



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

[REDACTED]
Kristie D.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Appeal No. 2019002875

Agency No. 2017-JCS-008

DECISION

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 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., 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 REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant has shown by a preponderance of the evidence that the Agency subjected her to a hostile work environment based on sex, disability, and/or reprisal for prior protected EEO activity.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Interagency Joint Exercise Planner in the Joint Exercise Division (JED) for the Joint Chiefs of Staff, located in Suffolk, Virginia. Report of Investigation (ROI), at 9. The JED is responsible for planning,

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.

executing, and scheduling of worldwide joint and coalition training for the Chairman of the Joint Chiefs of Staff, the Regional Combatant Commanders, and the Office of the Secretary of Defense. ROI, at 94-98. These exercises are deployed worldwide and distributed from the Agency's Suffolk, Virginia location. Id. As such, Complainant's duties as a Joint Exercise Planner included planning, coordinating, and developing operational components of interagency interaction in assigned Joint Staff exercises. Id. Complainant's duties, moreover, entailed providing advice to the Chief of the Interagency Branch on the conduct of training exercises and engaging in event planning for up to four exercises per year located both domestically and internationally. Id. Complainant's position therefore required frequent travel and the ability to drive a car overseas. Id.

Complainant worked on a team of five employees comprised of her and four male Interagency Joint Exercise Planners. The members of her team consisted of the Chief of the Interagency Branch (male), and three male coworkers: Coworker 1 (C1), Coworker 2 (C2), and Coworker 3 (C3). The Chief of the Interagency Branch served as Complainant's first-level supervisor (S1), and he was also responsible for the supervision of C1, C2, and C3.²

Complainant began working as an Interagency Joint Exercise Planner with the Agency in 2007 as an Army Reservist and was formally hired by the Agency as a Government Civilian in 2009. Id. at 241. From February 2014 through late December 2016, Complainant was out of the office. Id. at 243, 659. Specifically, during this time, Complainant was called up for active duty with the Army in 2014 and was deployed overseas to the country of Jordan for one year. Id. However, during Complainant's deployment she suffered mental stress and her daughter died. Id. Complainant's deployment and the death of her daughter caused her to experience mental trauma. She was diagnosed with Post Traumatic Distress Disorder (PTSD) and a depressive disorder by the Army. Id.

Complainant returned from deployment in 2015 and went through the Army's mobilization process. Id. at 244. Complainant, however, did not pass the Army's medical section upon her return from deployment and was placed in the Army's Warrior Transition Unit (WTU) where she received medical treatment for her PTSD and depressive disorder. Id. Complainant then notified the Agency and S1 of her placement in the WTU and that she would not be returning to the Agency until her treatment through the WTU was completed. Id. at 246-247. The Army further provided the Agency and S1 with its orders that Complainant's placement with the WTU would be extended for further medical treatment. Id.

C1 explained that S1, who had periodic contact with Complainant during this time, would continually express his frustration with the reasons for Complainant's extended absence. C1 specifically attested:

² Complainant, S1, C1, and C2 provided testimony for the Agency's Fact-Finding Conference held on April 10, 2018. The Fact-Finding Conference has been made part of the Report of Investigation, at 233-543.

During this time, our supervisor, [S1], who had periodic contact with [Complainant], was clearly frustrated with her timelines for returning to work with our unit. [S1] often reflected this frustration by calling her "you know who" in a cynical fashion, and questioning her character by openly surmising that her delays were merely for the purpose of obtaining government benefits. He implied, but did not explicitly state, his belief that the benefits were unwarranted.

I believe that the net effect of [S1's] frequent comments and insinuations regarding [Complainant] during her period of leave was to create a hostile atmosphere regarding her return and that she came back to work for a boss that was predisposed not to respect her.

Id. at 659.

C2, like C1, attested that S1 would make inappropriate comments surrounding Complainant's medical treatment due to her delay in returning to the office. C2 specifically explained:

During the time of her delay, [S1] on several occasions made comments either alluding or stating outright that [Complainant] was milking the system.

He implied that the delays were due to her either feigning an illness or stretching out the treatment for an illness to delay her return to the Joint Staff.

This was made on several occasions, including occasions where I tried to correct [S1] and told him his allegations were both untruthful and inappropriate.

Id. at 342.

S1 admitted to saying that Complainant was "milking the system." But he denied saying any other inappropriate comments about Complainant's medical treatment and her delay in returning to the office. Id. at 147.

Complainant was medically cleared by the Army and was scheduled to return to the office in January 2017. Upon learning of Complainant's impending return to the office, S1 and C1 discussed which exercises Complainant should be assigned to. According to C1, he suggested to S1 that Complainant could be assigned to the "Warfighter exercise as it would be a good fit for her experiences while on active duty and the exercise development was just beginning so she would be able to step in from the start." Id. at 659. C1 maintained, however, that S1 rejected his suggestion and replied, "No, let her do NORTHCOM for a couple of years." Id. C1 averred that his "impression of this comment, and the tone it was given in, was that [S1] intended to punish [Complainant] for the delay in returning." Id. C1 explained that assignments to NORTHCOM, SOUTHCOM, and CENTCOM are considered to be the least desirable among their informal hierarchy of exercises. Id. at 659-660.

C1 continued to explain that S1 assigned Complainant to all three exercises, and CENTCOM had been canceled as expected because it had been canceled for the previous three years. Id.

According to Complainant, upon her return to the office in January 2017, S1 intentionally made it difficult for her to perform the duties of her position. Complainant averred that she was aware of the comments made by S1 based on her medical condition, and therefore she avoided going to therapy for her condition. Complainant averred:

To avoid any further discrimination and [S1] making comments about my ability to work or to miss work to go to my therapy, I stopped it and would continue it by phone so I could get rid of at least that piece of the harassment.

Id. at 253-254.

Complainant further maintained that S1 wanted to assign her the NORTHCOM exercise but refused to allow her to attend the planning conferences for the execution of the exercise. Id. at 259. Complainant also stated that when she was assigned to the AFRICOM exercise and it came time for her to present the exercise, S1 removed her computer from her. Id. at 261-262.

Complainant stated that she was additionally assigned to the Blue Flag exercise, which was a very low exercise and not part of her job description. Id., at 266. She maintained that her male colleagues were given the opportunity to travel to Washington, D.C. and travel internationally to Israel, among other places, for meetings and to obtain information. Id. at 268-269. Complainant stated that she was not afforded the same opportunities as her team members to travel, and such travel opportunities often meant bonuses and other perks. Id. at 282. Also, according to Complainant, she had not been assigned to a joint exercise since October 2017, and she has no control over how the exercises are assigned. Id. at 268-288.

C1 attested that although Complainant's travel schedule may look comparable, there are events on Complainant's schedule that were likely to get canceled, and therefore she was not treated equally to the male Interagency Joint Exercise Planners on the team. Id. at 459- 460. C2 similarly observed that Complainant was treated differently to the males on the team, and therefore believed that Complainant was treated unequally based on her sex. C2 specifically attested that since Complainant returned to the office, she has been marginalized by S1 who is in control of the scheduling and the number and types of events they are assigned. Id. at 343. C2 observed that Complainant was assigned to exercises that are considered secondary in nature to the command. Id. at 344. C2 additionally observed that Complainant had not been assigned to an exercise outside of the continental United States for some time and stated that international commands are considered prestigious assignments because they are very large in scale. Id. C2 explained that each male on their team had been assigned multiple commands outside the United States and one of the benefits of their position is being able to travel to multiple locations. Id. at 344-46. C2 stated, moreover, that he, S1, C1 and C3 have made multiple trips to Washington, D.C. to visit government agencies, while Complainant was not allowed to. Id.

C2 also explained that Complainant was denied training opportunities as well, while males were not:

There have also been occasions where [Complainant] has requested schools. Those requests have gone either answered with an outright no or ignored; whereas every other male in our branch who has wanted to attend training has been allowed to attend training.

Id. at 345.

C2 further attested as to his belief that Complainant was subjected to a hostile environment due to her sex:

[I]t's a hostile environment for a woman to be working in because I've seen that, in my view, demonstrated where the attitude is either dismissive or condescending toward women in the workplace. . . .

Because of that, I attributed it to [Complainant] being female, as I did for an employee who worked there before [Complainant] I believe arrived, who has since moved on to a different position in a different division, in a different room way across the building, but it wasn't just to [Complainant].

Id. at 357-358.

This employee (female) cited by C2, who moved to a different position in a different division, stated for the record:

I worked as an Interagency Planner for approximately six months in 2007 with [S1]. [S1] was routinely rude to me. I felt as though he treated me lesser or as a child Having always excelled in previous positions, I felt defeated, alone, and helpless. No one would train me or teach me how to perform this new position. During this time, another male, [C2], was hired as another Interagency Planner and he was given an overwhelming amount of support and assistance by both S1 and [another management official] It felt like a toxic environment I was unable to leave. I attributed [S1's] behavior towards me to my belief that he is a sexist: I truly believe he thinks women are inferior to men.

Id. at 648.

In addition, the Content Development Coordinator, who oversaw the Joint Staff travel and training budget, explained that Complainant's male coworkers received more money via the voucher system than she did. The Content Development Coordinator further averred that "[Complainant] rarely spent time traveling, while her team spent the majority of their time traveling (with the exception of [C2], after he began experiencing health problems)." Id. at 650.

The Content Development Coordinator specifically attested that “[Complainant’s] team received substantial sums of money via the voucher system, while the amounts [Complainant] received were relatively insignificant.” Id.

Moreover, according to an Event Planner for the JED (female), she specifically requested that Complainant take part in the Eagle Lion 17 Exercise scheduled to take place in Jordan in late April through the end of May 2017. Id. at 657. The Event Planner explained that she was serving as the Lead Exercise Planner for the Eagle Lion Exercise and Complainant mentioned that she was available. Id. The Event Planner thought Complainant could provide valuable support for the Exercise, as Complainant had knowledge of Jordanian culture and had a relationship with Jordanian leadership due to her recent deployment in the country. Id. The Event Planner attested that funds were available for Complainant’s participation. Id. However, according to the Event Planner, S1 declined to allow Complainant to provide her assistance for the event, saying that Complainant was unavailable at the time of the Exercise. Id. The Event Planner stated that, because Complainant was not permitted to support the Exercise, they were forced to receive support from a contractor who lacked interagency experience and was overwhelmed because interagency work was not part of his primary mission. Id. The Event Planner opined that Complainant would have provided superior support than the contractor, as the exercise involved the participation of over 20 countries. Id. The Event Planner averred that shortly after she returned from Jordan after completion of the Exercise, Complainant said to her that she had in fact been available. Id.

On June 29, 2017, Complainant sent S1 an email with a letter attached. Complainant wrote that her letter constituted an “Official Hostile Work Environment complaint.” Id. at 78-80. In the letter, Complainant described several incidents wherein C3³ displayed angry and aggressive behavior towards her and C1 and C2. Id. Complainant also wrote in the letter that she wanted “to be treated with respect and be comfortable” and requested that S1 ensure that she work in a professional work setting. Id. A day earlier, on June 28, 2017, S1 had agreed to support Complainant’s attendance at a USCENCOM Orders Writing Conference for Internal Union in Tampa, Florida for three days. Id. at 569-570. However, the next day, on June 29, 2017, the same day after Complainant wrote the letter accusing C3 of a hostile work environment, S1 informed Complainant that he could no longer support her attendance to the Conference due to budgetary reasons. Id.

The Event Planner for the JED thought there was money available to send Complainant to the conference. The Event Planner explained:

I remember having discussions with the [Colonel] about funding to send [Complainant] to this event. I recall that the consensus was funds would be made available to send her to this event, as her involvement would greatly enhance it.

Id. at 657.

³ C3 did not provide an affidavit or statement for the record.

Complainant contacted an EEO Counselor on July 26, 2017, and filed an EEO complaint on October 4, 2017, as amended, alleging that the Agency discriminated against her on the bases of sex (female), disability (mental), and reprisal for prior protected EEO activity when:

1. Beginning in December 2016, S1 prevented her from performing her duties, he sabotaged her work opportunities and assigned her work which was substantially unequal in skill and duration as compared to similarly situated males with the same job description;
2. Beginning in January 2017 and continuing, she was subjected to displays of anger and disrespect by C3 and S1 failed to take appropriate action to correct C3's behavior;
3. S1 afforded more opportunities for males to travel than to her;
4. S1 designed work schedules which provided males more professional opportunities, desirable work locations, and premium compensation and benefits;
5. On an unspecified date, she received a disparate performance objective which would not allow her to meet the criteria for a superior rating on her performance evaluation;
6. S1 has repeatedly made disparaging comments about her disability, character, and medical status;
7. On or about June 29, 2017, S1 belittled her; attempted to influence witnesses; and failed to take appropriate action in response to her complaint;
8. On June 29, 2017, S1 cancelled his support for an event she was scheduled to attend, resulting in loss of pay and job opportunity;
9. Beginning on October 4, 2017, and continuing, S1 removed her from all Joint Staff Exercises for the 2018 calendar year, giving them to her male colleagues and issued her less-favorable assignments;
10. On February 17, 2018, S1 degraded and intimidated her in front of her coworker when he blocked the entrance of her cubical, placed his hands on his hips, leaned toward her, and glared at her for over 60 seconds;
11. On or about March 12, 2018, she learned that similarly-situated males were not required to pay additional expenses for travel which occurred in July 2017.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, 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 the Agency subjected her to discrimination as alleged.

The Agency specifically found no evidence in the record that Complainant had any limitations or was treated differently by S1 due to her mental impairment. The Agency noted that it was not able to corroborate Complainant's mental impairment or that it was aware of it. In so finding, the Agency noted that although Complainant provided the Agency with orders releasing her from military service based on a servic-connected disability, the record did not establish that Complainant ever told or put management on notice of her actual impairment. The Agency found that a full review of the record showed that no one who worked with Complainant knew she had a mental impairment, and that S1 averred that he was not aware of Complainant's impairment. The Agency therefore determined that Complainant did not show that she was an individual with a disability under the Rehabilitation Act.

In addressing Complainant's claim of a hostile work environment with regard to claim 1, the Agency found no evidence that Complainant was prevented from performing her duties, that her work opportunities were sabotaged, or that she was assigned work that was substantially unequal in skill and duration to similarly situated males with the same job description. In so finding, the Agency noted that after Complainant's return to work, S1 assigned Complainant to support exercises for Internal Union, Vigilant Shield, Blue Flag 18, Integrated Advance 17, and Global Thunder 18. The Agency found no evidence showing that S1 considered Complainant's gender in making assignments for her. With regard to claims 3 and 4, the Agency found no evidence that S1 afforded males with more opportunities to travel and more professional opportunities, among other things. The Agency observed that Complainant requested to be removed from the USNORTHCOM Exercise that would have afforded her with more travel. The Agency also noted that Complainant was scheduled to attend two other events that were overseas, which were canceled due to weather and a lack of funding. The Agency noted that although Complainant claimed she was relegated to exercises within the United States, the record showed that Complainant traveled to Germany on several occasions to support operation Blue Flag.

The Agency also found, with regard to claim 5, that there was no evidence that Complainant received disparate performance objectives or that Complainant was not afforded the same opportunity to meet the elements necessary for a superior performance rating. In addressing claim 6, the Agency noted that S1's comments were not directed at Complainant and were made prior to her return to the office. The Agency also found that S1 only made a few isolated statements that were not severe or pervasive enough to amount to a hostile work environment. Regarding claims 2 and 7, the Agency found that Complainant failed to show that S1 did not take appropriate actions to correct C3's behavior. The Agency nevertheless observed that C3's conduct towards Complainant were common workplace occurrences that amounted to simple personality conflicts, which were not abusive enough to constitute harassment. With regard to claim 8, the Agency determined that the writing event was canceled for Complainant due to a lack of funding, and not due to discrimination. The Agency additionally found, with respect to claim 9, that the record did not establish that Complainant was removed from exercises for the 2018 calendar year as she alleged.

In addressing claim 10, the Agency determined that S1 was simply questioning Complainant about her work duties and his conduct did not amount to harassment or discrimination. As for claim 11, the Agency found that male employees were actually required to pay additional expenses for travel that occurred in July 2017.

CONTENTIONS ON APPEAL

Complainant's Brief on Appeal

On appeal, Complainant, through her attorney, initially argues that the Agency improperly found that she was not an individual with a disability under the Rehabilitation Act. Complainant maintains that the Agency was aware of her PTSD and depressive disorder. Complainant states that she has a 100 percent disability rating from Veteran's Affairs, and her conditions require medication, psychotherapy, and the use of a therapy dog. Complainant asserts the Agency's final decision erred in finding that the ROI lacked her medical documentation, as the Agency refused to allow her to supplement the ROI with her medical records.

Complainant asserts, moreover, that S1 expressed dismissive views about women in general, and he showed animus about her medical leave regarding when she would return to work. Complainant contends that S1 strongly implied to C1 that he would punish her by assigning her to undesirable military exercises. Complainant states that following her return from medical leave, S1's animus for her manifested in him assigning her fewer military exercises, ones that were likely to get cancelled, and exercises that were considered of the lowest quality by the team. She states that this resulted in a substantial pay difference and a loss of professional opportunities for her. Complainant maintains that her coworkers, across the board, attested that S1 held discriminatory views about her and subjected her to discrimination. Complainant maintains that between December 2016 and March 2018 she only completed four exercises, and on ten occasions, her assignments or exercises were canceled or terminated. She asserts that her male counterparts worked at least double the amount of exercises and had none of their assignments or exercises canceled.

Complainant further contends that S1 failed to take any actions with regard to her complaints that C3 had been subjecting her and other team members to a hostile work environment. Complainant contends, moreover, that after she sent the June 29, 2017, email about C3's hostile work environment, S1 abruptly canceled her scheduled attendance to the Conference in Tampa, Florida later the same evening. Complainant asserts that S1 stated that he canceled her attendance due to budget constraints, but he nevertheless admitted there was no documentation actually showing there were budgetary issues impacting her attendance to the event.

She additionally states that after S1 became aware of her EEO activity for the instant case, S1 released a schedule in October 2017, showing that he had not scheduled her for a single Joint Staff exercise for the 2018 calendar year, which C1 verified in the record.

Complainant states, moreover, that after she filed her EEO complaint, S1 approached her cubicle, engaged her in a heated exchange, and physically intimidated her by standing over her, glaring at her, and blocking her in her workspace for approximately 60 seconds. Complainant additionally states that she was required to repay a travel expense in the amount of \$12, while males have not been required to pay travel expenses many times that amount.

In response, the Agency restates the position it took in its final decision, and requests that we affirm its final decision.

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 AND FINDINGS

Individual with a Disability

In 1992, the Rehabilitation Act was amended to clarify that the standards set out in the Americans with Disabilities Act of 1990 (ADA) applied to complaints of discrimination based on disability by federal employees or applicants for employment. See Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344, 4424 (1992) (codified as amended at 29 U.S.C. § 791(g)); see also 29 C.F.R. § 1614.203(b). Moreover, the events in the instant case arose after January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which expanded the definition of disability under the ADA and the Rehabilitation Act. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. 29 C.F.R. § 1630.1(c)(4). Consistent with the ADAAA's purpose of reinstating a broad scope of protection under the ADA, the definition of “disability” shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. Id. The primary object of attention in cases brought under the ADA should be whether agencies have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. Id. The question of whether an individual meets the definition of disability should not demand extensive analysis. Id.

Under EEOC regulations implementing the ADAAA, an individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g)(1).

Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. 29 C.F.R. § 1630.2(i)(1)(i). The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 29 C.F.R. § 1630.2(j)(1)(i). “Substantially limits” is not meant to be a demanding standard. Id. An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Id.

Upon review, we find that Complainant has established that she is an individual with a disability protected by the Rehabilitation Act under the expansive definition set forth in the ADAAA, and the Agency has clearly erred in finding otherwise. In so finding, the record reflects that while Complainant was deployed with the Army overseas she was diagnosed with PTSD, and a depressive disorder due to the death of her daughter. The record shows that Complainant did not pass the Army’s medical section upon her return from deployment and was placed in the Army’s WTU where she received medical treatment for her PTSD and her depressive disorder. Complainant then notified the Agency and S1 of her placement in the WTU and that she would not be returning to the Agency until her treatment through the WTU was completed. The Army further provided the Agency and S1 with its orders that Complainant’s treatment with the WTU would be extended for further medical treatment. The record reflects that Complainant had been taking medications, going to therapy, and she was later provided with a therapy dog. Complainant averred that her conditions impact her life every single day, and it’s “very hard to manage and to move on with [her] life to focus.” ROI, at 252.

Moreover, the record also establishes that it was common knowledge among S1, C1, and C2 that Complainant had medical conditions associated with her deployment in the Army. We note that S1 was in constant contact with Complainant about her delay in returning to work and he also received documentation from the Army about Complainant’s medical status. C1 and C2 specifically attested that S1 repeatedly made comments about her extended absence in relation to her conditions. We note that S1 admitted to saying that Complainant was “milking the system,” and both C1 and C2 attested that S1 would frequently make statements implying that she was faking her illness or stretching out the treatment for her illness to delay her return. Both C1 and C2 believed that S1’s repeated comments about Complainant’s medical conditions were both untruthful and inappropriate. In addition, Complainant averred that she had been aware of S1’s inappropriate comments about her medical conditions, and therefore stopped going to therapy to avoid further comments from S1. We therefore find the Agency’s determination that no one who worked with Complainant was aware of her medical conditions to be dubious.

We find it highly unlikely that S1 was unaware of Complainant's PTSD and depressive disorder, especially given his reported comments to C1 and C2.

Therefore, we find that Complainant was substantially limited in the major life activities of thinking and concentrating and that she has shown to be an individual with a disability protected by the Rehabilitation Act under the expansive definition set forth in the ADAAA. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0720060029 (Sep. 5, 2008) (finding substantial evidence in the record to support the Administrative Judge's determination that complainant was an individual with a disability because his PTSD substantially limited the major life activities of concentrating, focusing, thinking, and recalling). As such, we will consider the merits of her disability discrimination claims below.⁴

Supervisory Harassment / Hostile Work Environment

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, religion or prior EEO activity is unlawful, if it is sufficiently patterned or pervasive. Wibstad v. U.S. Postal Serv., EEOC Appeal No. 01972699 (Aug. 14, 1998) (citing McKinney v. Dole, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985)); Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 at 3, 9 (Mar. 8, 1994). A single incident or group of isolated incidents will not be regarded as discriminatory harassment unless the conduct is severe. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982). Whether the harassment is sufficiently severe to trigger a violation of Title VII [or the Rehabilitation Act] must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, 510 U.S. 17 (1993).

To establish a claim of hostile environment harassment, Complainant must show that: (1) she is a member of 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 the 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).

⁴ There is no dispute that Complainant was qualified, i.e., she satisfied the requisite skill, experience, education and other job-related requirements of her position and with or without reasonable accommodation she can perform the essential functions of her position. 29 C.F.R. § 1630.2(m).

Upon review, we find that S1's actions towards Complainant were based on her disability and sex. As noted above, we note that S1 admitted to saying that Complainant was "milking the system," and both C1 and C2 attested that S1 would frequently make statements implying that she was faking her illness or stretching out the treatment for her illness to delay her return to the Joint Staff. Both C1 and C2 believed that S1's repeated comments about Complainant's medical conditions were both untruthful and inappropriate. C1 and C2 further observed, and the record reflects, that Complainant was treated differently than her male colleagues, and C2 specifically believed that S1 harbored animus towards Complainant because of her sex. As such, we find that Complainant has established the first three prongs of the prima facie case of a hostile work environment.

Objectively Hostile or Abusive Work Environment

Here, we find that the Agency's conduct was sufficiently severe and pervasive to alter the conditions of Complainant's employment and create an abusive working environment. We find that a reasonable person would find that the cumulative effect of S1's actions created a hostile work environment. In so finding, we note that both C1 and C2 attested that S1 openly questioned Complainant's character by surmising that her delay in report to the office was simply to obtain government benefits. S1 did not dispute that he said that Complainant was "milking the system," and C1 and C2 explained that S1 would make frequent dishonest and inappropriate comments implying that Complainant was faking her illness.⁵ As C1 attested:

I believe that the net effect of [S1's] frequent comments and insinuations regarding [S1] during her period of leave was to create a hostile atmosphere regarding her return and that she came back to work for a boss that was predisposed not to respect her.

ROI, at 659.

The record specifically shows that S1 intentionally assigned Complainant to exercises and assignments that were less prestigious than her male colleagues and that were likely to be canceled, as C1 and C2 maintained. The record also establishes that S1 would dishonestly inform other employees that Complainant was not available for assignments, training, and exercises. For example, as noted above, the Event Planner asked that Complainant take part in the Eagle Lion Exercise scheduled to take place in Jordan, feeling that she could provide valuable support.

⁵ In considering a hostile work environment claim, we look to the totality of the circumstances. Harris, 510 U.S. at 23. Just because complainant may have not been present when the disability-related derogatory comments were made, does "not render [those] comment[s] irrelevant to [her] hostile work environment claim." Schwapp v. Town of Avon, 18 F.3d 106, 111 (2d. Cir. 1999) (court considered eight additional racially-charged incidents that did not occur in plaintiff's presence in reversing district court's granting of summary judgment to defendants in a hostile work environment claim).

According to the Event Planner, S1 told her that Complainant was not available to support the exercise when, in fact, she was available. We note that the Content Development Coordinator observed that Complainant rarely spent time traveling, while her team spent the majority of their time traveling. The Content Development Coordinator stated that Complainant's team received substantial amounts of money via the voucher system, while the amounts Complainant received were relatively insignificant.

The record also shows that S1 approved Complainant's participation in the Conference scheduled to be held in Tampa, Florida for three days, but then abruptly canceled Complainant's approval to attend the Conference after Complainant submitted a harassment complaint against C3, by saying that budgetary issues were the reason she could not attend. As noted above, the Event Planner recalled that the "the consensus was funds would be made available to send her to this event, as her involvement would greatly enhance it." C2 further maintained that Complainant's other training requests have gone either unanswered with an outright no or ignored, whereas every other male in the branch who has wanted to attend training has been allowed to attend training.

C2 specifically attested, in reference to S1's actions and behavior towards Complainant:

So it's a -- you know, to use a time-worn cliché a death by a thousand cuts. To me that's what it is. It indicates a hostile work environment.

You could take any particular incident that I just cited, take it in isolation and say, well, there's mitigating reasons for that; but when you add them up to a totality and compare it against the rest of us who have not seen or been subject to any of those individual slights, to me it indicates a clear pattern of bias.

Now, hostile environment is the perception of the person who's having to deal with it, but I do know for a fact [Complainant] has raised this issue with [S1] before, only to see the behavior continue after the issue has been raised.

ROI, at 350-51.

Therefore, based on the statements of multiple Agency employees herein and considering S1's actions towards Complainant in totality, we find that his behavior clearly unreasonably interfered with Complainant's work performance and was severe and pervasive enough to amount to a hostile work environment. In so finding, we note that Complainant described how S1's statements about her affected her:

I would ask [coworkers] how it's going. They would tell me that [S1] was bashing me. [S1] was saying I was milking the system. That's so painful. You give so much and then it's a vet-on-vet attack. I didn't have any control.

Id. at 290.

We therefore find that Complainant has also established the fourth prong of the prima facie case of a hostile work environment.

Liability

As noted above, the Chief of the Interagency Branch was Complainant's first-line supervisor. An employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee; See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998). When, as here, the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998); and Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). However, the Agency has not raised such a defense, either in its final decision or on appeal. Therefore, we find that the Agency is liable for S1's harassment and any compensatory damages that Complainant may be entitled to for that harassment.⁶

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and find that Complainant has established that she was subjected to discrimination as alleged.⁷

ORDER

The Agency is ORDERED to take the following remedial actions:

1. The Agency shall immediately ensure that S1 no longer has any supervisory/managerial authority over Complainant. In doing so, Complainant shall not be transferred to another position unless she requests reassignment.
2. Within thirty (30) calendar days of the date this decision is issued, the Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages within forty-five (45) calendar days of

⁶ As of the date of the April 10, 2018, Fact Finding Conference, C1, C2, and Complainant were still under the supervision of S1.

⁷ As we have found disability and sex discrimination, it is not necessary to address the basis of reprisal, as a finding on that basis would not entitle Complainant to any additional relief.

the date the Complainant receive the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim/evidence for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.

3. If S1 is still employed by the Agency, within 60 calendar days of the date of this decision, the Agency shall provide him with 16 hours of mandatory in-person anti-harassment training designed to make clear to him what constitutes prohibited behavior and how to prevent engaging in it in the future.
4. If S1 is still employed by the Agency, within 60 calendar days from the date of this decision, the Agency shall consider discipline against him. The Commission does not consider training to be a disciplinary action. If the Agency decides to take disciplinary action, it shall identify the actions 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 S1 has left the Agency's employ, the Agency shall furnish documentation of his departure date.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Suffolk, Virginia 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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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 the date this decision was issued. 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 (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 (R0610)

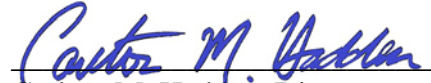
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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

September 16, 2020
Date