U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington Field Office

131 M Street, N. E., Suite 4NW02F
Washington, D. C. 20507
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
Washington Direct Dial: (202) 921-2970
FAX: (202) 827-2349
Website: www.eeoc.gov

Holly Felmlee, Complainant, v. Lloyd J. Austin III, Secretary, Department of Defense, Department of Defense Education Activity, Agency.	EEOC No. 570-2022-00982X Agency No. EU-FY22-022 Administrative Judge Bryan M. Douglas October 25, 2024

DECISION

For the reasons explained below, this Decision is issued without a hearing for Claims a. to d., f., the religious accommodation claim, and the religious harassment claim, in accordance with 29 C.F.R. § 1614.109(g) (2024). Additionally, in accordance with 29 C.F.R. § 1614.109(i), this Decision is issued following a hearing for Claim e. and the retaliatory harassment claim.

Procedural Background:

Complainant filed the formal complaint on December 28, 2021. The Agency investigated, and on or about July 7, 2022, Complainant requested a hearing. On November 18, 2022, I held an Initial Conference (IC). After the IC, on November 21, 2022, I issued the Case Management Order, confirming the issues for adjudication and setting forth hearing procedures and deadlines for discovery and dispositive motion filings. On March 30, 2023, the Agency filed Agency's Motion for Summary Judgment (Agency's Motion). On April 14, 2023, Complainant filed Mrs. Felmlee's Opposition to Agency's for Summary Judgment and Cross Motion for Summary Judgment in Favor of Claimant (Complainant's Opposition and Motion). On April 21, 2023, the Agency filed Agency Reply to Summary Judgment Opposition (Reply).

On May 9, 2024, I issued Order Granting, in Part, Agency's Motion for Summary Judgment and Denying Complainant's Motion for Summary Judgment. In the Order, summary judgment was granted for the Agency for Claims a. to d., f., the religious accommodation claim, and the religious harassment claim, and denied for Claim e. and the retaliatory harassment claim. The parties were ordered to meet and confer to attempt settlement. Settlement was not achieved.

On June 3, 2024, I issued Order Scheduling Pre-Hearing Conference. On June 18, 2024, the Agency filed Agency's Prehearing Report (PHR). On June 19, 2024, Complainant filed Complainant's Prehearing Report, which was dated June 18, 2024.[1]

On July 12, 2024, I held the Pre-Hearing Conference (PHC) with the parties. During the PHC, I discussed the witnesses approved for the hearing and other logistical issues related to the hearing. I confirmed the pre-hearing rulings and orders in the Pre-Hearing Order, issued on July 15, 2024. I ordered a hearing by videoconference using Microsoft Teams, scheduling the hearing for August 12, 13, and 14, 2024. On August 12, 2024, I convened the hearing, but the Agency did not arrange for a court reporter, and thus, the hearing was not able to proceed that day. On August 13 and 14, 2024, I held a hearing by videoconference on Microsoft Teams on Claim e. and the retaliatory harassment claim. The hearing concluded on August 14, 2024. On August 27 and 28, 2024, the court reporter provided the hearing transcript to me.

As a roadmap for this Decision, Section I identifies the claims that are at issue in this case. Section II pertains to those claims for which I am granting the Agency's Motion – Claims a. to c., f., the religious accommodation claim, and the religious harassment claim. Section III includes the findings and conclusions following a hearing for Claims d. and e., and the retaliatory harassment claim. Section IV is the conclusion.

I. Issues

Whether Complainant was subjected to discrimination and harassment based on religion (Christian/Catholic) and reprisal from November 29 to December 10, 2021, when:

a. On November 29, 2021, Complainant's supervisor told her she would be required to test for Covid weekly on Mondays starting on December 6, 2021.
b. On December 3, 2021, Complainant was told if she refused to take the Covid test she would not be allowed in the office and would be charged Absence Without Official Leave (AWOL).
c. On December 6, 2021, Complainant was placed in an AWOL status. (Also identified in the Letter of Acceptance (LOA) as Claim Number 2.)
d. On December 7, 2021, Complainant was issued a termination letter by her supervisor; then, on the same day, the termination letter was rescinded.
e. On December 10, 2021, Complainant was terminated during her probationary period. (Also identified in the LOA as Claim Number 3.)

II. Summary Judgment of Claims a. to c., f., Religious Accommodation, and Religious Harassment

As a preliminary matter, in the partial summary judgment order, summary judgment was granted for the Agency for Claims a. to d., f., the religious accommodation claim, and the religious harassment claim. Upon further review of the record, summary judgment for Claim d. was not warranted. Thus, I **VACATE** summary judgment on Claim d. Claim d. was included and covered in detail during the hearing, with each party presenting evidence on the claim. Therefore, there is no prejudice to either party by vacating summary judgment for this claim after holding the hearing.

[1] Complainant's PHR is **ACCEPTED**.

Claims a. to c., f., the religious accommodation claim, and the religious harassment claim are addressed in this section of the Decision. Claims d. and e., and the retaliatory harassment claim will be addressed in Section III.

With regards to those claims for which summary judgment is appropriate, the record before me consisted of the ROI and the parties' submissions described above, filed on and before April 21, 2023 (the date of the Agency's Reply). After consideration of this record and drawing all justifiable inferences in Complainant's favor, I **GRANT** the Agency's Motion for Claims a. to c., f., the religious accommodation claim, and the religious harassment claim.

A. Legal Standards for Summary Judgment

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other evidence establish no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 1614.109(g); *see also Murphy v. Dep't of the Army*, EEOC Appeal No. 01A04099 (July 11, 2003) (noting that the regulation governing decisions without a hearing is modeled after the Federal Rules of Civil Procedure, Rule 56); *see also* U.S. Equal Emp't Opportunity Comm'n *Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110)* Ch. 7, III., E., 4. (Aug. 5, 2015). Only disputes over facts that might affect the outcome of the suit under governing law, and not irrelevant or unnecessary factual disputes, will preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Material factual disputes include credibility disputes where two or more people have different versions of the relevant event, and the determination of that credibility dispute will affect the outcome of the case. There is no genuine issue of material fact if the relevant evidence in the record, taken as a whole, indicates that a reasonable fact finder could not return a verdict for the party opposing summary judgment. *Id.*

When opposing a properly supported motion for summary judgment, a party must respond with *specific facts* showing that there is a genuine issue of material fact and that the moving party is not entitled to judgment as a matter of law. *See Anderson*, 477 U.S. at 250. An opposing party may not rest upon mere allegations or denials in the pleadings or upon conclusory statements in affidavits; rather, the party must go beyond the pleadings and support the party's contentions with proper documentary evidence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). To defeat summary judgment, a party must show that there is sufficient material evidence supporting the claimed factual dispute to require a fact finder to resolve the parties' differing versions of the truth at trial. *Anderson*, 477 U.S. at 248-49.

In this administrative process, summary judgment can only be issued when the record is sufficiently developed to support a decision without a hearing, keeping in mind the quasi-investigative nature of these proceedings. *See Petty v. Dep't of Defense,* EEOC Appeal No. 01A24206 (July 11, 2003); *Murphy v. Dep't of the Army*, EEOC Appeal No. 01A04099 (July 11, 2003). An Administrative Judge (AJ) should not issue a decision without holding a hearing unless the AJ ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the opportunity for essential

discovery before responding, if necessary. *See Petty v. Dep't of Def.*, EEOC Appeal No. 01A24206 (July 11, 2003).

B. Substantive Burdens of Proof – Disparate Treatment and Harassment

1. Disparate Treatment

In the absence of direct evidence, Complainant initially must establish, by a preponderance of the evidence, at least a prima facie case of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). The allocation of burdens and order of presentation of proof in a disparate treatment case alleging discriminatory treatment is a three-step procedure: (1) Complainant has the initial burden of proving, by a preponderance of the evidence, *a* prima facie case of discrimination; (2) the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its challenged action; and, (3) Complainant must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Reed v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120100686 (Sept. 9, 2011). Proof of a prima facie case will vary depending on the facts of the case. *McDonnell Douglas*, 411 U.S. at 804 n.14; *Schorloff v. U.S. Postal Serv.*, EEOC Appeal No. 0120064817 (Apr. 4, 2008).

To establish a prima facie case of disparate treatment, Complainant must show that Complainant (1) was a member of a protected class; (2) was subjected to an adverse employment action concerning a term, condition, or privilege of employment; and, (3) was treated differently than similarly situated employees outside Complainant's protected class, or there is some other evidentiary link between membership in the protected class and the adverse employment action. *Strong v. Dep't of Justice*, EEOC Appeal No. 0120102746 (Oct. 15, 2010); *Trejo v. Soc. Sec. Admin.*, EEOC Appeal No. 0120093260 (Oct. 22, 2009); *McCreary v. Dep't of Def.*, EEOC Appeal No. 0120070257 (Apr. 14, 2008); *Saenz v. Dep't of the Navy*, EEOC No. 05950927 (Jan. 9, 1998).

For a reprisal case, Complainant must establish a prima facie case by showing that: (1) Complainant engaged in a prior protected activity; (2) the agency was aware of the protected activity; (3) subsequently, Complainant was subjected to adverse treatment by the agency; and, (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Dep't of the Air Force*, EEOC Appeal No. 01A00340 (Sept. 25, 2000). "The Commission has held that this causal connection may be shown by evidence that the adverse action followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred." *Lee v. Dep't of Interior*, EEOC Appeal No. 01A62376 (Aug. 25, 2006) (citing *Simens v. Dep't of Justice*, EEOC Request No. 05950113 (March 28, 1996)).

The Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. *See Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53, 57 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process);

U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on Retaliation and Related Issues* (*Retaliation Enforcement Guidance*), II, B, 1. (Aug. 25, 2016). "Instead, the statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." *Lindsey v. U.S. Postal Serv.*, EEOC Request No. 05980410 (Nov. 4, 1999) (citing EEOC*, Compliance Manual* (May 20, 1998)); *see Burlington N.*, 548 U.S. at 57; *Retaliation Enforcement Guidance*, II, B, 1.

If Complainant establishes a prima facie case of discrimination, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the challenged actions. *Burdine*, 450 U.S. at 253-54; *McDonnell Douglas*, 411 U.S. at 802. If the Agency does so, the prima facie inference drops from the case. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-511 (1993). The Agency's explanation must "[frame] the factual issue with sufficient clarity so that [complainant] will have a full and fair opportunity to demonstrate pretext." *Parker v. U.S. Postal Serv.*, EEOC Appeal No. 05900110 (April 30, 1990) (citing *Burdine*, 450 U.S. at 256); *see also Hicks*, 509 U.S. at 502 (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) and *Burdine*, 450 U.S. at 256). While an Agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded the affected employee. *Lorenzo v. Dep't of Def.*, EEOC Request No. 05950931 (Nov. 6, 1997).

To prevail, Complainant must demonstrate by a preponderance of the evidence that the Agency's reasons were a pretext for discrimination. *Burdine*, 450 U.S. at 256. At all times, Complainant retains the ultimate burden of persuasion, and it is Complainant's obligation to show by a preponderance of the evidence that the Agency acted based on a prohibited reason. *Papas v. U.S. Postal Serv.*, EEOC Appeal No. 01923753 (Mar. 17, 1994) (citing *Hicks*, 509 U.S. at 511 (citing *Aikens*, 460 U.S. at 716 and *Burdine*, 450 U.S. at 256)).

2. Religious Accommodation

"Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an 'undue hardship on the conduct of the employer's business.'" *Groff v. DeJoy*, 600 U.S. 447, 453-454 (2023) (quoting 42 U.S.C. § 2000e(j)). A claim that an employer has violated this requirement of Title VII is generally analyzed in two steps. At the first step, Complainant must show that there was a failure to accommodate: namely, that a conflict between a work requirement and a religious practice existed but was not accommodated. The Agency may dispute this showing with competent evidence. If Complainant prevails on the first step of the analysis, then at the second step, the Agency may nevertheless defeat the claim by demonstrating that an accommodation would have imposed an undue hardship.

The traditional framework for establishing a failure to provide a religious accommodation requires Complainant to demonstrate that: "(1) [complainant] has a bona fide religious belief, the practice of which conflicted with [complainant's] employment, (2) [complainant] informed the agency of this belief and conflict, and (3) the agency nevertheless enforced its requirement against [complainant]." *See Baum v. Soc. Sec. Administration*, EEOC Appeal No. 01A05985 (Mar. 21, 2002).

If the Complainant makes this showing, the burden shifts to the Agency to show either that it offered a reasonable accommodation or that it could not reasonably accommodate the employee's religious practice or observance without undue hardship. If the Agency makes this showing, it is entitled to prevail. Moreover, Title VII does not require the Agency to offer an employee's preferred accommodation or to demonstrate that an employee's preferred accommodation would cause an undue hardship. *See generally U.S. Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015); U.S. Equal Emp't Opportunity Comm'n, Compliance Manual on Religious Discrimination, Section 12 (Jan. 15, 2021).

3. Harassment

Harassment of employees that would not occur but for their religion is unlawful if sufficiently severe or pervasive. *Wibstad v. U.S. Postal Serv.*, EEOC Appeal No. 01972699 (Aug. 14, 1998). To warrant a hearing on a claim of discriminatory harassment, Complainant must present enough evidence to raise a genuine issue of material fact as to whether, because of religion, Complainant was subjected to conduct so severe or pervasive that a reasonable person in Complainants position would have considered it hostile or abusive. *See* 29 C.F.R. § 1614.109(g); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to their employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality."). That conduct should be evaluated from the objective viewpoint of a reasonable person in the victims' circumstances. U.S. Equal Emp't Opportunity Comm'n *Enforcement Guidance on Harris v. Forklift Systems, Inc.*, EEOC Notice 915.002 (Mar. 8, 1994). Only if Complainant satisfies Complainant's burden of proof with respect to both elements of motive and hostility will the question of Agency liability for harassment present itself. *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120132783 (Sept. 11, 2015).

Regarding a claim of retaliatory harassment, Complainant must show that the alleged harassment was "materially adverse," *i.e.,* that it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," regardless of whether the harassment is severe or pervasive enough to create a hostile work environment. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *see also Retaliation Enforcement Guidance*, I, B; II, B.

Further, if Complainant fails to raise a genuine issue of material fact as to the existence of discriminatory intent on the part the responsible management officials, "no further inquiry would be necessary as to whether the incidents complained of are severe or pervasive to rise to the level of harassment or constitute separate acts of discrimination under disparate treatment theory." *Nicki D. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133247 (Oct. 15, 2015).

C. Summary Judgment Analysis - Claims a. to c., f., Religious Accommodation, Religious Harassment

Regarding Claims a. to c., f., the religious accommodation claim, and the religious harassment claim, I find summary judgment is proper. The record is adequately developed. Complainant was given the opportunity to engage in essential discovery, ample notice of the Agency's Motion, a statement of the undisputed material facts, and the opportunity to respond to

the Agency's Motion. For these claims, Complainant did not identify or produce evidence that tended to disprove the facts asserted by the Agency. Complainant also did not explain how the facts that Complainant disputed are material under the legal principles applicable to the case. After consideration of the entire record and drawing all justifiable inferences in favor of Complainant, I find that there are no genuine issues of material fact in this case, and thus, summary judgment in favor of the Agency is appropriate for Claims a. to c., f., the religious accommodation claim, and the religious harassment claim.

While Complainant alleged discrimination based on religion and reprisal, a fair reading of the complaint and the record showed that Complainant believed she was treated differently and harassed based on vaccination status. In other words, Complainant believed she was treated differently than those who were vaccinated and harassed because she was not vaccinated when she was required to be tested for the Coronavirus Disease 2019 (COVID-19), not permitted access to her worksite, threatened with and deemed as AWOL, and had to wait until November 10, 2021, to file a religious exemption from the COVID-19 vaccination and testing requirements. Discrimination based on the COVID-19 vaccination status rather than religion is not a basis protected by the statutes enforced by the EEOC. *See* 29 C.F.R. § 1614.103(a) (identifying the bases of discrimination prohibited by the laws enforced by the EEOC); *see Elliott D. v. Dep't of Transportation*, EEOC Appeal No. 2022003813 (Sept. 29, 2022) (noting vaccination status is not a protected basis under the statutes enforced by the EEOC) (*citing Casie S. v. Dep't of Veteran Affairs*, EEOC Appeal No. 2022002450 (July 25, 2022)). Accordingly, Complainant cannot establish a prima facie case of discrimination for Claims a., b., c., and f.

Regarding the denial of religious accommodation claim, the Agency did not approve or deny any exemption requests and, at the time, was waiting for guidance from the Department of Defense on how to process requests.[2] Moreover, along with the entire federal workforce, Complainant was required to be vaccinated against the COVID-19 or instead, be tested to avoid and limit the spread of the disease. *See Reese W. v. Dep't of Veterans Affairs*, EEOC Appeal No. 2022002734 (July 25, 2022); *see also* U.S. Equal Emp't Opportunity Comm'n, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act and Other EEO Laws, EEOC Technical Assistance Questions and Answers*, Question A.6 (update of July 12, 2022) (if job-related and consistent with business necessity, employers can require mandatory COVID-19 viral testing to evaluate an employee's continued presence in the workplace). While Complainant was told she was required to get the COVID-19 vaccine, the Agency permitted Complainant to be tested for the COVID-19 instead of getting the vaccine. In other words, the Agency essentially accommodated Complainant by allowing her to submit to weekly tests without getting the vaccine. *See Lenard H. v. Nat. Sec. Agency*, EEOC Appeal No. 2023001308 (July 10, 2024) (stating permitting weekly testing for the COVID-19 in lieu of vaccination was essentially a religious accommodation of complainant's refusal of the vaccine); *see also Reese W. v. Dep't of Veterans Affairs*, EEOC Appeal No. 2022002734 (July 25, 2022) (finding complainant was not aggrieved when the agency granted a religious accommodation request for exemption from the COVID-19 vaccination requirement because of religious belief and required weekly testing in lieu of vaccination). As such, Complainant cannot establish that the Agency denied her a religious accommodation.

[2] By January 2022, the Agency stopped requiring the COVID-19 vaccination because of pending litigation.

Moving to the harassment claim, it is clear Complainant is frustrated about her treatment. Aside from assertion, assumption, and conjecture, however, Complainant did not show the Agency was motivated by discriminatory animus. Therefore, under the standards of *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993), Complainant's harassment claim must fail. *See Nicki D. v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133247 (Oct. 15, 2015). The Commission has repeatedly found that not every unpleasant or undesirable action which occurs in the workplace constitutes an EEO violation. *See In the Est. of Lois G. v. Dep't of Veterans Affairs*, EEOC Appeal No. 2021001753 (Sept. 6, 2022); *see Brenton W. v. Dep't of Defense*, EEOC Appeal No. 2021000847 (Oct. 7, 2021); *see Shealey v. Equal Emp't Opportunity Comm'n.*, EEOC Appeal No. 0120070356 (Apr. 18, 2011) (citing *Epps v. Dep't of Transp.*, EEOC Appeal No. 0120093688 (Dec. 19, 2009)). What is prohibited is "behavior so objectively offensive as to alter the conditions of the victim's employment." *Oncale v. Sundowner Offshore Svcs., Inc.*, 523 U.S. 75, 81 (1998). The evidence does not support a finding of such prohibited conditions.

The Commission has repeatedly recognized that ordinary managerial and supervisory duties include assuring compliance with agency policy and procedures and otherwise managing the workplace. *Erika H. v. Dep't of Transp.*, EEOC Appeal No. 0120151781 (June 16, 2017). Employees will not always agree with supervisory communications and actions, but absent discriminatory motives, these disagreements do not violate EEO law. *Steven T. v. Dep't of the Treasury,* EEOC Appeal No. 2020003020 (Sept. 19, 2020). Even assuming the incidents occurred as Complainant alleged, under the totality of circumstances of this case, the conduct and treatment did not rise to the level of severity or pervasiveness necessary to establish discriminatory harassment. *See Lovella v. Dep't of Veterans Affairs*, EEOC Appeal No. 2022002563 (Apr. 11, 2023); *Brenton W. v. Dep't of Defense,* EEOC Appeal No. 2021000847 (Oct. 7, 2021); *see Nereida R. v. Dep't of Homeland Sec.*, EEOC Appeal No. 2020000085 (Sept. 17, 2020); *see Gilda M. v. Dep't of State*, EEOC Appeal No. 0120182560 (Dec. 11, 2019).

Based on the foregoing, summary judgment in favor of the Agency is appropriate for Claims a. to c., f., the religious accommodation claim, and the religious harassment claim.

III. Findings and Conclusions Following a Hearing

With regards to Claim e and the retaliatory harassment claim, the following findings and conclusions are issued following a hearing in accordance with 29 C.F.R. § 1614.109(i).

A. Standards of Law

1. Disparate Treatment and Harassment

The applicable substantive law for a disparate treatment claim and harassment are identified above in Section II, B.

2. Liability for Hostile Work Environment

Generally, the standard for employer liability for hostile work environment depends on whether the harasser is the victim's supervisor. An employer is subject to vicarious liability for

unlawful harassment if the harassment was "created by a supervisor with immediate . . . authority over the [complainant]." U.S. Equal Emp't Opportunity Comm'n *Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors*, EEOC No. 915.002 (June 18, 1999) (*Vicarious Liability Enforcement Guidance*) (citing *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)); *Isidro A. v. U.S. Postal Service*, EEOC Appeal No. 0120182263 (Oct. 16, 2018). If the harassment does not result in a tangible employment action, the agency can make out an affirmative defense by demonstrating: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. *Id*. Whether an employer can prove the first prong of that defense, *i.e.*, that it exercised reasonable care to prevent and correct promptly any harassing behavior, depends on the circumstances of the situation. *Vicarious Liability Enforcement Guidance*.

B. Findings of Fact

At the time of the allegations, Complainant was a probationary employee, serving as a Financial Analyst, assigned to the Agency's Customer Service Representative Team, Europe West District Superintendent's Office. Complainant's supervisor was Financial Manager Theresa Moore. Complainant and Moore did not work in the same location. Complainant worked in Brussels, Belgium. Moore supervised Complainant from Germany. Leigh Johnson, Chief of Staff, was the building administrator for Complainant's worksite in Brussels.

On September 9, 2021, President Joseph Biden issued Executive Order 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees. The Executive Order required all federal employees be fully vaccinated against the Coronavirus Disease 2019 (COVID-19). On an unknown date in September 2021, Complainant informed Moore she was going to request a religious exemption from the COVID-19 vaccination requirements. On October 18, 2021, the Agency issued its guidance on the requirement for all employees to be fully vaccinated against the COVID-19. The Agency mandated that by November 22, 2021, all employees, including employees in full-time telework or remote work, were required to be fully vaccinated. The Agency also required employees who were not fully vaccinated to be tested weekly, including those who had medical or religious exemptions (this was not required for those who teleworked or remotely worked full time).

The Agency permitted employees to request an exemption from the vaccination requirement based on a medical condition or sincerely held religious belief, practice, or observance. The deadline to submit exemption requests was first set for November 8, 2021, but it was later extended to November 15, 2021.

The Agency's policy for employees who refused vaccination or provide proof of vaccination included "disciplinary measures, up to and including removal from Federal service, *unless the DoD civilian employee has received an exemption or the DoD civilian employee's timely request for an exemption is pending a decision*." (emphasis added) Moreover, the Agency was not permitted to "begin any disciplinary action for those DoD civilian employees whose requests for exemption are pending decision." The Chief Academic Officer was appointed as the Agency's sole

decision authority for all exemption requests. On or about November 22, 2021, the Agency began processing exemption requests.

In the meantime, on or about October 20, 2021, Complainant informed Laura Tronge, Reasonable Accommodation Coordinator, that she wanted to request a religious accommodation for the vaccination and testing requirements.

On November 5, 2021, Complainant submitted to Moore "Request for a Religious Exemption to the COVID-19 Vaccination Requirement," the form used by the Agency to process exemption requests. Complainant requested exemption from the COVID-19 vaccination requirement for religious reasons and, in effect, requested permission to mask, social distance, testing, and permanent remote work as forms of religious accommodation.

On November 15, 2021, Moore evaluated Complainant's performance in a progress review. The appraisal period was from May 1, 2021, to April 30, 2022. Regarding Complainant's "Analytical Ability," Moore wrote, "Ms. Felmlee successfully maintains a challenging workload in the Europe East District with a logical, precise and helpful approach. She is courteous, knowledgeable and patient when addressing a wide range of pay issues." Regarding "Coordination and Teamwork," Moore wrote, "Ms. Felmlee has established a solid rapport with administrators, timekeepers, and customers. She frequently collaborates with her team members to review processes." Regarding "Innovation and Creativity," Moore wrote, "Ms. Felmlee defines a problem clearly and then researches to find the best possible solution." With respect to "Oral and Written Communications and Partnering," Moore noted, "Ms. Felmlee routinely provided advice, guidance and training to school timekeepers in all matters related to payroll both at the Europe East District office and schools and outstanding communication skills." Moore wrote about Complainant's, "Information Technology and Gathering," "Ms. Felmlee is knowledgeable and proficient in the various databases relate to her CSR duties."

Notably, in the progress review, Moore did not identify any performance issues that Complainant had during the rating period (May 1, 2021, to April 30, 2022) or performance elements in which Complainant needed to show improvement. For example, Moore did not state that Complainant failed to use the Global Service Desk (GSD) ticket system, that there were complaints about her professionalism and customer service, that her work had not met expectations, that she was provided guidance and assistance but did not follow the directions provided, and that her customer service skills failed to meet expectations.

On November 29, 2021, Moore told Complainant she was required to test for COVID-19 weekly, beginning on December 6, 2021. On December 1, 2021, Complainant made initial contact with an EEO Counselor. On December 2, 2021, Moore and Johnson told Complainant she was required to be tested weekly because she was not fully vaccinated. Additionally, on December 2, 2021, Complainant submitted to Tronge, the Agency's "Reasonable Accommodation Request Form." In the Form, Complainant requested full time telework for her religious belief "of not having medical procedures that alter my GOD given temple." Tronge forwarded Complainant's request to David Walton, Tronge's supervisor, and, on December 2, 2021, notified Moore that Complainant "had requested a COVID testing exemption as a reasonable accommodation." On December 3, 2021, Tronge told Complainant, "I have been advised by my supervisor, if you wish

to receive an exemption from the COVID testing while a decision is made on your exemption request, you may request leave from your supervisor until you have been notified of a decision."

On December 3, 2021, Moore sent Complainant an email, subject "FW: COVID-19 Screening Testing Requirement." Moore wrote:

> According to the COVID guidance: **Refusal to Participate in a Screening Testing Program**: Worksite access will be denied for any DoDEA civilian employee or contractor personnel who refuses to participate in the mandatory COVID-19 screening testing program.
>
> You have indicated that you will not submit to the weekly COVID test to begin December 6, 2021; therefore, you will be denied access to the Europe West DSO and will be charged AWOL.
>
> I wish my response could have been more favorable. (emphasis in original)

The policy cited by Moore stated, "**Refusal To Participate In Weekly Screening Testing Program:** Worksite access will be denied for any DoDEA civilian employee or contractor personnel who refuses to participate in the mandatory COVID-19 screening testing program." (emphasis in original).

On December 3, 2021, Complainant informed Moore that Tronge, whom Complainant identified as the "diversity manager," told Complainant that she was entitled to leave. Later that day, Complainant sent an email, subject, "Holly Felmlee Covid Testing," to Moore and others. Complainant questioned what was expected of her for December 6, 2021. Complainant wrote:

> I enacted my right to an exemption for a deeply held religious belief to opt out of Covid-19 vaccine and testing. The accompanying documentation for the exemption states: "In addition, Components may not begin any disciplinary action for those DoD civilian employees whose requests for exemption are pending decision." This seems to conflict with the statement Mrs. Johnson provided this morning stating I would be denied workplace access starting Monday. That feels retaliatory and not in line with the original framework for exemptions provided.
>
> I need clarification on what Monday will look like for me. Will I be working or not? If not please provide reasoning in writing and what that leave will be coded as (or other documentation if not a leave code). If I am to work, let me know at what location.

Moore did not respond to Complainant's email or answer her questions.

On December 6, 2021, Complainant did not get vaccinated or tested for COVID-19, and was thus, not permitted to go to the office. Moore did not offer Complainant the option to use leave or under the circumstances give Complainant the impression that she could request leave. Nor did Moore consider telework for Complainant because according to Moore, the Superintendent did not permit telework. Instead, Moore deemed Complainant as AWOL for December 6, 2021, and, on December 6, 2021, signed "Notice of Termination During Probationary Period." The document was pre-dated for December 7, 2021. Moore wrote that Complainant was not "suitable for employment" because, "On 6 December 2021, you were Absent Without Leave (AWOL) from your duty location. As a federal employee, you are expected to report to your duty station on time and follow leave guidance procedures as required." No performance issue was included in the termination of employment notice. Nor were any performance issues mentioned by Moore to the Labor Management and Employee Relations (LMER) staff when this termination notice was discussed and written.

On December 7, 2021, Johnson met Complainant in a parking lot and informed her she was terminated for being AWOL on December 6, 2021. Johnson provided to Complainant the memorandum from Moore terminating her employment. After Complainant was given the termination letter, several important things happened the same day. Knowing that Complainant was marked as AWOL because she refused the COVID-19 test, Alexa Rukstele, Chief of Labor Management Employee Relations, informed Moore that Complainant's termination should be rescinded. Rukstele told Moore to rescind it because termination the day after a single incidence of AWOL was not supported or appropriate, it was generally not the practice of the Agency to do so, the Agency was waiting for guidance on the work status for employees who refused testing for COVID-19, and in December 2021, the Agency was not taking any disciplinary actions related to COVID-19 and did not terminate any other employees based on testing or on a refusal to test.[3]

Subsequently, between December 7 and 10, 2021, Moore, Chief of Resource Management Division Claudia Shaw, or both, informed Rukstele that Complainant had performance and other issues that supported termination of Complainant's employment. Again, the performance issues cited by Moore were not included in the termination letter, dated December 7, 2021. Again, before December 6, 2021, when Moore signed the termination letter dated December 7, 2021, Moore did not communicate to LMER Specialists Laura Hanks or Amber Sloan any of the cited issues of Complainant's performance. Indeed, before December 6, 2021, the only reason Moore ever provided to Hanks and Sloan for the termination of employment was Complainant's status as AWOL on the same day.

On December 7, 2021, Moore signed "Notice of Cancellation of Termination During Probation Period" and emailed it to Complainant. In the email to Complainant, Moore informed Complainant that she was to report to work on December 8, be prepared to test, and if she chose not to test or report to work, she was "authorized take annual leave from December 6 [to] 8." In response, Complainant told Moore, "After this morning's events I feel like the work environment has become hostile. I was humiliated and shamed for my religious faith and the exercising of those beliefs. Therefore I am requesting full-time tele-work until a decision on my religious exemption and reasonable accommodations has been made." (grammar, spelling, and punctuation in original)

[3] Rukstele was in Virginia, which is six hours behind Central European Time.

On December 7, 2021, Moore was notified that Complainant initiated the informal EEO complaint for this case. On December 8, 2021, Complainant emailed Moore, where she repeated her complaints about the workplace in the email from December 7, 2021, and informed Moore she requested Leave Without Pay (LWOP) for December 6 and 7, 2021. Additionally, on December 8, 2021, Complainant requested Moore approve administrative leave. Moore denied administrative leave but approved Complainant's request for LWOP. On December 8, 2021, *and for the first time*, Moore provided LMER with information regarding Complainant's performance in servicing tickets in the GSD system and "recent examples of situations where timekeepers did not receive assistance or expressed frustration with Ms. Felmlee."

On December 10, 2021, Moore signed "Notice of Termination During Probationary Period." Moore wrote:

> On or about 17 August 2021, you requested two separate customers to email you directly, this is outside of the process expectations, which are to keep all communication within the ticketing system for audit and accountability. On or about 14 September 2021 and 28 September 2021, you prematurely closed two separate tickets without resolving the pay issues. One customer stated "Why did 2 weeks have to pass while you just ignored it until I pushed the issue? That's TERRIBLE customer service and very infuriating." On or about 13 October 2021, 30 November 2021, and 6 December 2021, three separate complaints were made about your professionalism and customer service skills. This is unacceptable as a Financial Analyst as your actions have serious implications causing employees to not be paid properly or on time.
>
> In the last several months your work has not met expectations. Guidance and assistance have been provided; however, you fail to follow the directions given and your customer services skills fail to meet expectations. (grammar, spelling, punctuation, and emphasis in original)

Before she completed Complainant's progress review on November 15, 2021, and requested a letter terminating Complainant's employment (before December 6 and 10, 2021), Moore was aware of the September, October, and November 2021 incidents cited in the termination letter dated December 10, 2021. Additionally, Moore learned of the incident of December 6, 2021, involving Complainant, *after* she signed had already signed the termination of Complainant's employment, dated December 7, 2021 (Moore signed and dated the termination on December 6, 2021, at 13:58 hours, but the email notice to Moore of Complainant's behavior for December 6, 2021, was sent on December 6, 2021, at 16:28 hours). Considering Moore's evaluation of Complainant's performance as of November 15, 2021, it was not until after Complainant requested the exemption from the COVID-19 vaccination and testing requirements for religious reasons, did Moore consider the incidents she cited for the termination of Complainant's employment as examples of unsatisfactory performance, failing to follow directions, and failing to meet expectations.

On December 13, 2021, Shaw approved the Request for Personnel Action for the termination of Complainant's employment, with the effective date of December 10, 2021. On December 10, 2021, Complainant's employment was terminated.

C. Analysis

Based on the record through hearing, I find Complainant proved by a preponderance of the evidence that the Agency's legitimate, nondiscriminatory reasons were pretext for reprisal. I also find that Complainant proved by a preponderance of the evidence she was subjected to retaliatory harassment. Since there was a tangible employment action, the Agency is liable for the harassment.

Complainant can establish a prima facie case of reprisal for Claims d. and e. Complainant engaged in a form of protected activity when she requested a religious accommodation in the form of an exemption from the requirements of the COVID-19 vaccination and testing requirements. *See Retaliation Enforcement Guidance*, II, A, 2, e (stating, "A request for reasonable accommodation of a disability constitutes protected activity under the ADA, and therefore retaliation for such requests is unlawful. By the same rationale, persons requesting religious accommodation under Title VII are protected against retaliation for making such requests."); *see Stanton S. v. U.S. Postal Serv.*, EEOC Appeal No. 0120172696 (Feb. 5, 2019) (finding request for religious accommodation was protected activity); *see Lankford v. Dep't of the Navy*, EEOC Appeal No. 01A43157 (Aug. 22, 2005) (finding request for religious accommodation was protected activity). Complainant also engaged in a form of protected activity when she opposed discrimination in her emails to Moore and initiating contact with an EEO counselor. *See Crawford v. Metro. Gov't of Nashville & Davidson Cty.*, 555 U.S. 271, 276 (2009) (holding when an employee communicates to their employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity); *Ollie N. v. Dep't of the Army*, EEOC Appeal No. 0120180569 (May 29, 2019) (stating protected "opposition" activity broadly includes the many ways in which an individual may communicate explicitly or implicitly opposition to perceived employment discrimination) (citing *Retaliation Enforcement Guidance*, II, A, 2.)).

Moore was aware of Complainant's protected activity. Subsequently, and within days of learning of Complainant's protected activity, on December 7, 2021, Moore terminated Complainant's employment for being AWOL when the Agency's policies prohibited any disciplinary action. Moore's termination of Complainant's employment on December 7 was a materially adverse action, irrespective of whether it was subsequently rescinded. 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 R.R. Co. v. White*, 548 U.S. 53, 68 (2006); *Retaliation Enforcement Guidance*, II, B, 1.; *Lindsey v. U.S. Postal Serv.*, EEOC Request No. 05980410 (Nov. 4, 1999). Here, a reasonable employee would be deterred from engaging in a form of protected activity, like requesting a religious accommodation or opposing discrimination for requesting such an accommodation, when after doing so, their employment is terminated even though the policies used to support the underlying charge instructed the Agency to not begin any disciplinary action for employees whose requests for exemption were pending decision and one incidence of AWOL did not support termination of employment.

Three days after Moore canceled the termination of December 7, and learned of Complainant's informal EEO complaint for this case, on December 10, 2021, Moore terminated Complainant's employment for job performance-related reasons that were not cited in the first termination notice, not provided to the LER employees with whom Moore consulted for the first termination notice, and not identified by Moore in Complainant's mid-year performance appraisal. Termination of employment is a materially adverse action. Considering the evidence, Complainant established a nexus between the request for religious accommodation, opposition to discrimination, participation in the EEO process, or all three, and the termination that was rescinded and the final termination of her employment. Accordingly, Complainant established a prima facie case of reprisal for Claims d. and e.

Moore stated that she decided to terminate Complainant's employment because she was a probationary employee who failed to report to work and had poor performance. Moore stated that the termination for being AWOL was rescinded and canceled because AWOL could not be used for the termination. Moore stated that the termination of employment, dated December 10, 2021, was issued because Complainant had poor performance during her probationary period.

Complainant established by a preponderance of the evidence that the Agency's legitimate, nondiscriminatory reasons for terminating her employment were pretext for discrimination. Notably, the Agency's cancelation of the termination evidenced that Moore's action was not consistent with the Agency's established policies and practices implementing those policies. Indeed, testimony by the Agency's Chief of LMER confirmed that Complainant's removal for one incident of AWOL was not sufficient grounds to terminate her employment. Additionally, the Agency did not permit disciplinary action of Complainant because she had a pending request for an exemption from the COVID-19 requirements. When Moore did not achieve her chosen outcome and was forced to rescind the termination of Complainant's employment, Moore decided to manipulate Complainant's prior-overlooked performance shortcomings as reasons to terminate Complainant's employment. I find Moore's actions and decisions as such because Moore already knew about Complainant's purportedly unsatisfactory performance, did not consider these issues important enough to include or discuss in her evaluation of Complainant's progress even though they could ostensibly justify termination, did not raise them with the LMER staff until *after* the first termination was rescinded, and considered Complainant's overall performance as meeting expectations until she requested a religious accommodation and engaged in protected activity. In other words, Complainant's job performance was acceptable to Moore until Complainant engaged in protected activity. Had Complainant not requested a religious accommodation or otherwise engaged in a form of protected activity, Moore would not have terminated Complainant's employment.

Additionally, I find that Moore's testimony was not credible on key issues. Such issues included Moore's testimony about the timing of her knowledge of Complainant's performance shortcomings cited in the termination letter, her assessment of Complainant's performance in the progress review, her communication of Complainant's performance shortcomings to the LMER staff and the timing of those communications, and the circumstances prompting her decision to terminate Complainant's employment. Based on my observations of Moore during the hearing and the record of evidence, I find Moore's testimony was incoherent, implausible, and inconsistent with the evidence in the record. Additionally, based on my observations of Moore's demeanor and

facial expressions at the hearing while testifying about these key issues (e.g., smiling and conveying to me a sense of exaggerated self-confidence when providing implausible explanations for Complainant's satisfactory progress review, not including the performance shortcomings in the first termination letter, and her discussions with the LMER staff about those performance shortcomings) impressed upon me such deception, inconsistencies, and contradictions with the evidence that I find her testimony unworthy of credence.

Based on the record through hearing and for the above reasons, I find that the performance issues Moore used as examples of unsatisfactory performance were not the true reasons for the termination of Complainant's employment. Instead, the preponderance of the evidence established that Moore terminated Complainant's employment because of Complainant's protected activity of requesting a religious accommodation, opposing discrimination, and participating in the EEO process. Further, I find that the preponderance of the evidence established that the legitimate, nondiscriminatory reasons used to justify the termination of Complainant's employment were pretext for reprisal.[4]

Regarding the retaliatory harassment claim, based on the above findings, I also find that Complainant established that she was subjected to retaliatory harassment. An employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. *Ellerth*, 524 U.S. at 762-63, *Harassment Enforcement Guidance* at IV. Since the termination of Complainant's employment is a tangible employment action, I find that the Agency is vicariously liable for the retaliatory harassment of Complainant by Moore. *See Terrance A. v. Dep't of the Treasury*, EEOC Appeal No. 2020002047 (Sept. 13, 2021) (finding a supervisor's comments about complainant's EEO complaints, the agency's attempts to legally "stop" his EEO activity, and the supervisor's repeated comments that his complaints were ridiculous, would have a sufficiently chilling effect to deter a reasonable person from filing EEO complaints, and thus, the agency was vicariously liable); *see also Melissa M. v. Dep't of Homeland Sec.*, EEOC Appeal No. 2020001984 (Aug. 5, 2021) (finding the supervisor subjected complainant to sex and national origin harassment that resulted in a tangible employment action when the supervisor issued complainant an unsatisfactory performance rating and demoted her); *see also Thomasina B. v. Dep't of Defense*, EEOC Appeal No. 0120141298 (Feb. 19, 2021) (finding the supervisor subjected complainant to sex-based harassment that resulted in a tangible employment action when the supervisor disciplined complainant and frequently moved her work location); *see also Lelah T. v. U.S. Postal Serv.*, EEOC Appeal No. 0120172533 (Oct. 24, 2018) (finding the manager sexually harassed complainant and the agency was vicariously liable when the manager cancelled complainant's detail in retaliation for complaining about harassment to the plant manager).

IV. Conclusion

After consideration of the record and drawing all justifiable inferences in Complainant's favor, I find that a decision without a hearing in favor of the Agency is appropriate for Claims a. to c., f., the religious accommodation claim, and the religious harassment claim.

---

[4] I find that Complainant did not establish by a preponderance of the evidence that religion motivated the Agency's actions, and as discussed above in summary judgment section, Complainant alleged discrimination based on vaccination status.

For Claims d., e., and the retaliatory harassment claim, I find that the preponderance of evidence supports a finding that the Agency discriminated against Complainant based on reprisal. I also find that Complainant was subjected to retaliatory harassment for which the Agency is vicariously liable.

Judgment will be entered, in part, for the Agency, and, for Complainant, in part. The Agency will remedy the discrimination against Complainant. A decision on remedies will be issued after Complainant's attorney submits an attorney's fees petition and the Agency has had the opportunity to file a response.

This Decision is **not final** for purposes of triggering the time limit within which the Agency is required to take final action or within which a party may file an appeal to the Commission's Office of Federal Operations. **Only after this Decision is made final and accompanied by an order entering judgment will this Decision be considered final in accordance with 29 C.F.R. § 1614.109(i)**.

It is so ORDERED.

____

For the Commission: Bryan M. Douglas
Administrative Judge
Telephone: (202) 921-2768
Bryan.Douglas@eeoc.gov

Provided to the following by email, FedSEP, and EEOC Public Portal:
Holly Felmlee: hollyf730@yahoo.com
Scott Lloyd: edwardscottlloyd@protonmail.com
Jason Myers: jason.myers@dodea.edu