



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

[REDACTED]
Opal V.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Contract Management Agency),
Agency.

Appeal No. 2021000649

Agency No. P6190076

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from an October 6, 2020 Final Agency Decision (“FAD”) concerning an equal employment opportunity (“EEO”) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (“ADEA”), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Contract Cost/Price Analyst, GS-1102-14, at the Cost and Pricing Center (now Cost and Pricing Regional Command) in Boston, Massachusetts.

On October 31, 2019, Complainant filed a formal EEO complaint alleging discrimination by the Agency on the bases of race (Asian), sex (female), age (55), and reprisal for prior protected EEO activity.²

¹ This case has been randomly assigned a pseudonym which will replace Complainant’s name when the decision is published to non-parties and the Commission’s website.

The responding management officials were the Director, CACO/DACO Group, NH-1102-04 (“D1”) and two Supervisory Contract Price/Cost Analysts, NH-1102-04 (“S1” and “S2”). The Agency, in its FAD, framed the claims as follows:

1. On December 13, 2018, S2 subjected Complainant to harassment/a hostile work environment when he:
 - a. Expressed his disappointment in her and chastised her when she requested sick leave, and,
 - b. During a team meeting for the Board of Review (“BOR”) Standard Operating Procedures (“SOP”), S2 criticized, yelled, and accused her of not leading and completing the task of getting the SOP disseminated.
2. In March 2019, a coworker informed Complainant that S2 directed them to complete the BOR SOP that she previously completed.
3. From August 28, 2018, to October 3, 2019, D1, S1, and S2 subjected Complainant to harassment/a hostile work environment, to include the following incidents:
 - a. On August 28, 2018, S1 inquired about when she would retire and asked whether she could get her old Pricing job back.
 - b. On June 5, 2019, during a performance discussion, S2 was assertive, commanding and discussed the previous EEO complaint that she filed in December 2018.
 - c. On June 19, 2019, during a telephone conversation, S2 was sarcastic, demeaning, degrading, belittling, and/or unprofessional when she requested one day of sick leave and he required her to provide a doctor’s note.
 - d. On June 20, 2019, during a telephone conversation, she reported to D1 the harassment she was being subjected to by S2. However, D1 required her to provide him the allegations in writing,

² Agency Case No. P6190025 (alleging that S2 subjected her to a hostile work environment between October 31, 2018 and December 13, 2018). Complaint dismissed for untimely filing of her formal complaint.

- e. On July 11, 2019, S2 failed to respond to her requests to discuss her concerns about the performance elements deadlines, and he disregarded the additional concerns she raised.
 - f. On September 25, 2019, and September 26, 2019, S2 called her on the telephone and emailed her multiple times demanding that she review and respond to the memorandum changing her work schedule.
 - g. On October 3, 2019, S2 berated her about the notes she took on a selection panel.
- 4. On July 8, 2019, S2 sent her an email with draft performance elements which included deadlines that were not reasonable.
 - 5. On September 5, 2019, S2 assigned her an extra duty by requiring her to participate on an interview panel.
 - 6. On September 24, 2019, S2 issued her a memorandum changing her work schedule.

Prior to investigating Complainant's complaint, the Agency dismissed Claims 1 and 2 on procedural grounds.

The investigation into the remaining claims showed that in October 2018, S2 (white, male, 38), a became Complainant's first level supervisor. S2 was located in Dallas, Texas, and visited the Boston office with unspecified frequency. Regardless, S2 was in frequent contact with Complainant via phone and email communications. Previously, Complainant reported to S1 (white, male, 69) as her first level supervisor from August 2016 through his retirement in October 2018. D1 (white, male, 36) was Complainant's second level supervisor throughout the relevant time frame.

According to Complainant, S2 "continuously" reminded her that she was responsible for a heavier workload than her colleagues because of her "years of experience," and she was a GS-14. She also alleges that S2's comments of this nature were "age-centric." S2 denies making age-related comments, but confirms that more was expected of Complainant because of her higher grade level. S2 testified, "Complainant is the senior analyst on the team as a GS14 with many years of experience. Her performance level has barely met fully successful since I became her supervisor and I have been working to address these issues with her."

Complainant was the only GS-14 employee reporting to S2, and in her division. However, Complainant also notes that she was the only non-Caucasian employee on her team. She recounts that there was previously another Asian employee on the team (male, age not specified) and that he retired early because of S2's alleged harassing conduct toward him. She alleges that during phone calls and meetings, his tone was derogatory.

She recalls that his comments were “not simply constructive criticism” but came across as “threats” to her employment. She asserts that her prior performance evaluations under S1 rated her as “outstanding,” yet under S2 decreased her rating without prior discussion. She alleges that other team members shared that their performance ratings did not change under S2.

The record contains firsthand accounts from two of Complainant’s colleagues (“C1” and “C2”) confirming that she was “distressed” after calls with S2, and her anxiety and stress related to interactions with S2 impacted her health. C1 (Hispanic, male, 48), a Management Analyst, GS-0343-12 Mission Support Office, recounted that due to his proximity to Complainant’s workspace, he “often would hear [Complainant’s] unpleasant conversations with [S2] over the telephone and he] often would observe that [Complainant] was distressed and upset after phone conversations with [S2].” C1 was also present during the December 13, 2018 meeting where S2 “directly and openly criticized [Complainant] for not leading and distributing the SOP document to her Team members, when in fact she had done so.” C2 (white, female, 65) Traffic Management Specialist, GS-12, testified that S2’s poor leadership negatively impacted office morale generally, and that she witnessed Complainant was often upset after speaking with him. Complainant would tell her that she couldn’t take it. Neither C1, nor C2 reported to S2.

Complainant’s compressed schedule of 7:00 am to 5:30 pm with set telework days on Wednesday and Thursday, with Fridays off. S2 teleworked full time and was in constant contact by phone and email. He was also aware that her commute to work was 2 hours. Yet he refused to be flexible with her arrival times, or requests to telework on non-telework days. Complainant recounts that to ensure she maintained her schedule of record, S2 called her multiple times per day. S2’s calls would be unnecessarily long and critical and had the effect of derailing Complainant from whatever she was working on.

According to Complainant, a coworker (“C3”), a Contract Administrator, GS-13 (white, female, 30), who also reported to S2, was permitted to arrive late, leave early and telework additional days if she requested it. In contrast S2 regularly checked up on Complainant to ensure she maintained her schedule of record. In particular, S2 would not allow Complainant to work on her day off, which she needed to do in order to timely complete her assignments. S2 explains that Complainant’s proffered comparator (“C3”) had more flexibility with respect to her work hours and location because she held a maxi-flex work schedule with ad hoc telework days.

On or about June 20, 2019, S2 notified Complainant’s team that he would be in town the following week and directed everyone to be present while he was there. Complainant had requested leave for a doctor’s appointment June 20, 2019, but realized she mixed up the date, and it was scheduled on June 27, 2019. When she canceled the initial request and requested sick leave for the correct day, S2 called and asked why she changed her leave request shortly after he announced to the team that he would be in town that week. Complainant explained that she would still be in the office for three out of the four days S2 would be on site, and that the appointment had been scheduled well in advance, she just got the date wrong. She felt uncomfortable, as S2 was prying about personal information.

During the call, S2 used a mocking tone, asking Complainant if the leave request was for a hair appointment. He instructed Complainant to provide him with medical documentation. When she explained that she was not on leave restriction, so such a request violated the collective bargaining agreement between the union and the Agency, S2 responded sarcastically that even his 11-year-old son could obtain a doctor's note. Complainant notes S2 only provides a few days' notice of his visits, which are typically Monday through Thursday. She asserts that it was unreasonable to limit any and all of her medical appointments to Mondays, Fridays and weekends just in case S2 decides to visit.

According to S2, the June 20, 2019 phone call was simply to ensure that Complainant sought leave for medical reasons, otherwise he would have denied the request. He alleges that when Complainant explained her leave request, she was "sneaky" and "not forthcoming." S2 characterized Complainant's request for sick leave for June 27, 2019 as part of "a pattern" of being out of the office when he visits. However, his most recent example of this "pattern" occurred six months earlier in December 2018. In that instance, S2 recounts that he instructed the team to be in the office, yet Complainant took her scheduled telework day, and on a day when she was in the office, and they were supposed to meet face to face, Complainant asked to leave early because she was feeling ill. Notably, this occurred on December 13, 2018, immediately after S2 humiliated Complainant during a team meeting. He said he was disappointed in Complainant but ultimately granted Complainant's leave request.

Following the June 20, 2019 conversation, Complainant called D1 and told him about S2's comment about the hair appointment and comparison to his 11-year-old son. D1 agreed that this was unacceptable. Complainant also confided that she "could not take it anymore" and she felt that S2 "had a target on her back." She noted that S2 did not seem to account for the fact that nobody had been hired to fill C3's position, since C3 left the Agency in April 2019. C3's departure not only resulted in more work for Complainant, but also impacted Complainant because she relied on C3's advice, as C3 had more experience than Complainant. Complainant stated to D1 that S2 appeared to acknowledge that her workload was excessive, as he told her they intended to hire another GS-14 and GS-13, yet he still held her to a higher standard. After the conversation, D1 sent Complainant an email stating in part, "In order to proceed further, I need you to provide your allegations in writing so that I can ensure the record is clear and the allegations are properly documented." Complainant informed D1 the next day that she raised the matter with an EEO Counselor.

S2 reference to Complainant's EEO Activity

Complainant testifies that during a June 5, 2019 performance meeting, S2 "began to talk about the EEO Complaint...initiated on December 20, 2018. He commented that he had not heard about the status of the EEO complaint recently. [S2] stated that his actions at issue in December 2018 EEO Complaint were not intentional." Complainant describes S2's tone as "assertive and commanding," and she recounts feeling unnerved by his comments because the EEO Counselor explained that her EEO activity was not to be discussed.

Complainant recounts in the record, “I felt very uncomfortable and I did not respond or engage in the conversation. I was upset that I could not stop the conversation.”

S2 testifies that he first became aware of Complainant’s EEO activity when an EEO Counselor contacted him on January 24, 2019, regarding the EEO complaint complainant initiated on December 20, 2018. S2 states that he has no record of holding a performance discussion with Complainant on June 5, 2019, but they did meet on June 26, 2019. S2 confirms that during the June 26, 2019 meeting, he communicated in a manner that “could be perceived as assertive and commanding” but he was discussing his concerns about her performance, not her EEO complaint. He also reveals:

I did mention the EEO once with the purpose of showing that I had committed to addressing her concerns, one of which was a request for training, but she had not yet registered for any of the classes. That was my only reference to EEO and it was intended to continue and address the issues she had raised. Even today, I ask her when we need to have a performance or sensitive discussion to find an office to call me from, which was another EEO issue she had raised. While nothing formal came from it, I still wanted to be sensitive to her concerns.

In her rebuttal statement, Complainant strenuously disputes S2’s characterization of his tone, as “sensitive.” She also points out that she had not taken any action on that complaint in 5 months, yet S1 raised it during their performance appraisal.

The extent of D1’s knowledge of S2’s comments is not clear from the record. There is no mention of S2’s references to Complainant’s EEO activity in the notes from Complainant’s June 20, 2019 phone call, which would be consistent with S2’s account that the discussion occurred on June 26, 2019. However, D1

On July 8, 2019, as a follow up to their performance meeting, S2 informed Complainant that to meet her performance elements, she must respond to the Monthly Level III/VI CAR Slides by the 8th and 10th of the month, and complete Monthly Performance Measure Slides by the 10th of the month. Complainant explains this was an unreasonable request because she could not complete these tasks until other offices submitted their slides, and they were often late doing so. She emailed S2 on July 11, 2019 outlining these and other concerns. S2 responded on July 24, 2019. Contrary to Complainant’s assertion, the email acknowledges her concerns. However, the email also communicates that these dates will not be changed, and makes suggestions, such as contacting the offices and requesting the slides to get them sooner.

In September, S2 tasked Complainant with participating on an interview panel, but did not modify her existing workload. On October 3, 2019 S2 explained that he sought documentation of her participation in the interview because he was the selecting official and needed to ensure that there was a proper record confirming that the Agency complied with Merit Promotion principles. “As her supervisor, I was also interested in the adequacy and completeness of her work products.”

He also claims that he was “just trying to understand” because it did not appear that Complainant submitted her interview documentation to the lead, as her comments were not transcribed in the spread sheet. He also recalls that he “pointed out” to Complainant that the other two panel members timely entered their comments into the spreadsheet, and he expected her to do the same.

At the conclusion of its investigation of the remaining claims, the Agency provided Complainant with a copy of the report of investigation (“ROI”) and notice of her right to request either a FAD or a hearing before an EEOC Administrative Judge (“AJ”). Complainant opted for a FAD. In accordance with Complainant’s request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). The FAD concluded that Complainant failed to prove that the Agency subjected her to discrimination or unlawful retaliation as alleged.

The instant appeal followed.

ANALYSIS AND FINDINGS

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, (“EEO MD-110”) 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”).

Failure to State a Claim – Claim 1

Pursuant to 29 C.F.R. § 1614.107(a)(1), an agency shall accept a complaint from an aggrieved employee or applicant for employment who believes that they have been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep’t of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

Claims 1(a) and 1(b) involve identical matters to the allegations in Claims 2(a) and 2(b) of Agency Case No. P6190025, which was initiated prior to the instant complaint.³

³ The Agency has also provided sufficient evidence that Agency Case No. P61 90025 was properly dismissed for failure to timely file a formal EEO complaint. See 29 C.F.R. §§ 1614.107(a)(2) and .106(b).

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides for the dismissal of a complaint that states the same claim that is pending before or has been decided by the Commission or the Agency. To be dismissed as the "same claim," the present formal complaint and prior complaint must have involved identical matters. See Jackson v. United States Postal Serv., EEOC Appeal No. 01955890 (Apr. 5, 1996).

Untimely EEO Contact – Claims 2 and 3(a)

Pursuant to 29 C.F.R. §1614.107(a)(2), an agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105, §1614.106 and §1614.204(c), unless the Agency extends the time limits in accordance with §1614.604(c).

Under 29 C.F.R. § 1614.105(a)(1), complaints of discrimination should be brought to the attention of the EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. It is undisputed that Claims 2 and 3(a) occurred over 45 days before Complainant initiated the instant complaint.

The Supreme Court of the United States has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (Jun. 10, 2002). However, upon review, we find that Claims 2 and 3(a) are untimely, as Complainant has not set forth sufficient evidence linking them to her harassment claims.

Claim 2 concerns a fleeting remark made by C3 in March 2019, with no elaboration on how the knowledge that S2 instructed C3 to do work that Complainant already completed constituted harassment or was connected to Complainant's remaining claims beginning June 5, 2019. By that point, C3 had not been with the Agency for several months. Even considering Complainant's allegations that she was subjected to harassment in October and November 2019, the allegation in Claim 2 occurred months later.

Claim 3(a) concerns S1A's August 28, 2018, comment regarding Complainant's retirement. While it relates to Complainant's protected category of age, claim 3(a) is clearly an isolated incident, and unlikely to reoccur. S1A apologized to Complainant, acknowledging that his statement could be interpreted as inappropriate. S1A was not involved in any of Complainant's other harassment allegations.

Disparate Treatment – Claims 5 and 6

The Commission has held that harassment allegations that include discrete acts that would independently state claims outside of a harassment framework, assuming that they are timely, are properly reviewed in the context of disparate treatment. Conlin v. Dep't of Veterans Affairs, EEOC Appeal No. 0120055310 (Dec. 5, 2006). Assignment of an additional duty (Claim 5) and change of work schedule (Claim 6) are discrete employment actions.

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). 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). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a *prima facie* case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

The Agency's legitimate nondiscriminatory reason for assigning Complainant to participate on an interview panel (Claim 5) was that Complainant was the senior Cost/Price Analyst and had the necessary subject matter expertise to assess the candidate. While not explicitly stated in her position description ("PD"), both S2 and D1 testified that it was an expected responsibility of Complainant's GS-14 level position, and it fell under the general provision that Complainant would provide assistance with hiring as needed. While S2's expectation that Complainant maintain the same workload while completing her panelist responsibilities may not have been feasible, the assignment itself was not unreasonable. Complainant has not offered any evidence that would indicate S2's underlying motivation was discriminatory. We note that despite Complainant's assertions, her higher grade-level is a legitimate nondiscriminatory reason to hold her to a different standard than her colleagues and expect her to perform additional temporary duties that require her GS-14 level expertise.

The Agency's legitimate nondiscriminatory reasons for changing Complainant's schedule (Claim 6) included "mission requirements," Complainant's performance, and Complainant's use of uncompensated time. Complainant was blindsided by the September 24, 2019 memo notifying her of the change in schedule. However, S2 testified that he discussed the change with Complainant in July 2019. By Complainant's own account, she routinely used her day off to complete her assignments. Complainant has not provided evidence that would indicate the Agency's rationale is pretext for discrimination. As with Claim 5, Complainant also has not shown that the Agency acted unreasonably in terms of business judgment.

Harassment/Hostile Work Environment

To prove her harassment/hostile work environment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in her position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of sex, race, age, and/or protected EEO activity. Only if Complainant establishes both hostility and motive, will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (Jun. 18, 1999).

For reasons previously discussed, Claims 1, 3(a), 5, and 6 cannot be included in this analysis. Based on the evidence provided, Complainant's remaining claims, even when considered together with the harassment allegations in Complainant's prior EEO complaint as background information, do not rise to the level of severity and/or pervasiveness to establish harassment. These claims all involve routine work assignments, instructions, and admonishments, which are all "common workplace occurrences." We have previously found micromanagement, and criticism, while unpleasant, are "common workplace occurrences." See Gormley v. Dep't of the Interior, EEOC Complaint No. 01973328 (Feb. 18, 2000) (finding the complainant's allegation that her supervisor monitored her work duties and time in and out of the office more closely than her coworkers amounted to a common workplace occurrence). Likewise, it is well established that instances of a supervisor questioning an employee with respect to their duties, *even if done in a confrontational manner*, is a "common workplace occurrence." See Carver v. United States Postal Serv., EEOC Appeal No. 01980522 (Feb. 18, 2000).

As Complainant requested a FAD instead of a hearing, we do not have the benefit of an Administrative Judge's credibility determinations of the witnesses in this case. Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. When the evidence is at best equipoise, Complainant fails to meet that burden. See Wiley G. v. Dep't of Homeland Sec., EEOC Appeal No. 0120181972 (Nov. 27, 2019), Brand v. Dep't of Agriculture, EEOC Appeal No. 0120102187 (August 23, 2012) (Complainant failed to establish that his coworker made offensive comments in a "he said, she said" situation where Complainant requested a FAD and an Administrative Judge did not make credibility determinations). In much of his testimony S2 denies Complainant's account of events and characterization of his conduct toward her.

He also indicates that he does not trust Complainant and makes a point of denigrating Complainant by claiming that C3 left early and took additional telework days in part, to avoid Complainant. In addition, there is no witness testimony from employees who also reported to S2 as a first line supervisor, so it is not clear from the record the extent to which S2 singled Complainant out or if he treated other employees similarly. Thus, many of Complainant's assertions regarding the nature and severity of S2's conduct amount to a "he said, she said" scenario, and are not sufficient to meet her evidentiary burden.

Per Se Retaliation – Claim 3(b)

Agencies have a continuing duty to promote the full realization of equal employment opportunity in its policies and practices. 29 C.F.R. §1614.101 This duty extends to every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Agencies are obligated to "ensure that managers and supervisors perform in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal employment opportunity. 29 C.F.R. §1614.102(5); Binseel v. Dept of the Army, EEOC Request No. 05970584 (Oct. 8, 1998).

Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and Title VII. See Binseel. When a supervisor's behavior has a potentially chilling effect on use of the EEO complaint process – the ultimate tool that employees have to enforce equal employment opportunity - the behavior is a violation of Title VII's anti-retaliation prohibition. Id., Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006), see, e.g. Kaarup v. Dep't of Transportation, EEOC Appeal No. 0120072592 (Jul.10, 2009) (retaliation found where, upon learning that the complainant contacted an EEO counselor, the supervisor named in the complaint asked him why he did not come to him first, and told him to follow the chain of command next time), Vincent v. United States Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009).

S2's comments about Complainant's prior EEO activity during their June 5 (or 26), 2019 performance meeting constitute unlawful restraint on Complainant's use of the EEO complaint process. Complainant describes feeling "threatened" when S2 brought up her EEO complaint, and she felt that she did not have an option to just leave the meeting. Complainant points out that S2 learned about her EEO activity in January 2019, yet he brought it up five months later within the context of a performance review. His testimony indicates that he was aware at the time that Complainant decided not to pursue a formal complaint. Regardless of his protestations of innocent intent, S2's comments, under these particular circumstances, were reasonably likely to deter Complainant's EEO activity.

Although Complainant notified D1 about S2's earlier harassing comments, the evidence is ambiguous at best as to whether she told D1 that S2 improperly referenced Complainant's EEO activity during a performance meeting. D1 indicates that he was not aware of Complainant's first EEO complaint, stating that he first learned that Complainant engaged in EEO activity when he was contacted about the instant complaint.

However, when asked about S2's comments during the performance meeting, D1 recalls that "on or sometime after" June 5, 2019, S2 "communicated that he [S2] brought up the previous issue [EEO counseling] with [S1] to explain to Complainant that nothing that happened prior to his assuming the position would be considered by him. [S2] communicated that *he was trying to give the Complainant a sense of comfort that there would be No retaliation.*" [Emphasis added]. Based on D1's admission that S2 told him that he discussed Complainant's EEO activity during the performance meeting, we conclude this was sufficient to impose on him a duty to take some action to mitigate the potential impact this may have had on Complainant. However, there is no evidence that he took any type of action upon learning of S2's actions.

CONCLUSION

Based on a thorough review of the record, and for the foregoing reasons, we AFFRIM the Agency's FAD finding that Complainant failed to prove she was subjected to discrimination based on sex, race, and/or age. With the exception of Claim 3(b), we also AFFIRM the Agency's finding that Complainant failed to prove she was subjected to reprisal for prior EEO activity.

However, we find that the Agency has committed a violation of the anti-reprisal provision of Title VII. We hereby REMAND Claim 3(b) to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency is ORDERED to take the following action:

1. Compensatory Damages: Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall complete a supplemental investigation concerning Complainant's entitlement to compensatory damages (limited to harm arising from the reprisal) based on the events in Claim 3(b) and determine the amount of compensatory damages due, then issue a new FAD which addresses compensatory damages and includes appeal rights to the EEOC. The Agency shall pay the determined amount of compensatory damages within **sixty (60) calendar days** of the date the new FAD is issued, and, if applicable, the Agency shall provide for payment of any adverse Tax Consequences.
 - a. During the supplemental investigation, Complainant may submit evidence in support of a claim for compensatory damages, and Complainant *shall* cooperate in determining compensatory damages, including responding to the Agency's requests for evidence, input, and/or documents. The Agency shall set forth a **30-day time limit for Complainant to reply** to any agency requests for information.
 - b. Once the new FAD is issued, if there is a dispute regarding the exact amount of compensatory damages, the Agency shall pay Complainant for the

undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

- c. Training: Within **ninety (90) calendar days** of the date on this decision, the Agency shall provide D1 and S2 with two hours of interactive EEO training with an emphasis on retaliation, how to respond if an employee notifies Management about incidents of alleged reprisal, and the duty of management officials to prevent reprisal in the workplace.
2. Disciplinary Action: Within **one hundred and twenty (120) calendar days** of the date on this decision, the Agency shall consider taking appropriate disciplinary action against S2. If the Agency decides to take disciplinary action, it shall identify the action taken in its compliance report to EEOC. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline in its compliance report.
3. Posting Order: Within **thirty (30) calendar days** of the date on this decision, The Agency shall post a notice in accordance with the paragraph below.

The Agency is directed to **submit a report of compliance**, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation reflecting that the corrective action addressed above has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post copies of the attached notice at its Cost and Pricing Regional Command in Boston, Massachusetts. 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).

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

August 31, 2022
Date