



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

[REDACTED]
Terisa B.,¹
Complainant,

v.

Patrick M. Shanahan,
Secretary,
Department of Defense
(Defense Finance & Accounting Service),
Agency.

Appeal Nos. 0120180570, 0120181692, 2019002121

Agency Nos. DFAS-00017-2017, DFAS-00059-2017, DFAS-00055-2018

DECISION

Complainant timely filed appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from Agency final decisions concerning her equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. As the complaints at issue here involve related and often overlapping events, we are exercising our discretion, pursuant to 29 C.F.R. § 1614.606, to consolidate Complainant's three appeals together for adjudication in the instant decision. For the following reasons, the Commission MODIFIES the Agency's final decisions with regard to Agency Nos. DFAS-00017-2017 and DFAS-00059-2017. The Commission AFFIRMS the Agency's final decision with respect to Agency No. DFAS-00055-2018.

ISSUES PRESENTED

The issues presented are: 1) whether the comments made by Complainant's supervisors about her EEO activity constituted a per se violation of Title VII; 2) whether Complainant established that the Agency's proffered explanation for its actions was pretext to mask discrimination based on her protected classes; and 3) whether Complainant established that she was subjected to a hostile work harassment and a constructive discharge, as alleged.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Technology (IT) Specialist at the Agency's Strategy, Support, Information, and Technology Directorate Office in Indianapolis, Indiana. Report of Investigation, Agency No. DFAS-00017-2017 (ROI 1), at 32.² Complainant, a newly-hired employee, was subject to a one-year probationary period, which was later switched to a two-year probationary period. ROI 1, at 148. The Supervisory IT Specialist served as Complainant's first-level supervisor (S1), and the Division Chief served as Complainant's second-level supervisor (S2).

In September and October 2016, Complainant sent S1 several emails regarding jokes and purported harassment occurring in the workplace and involving coworkers. Specifically, in an email dated September 16, 2016, to S1, Complainant stated that a coworker (C1) took her shoulder and gave it a hard squeeze. Id. at 190. Complainant also stated that on another occasion C1 said to her that he had a former "beau" who was of color. Id. She further mentioned in the email that C1 said her work was great and, "I love you! In fact, I'd give you a big hug, but I'd probably get in trouble!" Id. S1 then reportedly asked Complainant if she wanted him to take any action, to which Complainant purportedly responded with a "no" answer. Id. at 165. S1 explained that he further asked Complainant if she wished to have no further interaction with C1, but she allegedly responded with a "maybe" answer. Id. As such, according to S1, he thought that Complainant did not wish to pursue the matter, so he considered the matter dropped. Id.

In the September 16, 2016, email to S1, Complainant also reported that the Team Leader made an anti-lesbian statement about another coworker in an email to her. Id. On September 25, 2016, Complainant additionally forwarded an email from the Team Leader wherein the Team Leader referred to her as a "documentation Nazi" in relation to an assignment. Id. at 188. In another email to S1 dated October 4, 2016, Complainant also reported that the Team Leader made a racially-offensive remark when she said that some of her Kentucky relatives still believe in the "one drop rule." Id. at 191, 360. Complainant believed that the Team Leader made the remark because she (Complainant) made a statement about her multiracial children. Id. at 360. Nevertheless, according to Complainant, S1 told her that management did not like people who tattle on others and that S2 indicated that it is easier to get rid of "troublemakers" who are probationary employees. Id. at 146, 148.

In response, S1 averred that Complainant told him that she wanted to look good in the eyes of management, so she sent several emails identifying employee conduct she did not like.

² The page numbers refer to the "Bates stamp" numbers on the bottom right of each page.

S1 stated that he spoke with S2 over his frustration with Complainant regarding her complaints, and S2 reminded him that Complainant was a probationary employee and it is easier to get rid of a probationary employee prior to the end of the probationary period. Id. at 164. S1 also stated that S2 was concerned that Complainant's willingness to complain about coworkers made Complainant come across as a tattletale, a statement with which he agreed. Id.

S1 recalled that, on October 7, 2016, he had a meeting with Complainant to go over Complainant's performance plan. Id. Therein, according to S1, he verbally told Complainant that she was bringing up numerous issues and forcing him to address them as legitimate EEO complaints. Id. S1 attested:

I told the Complainant that I do not see where the complaints were anywhere close to valid EEO complaints and that the Complainant dancing around the EEO complaint topic while complaining was causing me a lot of extra work and stress. I told her she must stop doing these things unless it is a real complaint. I also told the Complainant that management felt the way I do about the complaints, which is we see someone that does not work well with others.

Id.

S1 further attested that he told Complainant that management said it was easier to get rid of a probationary employee and that management had brought up termination if her complaints continued. Id. at 165. S1 explained that Complainant's complaints were not anywhere close to being valid EEO complaints and were more indicative of employees simply not getting along with each other. Id. S1 maintained that he told Complainant that she could be terminated if her complaints about employees continued. Id.

S1 explained that Complainant complained that someone sent a derogatory email about someone's sexual orientation but did not provide any details into the matter. Id. S1 moreover stated that Complainant complained that C1 gave her shoulder a hard squeeze, mentioned he once dated a woman of color, said he loved her, and wanted to give her a hug. Id. S1 attested that he saw no harassment or discrimination in Complainant's complaints to him, and Complainant nevertheless told him that she did not want him to say anything about the incidences. Id. S1 additionally recalled that Complainant complained to him that the Team Leader made a remark about the "one drop rule" and ethnicity. However, according to S1, after speaking with the Team Leader, he determined that the conversation about the "one drop rule" was not meant to be discriminatory, but he nevertheless advised the Team Leader to avoid such topics in the future. Id. at 166.

Moreover, according to Complainant, on October 11, 2016, she mentioned to S1 about reminding a coworker about personally identifiable information (PII). Id. at 149.

Complainant stated that S1 nodded and then slowly pointed his finger towards his temple like a pistol, made a grimace and shooting motion, and said, “As long as you are cognizant.” Id. S1, however, denied making the pistol-style gesture as alleged by Complainant and asserted that he simply reminded Complainant that the PII verbiage in the performance plan element was meant to be a reminder to employees to recognize their responsibility to protect PII data. S1 admitted that he did point to his head and said, “So long as you are cognizant.” Id. at 170. S1 averred that he meant to communicate to Complainant that, so long as she recognized her responsibility and demonstrated that she did, then she had nothing to worry about. Id.

Complainant moreover maintained that S1 started rejecting her timesheets after he made the pistol gesture to his head. S1 stated, however, that Complainant had her timesheets initially rejected because she did not use the correct combination of codes or entered incorrect times. Id. He stated that he directed Complainant to retake preliminary online training on timesheets and ask questions of her teammates. Id.

Complainant continued to express frustration as S1 continued to reject her timesheets from January 2017 through May 2017. Report of Investigation Agency No. DFAS-00059-2017 (ROI 2), at 173. Complainant averred that she did not miss any pay during this time period, but the constant threat of the possibility of a pay delay or non-payment created a stressful situation for her. Id. at 210. S1 explained that other employees had their timesheets rejected as well, and when a timesheet is rejected, he enters comments so the employee can correct any mistakes made. Id. at 330-34. S2 attested that Complainant lost no pay or benefits due to the issues with her timesheets. Id. at 362.

Complainant subsequently began to experience technical issues with her laptop and asked S1 to direct her to the office where she could get her computer fixed. But according to Complainant, S1 purposefully sent her to the wrong office and sent her on a “wild goose chase” when she just simply needed to have her laptop fixed. Id. at 216. However, S1 averred that he had no idea that the office had moved, as it had been there for many years. Id. at 336. S1 attested that he would have given anyone else the same instructions at the time Complainant asked and he simply made an honest mistake. Id. at 336.

On January 20, 2017, S1 held a meeting with Complainant in his cubicle to discuss with Complainant how to correctly use the Agency’s time and attendance system. Id. at 341-42. S1 attested that he mentioned to Complainant during the meeting that every action Complainant takes against him is hostile in nature. Id. He averred that Complainant had been acting in an inappropriate manner towards him since the meeting held on October 7, 2016, wherein she alleged discrimination. Id. S1 maintained that since that meeting Complainant had made every effort to make him look bad and tried to twist anything he did or said to her as if he was harassing her or discriminating against her. Id. S1 attested that during the meeting he did not speak directly about her claims but explained that he hoped to clear up her understanding, so they could move past their issues. Id.

Further, according to Complainant, in May 2017 S1 accused her of not following protocol when requesting leave even though she received no training on how to request leave. Complainant believed that other employees were treated more favorably when requesting leave. S1 stated that Complainant requested leave for an appointment on the same day and did not properly request the leave in advance. Id. at 348. S1 stated that Complainant's leave was nevertheless approved with the expectation that she would make the proper leave adjustments upon her return to work. Id.

Complainant further stated that, on May 18, 2017, she reminded S1 that there was a missing element from her performance plan in October 2016. Complainant averred that S1 told her she must have been confused about the performance plan and believed that S1 lied to her about the plan. In response, S1 confirmed telling Complainant that she must have been confused about the elements on her performance evaluation. Id. at 352-53. S1 averred that he discovered that an element had been missing on the performance plan Complainant signed when she came on board, and everyone else in the branch had the element in their performance plan. Id. S1 explained that he told Complainant via email about the element, as it was already in the plans of other employees. Id.

Later, on or about September 19, 2017, Complainant allegedly found a "like" on her Facebook account from a person with the same last name as S1. Id. at 238. Complainant stated her Facebook account was subsequently flooded with nude, lewd, and religiously harassing posts. Complainant believed that someone possibly associated with S1 used a fake Facebook account to harass her on social media. Id. S1 however denied having any knowledge of Complainant's Facebook account. Id. at 356.

Complainant also claimed that, from November 2017 through April 2018, she received a lack of managerial support for advancement opportunities and she received misleading instructions regarding her performance appraisal. Report of Investigation, Agency No. DFAS-00055-2018 (ROI 3), at 153-57. Complainant maintained that, due to performance plan stipulations, she was restricted from complaining due to the threat of being marked as "not getting along with others." Id. Complainant further believed that her new first-level supervisor hindered her nomination to Leaders-in-Motion (LIM) to shadow the Director and her Deputy Director. Id. Complainant moreover averred that she received no acknowledgement of any achievement of goals or contributions to the Blended Retirement Programming Project, while others received accolades, medals, awards, and certificates which they could use for advancement. Id.

She also recalled that her new first-level supervisor limited her performance appraisals to only the time when he took over as her supervisor, while others were allowed to report their work and accomplishments for the entire year for the rating period of May 2017 through March 2018. Id. Complainant stated that her new first-level supervisor did not inform her of the ability to submit documentation regarding her appraisal until she asked him. Id.

The new supervisor denied providing Complainant with instructions to limit her accomplishments report to the time he served as her supervisor. Id. at 173-74. He stated that the entire team was rated based on the same time period for the rating period and everyone was notified by email in February 2018 and in weekly meetings that they needed to submit their self-assessment, so he could complete their appraisals. Id.

Complainant subsequently resigned from her position effective April 26, 2018. According to Complainant, she resigned because she was consistently subjected to the threat of receiving a negative performance appraisal. Id. at 158-61. Complainant specifically explained that she was summoned to a performance plan meeting with her new supervisor, who said to her, “You and I have a problem, and I think I know what it is.” Id. Complainant stated that the new supervisor spoke of a problem wherein he assumed she did not understand that he was her supervisor and she should be communicating with him. Id. Complainant averred that the new supervisor was openly inferring that she was a “managerial problem person” due to lack of interaction. Id. She maintained that the lack of timely or otherwise responses from her management helped to isolate her from her team and from relevant career-impacting opportunities and knowledge. Id. Complainant contended that she resigned because she received no support from management, which she needed in order for her career to thrive. Id.

Complainant filed EEO complaints on December 30, 2016, May 31, 2017, and May 21, 2018, respectively, alleging that the Agency discriminated against her on the bases of age (47), religion (Judeo-Christian), race (African-American), and reprisal for prior protected EEO activity when:

1. On October 7, 2016, S1 directed her to stop sending emails with her coworkers’ names regarding training and other incidents. S1 commented that such concerns are taken seriously but management is not looking for troublemakers. Further, S1 commented that legal liability had to be considered before following up on such claims, and that probationary employees are easier to get rid of than permanent ones;
2. On October 11, 2016, S1 made a pistol-style gesture toward his temple and commented, “As long as you are cognizant” when she informed him that she had reported PII concerns to her team;
3. In November and December 2016, S1 rejected her timesheets numerous times during the approval period, and commented about her rejected timesheets in a branch meeting;
4. On approximately December 20, 2016, she became aware that the insults, lack of instruction, lack of communication, lack of training, and other factors were attempts to not retain her;
5. On January 2017 through May 2017, S1 rejected her timesheets;

6. On or about January 9, 2017, S1 directed her to go to a restricted government area;
7. On January 19-20, 2017, and April 11, 2017, S1 changed positive comments on her quarterly review to negative comments;
8. On or about January 20, 2017, during a “behavioral” meeting with her, S1 mentioned her previous harassment complaint and stated he wanted the hostilities to cease;
9. On April 12-13, 2017, S1 was belligerent when she asked to be included in project code discussions;
10. In approximately May 2017, S1 accused her of not following protocol for requesting leave;
11. On or about May 8, 2017, management accused her of not following instructions after she was directed to copy her supervisor on her email messages;
12. On May 18, 2017, during her performance plan review, S1 lied to her about a performance element and commented that she was confused;
13. On or about September 19, 2017, she found a “like” on her Facebook account from a person with the same last name as S1, and subsequently her Facebook account has been flooded with nude/lewd and religiously harassing posts;
14. Since approximately November 2017 through April 2018, she received a lack of managerial support for advancement opportunities and she received misleading instructions regarding her performance appraisal; and
15. In May 2018, she felt forced to resign from her position with the Agency.³

Following the investigations, the Agency provided Complainant with copies of the reports of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant’s requests, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) for each complaint.⁴

³ Claims 1-4 are encompassed in Agency No. DFAS-00017-2017, claims 5-13 pertain to Agency No. DFAS-00059-2017, and claims 14-15 are part of Agency No. DFAS-00055-2018.

⁴ Complainant specifically requested a Final Agency Decision from the Agency with regard to Agency Nos. DFAS-00017-2017 and DFAS-00055-2018. With respect to Agency No. DFAS-

The decisions concluded that Complainant failed to prove that the Agency subjected her to discrimination and a hostile work environment as alleged. The Agency specifically found that Complainant did not establish that its legitimate, nondiscriminatory reasons were pretextual based on her protected classes. The Agency further found that Complainant did not substantiate that many of the incidents in her claims occurred as alleged and did not establish that her claims were severe or pervasive enough to rise to the level of a hostile work environment.

CONTENTIONS ON APPEAL

*Complainant's Briefs on Appeal*⁵

On appeal, Complainant maintains, inter alia, that she was pressured into resigning due to the Agency's retaliation and harassment against her. She states that many of her coworkers have also engaged in hostilities against her, and that S2 assigned her career-damaging assignments against protocol. She also states that S2 was aware that she was receiving hostile phone calls but did not investigate the matter. Complainant further maintains that C1 touched her in "semi-intimate ways" and commented to her on the ethnicity of his former lover.⁶ She also contends that she was under the impression that she could report her EEO issues to management under Agency policy, but S1 ignored her complaints and did not adhere to the Agency's EEO policies. Complainant moreover maintains that offensive and inflammatory comments were made about her and she had been labeled as a problem employee. Complainant contends that her new supervisor continued the same pattern of reprisal and harassment against her, which included never asking her for her appraisal input, among other things.⁷

00059-2017, when Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

⁵ Complainant filed a brief for each appeal.

⁶ We note that coworker harassment was not an accepted issue for any one of Complainant's EEO complaints.

⁷ To the extent that Complainant raises new issues on appeal, the Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004). Should she wish to pursue any additional claims, Complainant is advised to contact an EEO Counselor to initiate the administrative process.

Agency's Response

In response, the Agency asserts that it articulated legitimate, nondiscriminatory reasons for its actions, which Complainant did not show were pretextual based on her protected classes. The Agency also asserts that Complainant did not show that its actions were severe or pervasive enough to rise to the level of a hostile work environment. The Agency moreover argues that Complainant has not presented evidence of any adverse action or a threat of an adverse action prior to her resignation, and therefore she has not shown a nexus between her EEO activity and her resignation.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 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”).

ANALYSIS AND FINDINGS*Per Se Reprisal (Claims 1, 8)*

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004 (Enforcement Guidance on Retaliation), at § II. B. (Aug. 25, 2016).

Given the importance of “[m]aintaining unfettered access to [the] statutory remedial mechanisms” of the anti-retaliation provisions, Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)), our cases have found that a broad range of actions can constitute reprisal. Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a per se violation of the law. Binseel v. Dep’t of the Army, EEOC Request No. 05970584 (Oct 8, 1998) (per se violation found where complainant told that filing an EEO suit was “wrong way to go about getting a promotion”).

Agencies have a continuing duty to promote the full realization of equal employment opportunity in their policies and practices. 29 C.F.R. § 1614.101(a). This duty extends to every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Agencies are obligated to ensure that managers and supervisors perform “in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal employment opportunity.” 29 C.F.R. § 1614.102(a)(5). When a supervisor's behavior has a potentially chilling effect on the use of the EEO complaint process -- the ultimate tool that employees have to enforce equal employment opportunity -- the behavior is a per se violation. See Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recon. den'd, EEOC Request No. 0520090654 (Dec. 16, 2010) (per se violation found where supervisor mentioned EEO complaints had been filed and said, “What goes around, comes around”).

In the instant case, as noted above, there is no dispute that S1 held a meeting on October 7, 2016, with Complainant wherein S1 told Complainant that she was bringing up numerous issues and forcing him to address them as legitimate EEO complaints. ROI 1, at 164. S1 attested that he told Complainant during the meeting that Complainant's complaining about EEO issues was causing him a lot of extra work and stress, and that he did not feel her complaints constituted real EEO complaints. Id. S1 further averred that he told Complainant that management sees her as someone who does not work well with others due to her verbal EEO complaints to them. Id. S1 moreover attested that he told Complainant that management said it was easier to get rid of a probationary employee and that management brought up termination if her complaints continued. Id. at 165. S1 maintained that he told Complainant that she could be terminated if her complaints about employees continued. Id. S1 moreover attested that, on January 20, 2017, he held another meeting with Complainant wherein he mentioned the October 7, 2016, meeting and Complainant's belief that she had been subjecting him to discrimination. ROI 2, at 341. During the meeting, S1 said to Complainant that every action Complainant takes towards him is hostile in nature. Id.

Therefore, there is no dispute that S1 threatened Complainant with termination and labeled Complainant as someone who does not work well with others, among other things, due to her verbal EEO complaints about coworkers. S1's comments during his October 7, 2016, meeting with Complainant, on their face, discourage participation in the EEO process. We find that such comments are reasonably likely to deter a reasonable employee from engaging in protected activity and has a potentially chilling effect on the EEO process. Employees have a right to engage in protected EEO activity without being subjected to threats and intimidation. We find that S1's comments therefore constitute a per se violation of Title VII. See Webster v. Dep't of Defense, EEOC Appeal No. 0120080665 (Nov. 4, 2009) (supervisor's comments about the stress that he experienced because of complainant's EEO complaints had a potentially chilling effect on the exercise of EEO rights and constituted per se reprisal); Switzer v. Dep't of the Army, EEOC Appeal No. 0120062080 (supervisor's comment that complainant's EEO complaints were “unfounded” violated Title VII by interfering with complainant's EEO rights); see also Enforcement Guidance on Retaliation at II.B. (“[r]etaliation expansively reaches any action that

is ‘materially adverse,’ meaning any action that might well deter a reasonable person from engaging in protected activity.”). We therefore find that the comments made to Complainant by S1 constitute a per se violation of Title VII.

Disparate Treatment (Claims 3, 5, 6, 10, 12)

To prevail in a disparate treatment claim, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, a complainant must prove, by a preponderance of the evidence, that the agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

After a review of the record, assuming arguendo that Complainant has established a prima facie case of discrimination based on her protected classes, we find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions with regard to claims 3, 5, 6, 10, and 12. In particular, with respect to claims 3 and 5, S1 explained that Complainant had her timesheets initially rejected because she did not use the correct combination of codes or entered incorrect times. In addressing claim 6, S1 explained that he had no idea that the office had moved, and he simply made an honest mistake in directing her to the wrong office. S1 also averred, with respect to claim 10, that Complainant requested leave for an appointment on the same day and did not properly send out a leave request in advance. S1 stated that Complainant's leave was nevertheless approved with the expectation that she would make the proper leave adjustments after she took the leave. As for claim 12, S1 confirmed telling Complainant that she must have been confused about the elements on her performance evaluation, as he discovered that an element had been missing on the performance plan Complainant signed when she came on board.

The burden now shifts to Complainant to establish that the Agency's nondiscriminatory reasons were pretext for discrimination. Burdine, at 254. Upon review, we find that Complainant has not established that the Agency's reasons are pretextual based on her protected classes. Specifically, with respect to claims 3 and 5, while Complainant's timesheets may have been initially rejected, the evidence establishes that errors in the timesheets, rather than Complainant's protected bases, caused the rejections. Further, there is no dispute that she never lost any pay or leave as a result. As for claim 6, we find that Complainant has not shown that S1's action of sending her to the wrong office was intentional. We note that a mistake made by an agency is not evidence of pretext unless there is evidence that the mistake was based on a complainant's protected classes.

See Vickey S. v. Dep't of Defense, EEOC Appeal No. 0120112893 (Nov. 17, 2015); Hsieh v. Dep't of Veterans Affairs, EEOC Appeal No. 0120120980 (June 4, 2012); Carroll v. Dep't of Justice, EEOC Appeal No. 01A20985 (Jan. 21, 2003). There is simply no evidence here that S1's mistake was based on Complainant's protected classes. Also, as for claim 10, there is no dispute that Complainant's leave was nevertheless approved even though she reportedly did not follow proper procedures in requesting the leave. Moreover, there is simply no evidence that S1 was motivated by discriminatory or retaliatory animus with respect to claim 12.

Hostile Work Environment

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create a hostile or abusive working environment." The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive" and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23.

To establish a claim of harassment, Complainant must show that: (1) she is a member of a statutorily protected class; (2) she was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994) (Enforcement Guidance on Harris).

In this case, the record does not support a finding that the Agency subjected Complainant to discriminatory harassment. With the exception of our finding of per se reprisal with regard to claims 1 and 8, the evidence does not establish that the incidents alleged by Complainant occurred because of her race, age, religion, or protected EEO activity. For example, there is simply no evidence to reflect that S1 made the gesture towards his head in relation to Complainant's EEO activity or any other protected class. We also find that claims 1 and 8, or any other of Complainant's claims taken together, were not so severe or pervasive as to establish a hostile work environment. Further, we find no evidence herein that S1 subjected Complainant to harassment through social media regarding claim 13, as alleged.

Constructive Discharge (Claim 14)

The central question in a constructive discharge claim is whether the employer, through its unlawful discriminatory behavior, made the employee's working conditions so difficult that any reasonable person in the employee's position would feel compelled to resign. Carmon-Coleman v. Dep't of Defense, EEOC Appeal No. 07A00003 (Apr. 17, 2002). The Commission has established three elements which a complainant must prove to substantiate a claim of constructive discharge: (1) a reasonable person in the complainant's position would have found the working conditions intolerable; (2) conduct that constituted discrimination against the complainant created the intolerable working conditions; and (3) the complainant's involuntary resignation resulted from the intolerable working conditions. See Walch v. Dep't of Justice, EEOC Request No. 05940688 (Apr. 13, 1995).

Here, Complainant states that she was forced to resign because she was continuously threatened with the possibility of a negative performance appraisal from her new supervisor. Complainant averred that the new supervisor was openly inferring that she was a “managerial problem person,” which was misleading and false. Complainant maintained that the lack of timely responses from her management helped to isolate her from her team and from relevant career-impacting opportunities and knowledge. Complainant specifically attested that she resigned because there was no supportive managerial environment, which she needed for her career to thrive.

Upon review, we find that Complainant did not show that her working conditions were so intolerable that she was forced to resign. In so finding, we note that, at the time Complainant resigned, there is no dispute that S1 was no longer her supervisor, as Complainant was assigned to a new supervisor. Further, as noted above, Complainant has not established that the Agency's actions were severe or pervasive enough to amount to a hostile work environment, and therefore Complainant's resignation cannot be construed as a discriminatory constructive discharge. There is simply no corroborating evidence here that Complainant's new supervisor labeled Complainant as a managerial problem person, among other things. As Complainant did not request a hearing, we do not have the benefit of an Administrative Judge's credibility determinations after a hearing; therefore, we can only evaluate the facts based on the weight of the evidence presented to us. As such, we find that Complainant did not establish that she was constructively discharged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decisions with regard to Agency Nos. DFAS-00017-2017 and DFAS-00059-2017. We AFFIRM the Agency's final decision with respect to Agency No. DFAS-00055-2018.

ORDER

The Agency is ORDERED to take the following remedial actions within one hundred and twenty (120) calendar days of this decision is issued:

1. The Agency shall conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages with respect to the finding of per se reprisal and shall determine the amount of compensatory damages to which Complainant is entitled. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, if any, and will provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages with appeal rights to the Commission. A copy of the final decision must be submitted to the Compliance Officer referenced below. Within 30 days of its determination of the amount of compensatory damages owed to Complainant, the Agency shall pay Complainant that amount.
2. The Agency shall provide a minimum of eight hours of in-person or interactive EEO training to the management official identified as S1 in this decision, with a special emphasis on reprisal and the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings under, the Federal equal employment opportunity laws.
3. The Agency shall consider taking appropriate disciplinary action against S1. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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 S1 has left the Agency's employ, the Agency shall furnish documentation of the departure date.
4. The Agency shall post a notice of this finding in accordance with the paragraph below.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision."

POSTING ORDER (G0617)

The Agency is ordered to post at its Strategy, Support, Information, and Technology Directorate Office in Indianapolis, Indiana 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).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 4, 2019

Date