



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

[REDACTED]
Betsy W.,¹
Complainant,

v.

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

Appeal No. 2022001325

Hearing No. 471-2016-00078X

Agency No. DLAB-16-0036

DECISION

Following its January 11, 2022, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's finding of discrimination in violation of in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. The Commission REVERSES the Agency's final order.

BACKGROUND

On December 11, 2015, Complainant, a General Supply Specialist at the Agency's Disposition Services facility located in Battle Creek, Michigan, filed an EEO complaint alleging that she was discriminated on the bases of race (African American), color (dark brown), in reprisal for prior EEO activity, i.e., Agency Case No. DLAB 14-0011, and subjected to harassment (non-sexual) when the following events occurred: 1) between September 2015 and November 2015, S1, Reconciliation Branch Chief and Complainant's first level supervisor, subjected her to overbearing and numerous requests for justification of completed assignments; 2) on October 30, 2015, her reasonable accommodation request to telework was not processed within 30 days by

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.

S1 and S3, Supervisory, Transformation Manager and Complainant's third level supervisor; 3) on November 10, 2015, C1, her coworker, repeatedly pushed his desk into her cubicle wall causing her desk to bump against her; 4) on November 11 2015, she was issued a letter of counseling by S1 addressing the inclusion of her personal attorney on business related emails, reports of banging and kicking on her wall partition, and updating emergency contact information in the Defense Civilian Payroll System (DCPS); and 5) on November 15, 2015, she was charged 32 hours sick leave without pay even though she was allegedly approved for advanced sick leave on November 9, 2015, by S3.

On December 17, 2015, the above claims were accepted by the Agency, investigated, and Complainant requested a hearing before an EEOC Administrative Judge (AJ). The original claims were assigned to AJ1.

In early 2017, Complainant raised additional claims to the Agency. These additional claims were: 6) on February 21, 2017, she was given a cyber security letter by management officials S1 and S2, the Division Chief and Complainant's second level supervisor, which alleged that she committed a security breach by including her representative on work-related email messages; 7) on February 7, 2017, she found out that she did not receive a performance cash bonus like her coworkers for fiscal year 2016; 8) on January 27, 2017, she was rated "minimally acceptable" on her performance review by S1 and S2; 9) on January 27, 2017, she was presented with a ten-day suspension letter for tardiness by management officials S3, S2, and S1; 10) on January 27, 2017, she alleged that S3 threatened her and made physical contact on her right arm and threw suspension documents on her desk when attempting to get her to sign the ten-day suspension letter; 11) on February 14, 2016, her reasonable accommodation request to participate in the physical fitness program was denied; and 12) on December 17, 2015, she was approved for the Voluntary Leave Transfer Program (VLTP), but the chain of command did not email employees so that she could receive the donations.

On February 27, 2017, Complainant was notified that because the new claims were deemed like and related to the original claims, which were already pending a hearing, Complainant was advised that the EEO Director would notify the EEOC Hearings Unit of the new claims and that she should also notify them that she wanted to amend her pending complaint with the new claims. She was also informed that, "If you contact this Office in the future in order to file an EEO complaint regarding further related events of alleged harassment, there is no requirement that you seek EEO counseling regarding like or related claims to your complaint that is pending a hearing with the EEOC."

On March 13, 2017, S1 gave Complainant a notice of unacceptable performance, which provided her with 90 days to improve. On March 31, 2017, Complainant contacted the EEO office alleging that she was discriminated against and subjected to harassment based on her race, sex, disability, and in retaliation when, on or around March 16, 2017, she was placed on a performance improvement plan (PIP) by her chain of command (claim 13). In a letter dated April 3, 2017, the Agency accepted this claim as being like or related to Complainant's original complaint, and again advised her that the EEO Director would notify the EEOC Hearings Unit of

the new claims, and that she should also notify them that she wanted to amend her pending complaint with the new claim. She was also reminded that, in the future, there was no requirement that she seek EEO counseling regarding like or related claims to her complaint that were pending a hearing with the EEOC.

On June 27, 2017, S1 gave Complainant a notice of proposed removal for unacceptable performance. The proposed removal stated that Complainant had failed to make required improvements as specified in the March 13, 2017 notice of unacceptable performance. On July 24, 2017, Complainant was given a notice of a decision to remove her from Federal service, effective August 10, 2017 (claim 14). Complainant was advised of her right to grieve the decision, to file an appeal to the Merit Systems Protection Board (MSPB), or an EEO complaint with the Agency.

In February 2021, the original complaint was transferred to a second Administrative Judge (AJ2). In an order dated March 17, 2021, AJ2 ordered the Agency to investigate Complainant's additional claims, 6 – 13,² and to process Complainant's claim regarding her termination, claim 14, "either separately or as an amendment to the pending complaint(s) and advise Complainant with respect to her rights on a mixed-case complaint." The Agency argued that Complainant did not timely raise claim 14. The Agency had argued that there was not sufficient evidence to conclude that she properly or timely raised the claim to the Agency's EEO office or any other competent authority. AJ2, in his order, noted that the Agency's compliance with his order was not a withdrawal of its objection.

On September 7, 2021, during the hearing, AJ2 found that Complainant did timely bring claim 14 to the attention of the Agency on September 14, 2017, which was within the 45-day time limitation period that proceeded her August 10, 2017, removal. AJ2's determination was based on his interpretation of pre-complaint intake forms, dated September 14, 2017, where Complainant stated that, "I believe that I was discriminated against because of my race, color, disability, and reprisal for previous complaints that I filed. The most recent event . . . that occurred was on August 10, 2017, when I was terminated from federal government service."

AJ2 found that:

Yeah, so the Complainant is timely within 45 days. That's why she is requesting reinstatement. And, naturally, it is the responsibility of the EEO to help the Complainant and guide the Complainant and flushing some of these issues out. The Complainant is not a lawyer. She is not an EEO official. So she sent her documents to the EEO. In addition to that, the Complainant presented credible evidence showing that, after her termination, that she was prohibited from

² According to the Agency, Complainant never filed a motion to amend the original complaint with the new claims (6 – 13) and no order amending the complaint was ever entered into FEDSEP. The Agency further states that there is no indication that the Hearings Unit ever became aware of the new claims.

entering the Agency's facility. In other words, her contacts with the Agency was minimized, except through phone or e-mail.

Because he found that Complainant raised claim 14 in a timely manner, AJ2 directed the Agency to issue a final decision (FAD) with appeal rights to the MSPB.

A hearing on the merits of claims 1 - 13 was held September 7 through September 9, 2021. At the close of Complainant's case, the Agency motioned for a Directed Verdict. AJ2 granted the Agency's Motion in part. AJ2 granted the motion on all claims as to discrimination based on race, color, and disability. However, AJ2 found that Complainant did establish discrimination on the basis of reprisal regarding her hostile work environment claim and several of her disparate treatment claims.

Regarding Complainant's hostile work environment claim, AJ2 cited S1 assigning Complainant numerous and overbearing work assignments (claim 1); S3 taking 30 days to grant Complainant's telework request (claim 2); and Complainant not receiving a cash bonus in 2016 (claim 7). AJ2 found that Complainant was "heavily scrutinized" by management and was "on their radar" because she had filed a previous EEO complaint against S2 when she was Complainant's first level supervisor in the Electronic Division. AJ2 found S3's conduct as set forth in claim 10 to be especially "telling" when he went to Complainant's cubicle with three other individuals, two males and S2, to deliver Complainant's 10-day suspension letter. Complainant stated that S3 put the 10-day suspension on her desk and attempted to force her to sign it. In that process, he hit her arm. Although S3 denied making physical contact with Complainant, AJ2 found, based on the testimony presented, that S3 did touch Complainant. S3 claimed that he went to Complainant's office with the three individuals as witnesses in order to protect himself from any future allegation by Complainant. AJ2 described S3's actions as a "show of force" and "intimidation" due to Complainant's 5'8" stature, race, and sex. AJ2 discredited S2 and S3's testimony, which he found unworthy of credence.³ Based on the totality of the evidence presented, AJ2 found that management officials subjected Complainant to what he characterized as "a campaign of torment," because of her prior EEO activity.

AJ2 further found that Complainant established a prima facie case of disparate treatment based on her prior EEO activity, when: she was denied a cash bonus (claim 7); issued a minimally

³ AJ2 found that S3 had earlier lied to him about whether he had suspended Complainant for three days due to tardiness. AJ2 stated, "[b]ecause if [S3] could lie to me about [the] three-day suspension, nothing stops him from lying to me as to what happened, as to the reason why he . . . why he presented the – or the reason for the ten-day suspension." With respect to S2, AJ2 noted her claim that she was not aware that Complainant had named her as a responsible management official in prior EEO complaints, and her often repeated comment that she "did not recall," in her supplemental investigative affidavit regarding claims 6 – 14. According to AJ2, S2's testimony was "unbelievable," and lacked "credibility." During her testimony, AJ2 also felt that S2 displayed a "disdained look, a nonchalance attitude" towards Complainant or towards the proceeding.

acceptable performance rating (claim 8); issued a 10-day suspension (claim 9); denied participation in the fitness program (claim 11); management did not e-mail employees so that the employees could donate leave for her on the VLTP (claim 12); placed on a performance improvement plan (claim 13); and finally terminated (claim 14). AJ2 found that, based on the totality of the evidence presented, the Agency's reasons for its actions were unworthy of credence. Finding that S1, S2, and S3 showed "a disdain" for Complainant, AJ2 noted the lack of a justification for S3 going to Complainant's office with two other males and S2, S3 lying to him about Complainant's three-day suspension, and S2's "failure to tell the truth." AJ2 found that the Agency failed to articulate legitimate reasons for its conduct and that even if S2 and S3 had testified truthfully, the record showed that Complainant was retaliated against based on her prior EEO activity.

After a hearing on damages was held, AJ2 entered an order directing the Agency to: 1) expunge all adverse materials from Complainant's personnel file between 2015 through August 2017; 2) restore all annual leave, as well as sick leave used as a result of the Agency's conduct between 2015 and August 2017; 3) notify all employees of the Agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur; 4) commit that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur; 5) award Complainant \$3,200 plus interest in cash bonus based on GS-9 a fully successful performance evaluation for the rating period of February 2, 2017; 6) pay Complainant \$2,655.20 plus interest at the GS-11 level for the two suspensions, which lasted three and ten days; 7) pay Complainant \$1,062.08 plus interest at the GS-11 level for the 32 hours of AWOL that the Agency charged her; 8) pay \$180 in gas expenses as a result of the denial of the opportunity to telework and \$410 for denying the opportunity to participate in the Agency's fitness program; 9) pay \$14,153.33 plus interest in back pay to Complainant for the loss of her step increase at the GS-11 grade level between March 2015 through August 2017; 10) reimburse Complainant \$2,180.95 for the copays for her medical expenses between 2015 thru August 2017; 11) pay \$13,187.50 in attorney's fees; 12) pay Complainant \$25,000 in nonpecuniary, compensatory damages for emotional pain and suffering; 13) arrange sensitivity training for S3 and S2; and 14) to consider taking disciplinary actions against S3 for his behavior in Complainant's office on January 27, 2017.

On appeal, the Agency argues that:

- 1) AJ2 erred when he found that Complainant raised claim 14 in a timely manner, and ordered the Agency to issue a FAD on this issue.
- 2) AJ2 made findings that were unsupported by sufficient evidence, specifically:
 - a) The finding that S3 threatened and made physical contact with Complainant.
 - b) The finding that the Agency harassed Complainant when C1 repeatedly pushed his desk into her cubicle wall causing Complainant's desk to bump against her.
 - c) The finding that the Agency harassed Complainant when on or about November 15, 2015, she was charged 32 hours without pay even though she alleged that she was approved for sick leave on October 9, 2015, by S3.

- 3) AJ2 wrongfully excluded the testimonies of S3 and S2 during the Agency's case-in-chief to the prejudice of the Agency.
- 4) AJ2 exhibited behavior incongruent with that of a neutral and unbiased factfinder.
- 5) AJ2 referred to and made witness inquiries regarding matters unrelated to the claims at issue.

Complainant, in opposing the Agency's appeal, asks that we uphold AJ2's decision and reverse the Agency's final order. The Agency has not specifically contested any of AJ2's ordered relief.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VI.C (Aug. 5, 2015) provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ's decision to demonstrate that the AJ's factual determinations are not supported by substantial evidence. See id. In this case, this means that the Agency has the burden of pointing out where and why AJ2's findings are not supported by substantial evidence. Cf. id. (pointing out that "[t]he appeals statements of the parties, both supporting and opposing the [AJ's] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ's] factual determinations are supported by substantial evidence").

The Agency's First Contention on Appeal (Claim 14 – timeliness)

The record indicates that on December 7, 2021, the Agency issued a FAD on claim 14. Complainant filed an appeal to the MSPB on December 29, 2021. The Agency raised its objection to the timeliness of Complainant's EEO contact to the MSPB Administrative Judge (MSPB AJ). On March 7, 2022, the MSPB AJ issued a decision dismissing Complainant's appeal without prejudice because he could not resolve the timeliness issue. Because the Agency informed the MSPB AJ that it had filed the instant appeal with the Commission raising its assertion that AJ2 erred in finding that Complainant's EEO contact regarding claim 14 was timely, the MSPB AJ found that the Agency did not waive its objection by issuing a FAD on the

merits.⁴ Consequently, the MSPB AJ dismissed the appeal without prejudice, subject to an automatic refiling in 18 months. The MSPB AJ stated that:

If, before then, the parties receive a determination from OFO [Office of Federal Operations, EEOC] on the timeliness issue, they are strongly encouraged to move to refile the appeal sooner than the Board's automatic refiling. If upon automatic refiling the timeliness issue is still not resolved, then the Board will review the attendant facts and law and determine whether another dismissal without prejudice is appropriate.⁵

The Agency objects to AJ2's determination that Complainant's raised claim 14 in a timely manner. According to the Agency, there is no support for AJ2's finding that the pre-complaint intake form, dated September 14, 2017, and signed by Complainant was ever sent to or received by the Agency's EEO office. The Agency noted that the sections of the document that would have been completed by the EEO office, had it been received, were blank. At the hearing, according to the Agency, Complainant never established that she faxed, mailed, or emailed the form to the Agency's EEO office. The Agency further noted that although AJ2 stated that the form was emailed to both him and AR1, the prior Agency representative in this case, he presented no evidence establishing his receipt of the document; moreover, the Agency asserted, contacting an EEOC AJ is not the proper means by which the EEO process is initiated.

The Agency argues that even if there was evidence for AJ2 to find that Complainant timely exercised her rights with respect to her termination, AJ2 acted outside the scope of his authority to order it to issue a FAD over four years after the termination and to provide Complainant with a second set of appeal rights before the MSPB. The Agency maintained that AJ2 should have added claim 14 to the matters before him at hearing, and because he did not, the Agency asserts that AJ2 erroneously and without authority issued an order on a matter not before him and that his order should be found to be null and void.

As was noted above, in the Agency's February 27, 2017 letter advising Complainant that claims 6 – 12 were being referred to the Hearing Unit of the EEOC's Detroit Field Office, Complainant was told that going forward that she could file amendments with the EEOC's Detroit Field Office regarding like or related claims; and that if she contacted the EEO office "in the future in order to file an EEO complaint regarding future related events of alleged harassment, there is **no** requirement that you seek EEO counseling regarding like or related claims to your complaint that is pending a hearing before the EEOC." (emphasis added). The Agency reiterated these instructions in April 2017, with respect to claim 13.

⁴ According to the MSPB AJ, "[i]f the AJ actually believed the [A]gency could 'comply' with his order by issuing a FAD that dismissed the complaint as untimely, he never made that clear — and in deference to how EEOC's OFO might analyze this scenario, I find it inappropriate to decide on it myself."

⁵ MSPB Appeal No. CH-0432-22-0118-I-1 (Mar. 7, 2022). This decision became final on April 11, 2022.

As AJ2 stated, Complainant is not a lawyer, and, at that time, we note she was not represented by an attorney. AJ2 also found that she presented credible evidence showing that, after her termination, she was prohibited from entering the Agency's facility; consequently, her contacts with the Agency were minimized, except through phone or e-mail. Complainant indicated that she made several attempts to contact the Agency, but no one responded.

EEOC Regulation 29 C.F.R. § 1614.604(c) provides that the time limits in this part are subject to waiver, estoppel, and equitable tolling. Based on the record before us, we find that the 45-day time limitation period should be equitably tolled. We find it reasonable, based on the record established by AJ2, that Complainant was confused about the process as to where she should raise her concerns about her termination, and, based on the guidance from the EEO office, whether she even had to seek EEO counseling. In this regard, we note that the September 14, 2017, pre-complaint documents contained in the record were mailed to the EEOC's Washington Field Office in an envelope bearing a September 22, 2017, postmark.

Regarding the Agency's claim that AJ2 acted outside the scope of his authority by ordering it to issue a FAD with appeal rights to the MSPB on claim 14, we find that, because claim 14 constitutes a mixed case claim, AJ2 correctly interpreted our regulations concerning the processing of mixed case complaints. Moreover, as noted above, this matter is now before the MSPB, pending a determination on the issue of timeliness; therefore, we do not have jurisdiction over the merits of claim 14. Chandler S. v. Dep't of the Army, EEOC Appeal No. 2019003479 (Feb. 5, 2020).

The Agency's Second Contention

The Agency argued that the record does not support AJ2's determination that S3 threatened Complainant and made physical contact with her arm. According to the Agency, AJ2 relied solely on the uncorroborated and self-serving testimony of Complainant to support this conclusion while ignoring the testimony of: S3 who stated that he merely placed the letter on Complainant's desk and did not touch her; S2, who stated that she did not see S3 touch Complainant or hear him threaten her; D1, the Chief of Staff, who stated that S3 went to Complainant's desk, delivered the letter, and walked away; and D2, Human Resources Manager, who showed up at some point during the incident, but did not mention anything about seeing S3 touch Complainant during his testimony. AJ2, according to the Agency, never made any determinations about the credibility of D1 or anyone else.

We find that the Agency has failed in its attempt to show that there is not substantial evidence to support AJ2's determination that S3 threatened Complainant and made physical contact with her. We first note Complainant's testimony which AJ2 obviously found credible. We next note that AJ2 found that S3's testimony on this issue was not credible and he specifically discounted it. With respect to S2, although she testified at the hearing that she did not see S3 touch Complainant or threaten her, we note that in her May 14, 2021 supplemental affidavit, which was written four months earlier, she wrote "do not recall," when asked what she witnessed. D2, both in his affidavit and hearing testimony, stated that he was not present when S3 presented

Complainant with her suspension letter, he arrived later; however, at the hearing he testified that he was asked by someone to come upstairs to the scene because there was a “commotion.” In his affidavit, D2 stated that “[S3] informed me he [went] to hand the suspension letter to [Complainant], his arm brushed her shoulder as he went to set the letter on her desk, since she would not acknowledge his presence or take the letter from his hand[.]” D1 testified at the hearing, consistently with his affidavit, that S3 merely walked into Complainant’s cubicle, placed the letter on her desk and walked away; however, based on his examination of the record, AJ2 found that S3 engaged in the conduct that Complainant alleged took place.

The Agency next argued that the record does not support AJ2’s determination that C1 repeatedly pushed his desk into her cubicle wall causing Complainant’s desk to bump against her. Specifically, the Agency argues that AJ2 incorrectly found that Complainant complained that C1 constantly bumped into her desk and that C2, the Team Leader, testified that she sat right next to the desk when Complainant complained a couple of times. According to the Agency, this was not consistent with the testimony because C2 testified at the hearing that she did not recall any complaints about the desk.

We find that the Agency’s argument is disingenuous. First, AJ2 was merely stating what Complainant had alleged, he was not making a specific finding of fact. Moreover, although C2 did testify at the hearing that she did not recall any complaint about the desk, in her March 8, 2016, affidavit, which is contained in the first report of investigation, she stated that, “I was sitting there when she complained a couple of times and I sat right there next to [C1].” Thus, C2’s affidavit testimony is consistent with AJ2’s recitation of the facts. C2, in her affidavit, made clear that she never heard nor saw anything that indicated that C1 was harassing Complainant, but as AJ2 maintained, she did state that she witnessed Complainant comment on C1’s conduct.

Finally, the Agency argued that there is no substantial evidence in the record to support a finding that the Agency harassed Complainant when on or about November 15, 2015, she was charged 32 hours without pay even though she had been approved for sick leave on October 9, 2015, by S3. The Agency noted S3’s affidavit indicating that the leave discrepancy was corrected by payroll adjusting 32.25 hours of sick leave credit to Complainant on November 9, 2015. The Agency argued that AJ2 “[g]ave no reasoning as to whether the time taken to correct the balance was unreasonable or that the amount of leave credited was contrary to Agency policy or otherwise unreasonable.” We find that assuming, arguendo, the Agency compensated Complainant, that would not indicate, as the Agency appears to argue, that discriminatory harassment did not occur when she was initially charged with 32 hours of leave without pay in the first place.

Furthermore, at the damages hearing, Complainant’s attorney informed AJ2 that she and AR2, the Agency Representative who took over the case when AR1 left the Agency in May 2021, were:

able to agree about the time period, but not the amount of it. So[,] I just want to go to that there was a party stipulation of facts that [AR2] had proposed, it was regarding the finding on or about November 15, 2015[,] when the complainant was wrongfully charged 32 hours without pay, even though the complainant was approved by sick leave on October 29, 2015 by [S3]. The agency has submitted that the amount should be \$792. And we calculated it at a \$1,062.08.

Complainant's attorney notes, on appeal, that the Agency did not object to this representation. Complainant's attorney also notes that Complainant "[s]ubmitted evidence to support the lack of payment for this sick leave, which was considered by the Administrative Judge who properly found in her favor." Accordingly, we find that there is substantial evidence in the record to support AJ2's determination with respect to this issue.

The Agency's Third Contention on Appeal

The Agency argued that AJ2 erred because he wrongfully excluded S3 and S2 from its case-in-chief. The Agency argued that:

As their testimonies make clear, neither [S3] nor [S2] engaged in behavior at the hearing remotely close to unprofessional, disrespectful, degrading, insulting, threatening, or vulgar. Furthermore, neither engaged in conduct for the purpose of delaying the proceeding. With the first-line supervisor [S1] unavailable as she retired years prior to the hearing, the testimonies of [S2] and [S3] were indispensable to the Agency's case-in-chief as they were the remaining members of [Complainant's] supervisory chain. The Administrative Judge unduly prejudiced the Agency by precluding their testimonies.

The Commission notes that Administrative Judges have broad discretion in the conduct of hearings, including discovery, the determination of whether to admit evidence, or permit or compel the testimony of witnesses. See 29 C.F.R. §1614.109. Upon review of the record, the Commission finds no evidence that AJ2 abused his discretion in these matters.

At the outset, we note that upon finding that S3 had lied to him when he testified that he did not issue a three-day suspension to Complainant, which the Agency attributes to a confusing question, AJ2 recalled S3 the next day to testify. After S3 explained the supposed discrepancy, AJ2 accused him of intentionally lying to him. AJ2 as a consequence stated that all testimony concerning Complainant's removal and ten-day suspension would not be considered as "a legitimate, nondiscriminatory reason." AJ2 also found that such testimony was "unworthy of credence." AR2 did not object to this ruling. Moreover, contrary to the Agency's assertion otherwise, AJ2 did not prohibit S3's ability to testify during the remainder of the hearing; nor did he discount his testimony in areas other than the ten-day suspension and the removal.

At the conclusion of the Complainant's case-in-chief, AR2 moved for a directed verdict. After a lengthy discussion, AJ2, as noted above, granted the motion in part, and denied it in part.

AR2 was then asked by AJ2 what he wanted to do, and he indicated that he wanted to call three witnesses in his case-in-chief. These witnesses were C3, D2, and S2. AR2 told AJ2 that he wanted to call S2 back in order to ask her a “clarifying question,” i.e., whether, after having refreshed her recollection, Complainant’s previous EEO case “was the reason for the adverse actions that she was involved with.” AJ2 denied the witness request for S2, only. According to AJ2, he did not find her testimony to be credible. He noted that:

I have the report of investigation, her affidavit riddles with, I do not recall, I do not recall, I do not recall. I mean, come on. Now she wants to remember. Now she wants to remember. No. Her testimony is -- is unworthy of credence. So, I’m going to deny that.

AR2 did ask AJ2 that if the same ruling would apply to S3 being allowed to testify again (S3 had previously testified) and AJ2 said yes. We find no evidence to support the assertion that AJ2 “unduly prejudiced” the Agency with respect to any testimony he might have offered.

With regard to S2, we find that, given the limited nature for which AR2 stated that he wanted to utilize her, there is no support for the Agency’s assertion on appeal that S2’s testimony was indispensable to the Agency’s case-in-chief. She would have testified to something that AJ2 already believed to be the case, i.e., that she was fully aware that Complainant had filed a prior EEO complaint naming her as a responsible management official, and presumably she would have denied that Complainant’s EEO activity played any role in her actions as she did in her two investigatory affidavits.

Finally, we note that both S3 and S2 testified in Complainant’s case-in-chief where they answered questions from Complainant’s non-attorney representative, the Agency’s representative, AR2, and AJ2 on various matters. The Agency has presented no persuasive argument as to what specific testimony they would have given in its case-in-chief that they were not able to give during the time that they testified other than the narrow question that AR2 wanted to ask S2.

The Agency’s Fourth Contention

The Agency maintains that the totality of the circumstances and the factual record suggests that AJ2 had an animus towards the Agency and was not a neutral and unbiased factfinder in this case. The Agency cites a conversation between AJ2 and AR2, during a pre-hearing conference on November 23, 2021. During that discussion, the Agency maintains that AJ2: stated that he suspected that the Agency engaged in an intentional and orchestrated effort to subvert Complainant’s case even though, by his own admission, he had no evidence for this; referenced AR1, the previous Agency representative in this case until May 2021, in a disparaging manner; and mentioned an unrelated case that he was presiding over where AR2 was now the Agency representative after taking over for AR1. The Agency also mentioned that AJ2 “scolded” AR2 for trying to call a witness on the telephone even though he had earlier issued an order allowing telephonic testimony.

Finally, the Agency argued that AJ2, on September 9, 2021, displayed “unprofessionalism and [a] lack of judicial decorum” when he erroneously stated that AR1 had “retired unexpectedly in the midst of an allegation concerning EEO misconduct.” The Agency noted that AR1 had accepted a promotion at another Agency.

Our review of the record does not support the Agency’s contention that AJ2 had an animus towards the Agency in this case. At the outset, we find that with respect to the November 23, 2021 pre-hearing conference, AJ2 was not talking about Complainant’s case, i.e., the instant case, when he talked about his belief that the Agency “engaged in an intentional and orchestrated effort to subvert the complainant’s case.” AJ2 was talking about an unrelated case which he did not identify. AJ2 expressed his opinion that the Agency’s Office of General, i.e., AR1, interfered with the EEO process in that case. Because AR2 took over this unrelated case, he and AJ2 discussed in general terms AJ2’s assertions about interference. AR2 stated that, “I believe there is discussion with the EEO as far as getting familiarity with the case, but I don’t believe that the office of the counsel [sic] directs the EEO as to how they handle their procedures.” AJ2’s statement on September 9, 2021 that AR1 “retired unexpectedly in the midst of an allegation concerning EEO misconduct,” when viewed in context with his November 23, 2021 discussion with AR2 indicates that the EEO misconduct that he was referencing was his belief that the Office of General Counsel was interfering with the EEO office.

Throughout the hearing, we find several examples of AJ2 reprimanding AR2, Complainant’s non-attorney representative, and Complainant. For example, he accused Complainant’s non-attorney representative of trying to mislead him and told her if it happened again, he would remove her from the case and make her pay for the transcripts; he threatened to dismiss the case because Complainant and her non-attorney representative were 25 minutes late returning from a lunch recess; and he reprimanded AR2 for interrupting him. We note that AJ2 ruled in favor of the Agency in part with respect to its motion for a directed verdict.

In Catheryn P. v. U.S. Postal Serv., EEOC Appeal No. 2021002386 (Feb. 28, 2022), the Commission found that an allegation of bias without more is not sufficient reason to reverse an AJ’s decision but rather that a complainant “must show that the AJ’s bias against her so permeated the process, that it would have been impossible to receive a fair hearing, or that the process was so tainted by substantial personal bias that she did not receive a fair and impartial hearing.” We find that the Agency has made no such showing in this case.

The Agency’s Fifth Contention on Appeal

The Agency argued that although claim 14 was not among the matters at issue in this case, AJ2 focused on Complainant’s removal during his questioning of S3 and S2. The Agency also argued that when announcing his decision regarding the Agency’s motion for a directed verdict, AJ2 spoke about how S3 could have reassigned Complainant instead of removing her. According to the Agency, AJ2’s “[e]xtreme interest with the collateral issue of the Appellee’s removal was unnecessary and inappropriate.” The Agency maintained that AJ2 “selectively and one-sidedly used the termination in a manner beneficial to [Complainant] and adverse to the Agency.”

The Agency speculated that AJ2's opinion that Complainant should not have been terminated, "likely shaped his opinion regarding liability as to the claims that were at hand."

As noted above, AJ2 also found that Complainant established a prima facie case of reprisal discrimination regarding her termination, and that the Agency did not establish a legitimate, nondiscriminatory explanation for its actions, after he discounted the testimony of S3 with respect to claim 14. Notwithstanding these findings, the fact remains that the merits of claim 14 were not before AJ2, are not the subject of this appeal, and, other than speculating, the Agency has not indicated how it was harmed by AJ2's opinion about Complainant's termination.

We find that AJ2's findings of discrimination are supported by substantial evidence. Because the Agency and Complainant have not appealed AJ2's findings of no discrimination for certain claims, we exercise our discretion to not consider those findings.

CONCLUSION

We REVERSE the Agency's final order, and we REMAND the matter to the Agency to take corrective action consistent with this decision and the Order herein.

ORDER

The Agency shall take the following remedial actions:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$3,200 plus interest as a cash bonus based on a GS-9 fully successful performance evaluation for the rating period of February 2, 2017.
2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$2,655.20 plus interest at the GS-11 level for the two suspensions, three and ten days.
3. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$1,062.08 plus interest at GS-11 level for the 32 hours of Absent Without Leave that the Agency charged her.
4. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$14,153.33 plus interest in back pay to Complainant for the loss of her step increase at the GS-11 grade level between March 2015 thru August 2017.
5. Within 60 days of the date this decision is issued, the Agency shall restore all annual leave, as well as sick leave used as a result of the Agency's conduct between 2015 and August 2017.

6. Within 60 days of the date this decision is issued, the Agency shall expunge all adverse materials from Complainant's personnel file between 2015 thru August 2017.
7. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$25,000.00 in nonpecuniary, compensatory damages.
8. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$180 in gas expenses as a result of the denial of the opportunity to telework.
9. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$410 for denying her the opportunity to participate in the Agency's fitness program.
10. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$2,180.95 for the copay for her medical expenses between 2015 thru August 2017.
11. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$13,187.50 in attorney's fees.⁶
12. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training to S3 and S2 on Title VII, harassment, and avoiding reprisal against individuals who engage in protected EEO activity.
13. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S3 and S2. The Commission does not consider training to be disciplinary action. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure dates.

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

⁶ Although Complainant was represented by a non-attorney during the liability phase of the hearing, she obtained an attorney for the damages phase.

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H1019)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408.

A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

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

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

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

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

June 13, 2023

Date