



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

[REDACTED]
Darlene H.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2019004438

Hearing No. 550-2017-00155X

Agency No. 2016-26756-FAA-06

DECISION

Following its July 1, 2019, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of a portion of the EEOC Administrative Judge's (AJ) decision finding discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff et seq. Complainant filed an appeal challenging other aspects of the AJ's decision. For the reasons that follow, we MODIFY the Agency's final order.

BACKGROUND

During the period at issue, Complainant worked as a Real Estate Contracting Officer at the Agency's Administration Office of Finance and Management located in Renton, Washington. In June 2016, Complainant filed a discrimination complaint against the Agency alleging that she was subjected to discrimination and subjected to a hostile work environment based on sex (female),

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.

age (over 40), disability (depression/anxiety, degenerative disc), genetic information, and reprisal (participation in protected activity) when:

- (1) the Agency failed to issue her a performance evaluation for fiscal year 2015;
- (2) the Agency failed to select her for a promotion to a vacant Realty Specialist position as the result of its failure to provide her with a reasonable accommodation;
- (3) the Agency failed to keep her medical records confidential;
- (4) the Agency failed to provide her with official time to work on her EEO cases;
- (5) the Agency removed her job duties and failed to assign her meaningful work;
- (6) the Agency disapproved her requests for the Voluntary Leave Transfer Program;
- and
- (7) the Agency imperiled the currency of her contracting warrant by failing to allow her to attend classes.

After an 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. Complainant requested a hearing. The Agency, on December 4, 2017, filed a motion for a decision without a hearing. Complainant opposed the motion. The AJ granted the Agency's motion with regard to issues 2, 4, 5, 6, and 7. She denied the motion with regard to issues 1 and 3 and held a hearing on those claims.

With regard to issue 2, the AJ found that Complainant applied and was interviewed for a vacant Realty Specialist position but was not the most qualified. The record indicates that she scored at the bottom of the interviewees. The Agency noted Complainant's admission in her deposition that she did nothing to prepare for the interview and that she was most likely not the most qualified for the position. The Agency maintained that it selected the most qualified applicants after a fair and uniform application and interview process. With regard to issue 4, the Agency maintained that it provided appropriate and reasonable official time for Complainant to work on her EEO cases. Regarding issue 5, The Agency stated that Complainant took leave from March 22, 2015 until mid-July 2015. The leave was granted in lieu of a requested accommodation, which was to allow Complainant to work remotely from California. During her absence, the Agency reassigned her projects to others to continue making progress. The Agency claimed that Complainant was given work to do upon her return, including some difficult projects that her coworkers had not been able to complete. The Agency noted that Complainant was given credit for these difficult projects in her 2016 fiscal year performance evaluation.

With respect to issue 6, the Agency stated that Complainant applied for and was granted leave through the Voluntary Leave Transfer Program (VLTP). However, she was required to use all her accrued leave before using the VLTP hours. Apparently, Complainant did not realize that she was being charged her accrued hours (and not the VLTP hours) until approximately one year later. At that time, she attempted to use the VLTP hours, but was not allowed to because there was no longer a medical emergency, as required by Agency policy. Complainant, according to the Agency, would have seen that her time was being charged as accrued leave if she had reviewed her Leave and Earning Statements, but she did not do so.

With respect to issue 7, the Agency indicated that Complainant's contracting warrant has never expired or ceased being valid as the result of being denied training or for any other reason. According to the Agency, Complainant was provided required training, and the one training class that was denied was not required to maintain her contracting warrant.

The AJ noted that although Complainant contested the Agency's versions of the facts regarding issues 1 and 3, which shall be discussed below, the facts as set forth by the Agency were undisputed with respect to issues 2, 4, 5, 6, and 7.

In a separate decision, the AJ found that the Agency discriminated against Complainant on the bases of disability, genetic information, and in retaliation for engaging in protected EEO activity with respect to issues 1 and 3. Regarding claim 1, Complainant alleged that she was not issued a performance evaluation for the rating period ending September 30, 2015. During fiscal year 2015, her first-line supervisor was S1, and her second-line supervisor was S2. The AJ found that Complainant established a prima facie case of reprisal discrimination regarding claim 1, and the Agency did not provide a legitimate, nondiscriminatory reason for failing to provide Complainant with a performance evaluation. The AJ also found that Complainant testified credibly regarding her performance evaluation, but S1's testimony that he gave Complainant an end of year evaluation in May or June, made no logical sense and was not credible.

Regarding claim 3, the Agency requested that Complainant undergo an Independent Medical Evaluation (IME) which contained both a physical and a psychological evaluation. During the IME, some of the information requested related to her family's medical history. The AJ found that Complainant established a prima facie case of discrimination based on disability and genetic information. The Agency requested genetic information (in the form of a family medical history and the medical history concerning Complainant's mother's pregnancy with her) and failed to safeguard this information. The AJ found that Complainant's medical history should not have been provided to her supervisors; rather, her supervisors should only have received a summary of the specific limitations or restrictions caused by Complainant's mental or physical health conditions. The AJ also found that the Agency subjected Complainant to a hostile work environment based on disability, genetic information, and prior EEO activity, because management failed to safeguard her sensitive medical information and treated her differently than her coworkers. This caused Complainant to feel depressed, anxious, and ostracized at work for two years. The AJ further found that the unwanted negative treatment based on Complainant's disability and prior EEO activity was pervasive.

Finally, the AJ found that Complainant's supervisor not only had access to her medical documents, including her medical and psychological diagnoses, but that he left the documents unattended on his desk.² The AJ found this to be an egregious *per se* violation of the Rehabilitation Act that was "severe," and which contributed to a hostile work environment.

² On February 12, 2016, Complainant was teleworking, but she came into the office to pick up a replacement cord. She saw C1, a coworker, walk out of S1's office when S1 was not there. Complainant found S1 speaking with another employee, and she engaged in a conversation with

The AJ found no discrimination based on sex or age. As noted above, the AJ, in a separate decision, granted summary judgment in favor of the Agency regarding issues 2, 4, 5, 6, and 7. The AJ ordered the Agency to pay Complainant \$20,000 in nonpecuniary, compensatory damages, reasonable attorney's fees, if applicable, training for all managers in the Office of Finance and Management, and to place at all facilities within the authority of the Renton, Washington Office of Finance and Management, a copy of the notice advising employees of the finding of discrimination.

The Agency subsequently issued a final order rejecting aspects of the AJ's remedy, and simultaneously filed an appeal with the Commission. According to the Agency, the remedies awarded by the AJ resulted from erroneous conclusions of law and an abuse of discretion. Specifically, the Agency argued that the AJ erred by:

- (1) awarding \$20,000.00 in nonpecuniary damages, which the Agency maintains is "monstrously excessive," and inconsistent with amounts awarded in similar cases. Although the Agency did not argue for a specific amount, it cited prior Commission cases where \$2,000 - \$4,000 were awarded;
- (2) ordering the Agency to provide EEO training for all its managers and supervisors at the Renton, Washington, Federal Aviation Administration, Office of Finance and Management facilities; and
- (3) ordering that the Agency post a notice regarding the finding of discrimination at all facilities within the authority of the Renton, Washington, Federal Aviation Administration, Office of Finance and Management facilities.

Complainant, in her appeal, argues that the AJ erred by not interpreting the facts and the law correctly and, therefore, by not recognizing that that Agency's violations were not one-time events but were repeated actions occurring over a two-year period. According to Complainant, the amount awarded in nonpecuniary, compensatory damages should be increased to reflect the severity, harm, and duration that she actually suffered. Complainant also argued that the Agency should be ordered to acknowledge that she is a qualified individual with a disability.

him about a project. They went into S1's office to continue their discussion. Complainant saw a letter on top of a pile of other documents with the name of a company written in large font on top. The document caught her eye because the same company had conducted part of her IME. Upon looking more closely at the document, she saw that it was about her. Specifically, the document was a letter from Doctor-1 regarding the steps he and Doctor-2 took to conduct the evaluation of Complainant's physical and mental health. The document provided a list of "significant medical problems identified." These were: "cervical and lumbar DJD with chronic pain-appropriately treated and stable; hearing loss - untreated; Adjustment disorder mixed anxiety and depressed mood - inadequately treated."

Complainant argues that this Agency failure to acknowledge she is a qualified individual with a disability, has resulted in a failure on the Agency's part to provide her with a reasonable accommodation (i.e., full-time telework). Complainant argues that if the Agency acknowledged she is a qualified individual with a disability, this would prevent the Agency from subjecting her to harassment and retaliation in the future. Complainant also argues that the Agency should be required to collect any excess copies of her medical records and documents that were shared and destroy the copies. Complainant argues that she should be compensated for performance evaluation awards that she should have received when she did not receive a performance evaluation. Complainant maintains that she should have received two mid-year evaluations and two end of year evaluations, each having a maximum potential of \$500. Consequently, she requests an additionally \$2,000.

With respect to the AJ's grant of summary judgment regarding issues 2, 4, 5, 6, and 7, Complainant argues that the AJ erred because she did not issue her decision until after the hearing, and that some of the claims were admitted to by S1, which at a minimum shows that there were still material facts in dispute. For the most part, Complainant argues that the AJ's finding that S1 did not testify credibly regarding issues 1 and 3 creates a genuine issue of material fact regarding the remaining issues. Regarding issue 2, she states that the Agency did not provide an explanation for why S2 limited the interview questions to a period (the previous 12 months) when he knew she was not there during that entire time, and he also knew that he took her projects away from her. Complainant also maintained that the interview panel was prejudiced because two of the three members were aware of her EEO complaint. According to Complainant, the Agency's failure to grant her request to telework every day as a reasonable accommodation, and instead granting her leave without pay, put her at a disadvantage with respect to applying for the position.

With regard to issue 4, she states that S1 only granted her three hours of official time between August 1, 2015 and March 20, 2016. After S1 left the Agency, she stated that she was granted an additional five hours. According to Complainant, S2 denied her request for official time to respond to an Agency motion for summary judgment because he felt that official time was limited to "complaint preparation or to respond to Agency/EEOC requests for information." According to Complainant, because S1 and S2 denied her requests for official time, she "[h]ad to take leave to work on her case responses." According to Complainant, "she spent hundreds of hours of her own time working on the cases," but "[i]n fairness to all," she requested that the Commission rule in her favor and award her "a minimum of 80 hours of leave to replace the time she took leave, leave without pay, and use[d] her own time."

With regard to issue 5, Complainant claims that meaningful work projects were withheld from her for months until shortly before her interview for the Realty Specialist position. Complainant speculates that this was done to prevent her from having a completed project before the interview. With regard to issue 6, she maintained that there remains a dispute about 39 hours of voluntary leave that was never paid to her, even though the Agency has erroneously informed the Department of Labor that it has been repaid. Finally, with regard to issue 7, Complainant states that the "Agency finally placed [her] in training classes, although they waited until the last moment, [and] she was able to obtain the hours needed to keep her warrant active."

ANALYSIS AND FINDINGS

At the outset, we note that neither party is challenging the AJ's findings of discrimination with regard to the Agency subjecting Complainant to a hostile work environment due to disability, genetic information, and reprisal when: (1) she was not issued a performance evaluation for fiscal year 2015; and (2) her medical records were not kept confidential. Complainant is also not challenging the finding of no discrimination based on sex or age. Accordingly, these findings are AFFIRMED.

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VI.C (Aug. 5, 2015) provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ's decision to demonstrate that the AJ's factual determinations are not supported by substantial evidence. See id. In this case, this means that the Agency and Complainant have the burden of pointing out where and why the AJ's findings are not supported by substantial evidence. Cf. id. (pointing out that "[t]he appeals statements of the parties, both supporting and opposing the [AJ's] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ's] factual determinations are supported by substantial evidence").

Agency's Appellate Arguments

1. Compensatory Damages

With respect to nonpecuniary, compensatory damages, the Agency disputed the amount awarded by the AJ. Complainant also disputes the amount awarded by the AJ. We shall consider both appeals of compensatory damages in this section of the decision. Nonpecuniary losses are not subject to precise quantification, i.e., emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character and reputation, injury to credit standing, and loss of health. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991 (EEOC Guidance), EEOC Notice No. 915.002 at 10 (July 14, 1992). Objective evidence in support of a claim for non-pecuniary damages claims includes statements from Complainant and others, including family members, co-workers, and medical professionals. See id.; see also Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Nonpecuniary damages must be limited to compensation for the actual harm suffered as a result of the Agency's discriminatory actions. See Carter v. Duncan-Higgans, Ltd., 727 F.2d 1225 (D.C. Cir. 1994); EEOC Guidance at 13.

Additionally, the amount of the award should not be “monstrously excessive” standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01972555 (April 15, 1999) (citing Cygnar v. City of Chicago, 865 F. 2d 827, 848 (7th Cir. 1989)).

The AJ found that Complainant testified credibly regarding the emotional toll she experienced due to the lack of a performance evaluation for FY 2015. She indicated that it made her feel trapped, because she could not effectively look for other jobs, as many required the most recent year-end performance evaluation as part of the application materials. Complainant and her daughter also testified, credibly according to the AJ, about the emotional distress Complainant experienced because of seeing her medical documentation on S1’s desk where anyone could see it. Complainant stated that she was very anxious because she never knew for sure which of her coworkers or members of management had learned of her diagnoses, included her mental health diagnosis. When jokes were told in the office about mental health matters, she was never sure if they were discussing her. Her daughter testified that Complainant experienced significant depression when S1 and S2 became her supervisors. Previously, she loved her job, but, afterward, her demeanor changed dramatically. She gained weight, withdrew from family and friends and no longer wanted to go to work. According to Complainant’s daughter, her mother’s depression and social withdrawal lasted approximately two years.

The AJ, in determining the amount of the award, factored the nature, severity, and the duration of the harm caused by the Agency’s actions along with mitigating factors such as the ongoing stress of familial pressures (including Complainant’s role in helping her daughter, who was addicted to drugs, and her daughter’s children) and Complainant’s testimony about the stress related to claims upon which she did not prevail.

The Agency’s contention that the amount awarded by the AJ was “monstrously excessive,” and “inconsistent with amounts awarded in similar cases,” is based solely on its assertion that Complainant failed to establish a nexus between its actions and the harm she suffered. The Agency noted that, prior to S1 becoming Complainant’s supervisor, she already had been diagnosed with anxiety and depression, had fluctuations in her weight, and experienced stress associated with having a drug dependent child and a grandfather diagnosed with cancer. The Agency also noted that Complainant did not provide any evidence to support her testimony that she could not apply for any other jobs due to not receiving a 2015 performance evaluation, and that the AJ merely accepted Complainant’s self-serving testimony without any other evidence in the record to support her assertions.

We find that there is substantial evidence in the record to support the AJ’s award of \$20,000 in nonpecuniary, compensatory damages in this case. As noted above, the AJ found the testimony of Complainant and her daughter to be credible. An AJ’s credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

Other than the Agency's disagreement with the AJ's determination that there was a nexus between its discriminatory actions and Complainant's damages, it has not shown that the AJ erred or that the record does not support the AJ's findings. Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. Sinnott v. Dep't of Defense, EEOC Appeal No. 01952872 (Sept. 19, 1996); Carpenter v. Dep't of Agriculture, EEOC Appeal No. 01945652 (July 17, 1995). A complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain her burden in this regard. We also find that the AJ took into consideration the matters raised by the Agency, which took place before the discrimination, when arriving at an appropriate amount. On appeal, Complainant references incidents that were not part of the findings of discrimination. Finally, we find that the cases cited by the AJ are consistent with the amount awarded by the AJ here.³ Additionally, other more recent Commission cases support such an award. See Maxine C. v. United States Postal Serv., EEOC Appeal No. 2019001571 (July 7, 2020) (awarding \$20,000 in nonpecuniary damages after complainant was the victim of harassment), request for reconsideration denied, EEOC Request No. 2020004721 (Nov. 9, 2020); Ashlea P. v. United States Postal Service, EEOC Appeal No. 0120141369 (April 9, 2016) (awarding \$20,000 in nonpecuniary damages when complainant suffered anxiety and gastrointestinal problems after being subjected to harassment).

2. EEO Training/Discipline

Next, we address the Agency's contention that the AJ improperly ordered the Agency to conduct EEO training for all its managers and supervisors at its Renton, Washington, Office of Finance and Management. In the present case, we find that the AJ's training remedy is overly broad. The AJ did not specify a reason for issuing such a broad training order. The record reveals that Complainant's supervisor was the only responsible management official involved in the discriminatory and retaliatory finding. Moreover, we find there is no evidence in this case of a facility-wide culture of discrimination. See Joey B. v. Dep't. of Veterans Affairs, 0720160023 (December 21, 2016). Complainant's supervisor, however, left the Agency in March 2016. Therefore, we shall not order any training and we will MODIFY the AJ's Order to eliminate the requirement of training. Similarly, there will be no need for consideration of discipline of Complainant's supervisor.

³ See Philbert v. Dep't of Veterans Affairs, EEOC Appeal No. 0720090041 (May 5, 2010) (complainant awarded \$15,000 after the agency failed to timely process complainant's leave request and engaged in unauthorized access of medical records causing complainant sleeplessness, stress, headaches and high blood pressure); Cerge v. Dep't Homeland Security, EEOC Appeal No. 0120100102 (Jun. 19, 2012)(complainant awarded \$25,000 when the agency subjected him to multiple fitness-for-duty exams causing complainant humiliation, stress and anger leading to social isolation and despondence); Lampkins v. US. Postal Service, EEOC Appeal 0720080017 (Dec. 8, 2009) (complainant awarded \$25,000 after agency discriminated against him on the bases of disability and retaliation when it disseminated his private medical information and issued him a 14-day suspension causing him to become depressed and to isolate himself from family and friends).

3. Notice

We note the Agency's third and final contention, i.e., the AJ exceeded her regulatory authority by ordering the Agency to post a notice regarding the finding of discrimination at all facilities within the authority of the Renton, Washington, Office of Finance and Management. 29 C.F.R. § 1614.501(a)(1) usually requires that the Notice only be posted at "the affected facility." We have found that, on a case-by-case basis, there may be justification for ordering postings on a wider basis. However, in this case, the AJ did not explain her reasons for ordering the wider posting and we see no justification for ordering a posting on a wider basis. Therefore, we will MODIFY the AJ's Order so that the Notice need only be posted at the location where the discrimination took place. See Complainant v. USPS, EEOC Appeal No. 0720100019 (Sept. 8, 2011), request for reconsideration denied, EEOC Request No. 0520120027 (Mar. 29, 2012). We find the appropriate location to be at the Northwest Mountain Region, Office of Finance and Management located in Des Moines, Washington.⁴

Complainant's Appeal

Regarding Complainant's assertion that the AJ should have ordered the Agency to collect any excess copies of her medical records and documents that were shared and destroy the copies, we note that the AJ's finding of discrimination was based on S1's mishandling of her medical information. There was no determination of widespread dissemination beyond what the AJ found.

We also decline Complainant's request that we order the Agency to acknowledge that she is a qualified individual with a disability. These types of determinations are made on a case-by-case bases dependent upon the specific facts that are presented. We are also unwilling to speculate that Complainant will be subjected to future acts of discrimination or harassment without such a designation. If Complainant believes that she is being discriminated against based on disability in the future, she will be able to file a complaint at that time.

Finally, we decline to speculate that had Complainant received a 2015 performance evaluation, she would have also been entitled to a performance award; therefore, we will not direct the Agency to compensate Complainant for this matter.

Decision without a Hearing: Issues 2, 4, 5, 6, and 7

We must scrutinize the AJ's legal *and* factual conclusions regarding issues 2, 4, 5, 6, and 7 and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110),

⁴ According to the Agency, "[a]t the time of the complaint, the Agency's Northwest Mountain Regional Headquarters, Office of Finance and Management was located in Renton, Washington"; however, its location is currently in Des Moines, Washington.

at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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”).

We must determine whether the AJ appropriately issued the decision without a hearing on these issues. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, we find that Complainant has not met her burden. Ultimately, the AJ correctly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ's issuance of a decision without a hearing was appropriate.

With respect to issue 4, EEOC Regulation 29 C.F.R. § 1614.605(b) provides, in pertinent part, that if a complainant is an employee of an agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. The Commission has long held that a claim regarding the denial of official time concerns a violation of the Commission's regulations and does not require a determination of whether the denial was motivated by discrimination. See Edwards v. United States Postal Serv., EEOC Request No. 05960179 (Dec. 23, 1996).

The Commission held that such a claim should not be processed in accordance with 29 C.F.R. § 1614.108 et seq., since the focus is not on the motivation, but rather on the justification of why the complainant was denied a reasonable amount of official time. Edwards, supra.

According to the record, in August 2015, Complainant began requesting and receiving official time to work on her EEO complaints. The record indicates that she was given two hours in September – August 2015. The record also contains a February 29, 2016 email from S1 to Complainant indicating that because she was unsure of how much official time she required, he was granting her three hours of administrative leave; and a March 7, 2016, email where S1 stated that he had granted Complainant eight hours of administrative leave for discovery in EEOC Hearing No. 551-2015-00220X. She was also granted between seven and eight hours to appear at her deposition concerning EEOC Hearing No. 551-2015-00220X; and was given time, on February 11, 2016, to participate in mediation. After S1 left, it appears that Complainant was granted official time, albeit, not always when or in the manner she requested it. For example, on August 10, 2017, she requested ten hours to prepare a response to an Agency discovery request regarding the present case. Although her new supervisor, A1, denied the request for that day, she noted that Complainant had 30 days to complete the request; therefore, she would grant her two hours a week to work on the matter. She was also granted four hours of official time for an August 15, 2017, status hearing with the AJ.

To the extent that S2 informed Complainant that official time would not cover responding to an agency's summary judgment motion, we find that this was in error; however, we find no support for Complainant assertion that she "had to take leave to work on her case responses," and "spent hundreds of hours" of her own time working on the cases. We find no evidence showing that Complainant took leave instead of official time regarding responding to the Agency's summary judgment motion. We find no documentation supporting such assertions; nor do we find objective support for her request for an award of 80 hours of leave to resolve her claim that she took leave, leave without pay, or used of her own time. We find that Complainant has simply not established that she was denied a reasonable amount of official time.

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 441 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). 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, 143 (2000); St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

To meet her ultimate burden of proving that the Agency's actions were discriminatory, Complainant needs to demonstrate such "weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the [Agency's] proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence." Evelyn S. v. Dep't of Labor, EEOC Appeal No. 0120160132 (Sept. 14, 2017).

Assuming, arguendo, Complainant established a prima facie case based on her sex, age, disability, genetic information, and reprisal, like the AJ, we find that the Agency articulated, legitimate, nondiscriminatory reasons for its actions as were set forth in detail above. At the outset, we find that Complainant has not provided any evidence that raises a genuine issue of material fact that discriminatory animus played any role in these matters.

With respect to issue 2, one method by which Complainant could have established pretext was by showing that the disparities in qualifications were of "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the [selectees] over [her] for the job in question." Cyrus A. v. Dep't of Agriculture, EEOC Appeal No. 0120150117 (Oct. 18, 2016) (quoting Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006)). Here, however, the record indicates that Complainant received a score of 78, while the selectees received scores of 131 and 112, respectively. Complainant argues that she was disadvantaged during the interview because management denied her request for full-time telework as a reasonable accommodation and instead provided her with leave with pay, which resulted in her not being in the office for most of the preceding year. The issue of whether Complainant was denied a reasonable accommodation when her request to telework full-time was not approved was addressed in EEOC Appeal No. 0720180004 (Nov. 15, 2018) when the Commission affirmed the dismissal of this matter because Complainant had previously raised the claim in a grievance filed under the Agency's negotiated grievance procedures. Moreover, the Commission found that, to the extent, Complainant was further alleging that the Agency failed to provide her with a reasonable accommodation for issues that were not the subject of prior grievances, Complainant failed to establish that the Agency did not provide her with an effective accommodation. Consequently, we will not revisit this issue in the decision herein.

We also find that Complainant did not raise a genuine issue of material fact that discriminatory animus played a role regarding issues 5, 6, and 7. Regarding issue 5, because she was out on leave from March 22, 2015 until mid-July 2015, management reassigned her projects to others. Upon her return, she was provided work, which included assignments that her coworkers had not yet completed. With respect to issue 6, Complainant's VLTP requests were not denied; however, she was required to use up her accrued leave before using the VLTP hours. Regarding the 39 hours of leave she raises on appeal, we find that even if this is considered part of the accepted claim, Complainant has failed to show that the 39 hours in question were anything but a nondiscriminatory error at worst by the Agency. Finally, regarding issue 7, Complainant's contracting warrant never expired or ceased being valid. According to Complainant, the Agency placed her in training classes, and she was able to obtain the hours needed to keep her warrant active.

Regarding Complainant's hostile work environment claim, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) that Complainant's claim of a hostile work environment must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). A finding of a hostile work environment is precluded by our determination that Complainant failed to establish that any of the actions taken by the Agency regarding issues 2, 5, 6, and 7 were motivated by discriminatory animus. See Oakley v. United States Postal Service, EEOC Appeal No. 01982923 (Sep. 21, 2000).

CONCLUSION

Accordingly, we AFFIRM the Agency's final order finding no discrimination regarding issues 2, 5, 6, and 7, and find that Complainant was not denied official time regarding issue 4.⁵ The Agency will comply with the Order set forth herein.

ORDER

Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$20,000 in nonpecuniary compensatory damages.

POSTING ORDER (G0617)

The Agency is ordered to post at its Northwest Mountain Region, Office of Finance and Management located in Des Moines, Washington 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 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.

⁵ The Agency did not issue a final action addressing the AJ's grant of summary judgment concerning issues 2, 4, 5, 6, and 7. According to our regulations, the AJ's decision, therefore, became the Agency's final order after 40 days of its receipt by the Agency. See 29 C.F.R. § 1614.109(i).

The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0620)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, Complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

November 18, 2020
Date