER

The Agency shall take the following remedial actions:

1. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages within 30 days after the completion of the investigation.
2. Within 90 days of the date this decision is issued, the Agency shall provide 8 hours of in-person or interactive EEO training for S3 and HR1 on the Rehabilitation Act. The training shall emphasize the Agency’s obligations under the Rehabilitation Act.
3. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S3 and HR1. 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 any of the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

The Agency is ordered to post at its Fort Leavenworth, Kansas United States Disciplinary Barracks/Military Correctional Center facility 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is 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 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)


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 his or her 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 14, 2020

Date