



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Cheryl L.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury,
Agency.

Appeal No. 2021001710

Agency No. TIGTA200068F

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from a December 3, 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., Section 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), as amended, 29 U.S.C. § 791 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 worked as a GS-14 Human Resources Specialist for the Agency’s Treasury Inspector General for Tax Administration (“TIGTA”) in Washington, D.C.

On February 5, 2020, Complainant filed a formal EEO complaint alleging discrimination, including harassment/a hostile work environment, on the bases of disability (fibromyalgia, fibromyoma, chronic pain, cancer in remission and arthritis), age (53), and reprisal for prior protected EEO activity when:

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.

1. On September 19, 2019, Complainant's second level supervisor at the time ("S2A") sent Complainant an email showing that she forwarded a private discussion she had with Complainant to the Agency's EEO Manager, also the Reasonable Accommodation Coordinator ("RAC"), concerning Complainant's time off for medical reasons, which Complainant interpreted as a threat and an attempt to block her reasonable accommodation renewal request.
2. In September 2019, Complainant learned that her Position Description ("PD") was changed without explanation.
3. On October 10, 2019 and on other occasions, Complainant was excluded from training opportunities.
4. Since October 7, 2019, management has challenged Complainant's granted reasonable accommodation after initially approving it.
5. On December 7, 2019 and January 8, 2020, management denied her leave requests and provided her with inaccurate information and different rules for leave.

The Agency accepted the complaint and conducted an investigation. The evidence developed during the EEO investigation showed that during the relevant time frame, multiple management officials held positions as Complainant's first and second level supervisors. Complainant reported to the Assistant Director of Human Capital, GS-14, as her first level supervisor. ("S1A," "S1B," or "S2B"). Complainant reported to the Director, Human Capital & Personnel Security ("HC&PS"), GS-15, in the TIGTA Office of Mission Support/Human Capital as her second level supervisor ("S2A" or "S2B").

Prior to the relevant time frame, Complainant was provided with a reasonable accommodation ("RA"), which included a maxiflex schedule with three telework days, one "in-office" day later in the week and one "off" day per week. The accommodation allowed Complainant flexibility to schedule medical appointments and to telework on days she was physically unable to report to the office.

Events Prior to October 14, 2019 (S1A and S2A)

In early 2019, S2A (age 57) directed S1A to review all Human Capital position descriptions ("PDs") for accuracy and to ensure that they were not overly generic. Complainant alleges that S1A used the PD revision project (as well as exclusion from training and other projects within Complainant's PD) as an opportunity to retaliate against Complainant for engaging in protected activity related to her reasonable accommodation requests and medical appointments.

On August 21, 2019, Complainant received a final draft of her PD. It appeared S1A had added 7 program areas and 10 competencies that were not on the previous draft they discussed in March 2019. Complainant was particularly concerned about the travel requirement on her PD. The March 2019 draft stated: “[i]nfrequent travel by commercial carriers may be required,” whereas the August 2019 version stated: “[p]osition may require occasional travel to conduct audit review.” Complainant interpreted the change to mean that travel had become an “essential function” of her position and asserts that she was the only member of the Human Capital team who had the travel requirement on her PD changed. Complainant deduced that the change was as “a deliberate attempt to block” her RA, because she just submitted paperwork to renew her RA to the Reasonable Accommodation Coordinator (“RAC”) on August 15, 2019.

On September 19, 2019, as part of an ongoing discussion about the changes to her PD, Complainant received a response email from S2A, which contained an unrelated email from S2A to S1B, Complainant’s colleague, who was her “acting” first level supervisor at that time, and the RAC. In this email, entitled “Example,” S2A had pasted a conversation with Complainant about her leave requests for medical appointments into the body of the email. Complainant asserts that neither S1B nor RAC had a “need to know” about her medical appointments and concluded that the inclusion of this information was “designed to sabotage and damage her working relationship with S1B.” As S2A did not address why she included this email in the unrelated PD discussion, Complainant interpreted it as an intimidation tactic to get Complainant to stop asking about her PD and stop pursuing her RA. S2A disagreed, explaining that S1B, as Complainant’s supervisor had a “need to know” regarding Complainant’s leave, and, she included the RAC to ensure compliance with Complainant’s RA, which entailed flexibility for medical appointments.

On September 23, 2019, per the RAC’s request, Complainant submitted additional supporting documents and an updated RA form. Among other things, the RAC’s supplemental information request stated: “[a]s seen in [Complainant’s] position description, she is required to travel occasionally. You stated that commuting is an issue for her” and then lists several questions, such as whether Complainant “is capable of traveling.” Complainant provided the requested documents and on October 7, 2019, S2A approved the renewal of Complainant’s RA to remain in effect through October 7, 2020. Both S1A and S2A retired in or around October 2019.

Events After October 14, 2019 (S2B)

On October 14, 2019, S2B (age 34) was hired as the new Director of HC&PS. From November 24, 2019, through March 27, 2020, S2B also served as the Assistant Director for Human Capital, while the position was vacant, making her Complainant’s first and second level supervisor. Almost immediately, S2B established Wednesdays as the “core day,” meaning that all HC&PS employees were to report to the office on Wednesdays. One employee who relocated to Texas, was exempt from this requirement. Initially, Complainant was also exempt due to her reasonable accommodation. However, S2B reviewed Complainant’s October 7, 2019 RA and determined that the medical documentation on file did not preclude Complainant from reporting to the office on Wednesdays instead of Thursdays.

On December 9, 2019, S2B notified all HC&PS employees that she established “HC&PS Time and Attendance Guidance,” which specified core days and hours, along with leave policies. All employees were required to work during “official core hours” (9:00am to 2:30pm), and to take their lunch break during this time. S2B instructed all directorate employees to update telework agreements to comport with the core day and hours. In addition, the HC&PS Guidance specified that leave requests made over 3 months in advance would not be approved, and lunch breaks could not be used in conjunction with leave taken outside core hours.

On December 16, 2019, S2B notified Complainant that she was denying her requests for annual leave for April 16-19, 2020 (“Request #1”) and “Request #2”) that Complainant submitted on or around December 7, 2019, and for August 26-September 10, 2020. S2B instructed Complainant to “please submit leave requests no earlier than 3 months prior” and notified Complainant that she would need to provide medical documentation to support Request #1 because it was for more than 3 days and Complainant specified that she intended to use the leave to undergo “a medical procedure.” Complainant asserts that none of her colleagues were asked to provide medical documentation to support annual leave requests.

On January 8, 2020 and other dates, S2B, citing the December 9, 2019 Guidance, allegedly denied Complainant’s request to use her lunch break in conjunction with her leave in order to attend a medical appointment. Despite the new Guidance, Complainant followed up about Request # 1 and 2. S2B granted Request #1. Complainant followed up about Request #2 again in February and March 2020.

In March 2020, rather than grant Request #2, S2B sent an email to the entire team soliciting summer leave requests, even though summer was still over 3 months away. S2B explained that “[s]ince I was set to be out of the office for an extended period of time, I moved the opportunity to plan and request leave for the summer months ahead of time to everyone. This [was] in consideration for [Complainant’s] request and to ensure equity to all the employees.” Complainant asserts that S2B used the summer schedule to deny Request #2.

Reasonable Accommodation

On November 21, 2019, S2B met with Complainant and the RAC, about revising Complainant’s approved RA so that Wednesday would be Complainant’s “in-office” day. Complainant objected, and disputed S2B’s claim that the change was still compatible with Complainant’s medical documentation on file. Following the meeting, the RAC sought additional information to support Complainant’s claim that a Thursday “in office” day was part of her accommodation. The RAC’s questions included: “Is [Complainant] capable of reporting to the office on Wednesdays? If not, provide the specific medical need (with an explanation) that does not allow her to report to the office on this day.”

By letter on December 5, 2019, Complainant’s physician responded that Complainant’s “medical treatment plan” included telework three days a week with Thursday, specifically, as her weekly “in-office” day.

The letter explained why a Thursday “in-office” day benefitted Complainant in terms of managing the symptoms of her disabilities and explained how a change to her “in-office” day would negatively impact her medical treatment plan. The RAC deemed the reference to a “medical treatment plan” to be too vague, so on or about December 26, 2019, the RAC sent Complainant’s physician another information request to include a “specific medical reason/need (i.e. include the specific type of medical treatment in your medical plan) that prevents [Complainant] from reporting to the office on Wednesdays.”

On January 20, 2020, Complainant’s physician responded:

I have established a medical treatment plan for my patient to include medication, therapy, and required extended continuous periods of rest (Friday, Saturday, and Sunday). This medical plan has proven to be the best method to assist with the medical treatment I have established to mitigate her symptoms. [Complainant] would have medical challenges managing the symptom[s] and side effects of the medication, and not [be] able to have the extended period of rest without missing work. She's able to manage her symptoms with less stress when she is teleworking. Altering this schedule would exacerbate her medical condition and would have a negative impact on managing her pain, intensify her sleep disturbance, fatigue and increase other side effects from the medication.

The RAC deemed this response insufficient because it did not state whether Complainant was “capable” of commuting to the office on Wednesdays. We note that the physician’s January 20, 2020 response does state that a change of “in-office” day from Wednesday to Thursday “is not advisable” and “would be detrimental to [Complainant’s] treatment and health.” On February 27, 2020, the RAC re-sent the previous request for “the specific type of medical treatment in your medical plan that prevents [Complainant] from reporting to the office on Wednesdays” to Complainant’s physician, but neither the physician nor Complainant provided further documentation.

On March 9, 2020, S2B issued a memorandum informing Complainant that her approved RA from October 7, 2019, had been “modified.” Effective March 16, 2020, Complainant’s “in-office” day would be Wednesday.² S2B explained that all of her staff report to the office on Wednesdays, and she and the RAC determined that the change in “in-office” day would not conflict with Complainant’s medical documentation. As an additional modification, Complainant’s maxiflex schedule was converted to a compressed work schedule (10 hours per day, 40 hours per week) to more accurately reflect Complainant’s schedule with one day off per week. The memorandum instructed Complainant to submit an updated Telework Agreement reflecting Wednesday as her “in office” day and Alternative Work Schedule (“AWS”) Form with a compressed schedule by March 12, 2020.

² This memorandum entitled “Modification of Approved Reasonable Accommodation Request and New Reasonable Accommodation Request,” is also referenced interchangeably in the record as S2B’s March 9, 2020 “decision.”

On or around March 12, 2020, Complainant emailed S2B, explaining that the “modifications” were a “denial” of RA because they rendered her RA ineffective. S2B disagreed. On March 17, 2020, S2B noted that Complainant had not submitted an updated Telework Agreement and the AWS Form Complainant submitted contained two versions of a maxiflex schedule instead of reflecting a compressed schedule, per her instructions in the March 9, 2020 modification. S2B denied Complainant’s requests to change back to the maxiflex schedule, emphasizing that the March 9, 2020 modifications were “in effect.”³ S2B then instructed Complainant to “[p]lease submit the required documentation immediately today. Continued failure to adhere to these terms are grounds for disciplinary action.”

On or about March 20, 2020, Complainant submitted a “request for reconsideration” to S2B regarding the March 9, 2020 decision. Complainant referenced her medical documentation and explained that her reasonable accommodation required an “in-office” day of Thursday with Friday off because “after I work in the office, my medical condition is exacerbated. If I come in the office on Wednesday, I will need to take additional medication and will have challenges working on Thursday. This would require me to take additional leave.” S2B responded with a “courtesy explanation” on March 26, 2020, emphasizing that Complainant was not entitled to reconsideration because her approved RA was not denied. S2B repeated that the March 9, 2020 modifications were “in effect.” Complainant continued to pursue the matter on April 9, 2020, submitting a “Request for Second-Level Management Reconsideration of Reasonable Accommodation” to the Acting Deputy Inspector General for Mission Support, GS-15 (“AD”). On April 22, 2020, AD (age 62) responded that he supported S2B’s March 9, 2020 modifications. Complainant replied with a list of “follow-up questions.”

In a May 18, 2020 email, AD reiterated to Complainant that S2B’s March 9, 2020 modifications were still in effect. AD then informed Complainant that she had been provided with an “effective reasonable accommodation” based on his review of her medical documentation. He recalled that Complainant’s physician “was asked several times to provide the “specific treatment” that you were receiving on Wednesdays that would prevent you from reporting to the office that day. However, your doctor continuously provided the vague statement that his “medical plan, *with no specific treatment* that could only be provided on Wednesday, [or] prevented you from reporting on Wednesday.” Emphasis added. Although Complainant cited to the relevant portion of her January 20, 2020 medical documentation, the AD explained that he would not consider her personal explanation for how the change to her “in-office” day would impact her health because it was not the opinion of a medical doctor. AD’s email concluded by stating that Complainant could still receive her preferred accommodation by either (1) obtaining the specific information requested of her doctor to support her accommodation, or, (2) requesting an Independent Medical Review (“IMR”). If Complainant requested an IMR, a doctor unaffiliated with the Agency would consult directly with Complainant’s physician to determine whether the modified RA was an effective reasonable accommodation. Complainant did not pursue either option.

³ The March 9, 2020 memorandum points out that the change to Complainant’s in-office day from Thursday to Wednesday would not become effective until the Agency’s “maximum telework flexibilities due to the coronavirus (COVID-19) pandemic... have been lifted.”

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

Dissatisfaction with EEO Investigation

The regulation under 29 C.F.R. § 1614.108(b) requires the Agency to create an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An “appropriate factual record” is “one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.” § 1614.108(b). However, the complainant, upon receipt of the ROI, is provided an opportunity to cure defects in the record by either notifying the agency (in writing) of any perceived deficiencies in the investigation or requesting a hearing before an AJ. See EEO MD-110, at Ch. 6, § XI and Ch. 7, § I.

Upon review, we find that the Agency developed an impartial and appropriate factual record, as the ROI contains copies of relevant Agency policies, emails, medical documents, and decisions regarding Complainant’s denied reasonable accommodation. The ROI also contains affidavit testimony from Complainant, S2A, S2B, and AD, as well as multiple rebuttal statements and supplementary documents provided by Complainant.

On appeal, Complainant asserts that her EEO complaint was not properly investigated for an array of reasons, such as the EEO investigator’s failure to interview her proffered witnesses or her manager. However, when creating an “appropriate factual record” an EEO Investigator is not necessarily obligated to pursue all of a complainant’s suggestions regarding how the investigation is conducted. See Sid E. v. Dep’t of Transportation, EEOC Appeal No. 2019002597 (Sept. 22, 2020).

If Complainant wanted an opportunity to develop the record through discovery and cross examination of witnesses, she should have requested a hearing before an AJ. Tommy O. v. United States Postal Serv., EEOC Appeal No. 0120152090 (Jun. 8, 2017).

Failure to State a Claim – Claim 2

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an aggrieved employee or applicant for employment who believes that he or she has 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 (April 21, 1994). If complainant cannot establish that s/he is aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

Claim 2 fails to state a claim under the EEOC regulations because Complainant has not established that the changes to her PD rendered her "aggrieved." There is no evidence that Complainant has been asked to travel since the change to her PD was proposed and subsequently made effective. The revised language states that travel "may" be required, which does not support Complainant's assertion that the change made travel an "essential function" of her position. To the extent Complainant is alleging that she was given other new responsibilities without explanation, she has not explained how the new responsibilities materially changed the nature or function of her position.

Disparate Treatment – Claims 3 and 5

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).

For Claim 3, the EEO Counselor's Report reflects that Complainant initiated EEO contact on October 18, 2019. She alleges that she was not included or invited to four training opportunities under S2A, but also characterizes the matter as an "ongoing issue." The most recent instance occurred on October 10, 2019. Another instance occurred on September 23, 2019, when Complainant's colleague emailed Complainant about a training for "Interviewing and Selection Skills for Supervisors," saying that she hoped Complainant could attend. Even assuming, *arguendo*, that all 4 instances of denied training were timely, Complainant does not provide sufficient details or documentation to overcome S2A's legitimate nondiscriminatory explanation that she does not recall the instances in Complainant's allegations. S2B recalls some training requests immediately upon her arrival, and she explains that she set them aside to review Complainant's position, and whether there was a need or funding. Also, the September 23, 2019 request concerned training through a different office. S2B also asserts that Complainant was among a number of employees whose training requests were not granted due to lack of funds. In an October 24, 2019 email Complainant states to S1B: "based on your feedback in the Human Capital meeting today, I'm assuming that any training I listed below Is put on hold until [S2B] valuates the programs in our function."

Complainant disputes the veracity of S2A and S2B's responses. However, 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 (Aug. 23, 2012).

For Claim 5, S2B's legitimate nondiscriminatory reason for denying Complainant's December 2019 leave requests for dates in April and August 2020, and for denying Complainant's January 8, 2019 use of her lunch break, in conjunction with leave requests, to cover medical appointments that fell outside core hours, was that she acted in accordance with the HC&PS Time and Attendance Guidance she established on December 9, 2019. S2B's legitimate nondiscriminatory reason for establishing the Guidance is operational need, namely, "program management, workload, and personnel coverage." There is no indication in the record that S2B treated similarly situated employees outside Complainant's protected classes more favorably by granting leave requests over 3 months in advance and/or allowing them to use their lunch break in lieu of requesting leave outside of core hours.

An employer has the discretion to determine how best to manage its operations and may make decisions on any basis except a basis that is unlawful under the discrimination statutes. Furnco, supra; Nix v. WLCY Radio/Rayhall Communications, 738 F.2d 1181 (11th Cir. 1984). An employer is entitled to make its own business judgments. The reasonableness of the employer's decision may, of course, be probative of whether it is pretext. The trier of fact must understand that the focus is to be on the employer's motivation, not its business judgment. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

Here, Complainant is unable to establish pretext by demonstrating that S2B's explanation is unreasonable in terms of business judgment. For instance, she asserts that 2B's refusal to accept her leave requests violates the Agency's policy that employees requesting advance leave must notify their supervisor of their leave plans "as soon as possible." However, Agency policy also places the decision on whether to grant a leave request within the scope of managerial authority. Complainant inadvertently supports the reasonableness of S2B's legitimate nondiscriminatory reason in terms of business judgment when she argues, "there is no indication that the workload and staffing needs necessitated that I needed to be on duty [for the dates she requested annual leave over 3 months away]." Without such advance notice, S2B could not accurately predict the impact granting Complainant's requests would have on operational needs.

Similarly, in contrast with Complainant's assertions, S2B's Summer Request Schedule is not evidence of pretext, but proof that S2B acted in accordance with the Agency's policy of considering leave requests in a "fair and equitable manner." If Complainant expected S2B to waive the 3-month requirement and accept Complainant's leave requests, it should also be expected that S2B provide Complainant's colleagues with the same opportunity. S2B noted that Complainant was not the only employee that came to her with leave requests for summer dates over 3 months in advance. The stated reason – to ensure consistent coverage – for requiring that lunch breaks not be used outside of core hours, either in lieu of or to extend a leave request, is also consistent with the December 9, 2019 Guidance and reasonable business judgment.

Complainant also dedicates much of Claim 5 to asserting that S2B treated her differently than employees outside her protected classes by requesting medical documentation to support a request for annual leave (Request #1). The record supports S2B's explanation that she interpreted Complainant's leave request as "annual leave in lieu of sick leave." Sick leave requests over 3 days must be supported with medical documentation. Although Complainant names employees who were not required to produce medical evidence to support sick leave for more than 3 days, she has not shown that the employees were "similarly situated."

Complainant disputes S2B's explanation, asserting that her request did not say the annual leave was "in lieu of sick leave" nor did she specify that she intended to take FMLA. However, Request #1 specifies that the leave was for a "medical procedure." Request #1 was ultimately approved by S2B on January 14, 2010, and there is no indication that the approval was conditioned on Complainant providing medical documentation after Complainant clarified to S2B that she was requesting annual leave.

Harassment/Hostile Work Environment

To prove harassment, Complainant must establish that she was subjected to conduct that was so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. She must also prove that the conduct was taken because of her age, disability, and/or prior 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).

Allegations of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See Phillips v. Dep’t of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996), Banks v. Dep’t of Health and Human Servs., EEOC Request No. 05940481 (Feb. 16, 1995). Unless it is reasonably established that the actions were somehow abusive or offensive, and were taken in order to harass complainant on the basis of any of her protected classes, such everyday events are not sufficiently severe or pervasive so as to offend the general sensibility of an individual experiencing such occurrences in the workplace. See Wolf v. United States Postal Service, EEOC Appeal No. 01961559 (July 23, 1998); see also Long v. Veterans Administration, EEOC Appeal No. 01950169 (Aug. 14, 1997).

As a preliminary matter, Complainant’s assertion that S2B and the RAC harassed her when they made “unnecessary and excessive requests for medical information” is more appropriately addressed in her claim of denied reasonable accommodation. S2B’s other alleged harassing actions, even when considered alongside the denied accommodation are not sufficiently severe or pervasive as to constitute harassment.

To the extent that Complainant alleges that S2B subjected her to a higher level of scrutiny than her coworkers by instructing her to keep her Skype location turned on and requesting medical documentation to support sick leave requests, we have previously found such scrutiny, while unpleasant, to be a “common workplace occurrence.” See Gormley v. Dep’t of the Interior, EEOC Complaint No. 01973328 (Feb. 18, 2000) (allegation that the complainant’s duties and time in and out of the office were closely monitored on a daily basis, and she was treated more harshly and unprofessionally by her supervisor than her colleagues, were “common workplace occurrences,” not harassment). Complainant’s allegations that S2B commented that Complainant’s “appointments” could refer to an appointment to get her nails done, and that in one instance S2B called Complainant at home about a project and referenced Complainant’s fatigue, do not describe conduct that was so severe or pervasive as to constitute harassment. We note that Title VII is not a general civility code. Rather, it forbids “only behavior so objectively offensive as to alter the conditions of the victim’s employment.” Oncale v. Sundowner Offshore Serv., 523 U.S. 75, 81 (1998).

S2A’s alleged harassing actions, must be considered separately, as they occurred before S2B was hired by the Agency.

All amount to isolated incidents, as they include several instances of denied training in 2015 and 2017, referenced in Claim 3, and exclusion from a meeting and preparation for a project in March and May 2019 respectively. While S2A did not provide a satisfactory explanation for including leave information in the email referenced in Claim 1, it was not inappropriate for S2A to share the information with S1B and the RAC. The email did not disclose the nature of the appointments or confidential details about Complainant's disabilities. Complainant's concern that the email threatened her RA would have been laid to rest when S2A notified her that her RA was granted. Even considered together, these isolated incidents do not amount to harassment.

Having thoroughly reviewed the record and the Parties' contentions on appeal, including those not specifically addressed herein, Complainant has not established discrimination as alleged.

Reasonable Accommodation – Claim 4

The Commission's regulations require an agency to make reasonable accommodation for the known physical and mental limitations of a qualified individual with a disability unless it can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), 1630.2(p). A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. See Bryan R. v. United States Postal Serv., EEOC Appeal No. 0120130020 (Mar. 20, 2015), citing EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002 ("EEOC Guidance No. 915.002"), Question 1 (Oct. 17, 2002).

Here, we conclude the December 5, 2019 response from Complainant's physician was sufficient to support Complainant maintaining Thursday as her "in office" day. Complainant's physician provided specific rationale, stating: "[the plan] has decreased the severity of [Complainant's] symptoms, stabilized her condition and delayed progression of her medical condition," and warned that a change in schedule would be "detrimental to her condition, mobility and treatment." Complainant's medical documentation establishes that Complainant was under a medical treatment plan created by her physician, which, among other things, included maintaining a schedule where, she worked "one day in the office on Thursday, off every Friday, and flexibility for her appointments to treat her medical conditions." Significantly, S2B's March 9, 2020 decision, quotes Complainant's January 20, 2020 medical documentation, where her physician states: "it is not advisable for [Complainant] to come in on Wednesday under the medical treatment plan I have prescribed. Wednesday in office day does not support the medical treatment plan....and would be detrimental to [Complainant's] treatment and health."

Yet, S2 and the RAC interpreted this to mean that Complainant could change her "in-office" day to Wednesday, noting that Complainant would still have Fridays off, allowing her to maintain three consecutive days of rest, per her physician's "medical treatment plan." S2B emphasized, "[a]gain, your doctor did not provide the specific treatment under his medical plan that prevents you from reporting to the office on Wednesdays."

The disconnect between the information provided and S2B arguments that it is still insufficient, can only be interpreted as a request to review and make a decision regarding Complainant's medical treatment, which is outside the scope of their authority. See, e.g. Bell G. v. United States Postal Service, EEOC Appeal No. 2021002760 (June 27, 2022) EEOC Appeal No. 2021002760 (rejecting the agency's claim that the complainant's medical documentation did not support her accommodation because, among other things, it did not explain why the complainant needed to take her medicine at a specific time). When granting an accommodation, consideration is limited to the Agency's obligation to provide an "effective" accommodation.

Protected individuals are entitled to reasonable accommodations, but they are not necessarily entitled to their accommodation of choice. Castaneda v. United States Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994). Here, the record is clear that the Agency had been successfully granting Complainant significant accommodation for her disabilities for many years. However, during the period in question, Agency management elected to alter Complainant's accommodation plan to change her in-office day from Thursdays to Wednesdays and to remove some flexibility in her work schedule for medical appointments by changing her schedule from maxi-flex to a compressed work schedule. As we have already determined, while Complainant's physician initially may not have been clear on the medical reasons for Complainant's in-office day remaining on Thursdays, further documentation from him clarified that Complainant's treatment plan required the three-day rest period to immediately follow the more physically stressful in-office day in order to reduce the symptoms of her medical conditions. Therefore, management's insistence on moving the in-office day to Wednesday which resulted in her having to work the next day rather than resting, rendered her reasonable accommodation far less effective.

As for the change in Complainant's schedule format from maxi-flex to a compressed schedule, Complainant refutes S2B's explanation that she was already working a compressed work schedule because she worked four days a week. Complainant asserts that, because she is no longer on a maxi-flex schedule, she can no longer adjust her lunch break to use it in conjunction with her leave for medical appointments or adjust her start or end time to accommodate medical appointments. To the extent that the change in schedule format has run counter to that part of Complainant's reasonable accommodation that formerly allowed her flexibility to attend medical appointments, we again find the change has rendered the accommodation less effective. We note that on appeal Complainant provides an email from OPM refuting S2B's rationale that it was not permitted under OPM policy to allow Complainant to have a "regular day off" with a maxi-flex schedule. By modifying Complainant's long-held accommodations to make them less effective, we conclude the Agency violated its accommodation duties under the Rehabilitation Act.

CONCLUSION

Accordingly, the Agency's final decision is MODIFIED. The Agency's finding of no discrimination is AFFIRMED with respect to Claims 1, 2, 3, and 5, and REVERSED with respect to Claim 4. Claim 4 (denial of effective reasonable accommodation) is hereby REMANDED to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is ORDERED to take the following remedial actions:

1. Revised Reasonable Accommodation Plan. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall, *with Complainant's consent*, return her reasonable accommodation plan to provide for Wednesdays as her in-office day and return her to a maxi-flex schedule to allow for maximum flexibility for scheduling medical appointments. If Complainant does not consent, the Agency shall engage in an interactive process with Complainant to provide for more effective accommodations needed.
2. Compensatory Damages. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall notify Complainant that she has a right to submit evidence to support her entitlement to compensatory damages with respect to harm arising from Claim 4 only.⁴ Complainant shall be directed to submit this evidence within **forty-five (45) calendar days** of receiving the Agency's notice. Within **sixty (60) calendar days** of receipt of Complainant's evidence (or when the 45-day period has passed), the Agency shall issue a decision on the compensatory damages claim, with appeal rights to this Commission, in accordance with 29 C.F.R. § 1614.110. Within **thirty (30) calendar days** of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
3. Training. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall provide at least two hours of in-person (or by video conference) one-on-one EEO training to S2B and the RAC. This single session training may be prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) explain *this decision* and what, if anything, S2B and the RAC should do differently if presented with a similar scenario in the

⁴ **Information on determining Compensatory Damages:** EEOC MD-110, Ch. 11 §VII (Aug. 5, 2015) available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm, and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

future, and (2) discuss the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations.

4. Disciplinary Action. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall consider taking disciplinary action against S2B. If the Agency decides to take disciplinary action, then 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.
5. Post Notice. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H0610)

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

September 26, 2022

Date