



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

[REDACTED]
Heidi E.,¹
Complainant,

v.

Andrew Saul,
Commissioner,
Social Security Administration,
Agency.

Appeal No. 2020002437

Hearing No. 550-2017-00399X

Agency No. SEA-16-0964-SSA

DECISION

Following its February 24, 2020, final order, the Agency filed a timely 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 an EEOC Administrative Judge's (AJ) finding of 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. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Complainant also filed a timely appeal following her receipt of the Agency's final order. On appeal, Complainant challenges the relief ordered by the AJ. For the following reasons, the Commission MODIFIES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked for the Agency as an Administrative Law Judge (ALJ) in Seattle, Washington.

Complainant was diagnosed with restrictive cardiomyopathy in 2004. She began working for the Agency as an ALJ in August 2011.

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.

Complainant stated she was diagnosed with asthma in 2015.

In late 2014, Complainant requested a parking space in the building as an accommodation for her condition. She provided a letter from her cardiologist (Doctor 1) dated November 26, 2014, in support of her request. The letter noted the history of Complainant's medical condition and her ultimate diagnosis of restrictive cardiomyopathy. The letter stated that Complainant took a number of medications and had a cardiac defibrillator implanted to treat her condition. The letter stated Complainant's condition was "permanent, chronic, and progressive" and noted she experienced "frequent arrhythmias, fatigue, edema, chest pain, nausea, loss of appetite and shortness of breath." The letter stated she required easily accessible parking to minimize the stress placed on her heart and to prevent further exacerbation of her condition.

Person A, Hearing Office Chief ALJ (HOCALJ), was Complainant's supervisor at the time and approved her parking request. After meeting with Complainant in December 2014, Person A informed Complainant of other possible accommodation (in addition to in-building parking) that might assist her in performing her job. Those accommodations included working from home for more days than permitted in the telework agreement.

At the time, Complainant was working from home two days per week in accordance with the relevant collective bargaining agreement. The record reveals that ALJs who teleworked were required to submit their six-month telework requests to the HOCALJ for approval. ALJs were required to provide their six-month calendars showing they would schedule a "reasonably attainable" number of cases.

On February 27, 2015, in connection with submitting her telework request for the period of April through September 2015, Complainant requested to continue her two telework days each week and to add a third telework day as part of the accommodations she was already receiving. Complainant stated given the nature of her condition her doctors advised it would be beneficial to telework an extra day, for several reasons including a reduction in stress and fatigue from the commute as well as a reduction in exposure to the germs and illnesses that were common in an office setting.

Person A forwarded Complainant's request to the Regional Attorney the same day it was submitted. Person A stated the request appeared to be reasonable and within the scope of her limitations as indicated by her treating health care providers and asked for guidance in responding.

The record contains a March 24, 2015 email from the Attorney Advisor to various Agency officials regarding Complainant's request of an "[a]dditional day per week of telework as a reasonable accommodation." The email noted the Office of the Seattle Regional Chief ALJ has reviewed Complainant's request to work-at-home an additional day per week for the period of April through September 2015, as a reasonable accommodation.

It was noted that on March 10, 2015, the Regional Office submitted Complainant's request, medical documentation, position description, and a draft approval memo by the Office of General Counsel (OGC) for advice as to whether Complainant was a qualified individual with a disability who could perform her duties at home and whose condition necessitated work-at-home. OGC reviewed the documentation and determined that because Complainant "can perform the essential functions of her position at home and because her condition necessitated work-at-home, the agency should grant this accommodation." The recommendation was to approve the request for one additional telework day per week for the period of April to September 2015.

The record contains a March 31, 2015 memorandum from Person A responding to Complainant's reasonable accommodation request. Person A noted that as a temporary accommodation pending a final decision on Complainant's request, he approved her additional day of telework on March 4, 2015, and she began working the additional day on March 5, 2015. The memorandum noted Complainant's November 26, 2014 letter from her cardiologist documenting her diagnosis of restrictive cardiomyopathy. The memorandum found Complainant was a qualified individual with a disability and that one additional day of telework per week would enable her to continue performing the essential functions of her job. Complainant was approved to telework one additional day per week through September 2015. She was informed her telework schedule could be revisited during subsequent enrollment periods.

For the next year and a half, Complainant continued to work from home three days a week and made use of the accessible parking spot when in the office. Complainant did not receive any performance-related counseling or discipline during this time.

In April 2016, Person B became the HOCALJ after transferring from the Agency's Dallas Office where he served as an ALJ. Complainant claimed that when she first met Person B he looked her up and down and stated incredulously "You're a judge?" Complainant stated that shortly after Person B became her supervisor, she went to explain to him that she needed to pay back advanced sick leave due to illness and he said he was glad that the issue with her heart was "resolved" and commented that she looked healthy and fine. Complainant stated that Person B asked, "what was it, tachycardia, or something?" Complainant noted on another occasion around the same time, Person B commented on her children's artwork and asked, "You have kids? And you're working full-time with young kids at home?"

Complainant stated in May 2016, Person B spoke to her about low productivity.

In May 2016, Person B spoke to Complainant about two bias complaints that were resolved in her favor.

In June 2016, Person B found two decision drafts that Complainant had sent to be rewritten by decision writers were legally sufficient.

Complainant stated on June 14, 2016, after a meeting, Person B came up behind her and rubbed her shoulders.

On August 16, 2016, Person B emailed Complainant noting he understood that Person C “approved a third day of telework for [her] each week in light of some medical issues.” Person B stated if Complainant planned to request continued telework over the next six-month period, he would like to “review” that issue and see whether it continues to be appropriate. Complainant was invited to provide medical evidence in support of the request if she wished to renew it.

In an August 18, 2016 reply, Complainant stated her “work at home is an accommodation that is part of the reasonable accommodations given to me while [Person A] was the HOCALJ.”

In a subsequent August 18, 2016 email, Person B stated that he still wanted to revisit the issue in connection with their next cycle of telework reviews.

Also, on August 18, 2016, Person B emailed the Regional Attorney and the Attorney Advisor noting Complainant has been teleworking three days a week since he arrived. He stated he thought Person C approved the arrangement, but Complainant now told him Person A did as part of a “reasonable accommodation.” Person B stated he would like to revisit the issue of a third day of telework because: (1) he has no idea what the medical issue is or whether such an accommodation is still warranted and (2) she is not very productive. Person B noted that the Chief Judge recently selected Complainant for an interview regarding her lack of productivity and as a result he asked her why she was turning in only 25 cases per month.

In an August 19, 2016 email, the Attorney Advisor informed Person B that Complainant was approved for three days of telework as a reasonable accommodation in March 2015. She noted that although Person A recommended approval, OCALJ (the Office of the Chief Administrative Law Judge in Falls Church, Virginia) is the DAO (DAO is not defined by the parties) for telework as a reasonable accommodation. The Attorney Advisor noted that they revisited the issue when Person C was Acting HOCALJ in Seattle and received guidance from ODAR (Office of Disability Adjudication Review) HQ regarding continuing approval. The Attorney Advisor stated that “HQ indicated that for [Complainant’s] ongoing requests for a third day of Telework as a RA, you do not need approval from OCALJ to approve it.” She noted Person B was able to approve the request based on the medical documentation Complainant provided in November 2014, if he believed it was sufficient to justify approval. Person B was informed alternatively he could engage in the interactive process if he felt he needed more current information and/or documentation from her. The Attorney Advisor forwarded the November 2014 doctor’s letter and the March 2015 accommodation approval to Person B who reviewed both documents.²

On August 24, 2016, Person B emailed all Seattle ALJs who telework, requesting their hearing schedules for the six-month period through March 2017.

² At his deposition, Person B claimed he reviewed a different doctor’s note than the one dated November 26, 2014. No evidence was provided that any other letter existed.

He stated the Agency was requiring teleworking judges to schedule 50 cases per month and that failure to do so may lead to withdrawal of telework approval.

On September 2, 2016, Complainant submitted her hearing schedule for the months of October 2016 – March 2017. Complainant stated the supplemental doctor's letter Person B requested would be forthcoming. Complainant's calendar scheduled an average of 44 cases each month for hearings, which consisted of 41 hearings in new cases and the rest being supplemental hearings in cases where she already had held a hearing.

Complainant subsequently submitted a letter from Doctor 1 dated September 2, 2016, stating her condition was chronic and progressive and noting it has not improved, nor is it expected to improve. The letter stated Complainant "require[s] the reasonable accommodations, including the ability to work from home 3 days a week as she has been doing for the past years. This will minimize any adverse effects of her health condition."

On September 9, 2016, the Chief ALJ sent an email which went to all ALJs listing her "Expectations for scheduling hearings." The Chief asked "EVERY judge to schedule hearings generally in the range of an average of 45-50 hearings per month. Those not yet scheduling an average of 45-50 cases a month, were asked to increase their dockets. For those judges who were teleworking, the Chief stated she was going to advise HOCALJs for the October 2016 to March 2017 period, an average of 45-50 scheduled hearings a month would be considered "reasonably attainable." The Chief noted she would remind HOCALJs to consider all extenuating circumstances in considering their telework requests. In a previous memorandum the Chief ALJ gave examples of extenuating circumstances including whether an ALJ is on a learning curve, is in a training program, or has been on extended leave. Management could also consider an ALJ's postponed hearings or heard-to-scheduled ratios.

On September 12, 2016, Person B contacted the Regional Attorney and the Attorney Advisor regarding Complainant's request for reasonable accommodation. Person B noted that Complainant has submitted a telework request for the upcoming period that proposes to schedule an average of 41 cases per month, and argues this is all she can do in light of her heart condition. Person B stated he is considering disapproving telework unless she schedules 45 cases per month, and this would result in the elimination of the third day of telework granted as an accommodation. Person B noted that Complainant gave him a "short letter" that same day from her physician stating she needs three days of telework per week because of her heart condition.

On September 13, 2016, Person B again contacted the Regional Attorney and the Attorney Advisor regarding Complainant's telework request. Person B noted that Complainant claimed the three days of telework have enabled her to perform the essential functions of her position; however, he stated she is not doing that, even with her accommodation. Person B stated Complainant's most recent Doctor's letter "does not strike me as very persuasive." Person B drafted an email for the Regional Attorney and the Attorney Advisor to review. In the draft, he stated the temporary accommodation approved by Person A in 2015 does not appear to have been made permanent.

Person B noted Complainant scheduled only 41 cases per month which is below the expected 45 cases per month. He also stated Complainant had a low productivity/scheduled-to-heard ratio which argued against continued approval of telework. Person B stated that if Complainant wanted to continue to telework, he expected her to schedule at least 45 cases per month and to issue decisions in the great majority of those cases so her resolve rate increases.

On September 13, 2016, the Attorney Advisor made proposed changes to Person B's draft and sent supporting documentation, including an email discussion between Person A and Complainant regarding her request for a third day of telework. Among the proposed changes was language informing Complainant that she could submit updated medical documentation to support her request for a third day of telework, to include current clinical status and prognosis, any restrictions on her work, and why telework for three days a week as an accommodation is necessary.

Complainant stated that on September 14, 2016, Person A told her that Person B spoke to him about her accommodations with the office door open.

On September 14, 2016, Person B brought Complainant into his office after reviewing her medical documentation. Complainant stated he held a conversation with her with his door open, in plain view of others walking by his office. Complainant stated he questioned whether she was a qualified individual with a disability and asked whether her time at the U.S. Attorney's Office was as a "clerk." She previously served as an Assistant U.S. Attorney (AUSA).

On September 15, 2016, Person B emailed the Attorney Advisor and the Regional Attorney another draft email. He removed the Attorney Advisor's proposed "interactive language" and said, "I think we should push the RA issue down the road and just deal with telework."

On September 16, 2016, Person B emailed Complainant and stated he was not trying to revisit the determination that she was a disabled individual who needed accommodation. Rather, he said he wanted to discuss the accommodation that she needs. Specifically, he stated that "[b]ecause telework is tied to productivity, and because your accommodation also involves telework, I wanted to discuss your productivity and telework." He noted that the supplemental hearings Complainant proposed to schedule did not count because they were not "new cases" and "may or may not be used." Person B stated that he did not consider Complainant's heart condition to be an extenuating circumstance that would excuse her from scheduling 45-50 cases per month. He stated that if she wanted to continue teleworking, she would need to schedule at least 45 cases per month. Person B also noted that Complainant needed to increase productivity to continue teleworking. Person B stated that if he approved continued telework for her, they could revisit her need for three days per week of telework as a reasonable accommodation at some later time. He stated if she adhered to her calendar of 41 cases per month and he withdrew approval to continue teleworking, they would address whether some other accommodation would be appropriate.

In a response the same day, Complainant agreed to change her supplemental hearings to regular hearings which would give her an average of 44.83 hearings. Complainant responded that she believed that her accommodation of working at home three days per week has not been rescinded.

Person B replied that he agreed that with the change to regular hearings, her ability to telework three days a week remained intact.

Complainant stated on September 16, 2016, ALJ 1 told her that Person B told him that he had never seen Complainant “breathing hard” and was “stuck” on her reasonable accommodation request. ALJ 1 also told Complainant that Person B was discussing her disabilities with Person A.

On November 16, 2016, Complainant had to leave work immediately for health reasons and Person B did not immediately respond to her request. The Acting Regional Chief Administrative Law Judge (RCALJ) approved Complainant’s leave request on November 16, 2016.

Complainant claimed Person B questioned her need for canceling/postponing hearings and the reasons she recused herself from cases.

On December 7, 2016, Person B emailed Complainant advising that he forwarded her physician’s letter proposing three days of telework as an accommodation and to his knowledge that letter has not been acted upon yet. He stated he would “ask [the Regional Attorney] to follow up on the matter so a decision can be made by the folks who handle accommodations.”

On December 16, 2016, Person B sent an email to several ALJs, including Complainant with the subject “seriously delinquent cases.”

Complainant stated that during the remainder of 2016 and throughout 2017, Person B avoided her in the office. She stated that she observed him frequently turning and walking in a different direction if he saw her coming.

Procedural History

Complainant filed an EEO complaint dated November 3, 2016, which the Agency defined as alleging:

1. Whether the Agency subjected Complainant to discrimination based on disability when, on September 16, 2016, she received an email from the HOCALJ stating that she was no longer permitted to work a third day of telework, which changed her previously approved reasonable accommodation.

2. Whether the Agency subjected Complainant to non-sexual harassment (hostile work environment) based on disability when, from September 16, 2016, and ongoing, in terms of working conditions, assignment of duties, and failure to accommodate.
3. Whether the Agency subjected Complainant to harassment (sexual) based on disability when, on June 14, 2016, the HOCALJ came up behind her and started rubbing her shoulders.

The Agency accepted claims (1) and (2) for further processing. The Agency dismissed claim (3) for untimely EEO Counselor contact. Specifically, the Agency noted that Complainant did not contact an EEO Counselor until September 16, 2016, which was beyond the applicable 45-day regulatory period for the matter alleged to be discriminatory in claim (3).

At the conclusion of the investigation on the accepted claims, 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). Complainant requested a hearing. The case was assigned to AJ1. While the case was pending, Complainant filed a Motion to Amend to include the basis of reprisal and to add an incident to her hostile work environment claim concerning the December 16, 2016 email she received from Person B.

In an April 24, 2018 Order Granting Motion to Amend, AJ1 noted the issues in the case are: whether the Agency discriminated against Complainant on the basis of disability (failure to accommodate) when her supervisor: (1) changed her telework schedule on September 16, 2016; and (2) allegedly subjected her to a hostile work environment regarding work conditions, assignments, and her accommodation from September 16, 2016, and ongoing. AJ1 noted Complainant sought to amend her complaint to add reprisal as a basis and to add another incident of harassment in the form of an e-mail from her supervisor dated December 16, 2016. AJ1 granted Complainant's Motion to Amend and ordered the Agency to add claim (3): Whether the Agency discriminated against Complainant on the basis of disability or reprisal for prior EEO activity by subjecting her to disparate treatment, a hostile work environment, or by failing to accommodate her disability when her supervisor issued her an email on December 16, 2016.

Following the completion of discovery, in September 2018, the Agency filed a Motion for a Decision Without a Hearing. Complaint responded and requested leave to file a Motion for a Decision Without Hearing. The Agency objected. Thereafter, the case was reassigned to AJ2. AJ2 granted Complainant leave to file a Motion for a Decision without a Hearing. Complainant filed a Motion for Summary Judgment on March 18, 2019. The Agency filed a response on April 5, 2019, and Complainant filed a reply on April 12, 2019.

Decision on Summary Judgment

On April 23, 2019, AJ2 issued an Order granting summary judgment in Complainant's favor on all issues but her reprisal claim. With regard to the reprisal claim, AJ2 found Complainant did not establish a prima facie case of reprisal discrimination.³

Disability and Accommodation

AJ2 found Complainant established she was a qualified individual with a disability. AJ2 noted there was no dispute Complainant has a serious chronic heart condition, in addition to asthma. AJ2 found Complainant was qualified and noted the number of cases that she scheduled and resolved was consistent with her peers, and she was never counseled or disciplined for performance issues until Person B became her supervisor.

AJ2 acknowledged the Agency argued that Complainant was raising a claim under the Privacy Act, over which the EEOC does not have jurisdiction. However, AJ2 noted the Rehabilitation Act also protects the confidentiality of employee medical information. AJ2 determined Person B was given access to Complainant's medical diagnoses when he did not have a need to know that information. AJ2 stated if Person B was tasked with determining whether Complainant should continue to receive reasonable accommodation, he should have only received information regarding her work restrictions and not specific information about her medical diagnosis. AJ2 noted that Person B received a November 2014 letter from Complainant's doctor which included Complainant's diagnosis and detailed medical history. Person B then requested updated medical information to support Complainant's continued telework accommodation. AJ2 found the request itself not problematic; however, she found the specific medical information should not have been handled by her supervisor, but by the Agency's HR or Reasonable Accommodation department/team. AJ2 stated Complainant's supervisor should then have only been given access to information regarding Complainant's work restrictions resulting from her serious medical condition.

Moreover, AJ2 found that once Person B received the information about Complainant's medical condition, he discussed it with her coworkers. AJ2 found the "disclosure of her medical information was doubly improper, as it both disclosed [Complainant's] medical information and made clear to coworkers that HOCALJ [Person B] did not believe [Complainant] was truly disabled and entitled to accommodation." AJ2 found these *per se* violations of the Rehabilitation Act.

³ AJ2 noted that Complainant identified additional allegations of reprisal that took place after the December 2016 email. However, AJ2 noted those facts are not before her and are the subject of a second EEO complaint that is still being investigated by the Agency. Thus, AJ2 declined to consider these additional facts.

AJ2 also found the accommodation of three days per week of telework was reasonable and effective, as Complainant was able to meet the essential functions of her position successfully for over a year and a half. AJ2 found it “was an illegal removal of accommodation for HOCALJ [Person B] to tell [Complainant] he was removing her accommodation and then to condition Complainant’s reasonable accommodation upon scheduling more hearings.” AJs found that by requiring Complainant to schedule 45 hearings per month in order to telework, he disregarded her reasonable accommodation and treated her the same as other teleworking ALJs.

Further, AJ2 found Person B treated Complainant worse than her peers based on her disability. Specifically, AJ2 found Person B required Complainant to schedule more hearings in order to retain her reasonable accommodation; failed to “count” her supplemental hearings, when he did so for others; subjected Complainant to heightened scrutiny in terms of her telework schedule and meeting her number “goals;” and spoke with Complainant’s coworkers about her disability and his impressions of whether she had a disability. AJ2 noted that Complainant’s coworkers indicated that Person B was “laser focused” on Complainant, her disability, and on removing her telework accommodation. Further, AJ2 noted Person B spoke with Complainant about her medical condition in areas where coworkers could overhear the conversation. AJ2 noted the burden then shifted to the Agency to show it had legitimate, nondiscriminatory reasons for its actions.

Harassment

AJ2 noted Person B made several statements to Complainant and about Complainant regarding her disability. He told her she looked “fine” and healthy. He told another ALJ that he had never seen Complainant “panting” and questioned whether she had a disabling condition. He discussed her medical condition with her while his door was open in full view of other employees. He remarked to other attorneys that he did not find Complainant’s doctor’s note to be “persuasive.” He repeatedly informed Complainant he did not think her reasonable accommodation was necessary or justified and indicated he intended to revoke her reasonable accommodation. AJ2 noted these events occurred over many months. AJ2 found these events alone were enough to create a hostile work environment - as for months she was unsure whether she would be able to continue working with accommodation. Further, AJ2 stated that “[f]ear of losing her telework accommodation would likely have negated her ability to work at all.”

AJ2 noted that Person B also made other comments to Complainant questioning her capability and credentials. He asked whether she was a judge at all in their first meeting. He questioned whether her time at the DOJ was as a clerk, rather than presuming that she was an AUSA, as she was. He questioned her decision to work ‘full-time’ while she had ‘young children at home.’” AJ2 noted Complainant did not allege sex as a basis for harassment, however, AJ2 found the facts support a finding of sex-based harassment.

Agency Burden/Pretext

AJ2 found that although the Agency had legitimate, nondiscriminatory reasons for some of its actions, Complainant proved the actions were pretext for discrimination.

Damages

Thereafter, AJ2 scheduled and held a hearing on damages. AJ2 issued a Decision on Damages After Hearing on December 9, 2019. Complainant filed a Request for Clarification or Reconsideration of Decision on Damages After Hearing. The Agency filed its Response to Complainant's Request for Clarification.

On January 14, 2020, AJ2 issued a Decision on Damages After Hearing, With Clarification. AJ2 awarded Complainant all reasonable attorney's fees and costs to which she may be entitled. AJ2 awarded Complainant \$250,000 in nonpecuniary, compensatory damages and \$3,750 in pecuniary damages. The Agency was ordered to pay Complainant the equivalent of what it would have paid in Thrift Savings Plan (TSP) contributions for two years and also pay her earnings on those contributions based on a reasonable rate of return. Additionally, AJ2 found the Agency liable for a loss of earning capacity for a period of two years. AJ2 noted this amount would be limited by the \$300,000 compensatory damages cap. AJ2 ordered the Agency to reimburse Complainant for 240 hours of advanced leave. AJ2 declined to award Complainant damages equal to the amount of pay she received in donated leave or reimbursement for Leave Without Pay (LWOP). AJ2 ordered the Agency to conduct training for managers, supervisors, and Human Resources personnel within its Seattle Office and to post a notice at all facilities within the authority of the Seattle Office.

The Agency subsequently issued a final order on February 24, 2020, rejecting AJ2's finding that Complainant proved that the Agency subjected her to discrimination based on disability.

CONTENTIONS ON APPEAL

On appeal, the Agency argues that AJ2 erroneously concluded that it subjected Complainant to disability discrimination based on failure to accommodate, disparate treatment, and a hostile work environment. The Agency also claims AJ2 improperly ruled on issues not accepted for investigation or added to the complaint via amendment. Additionally, the Agency challenges the damages awarded to Complainant.

Regarding her reasonable accommodation claim, the Agency argues that AJ2 improperly concluded Complainant was qualified and could perform the essential functions of her position. Additionally, the Agency argues AJ2 disregarded its evidence showing it never denied or modified Complainant's telework as a reasonable accommodation.

Regarding the claim of hostile work environment based on disability, the Agency argues that AJ2's findings consist of Complainant's subjective statements and the opinion evidence she submitted in the form of witness affidavits. The Agency notes AJ2 found that the alleged comments by Person B were sufficient to create a hostile work environment because, "for months," Complainant "was unsure whether she would be able to continue working with accommodation." However, the Agency stated the evidence shows otherwise.

Regarding the confidentiality of medical information, the Agency argues that AJ2 erroneously found that the relevant regulation meant that, as a supervisor/member of management, Person B's access to Complainant's confidential medical information was limited to her work restrictions. The Agency notes the regulation states that supervisors and managers may be informed of an employee's work restrictions and accommodations, but it does not state that they may access *only* that information or that they are prohibited from knowing other confidential medical information, including diagnoses. The Agency argues that as Complainant's supervisor, Person B had primary responsibility for processing her request for a reasonable accommodation. The Agency states therefore Person B properly gained access to the doctor's letter listing Complainant's medical condition for which she sought the accommodation and there was no violation.

In addition, the Agency argues AJ2 improperly added sex as a basis for the claim of harassment even after noting that it was not pleaded by Complainant. The Agency also argues that AJ2 improperly expanded the scope of Complainant's claim of disparate treatment based on disability when she considered incidents beyond the December 16, 2016 email. The Agency argues that because neither the hostile work environment based on sex claim nor the disparate treatment based on disability claim were accepted issues, the Agency has not had the opportunity to investigate either claim. The Agency notes its investigation of the disparate treatment claim based on disability was limited to the December 2016 email from Person B, as ordered by AJ1. The Agency argues it could not anticipate the need to investigate and respond on the merits of issues not accepted as part of the complaint.

Regarding relief, the Agency argues AJ2 failed to recognize that many medical records show Complainant's emotional state was largely intact during and after the events at issue, calling into question the accuracy of her allegations at the hearing. Further, the Agency states that to the extent Complainant experienced mental difficulties, numerous other events in her life contributed to her emotional state, including grappling with chronic physical impairments, undergoing a separate disciplinary matter at work, and facing bias complaints in federal court.

Additionally, the Agency argues that Complainant is not entitled to money for loss of future earning capacity because she failed to prove that Person B's conduct in 2016 caused her to stop working in mid-2018. Rather, the Agency states that Complainant's medical providers stated she had to stop working due to her heart condition and lupus, without any mention of emotional difficulties.

The Agency also argues that other events such as family issues, bias complaints against Complainant, and pursuing litigation on her EEO complaint also impacted Complainant's emotional state. The Agency also claims it is not responsible for the harm experienced as a result of the lupus and other physical impairments Complainant experienced.

Finally, the Agency argues AJ2 erred by awarding Complainant damages for advanced sick leave, copayments for medication, and TSP payments. Specifically, the Agency states Complainant has not shown that Person B's conduct in 2016 caused her to take advanced sick leave or buy antidepressants. The Agency claims there were multiple intervening factors that broke the causal connection in this case.

Complainant filed an appeal from the Agency's final order. Complainant noted that she was not challenging AJ2's finding that she did not establish a prima facie case of reprisal. Complainant appealed AJ2's decision to limit her front pay award to the \$300,000 damages cap and to categorize it as "lost earning capacity" and also filed a reply to the Agency's appeal.

Complainant notes that she made initial contact with an EEO Counselor in September 2016, after Person B threatened to remove her reasonable accommodation if she did not schedule more hearings, openly discussed her medical conditions with others in the office, and questioned her status as a disabled person because she did not "look disabled" to him, among other incidents. Complainant notes she reported several incidents where Person B engaged in gender discrimination and sexual harassment, which she states were investigated on a separate track and ultimately dismissed as outside the 45-day period.

Complainant claims that in December 2016, the Agency notified her it would investigate her disability discrimination claims, both disparate treatment and failure to accommodate, and her "ongoing" hostile work environment claim based on disability.

Complainant states it is undisputed that she is a person with a disability who the Agency successfully accommodated prior to Person B's tenure. Complainant states it is undisputed that after Person B became the HOCLAJ in 2016, he reviewed the March 2015 Memorandum and her doctor's November 2014 letter. Complainant notes that when confronted with the letter at deposition, Person B repeatedly insisted that he reviewed a different doctor's note; however, the only doctor's note she submitted in 2014 is the November 26, 2014 letter.

Complainant states she performed the essential functions of her position with reasonable accommodation. She claims that after receiving her September 2016 doctor's note, which specifically stated that she required the reasonable accommodation of working from home three days per week, Person B continually refused to acknowledge that all three days were an accommodation. Complainant states that Person B asserted that only her third day of telework was the accommodation, and that the first two days were governed by the union contract. Complainant notes that no one followed up with her to tell her that her accommodation changed from having the first two days governed by the union contract and the third day as a reasonable accommodation, to having all three days considered a reasonable accommodation.

Additionally, she argues AJ2 properly rejected the Agency's argument that Person B only threatened to remove Complainant's reasonable accommodation and that when she agreed to schedule a minimum of 45-hearings per month to retain her right to a reasonable accommodation, Person B continued to allow her to telework.

Complainant states that AJ2 acted appropriately and within her discretion to issue a decision without a hearing because the Agency is unable to rebut the strong evidence of disability discrimination, failure to accommodate, and hostile work environment presented by Complainant.

Regarding the Agency's argument that AJ2 expanded the scope of the accepted issues, Complainant notes the Agency cites AJ1's Order on Complainant's Motion to Compel as evidence that the three accepted issues be "limited to the same supervisor, [Person B], and to the time period between September 2014 and December 2016." However, Complainant states by citing this Order, the Agency creates unnecessary confusion because Person B did not come to the Seattle Office until 2016. Complainant states AJ1's Order on discovery did not alter the issues accepted for review. Complainant contends she has always maintained a disparate treatment disability claim as well as a failure to accommodate claim. She states the issues accepted for review were clearly identified in the ROI, and AJ1 amended those issues to add a reprisal claim.

Complainant states AJ2 correctly determined that the Agency subjected her to a hostile work environment based on disability. Complainant states over the course of two years, Person B created a hostile work environment related to her disability. She claims he started belittling her heart condition and stating that she looked "healthy," thus implying that because she looked healthy, she must be healthy. Complainant states Person B questioned her status as an individual with a disability openly to Person A, which he admitted in his deposition. Complainant also states that by speaking openly and publicly with Person A and ALJ1 about her medical condition, Person B caused her embarrassment and created an environment of hostility based on her disability.

Regarding her claim that she was subjected to a hostile work environment based on sex, Complainant explains that the Agency investigated that claim on a separate track. However, the claim was ultimately dismissed as outside the 45-day complaint period. Complainant argues AJ2 properly found that she produced sufficient evidence to assert a prima facie case for a hostile work environment based on sex.

Regarding her claim for relief, Complainant states AJ2 properly concluded that she was a "resilient person" prior to the stress, anxiety, humiliation, panic, and fear that she experienced as a result of Person B's discrimination and harassment. Complainant notes the AJ found that Person B's "harassment and discrimination set into motion what Complainant aptly described as a snowball effect of depression, anxiety and fearfulness for herself. HOCALJ [Person B's] harassment included a combination of second-guessing her as attorney, subjecting her to heightened scrutiny far above and beyond his treatment of his peers, minimizing Complainant's

serious medical condition and discussing her confidential medical information with her peers, and his persistent threat to remove her reasonable accommodation if she did not meet his production standard numbers.”

Complainant argues that substantial evidence supports the AJ’s decision on compensatory damages. She claims that the other factors in her life that caused emotional harm were addressed at the hearing through direct- and cross-examination and appropriately weighed by the AJ in reaching her decision.

Complainant states that her economic losses and her emotional harm caused by Person B’s discrimination and harassment are intertwined. She states that because of Person B’s discrimination, including his failure to accommodate her disability and the hostile work environment he created, she was forced to take medical leave as of August 20, 2018. Complainant notes she used her accumulated sick and annual leave, a significant amount of donated leave, advanced sick and annual leave, and leave without pay. Complainant notes that she stopped receiving a paycheck in early August 2019. She states that as of the date of the hearing, she had taken approximately 270 hours as leave without pay. Complainant states she applied for medical retirement in September 2019.

Complainant notes she requested front pay economic damages under a constructive discharge theory, arguing that Person B’s discrimination and harassment created a work environment where no reasonable person would continue. She states she requested front pay damages through retirement at age 62.

Alternatively, she states she sought recovery for loss to her work-life expectancy, which was different than “lost earning capacity.” Complainant argues that based on the testimony from her cardiologist (Doctor 2), her “work-life was shortened by at least two years.” Complainant states she hopes to make a full recovery, but at the time of the hearing, she had exhausted her leave options and was taking Family Medical Leave Act (FMLA) as leave without pay. She states she did not present economic damages as “lost earning capacity” in terms of “her ability in the future to earn a salary comparable with what she earned before the injury.” Complainant avers that she will likely never return to the same salary, in addition to the fact that her work-life expectancy is now shortened because of Person B’s discrimination and harassment.

Complaint claims the Agency knew how to accommodate her disabilities and did so effectively prior to Person B’s tenure. She states after Person B became her supervisor, he failed to accommodate her disabilities, discriminated against her based on her disability, and created a hostile work environment. She states if the Agency had intervened in September 2016, when she first made EEO Counselor contact, the evidence shows she would be working today. Instead, she states, the Agency allowed Person B’s conduct to persist for two more years until she was forced to take medical leave. Complainant requests an award of back pay, with interest, “due to the Agency’s failure to accommodate from the date of the discrimination up until the date this decision becomes final” and front pay for two years into the future.

ANALYSIS AND FINDINGS

I. Summary Judgment Decision on the Merits

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”).

At the outset, we note that neither party challenges AJ2’s finding that Complainant failed to establish a prima facie case of reprisal discrimination. Accordingly, we do not address Complainant’s claim of reprisal discrimination in this decision.

Confidentiality of Medical Information

Under the Rehabilitation Act, information “regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.” 29 C.F.R. § 1630.14(c)(1); see 42 U.S.C. § 12112(d)(4)(C). This requirement applies to all medical information, including information that an individual voluntarily discloses. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000). Employers may share confidential medical information only in limited circumstances: (i) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (ii) first aid and safety personnel may be told if the disability might require emergency treatment; and (iii) government officials investigating compliance with the ADA and Rehabilitation Act must be given relevant information on request. 29 C.F.R. § 1630.14(c)(1).

In the present case, it is undisputed that on August 19, 2016, when the Attorney Advisor forwarded to Person B both the November 26, 2014 letter from Complainant’s doctor and the March 31, 2015 memorandum from Person A, both documents included references to Complainant’s medical history and diagnosis. Although supervisors and managers may be informed regarding necessary restrictions and accommodations needed by the individual in question in compliance with 29 C.F.R. § 1630.14(c)(1)(i), here there is no dispute that in addition to describing Complainant’s restrictions, the Attorney Advisor informed Person B that Complainant has “restrictive cardiomyopathy.”

The Agency is correct that under 29 C.F.R. §1630.14(c)(1)(i) supervisors and managers may be informed of an employee's work restrictions and accommodations, and this does not state that they may access *only* that information or that they are prohibited from knowing other confidential medical information, including diagnoses. However, we find in the present case, the Agency has not shown that at the time of the disclosure that Person B had a need to know Complainant's diagnosis. Although the Agency claims that Person B had primary responsibility for processing Complainant's request for a reasonable accommodation and therefore properly gained access to Complainant's medical diagnosis for which she sought the accommodation, we note that in his deposition, Person B stated that he "didn't participate in granting or dealing with actual accommodation requests." Rather, he stated the decision whether to grant an accommodation was "made at high levels. I was never called upon. I don't think I ever would have been called upon to grant or deny an accommodation." Thus, we find there is no exception to the confidentiality provisions of the Rehabilitation Act which permits the release of an individual's medical diagnosis to a supervisor under the present circumstances. Forde v. United States Postal Service, EEOC Appeal No. 01A12670 (October 9, 2003), req. for recons. den., EEOC Request No. 05A40196 (February 5, 2004). Accordingly, in this instance we find the Attorney Advisor's disclosure of Complainant's medical diagnosis violated the Rehabilitation Act's prohibition against the release of confidential medical information.

Additionally, Complainant claimed that Person B improperly spoke to ALJ1 and Person A about her medical information. In his affidavit, ALJ1 noted he was the union representative for the office and that sometime late in the summer of 2016, he was discussing office wide scheduling of cases with Person B and the conversation shifted to a discussion of judges Person B felt were not scheduling enough hearings. ALJ1 noted Person B stated he did not think Complainant's reasonable accommodation of an extra day of telework was "medically necessary" because he did not see physical evidence of her condition. ALJ1 stated Person B mentioned Complainant's cardiac issues and breathing problems, but said he did not know how severe they were. ALJ1 said he was already aware of Complainant's medical conditions because Complainant had discussed them with him; however, he did not know if Person B knew he was aware of those conditions. ALJ1 said that he also told Complainant that Person B was discussing Complainant's medical condition with Person A.

In his deposition, Person A stated that he never had a discussion about Complainant, her impairment, or her reasonable accommodation with Person B.

In his deposition, Person B was asked if he spoke with ALJ1 about Complainant's disabilities and he stated he did not remember such a conversation. When asked if he spoke to Person A about Complainant's disabilities, he stated Person A was the HOCALJ when the accommodation was initially approved and the letter they had from the doctor did not say that she needed a third day of telework at that time. Person B noted he asked Person A how the transition had been made to the third day of telework as a reasonable accommodation. He stated that Person A did not remember and that was the end of the conversation.

Upon review, we find Person B improperly disclosed confidential medical information to ALJ1.⁴ We find there is no evidence that Person B knew that ALJ1 was aware of Complainant's medical diagnosis prior to the date in question and that as a supervisor he should not have disclosed confidential medical information, absent one of the valid reasons in 29 C.F.R. § 1630. In the present case, the Agency did not show that Person B's disclosure to ALJ1 fell within one of the exemptions specifically permitted. However, we find that there is no persuasive evidence that Person B improperly disclosed confidential medical information to Person A.

Denial of Reasonable Accommodation

We find AJ2 improperly determined that the Agency denied Complainant a reasonable accommodation. While the record reveals that Person B questioned Complainant's need for telework as a reasonable accommodation and informed her he was considering ending her ability to telework, he never actually removed her accommodation. We note the record contains a September 16, 2016 email in which Complainant stated, "I believe that my accommodations for working at home three days has not been rescinded by anything you have stated in your email." In response, Person B stated, "I agree that your telework three days a week remains intact." The record reveals Complainant continued to telework three days per week until she began a period of extended leave in August 2018. Additionally, we note Complainant was never required to perform more work in order to receive her requested accommodation of three days of telework per week. Furthermore, the record reveals Complainant was not counseled or disciplined for performance issues during the period at issue. Upon review, we find Complainant did not establish that the Agency denied her reasonable accommodation for her disability.

Disparate Treatment Based on Disability

AJ2's decision found Person B subjected Complainant to discrimination based on her disability by treating Complainant differently and worse than her peers. Specifically, AJ2 found Person B required Complainant to schedule more hearings in order to retain her reasonable accommodation; failed to "count" her supplemental hearings, when he did so for others; subjected Complainant to heightened scrutiny in terms of her telework schedule and meeting her number "goals;" and spoke with Complainant's coworkers about her disability and his impressions of whether she had a disability. AJ2 noted that Complainant's coworkers indicated that Person B was "laser focused" on Complainant, her disability, and on removing her telework accommodation. Further, AJ2 noted Person B spoke with Complainant about her medical condition in areas where coworkers could overhear the conversation.

Upon review, we find AJ2 misdefined Complainant's claim of disparate treatment based on disability. The Agency originally accepted Complainant's claims of failure to accommodate and harassment based on disability (and dismissed Complainant's claim of sexual harassment).

⁴ Because Person B is deceased we will not order any remedy specifically referencing Person B.

While her complaint was pending a hearing, AJ1 granted her motion to amend and added a third claim defined as: “[w]hether the Agency discriminated against the [C]omplainant on the basis of disability or reprisal for prior EEO activity by subjecting her to disparate treatment, a hostile work environment, or by failing to accommodate her disability when her supervisor issued her an e-mail on December 16, 2016.” Per this Order, AJ1 added a claim of disparate treatment based on disability *only* with regard to her allegation that Person B discriminated against her in connection with the December 16, 2016 e-mail. There was never an order issued modifying or vacating AJ1’s Order defining the claims.⁵

Moreover, we note that in both her Complainant’s Motion for Summary Judgment and in Complainant’s Response to Agency’s Motion and Brief in Support of Summary Judgment, Complainant defined the issues for review to include discrimination based on disability when: (1) she received the September 16, 2016 e-mail changing her previously approved accommodation, (2) she was subjected to harassment/hostile work environment from September 16, 2016, and ongoing, and (3) she was subjected to disparate treatment, a hostile work environment, or failure to accommodate when her supervisor issued her an e-mail on December 16, 2016. Complainant never defined her complaint as alleging the additional disparate treatment claims identified in the AJ’s decision. Upon review, we find those claims were not part of the complaint accepted by the Agency or as defined by any AJ orders during the processing of Complainant’s complaint and thus, were improperly considered in AJ2’s summary judgment decision.

Rather, the only disparate treatment claim properly before AJ2 involved the December 16, 2016 email. On December 16, 2016, Person B sent an email to several ALJs, including Complainant, with the subject “seriously delinquent cases.” Person B stated he was writing to judges who had either a very large number of cases in ALPO (a judge-controlled status), a reasonably large number of cases in ALPO that have been there for more than 60 days, a small number of fee petitions that have been in their offices without action for several months, or a combination of any of those. Person B noted he hoped this “gentle reminder” would get cases moving without the need to issue memos or directives. Complainant acknowledged that she had some fee petitions that needed to be issued.

⁵ We note the record contains AJ1’s “Order Re: Discovery” dated May 7, 2018, limiting several discovery requests to only Person B for the time period of September 2014 and December 2016. However, we note that this was issued approximately two weeks after the AJ1’s April 24, 2018 Order Granting Motion to Amend which defined the issues in the case as failure to accommodate when Complainant’s supervisor changed her telework schedule on September 16, 2016, and a hostile work environment claim from September 16, 2016, and going. We find the September 2014 date appeared to be a typo given the September 2016 date listed in the April 24, 2018 Order and the fact that Person B did not begin working as the HOCALJ until April 2016.

Thus, the Agency presented legitimate, nondiscriminatory reasons for including Complainant in the email. Complainant failed to meet her burden of showing that the Agency's actions were based on discriminatory animus on her disability.⁶

Hostile Work Environment Based on Sex

In her decision, AJ2 stated, "Complainant did not plead sex as a basis for a claim of harassment, however, I find the facts support such a finding of sex-based harassment/hostile work environment." Upon review, we note the record reveals Complainant did plead sex-based harassment in her original complaint regarding *one* incident when she alleged on June 14, 2016, Person B came up behind her and started rubbing her shoulders. The Agency dismissed Complainant's sex-based harassment claim for untimely EEO Counselor contact. We agree this incident was properly dismissed pursuant to 29 C.F.R. §1614.107(a)(2) for untimely EEO Counselor contact. Complainant did not raise this incident with an EEO Counselor until September 16, 2016, which was beyond the 45-day time limit.

We note that an AJ never found Complainant's sex-based harassment claim timely. Additionally, while the case was pending before AJ1, in his May 7, 2018 "Order Re: Discovery" he sustained the Agency's objection to a discovery request noting "gender is not an accepted claim in this case." Further, Complainant never moved to amend her complaint to include any of the sex-based allegations identified in AJ2's summary judgment decision. Therefore, we find that sex-based harassment is not part of the present complaint. Even if her complaint was based on sex, we find no persuasive evidence that Complainant was harassed on the basis of her sex. Moreover, even if the Agency's actions were based on sex, we find they do not rise to the level of a hostile work environment.

Hostile Work Environment Based on Disability

With regard to Complainant's hostile work environment claim, to establish a claim of hostile environment harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

⁶ Complainant also alleged the December 16, 2016 email was issued in reprisal for her protected EEO activity; however, AJ2 found no discrimination based on reprisal. Complainant did not challenge that finding on appeal, and thus, we do not address that basis here.

As an initial matter, we note that the complaint as defined consists of a claim that the Agency subjected Complainant to a hostile work environment on the basis of disability from September 16, 2016, and ongoing in terms of working conditions, assignments of duties, and failure to accommodate. While Complainant requested the Commission “look to the time period 45-days prior to [her] first EEO contact on September 16, 2016, and ‘ongoing’ through at least the end of discovery, which was August 6, 2018,” there is no indication that an AJ formally expanded the date of her hostile work environment claim to start prior to September 16, 2016. Thus, we find the incidents which pre-date September 16, 2016, will only be considered as background information and do not comprise part of her actual hostile work environment claim on the basis of disability.

Further, we note that Complainant’s claim regarding the December 16, 2016 email will not be considered as evidence supporting her harassment claim as we have already determined that Complainant’s disability was not a factor in this action.

Upon review, we find that Complainant failed to provide sufficient evidence to support her claim of a hostile work environment based on disability. Complainant stated that a couple days after Person B’s September 14, 2016 email, she met with him and he stated he wanted to talk about her heart condition and proceeded to do so with the door open. Complainant claimed that Person B belittled her heart condition by asking her, “What’s wrong with you again? Tachycardia or something like that?” Complainant also stated Person B asked her about her prior employment with the U.S. Attorney’s Office, stating he was surprised to hear that she had worked there. Complainant claimed that Person B asked if she had worked there as a clerk and she replied that she was an Assistant U.S. Attorney. We note Complainant does not claim that during the conversation she asked Person B to close the door and he refused to do so. Moreover, Complainant does not show that the comments questioning her work at the U.S. Attorney’s Office were related to her disability.

Complainant stated that on September 16, 2016, ALJ1 sent her an instant message stating that Person B was really “stuck” on her accommodations because he had not seen her “breathing hard.” Further, ALJ1 told Complainant that Person B had also discussed her accommodations with Person A.

In her deposition, Complainant stated there were multiple occasions in which Person B failed to respond to her leave requests. However, she only identified one specific incident on November 16, 2016, when Person B did not respond to her request for leave when she had to leave work immediately due to a health issue. Complainant admitted that Person B was not in the office on November 16, 2016, and the record revealed that the RCALJ approved her request in his absence within hours of her request for leave.

Complainant stated that from 2016 through 2017, Person B would go out of his way to avoid her in the office. When asked what her factual basis was for the contention that he was going out of his way to walk in a different direction was discriminatory or harassing, she stated “the expression on his face when he saw me or when he would see me again. He had a look of disgust.”

Complainant also alleged that Person B questioned her recusal from cases and her need for canceling/postponing hearings. Specifically, Complainant stated that Person B questioned her reasons for recusing herself from cases and the timing of her recusal requests. Complainant explained she sent emails to Person B and the Hearing Office Director saying she had to recuse herself; however, she noted this was not “good enough” for Person B. Complainant stated Person B wanted to know why she was recusing herself from the case and claimed it was improper for him to ask. Further, Complainant stated Person B accused her of canceling hearings when she had not canceled hearings. Specifically, she stated that Person B sent her several emails stating the schedule had come to his office and he was under the belief that Complainant was changing around her hearing schedule.

The ROI contains a chart showing that Complainant did cancel/postpone hearings during the relevant time, including 14 in September 2016, and 19 in November 2016. When asked about the chart in her deposition, Complainant noted that when a claimant does not appear for a hearing and the judge ends up dismissing the case or issuing a notice to show cause, it is counted as a hearing postponed. She also stated that if a representative drops a claimant within a week before the hearing, the rules require judges to find good cause and schedule another hearing. Further, she stated that if you have schedulers who do not schedule experts that are needed for the hearing, or an interpreter does not show up, the hearing is coded as postponed. Complainant also stated that no-shows are coded as postponements. Thus, Complainant states the document in the record showing the number of cases canceled/postponed in September 2016 through November 2016 is taken out of context. While Complainant may disagree with the categorization of which cases qualify as canceled/postponed hearings, she has not shown that other ALJs were treated differently regarding the types of cases that were considered canceled/postponed. Moreover, the Agency noted that Person B legitimately questioned Complainant for canceling/postponing a number of hearings during the period at issue, as well as why she recused herself from cases and the timing of her recusal requests as part of his supervisory and managerial responsibilities. Complainant failed to show that the questioning of her recusals and canceling/postponing hearings was based on her disability.

We recognize that Complainant received Person B’s letter regarding her reasonable accommodation on September 16, 2016. However, the record reveals that Person B began inquiring about her three-day a week telework arrangement on August 16, 2016, thus, we consider the identified comments surrounding her telework arrangement in the context of her hostile work environment claim. We note Person B’s remark that he did not find Complainant’s doctor’s note to be “persuasive” was made in the context of seeking advice from the Agency’s attorneys regarding Complainant’s reasonable accommodation.

There is no evidence that Complainant knew of Person B's email finding her doctor's letter unpersuasive until she obtained it from the Agency during discovery. Thus, we find this incident could not have contributed to the alleged hostile work environment.

Further, we note that the comments that Person B did not think Complainant's reasonable accommodation was necessary or justified were made in the context of determining whether Complainant's reasonable accommodation was appropriate. Although the Agency had previously approved Complainant's previous request of telework for three days per week, this did not prevent the Agency from requesting further information on whether the accommodation was still appropriate. Moreover, we find the comments by Person B asking what was wrong with Complainant and inquiring if it was tachycardia, might be considered by some to be insensitive, such comments do not rise to the level of harassment by themselves. Further, we disagree with the AJ's statement that the alleged comments were sufficient to create a hostile work environment because, "for months," Complainant "was unsure whether she would be able to continue working with accommodation," and fear of losing the accommodation "would likely have negated her ability to work at all." The record reveals that Person B first inquired about Complainant's three days of telework on August 16, 2016, and that by September 16, 2016, Person B confirmed to Complainant that her "telework three days a week remains intact" and the record reveals her requested accommodation continued until she began a period of extended leave in August 2018. Upon review, we find Complainant failed to show the conduct alleged was so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive.

II. Hearing Decision on Damages and Other Relief

Background on Damages

On December 9, 2019, AJ2 issued a Decision on Damages After Hearing. AJ2 noted that in the Agency's Closing Arguments, it included a witness statement by Person X and a new demonstrative exhibit regarding the Agency's interpretation of Complainant's medical timeline. Complainant objected to the Additional Post-Hearing Submissions. AJ2 determined both the statement of Person X and the demonstrative exhibit should be stricken from the record. AJ2 noted had the Agency wanted to include Person X as a witness, it could have. Further, AJ2 stated the Agency could have prepared its own demonstrative exhibit for the hearing and thus could have used it with witnesses and allowed Complainant's counsel to use it in cross-examination. However, the Agency did not do this. AJ2 noted no new evidence may be submitted during closing arguments.

Regarding the request for damages, AJ2 noted that Person B arrived in the Seattle Office in April 2016, and his "harassment and discrimination set into motion what [C]omplainant aptly described as a snowball effect of depression, anxiety and fearfulness for herself." AJ2 recognized two intervening factors in establishing Complainant's damages. One, was Complainant's diagnosis of lupus in early 2018. Complainant argued her lupus was caused by stress.

AJ2 noted Complainant's cardiologist (Doctor 2) stated she cannot confirm that stress caused Complainant's lupus, and also noted she is not a rheumatologist. AJ2 noted Doctor 2's testimony that stress and depression make managing illnesses like Complainant's illnesses more difficult. The second intervening factor was the emotional distress experienced by Complainant as a result of a disciplinary hearing in May 2018. AJ2 noted the disciplinary hearing was the subject of a separate EEO complaint. AJ2 found the disciplinary hearing likely did cause Complainant "significant distress." AJ2 found the distress resulting from the discipline was outside the scope of the subject complaint and did not award damages for that disciplinary action in her decision.

AJ2 noted Complainant went on medical leave on August 20, 2018. Complainant noted that at that point she was moving to a new medication which carried a high level of potential effects and it was unclear how her body would respond. Complainant stated in addition to the new medication, she felt exhausted both physically and emotionally. AJ2 noted due to Person B's harassment, Complainant stated she completely lost confidence and could no longer handle going to work. AJ2 noted Complainant did not mention her mental health when filing her request for medical leave due to the fact that mental health conditions can be stigmatized. Complainant did not return to work, and at the time of the hearing, had applied for disability retirement. AJ2 noted Complainant testified that she would have taken medical leave regardless of whether she had been subjected to a disciplinary hearing. However, she stated her fear of discipline at the time was heightened because the Agency did not view her telework as an accommodation. AJ2 awarded Complainant \$250,000 in compensatory damages.

Additionally, AJ2 found Complainant entitled to reasonable attorney's fees if any were incurred. AJ2 ordered the Agency to pay Complainant the equivalent of the tax penalties she incurred as a result of her early withdrawal from her TSP. The Agency was ordered to pay out-of-pocket co-payments and medication costs totaling \$3,750. The Agency was to pay loss of earning capacity for a period of two years. The Agency was ordered to reimburse Complainant for 240 hours of advanced leave. AJ2 stated this would not require payment from the Agency, but rather will require the Agency to forgive the leave that Complainant would have otherwise needed to repay. AJ2 rejected Complainant's argument that the collateral source rule applied since her coworkers provided their leave to her - as opposed to the Agency paying her directly. AJ2 stated awarding Complainant damages equal to the amount of pay she received in donated leave would amount to prohibited windfall. AJ2 declined to reimburse Complainant for LWOP. The Agency was ordered to conduct EEO training for managers, supervisors, and Human Resources personnel within its Seattle Office. Finally, the Agency was required to post a notice at all its facilities within the authority of the Seattle Office.

Thereafter, Complainant filed a Request for Clarification or Reconsideration of Decision on Damages After Hearing. On January 8, 2020, the Agency filed a Response to Complainant's Request for Reconsideration. In her Motion, Complainant raised four issues: (1) that the award of two years of lost earning capacity should be considered front pay, and should not be subjected to the damages cap; (2) that AJ2 erred in declining to apply the collateral source rule with regard to the pay she received via the Voluntary Leave Donation Program; (3) the amount of

compensatory damages should be increased from \$250,000 to \$300,000; and (4) regarding the TSP award, she clarified she did not make an early withdrawal from her TSP as had been stated in the AJ's decision, but rather she had requested the future value of the funds she would have received as "matching funds" from the government had she continued to work.

On January 14, 2020, AJ2 issued a Decision on Damages After Hearing, With Clarification. AJ2 declined to re-evaluate her decision with regard to the first three issues raised by Complainant. However, the AJ clarified and corrected the issue regarding the TSP award. Specifically, AJ2 stated that Complainant would have been able to work for an additional two years absent the harassment. Thus, AJ2 ordered the Agency to pay Complainant the equivalent of what it would have paid in TSP contributions for two years and also pay her the earnings on those contributions based on a reasonable rate of return. The remainder of the relief ordered in AJ2's December 9, 2019 Decision was restated.

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

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

At the outset, we find AJ2 improperly found the witness statement from Person X was a new document submitted for the first time at closing. Rather, we note the same witness statement was provided by the Agency during summary judgment pleadings. Thus, we will consider the witness statement by Person X. However, we find the exhibit containing the Agency's interpretation of Complainant's medical timeline was properly excluded by AJ2 for being untimely submitted.

As explained above, we find Complainant failed to establish that she was denied a reasonable accommodation, was subjected to disparate treatment, or was subjected to a hostile work environment and thus, she is not entitled to relief for those claims. However, we find the Agency is liable for relief stemming from the Attorney Advisor's disclosure of Complainant's medical diagnosis and Person B's improper disclosure of Complainant's medical condition to ALJ1, both of which violated the Rehabilitation Act's prohibition against the release of confidential medical information. Thus, because much of the relief awarded by AJ2 was based on findings of discrimination not upheld in this decision, much of that relief is inappropriate as explained herein.

Nonpecuniary Damages

During the hearing on damages, Complainant testified about Person B's disclosure of her heart condition to ALJ1. Complainant stated as a result of the disclosure she became extremely worried. She noted that ALJ1's initial instant message about the disclosure came up during a hearing she was conducting. She stated as a result she called a recess and was "floored" by what ALJ1 told her. She stated it was very hard to go back and finish that hearing.

We recognize that Complainant produced evidence that the harassment and discrimination, of which the disclosure of medical information is part, caused her stress, depression, anxiety, panic attacks, loss of confidence, and caused her to withdraw from family and friends. We find a portion of Complainant's stress, through not the entirety of her distress, was caused by the unlawful disclosure of medical information.

Nonpecuniary damages are available to compensate an injured party for actual harm, even where the harm is intangible. Carter v. Duncan-Higgins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984). Emotional harm will not be presumed simply because complainant is a victim of discrimination. Guidance at 5. The existence, nature, and severity of emotional harm must be proved. Id. We note that for a proper award of nonpecuniary damages, 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 Ward-Jenkins v. Department of the Interior, EEOC Appeal No. 01961483 (March 4, 1999) (citing Cygnar v. City of Chicago, 865 F.2d 848 (7th Cir. 1989)).

In Carle v. Dep't of the Navy, the Commission explained that evidence of nonpecuniary damages could include a statement by complainant explaining how she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Complainant could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. Id. However, evidence from a health care provider is not a mandatory pre-requisite to establishing entitlement to nonpecuniary damages. Sinnott v. Dep't of Defense, EEOC Appeal No. 01952872 (September 19, 1996).

As discussed above, the Commission finds discrimination on two incidents of improper disclosure of medical information, and we address the compensatory damages award associated with that specific finding. Upon review, we find Complainant is entitled to an award of nonpecuniary damages of \$3,000. We find this amount is adequate to compensate Complainant for the harm casually related to the discriminatory conduct.

We find that the amount of the award meets the goals of not being "monstrously excessive" standing alone, not being the product of passion or prejudice, and being consistent with the amount awarded in similar cases. See Devon H. v. Department of Homeland Security, EEOC Appeal No. 0120181822 (September 30, 2019)(\$3,000 awarded for involving two incidents of an improper disclosure of medical information that occurred on the same day by the same management official); Becki P. v. Department of Transportation, EEOC Appeal No. 0720180004

(November 15, 2018)(\$2,000 awarded for improper disclosure of medical information where Complainant experienced stress, embarrassment, loss of dignity, sadness, fell into a deeper depression, and became more withdrawn), req. for recons. den., EEOC Request No. 2019002712 (June 28, 2019).

Other Relief

Upon review, we find Complainant failed to show that she suffered any pecuniary damages as a result of the discrimination found here. Complainant requested out of-pocket reimbursements for co-payments for medical visits from 2018 to 2019, future co-payments with her therapist through 2020, and for medications from July 2017 through July 2018, for severe emotional distress, depression, and anxiety caused by the Agency. However, we find Complainant failed to show a nexus between Person B's disclosure in September 2016, and the claimed expenses from July 2017 – 2020. Similarly, we find Complainant failed to show that the disclosure of her medical condition caused her to take advanced sick leave, donated leave, or leave without pay.

Further, we find Complainant failed to establish entitlement to loss of earning capacity, back pay, or front pay. We note the AJ found Complainant would have been able to work for an additional two years absent the harassment. However, we find the Agency is not liable for harassment and thus, Complainant is not entitled to lost earning capacity, any back pay, or any front pay. In addition, we find Complainant failed to establish she is entitled to TSP contributions or earnings on TSP contributions. Complainant claimed she lost approximately \$7,200 per year in contributions made by the government for each year she cannot work due to the Agency's harassment and lost earnings on those contributions. However, as a result of our finding of no discrimination on her harassment claim, Complainant is not entitled to lost TSP contributions or earnings.

CONCLUSION

Accordingly, the Agency's finding of no discrimination on the disclosure of confidential medical information is REVERSED. The Agency's finding of no discrimination on the denial of accommodation claim, the disparate treatment claim, and harassment claim are AFFIRMED. The Agency shall comply with the Order herein regarding relief.

ORDER

To the extent it has not already done so, the Agency shall take the following remedial actions:

1. Within 60 days from the date this decision is issued, the Agency shall pay Complainant \$3,000 in nonpecuniary, compensatory damages.

2. Within 90 days from the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to the Attorney Advisor referred to in this decision on the Rehabilitation Act. The training shall emphasize the Rehabilitation Act's requirements with respect to maintaining the confidentiality of medical information/documentation.
3. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against the Attorney Advisor referred to in this decision. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the Attorney Advisor has left the Agency's employment, then the Agency shall furnish documentation of his departure date.

POSTING ORDER (G0617)

The Agency is ordered to post at its Seattle Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g).

The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

Complainant should submit 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, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files 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)

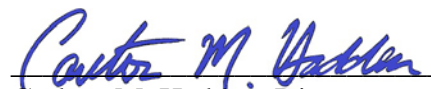
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

March 2, 2021
Date