No. 23-

IN THE

Supreme Court of the United States

QUENTIN BORGES-SILVA,

Petitioner,

v.

MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, UNITES STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from Petitioner's wrongful termination from the Environmental Protection Agency. This termination was based on the Petitioner's failure to complete a Performance Improvement Plan ("PIP"). There was a separate Administrative litigation before the Petitioner raised his identical claims concurrently before Equal Employment Opportunity Commission (EEOC) and after a four-day hearing, the EEOC ruled in significant favor of Petitioner, who established by a preponderance of the evidence that he was subjected to a hostile work environment during the PIP period and after, until he was terminated based on his sex and prior EEO activity, and that he was placed on a Performance Improvement Plan ("PIP") in reprisal for his prior EEO activity. In his Federal Court litigation, the Petitioner raised these claims and that they were decided in his favor by the EEOC as a defense to his wrongful termination. However, the District Court erroneously held they were not precluded from these findings because "the same issue" was not raised in the EEOC case.

The question presented is:

Whether offensive collateral estoppel in a concurrent administrative proceeding is binding in a district court proceeding arising from the same cause of action.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Quentin Borges-Silva, was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings.

Respondent Michael S. Regan, Administrator, United States Environmental Protection Agency, acting in his official capacity, was the defendant in the district court proceedings and appellee in the court of appeals proceedings.

Because the petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Borges-Silva v. Regan, No. 23-5030, U.S. Court of Appeals for the District of Columbia Circuit. Petition for rehearing en banc denied on December 4, 2023.*

- *Borges-Silva v. Regan, No. 23-5030, U.S. Court of Appeals for the District of Columbia Circuit. Summary affirmance entered on August 10, 2023.*

- *Borges-Silva v. Nishida, No. 1:21-cv-00474, U.S. District Court for the District of Columbia. Judgment entered on January. 13, 2023.*

- *Borges-Silva v. Regan, No. 570-2020-00896X, U.S. Equal Employment Opportunity Commission, New York District. Final Post-hearing bench decision and order entered October 13, 2022.*

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PETITION FOR WRIT OF CERTIORARI

Petitioner Quentin Borges-Silva respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The District of Columbia Circuit decision is unreported, but available at 2023 U.S. App. LEXIS 20997 and reproduced at App.1a-3a. The district court's decision is unreported but available at 2023 U.S. Dist. LEXIS 6244, and reproduced at App.4a-26a.

JURISDICTION

The District of Columbia Circuit issued its summary affirmance on August 10, 2023, and denied a timely petition for rehearing on December 4, 2023.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment is reproduced at App. 92a.

STATEMENT OF THE CASE

A. Factual Background

1. Petitioner was an Environmental Protection Specialist, GS-13,4 in tshe EPA's Communication Services

Branch ("Branch"), Field and External Affairs Division ("Division"), Office of Pesticide Programs, Office of Chemical Safety and Pollution Prevention ("Office"). His primary responsibility was responding to "webmail inquiries," which members of the public submitted via the Office's "Contact Us" webpage. Petitioner's first line supervisor was Branch Chief Gregory Siedschlag, and Division Director Jackie Mosby oversaw the Branch. *See* Memorandum Opinion, U.S. District Court for the District of Columbia, ("District Decision"), App. 7a.

2. From time to time, a backlog of webmail inquiries would accumulate periodically during Petitioner's 15-year tenure. Petitioner created a system for addressing that backlog and created templates and boilerplate responses for common webmail queries. *See* Final Post-Hearding Bench Decision and Order ("EEOC Decision") App. 33a.

3. Particular to the instance case, a backlog of webmail inquiries accumulated during the federal government shutdown from December 2017 until January 2018. Upon his return began working on the shutdown backlog and immediately informed the acting supervisor. Shortly after Mr. Siedschlag started as supervisor, he assigned four female co-workers to assist with the remaining backlog. App. 33a.

4. Mr. Siedschlag instructed Petitioner and the four female co-workers to track the amount of time they spent on each webmail response. Mr. Siedschlag did not inform team members about why they were tracking their time. Mr. Siedschlag used the tracking data to calculate an average response time for webmails to be met by Petitioner. App. 34a.

5. Some webmail queries are simple and can be answered using a boilerplate or a custom response in little time. Some webmails pose complex issues which may require the assistance of Subject Matter Experts ("SME") in formulating an accurate response. SMEs sometimes were slow to respond. Responding to complex webmails typically required substantially more time compared to simple webmails. Shortly after becoming the permanent supervisor, Mr. Siedschlag began to review drafts of all webmail responses prepared by Petitioner. After a period of time, Mr. Siedschlag stopped reviewing responses to simple emails which had been drafted by Petitioner. On various occasions, Petitioner has corrected the draft webmail responses of female colleagues in his unit. Mr. Siedschlag set numerous deadlines for Petitioner to reduce the webmail backlog after he became permanent supervisor in 2019. Petitioner found the deadlines unrealistic for various reasons and was consistently unable to meet them. In 2019, webmail increased by about 100%. Petitioner fairly consistently had technology issues which slowed down his work. Petitioner also spent time serving as back-up and covering for colleagues. In Spring of 2019, Petitioner spent substantial hours preparing documents for his 4711 and EEO complaints. Throughout the period at issue, Petitioner also worked on his neonicotinoids and pollinator responsibilities. Petitioner also worked on other matters including rulemaking, web edits, press inquiries and more during the time frame at issue. Overall, there were weeks in which Petitioner had little time to work on webmail responses during the time frame at issue. App. 34a-36a.

6. Upon learning that Mr. Siedschlag would become his permanent supervisor, Petitioner asked Dian Moseby

for a transfer. Shortly after Mr. Siedschlag became permanent, he required Petitioner to attend weekly meetings with him. The meetings were often followed by detailed emails from Mr. Siedschlag to Petitioner reviewing issues and deadlines from the meetings. For part of the relevant time frame, Mr. Siedschlag reviewed Petitioner's draft webmail responses and made edits to them. Mr. Siedschlag sometimes gave advice to Petitioner regarding how to respond to a webmail or reduce the backlog. Petitioner often found the advice to be unhelpful or inaccurate. Petitioner felt as if he could not succeed in satisfying the demands Mr. Siedschlag placed on him. App. 36a-37a.

7. Around April 2019, Petitioner filed a complaint under Agency Order # 4711, which concerns harassment complaints. The allegations included disparate treatment based on sex. Petitioner compiled comprehensive documents in support of the case. Anne Moseby was selected as the decision-maker for the complaint. The Agency's 4711 Order requires that complainants and alleged harassers be separated during the pendency of the 4711 investigation. That did not occur in Petitioner's case. Before filing the 4711 complaint, Petitioner attempted to meet with Ms. Moseby to complain about harassment by Mr. Siedschlag. Ms. Moseby refused to meet with him. At the conclusion of the 4711 investigation, Ms. Moseby found that there was no harassment or unfair treatment of Petitioner by Mr. Siedschlag. App. 37a.

8. Mr. Siedschlag contacted Tess Bermania in LER in the summer of 2019 about putting Petitioner on a performance improvement plan ("PIP"). Mr. Siedschlag issued a detailed PIP to Petitioner in August 2019.

The PIP pointed to quality, quantity and timeliness issues regarding which Petitioner was not performing satisfactorily. Petitioner demonstrated substantial knowledge on various substantive topics of concern to the EPA. Petitioner received a performance appraisal rating of "Outstanding" in about six of the 10 prior years preceding the complaint. Ms. Overstreet, who supervised Complainant for six years, testified that his work was excellent and that he was an outstanding performer. Ms. Overstreet also stated that Petitioner was flexible and professional, and that she received compliments about Petitioner's work. Co-worker Ms. Overby testified that Petitioner was a diligent, reliable and versatile co-worker. Ms. Overby testified that Mr. Siedschlag treated Petitioner more harshly then she and the other female co-workers. Ms. Overby stated that Mr. Siedschlag was less willing to work with Petitioner or compromise with him, and that he scrutinized his work more than hers. Co-worker Anne Hopkins testified that Mr. Siedschlag was hostile towards Petitioner and that Mr. Siedschlag micro-managed Petitioner. Ms. Hopkins testified that Mr. Siedschlag gave Petitioner a runaround with his edits and that some of Mr. Siedschlag's edits were incorrect. Co-worker Enid Chiu testified that Petitioner is reliable, professional, hard-working and knowledgeable. Ms. Chiu testified that Mr. Siedschlag did not criticize her for missing deadlines regarding the reduction of the backlog. App. 39a.

9. The hostile work environment adversely impacted Complainant in various ways. The hostile work environment adversely impacted Complainant's marriage. During and after the hostile work environment, Petitioner interacted less frequently with Ms. Borges-Silva and treated her

rudely. Their physical interactions became less frequent as well. Petitioner and Ms. Borges-Silva engaged in leisure activities less frequently during this time. Petitioner and Ms. Borges-Silva maintained a strong relationship throughout this time. Petitioner experienced negative mood changes as a result of the harassment. Petitioner stopped socializing within his community and instead watched television during his free time. Petitioner experienced insomnia due to the harassment. He would wake-up thinking about events at work, become angry and then be unable to get back to sleep. Petitioner increased his consumption of alcohol after the harassment started. He sometimes would drink late at night to try to get back to sleep. In addition to the increased alcohol consumption, Petitioner began eating large quantities of junk food. Petitioner experienced weight gain over the course of the hostile work environment. Petitioner had PTSD from prior bicycle accidents and for years had biked to work after rush hour for safety purposes. For the approximately six-week period when he was not permitted by his supervisor to ride to work after rush hour, Petitioner's PTSD was exacerbated from his rush hours rides. Petitioner was embarrassed in front of his colleagues by some of the incidents which comprised the hostile work environment. Petitioner believes his personal reputation suffered as a result. App. 40a-41a.

B. Procedural History

1. On June 28, 2019, Petitioner filed an Equal Employment Opportunity ("EEO") claim. On June 9, 2022, Equal Employment Opportunity Commission ("EEOC") Administrative Judge ("AJ") Robert D. Rose ruled that Borges-Silva "was subjected to a hostile work

environment based on his sex and prior EEO activity, and placed on a [performance improvement plan] in reprisal for his prior EEO activity." AJ Rose dismissed the claim that Borges-Silva was harassed based on his age. On October 13, 2022, AJ Rose issued his Final Post-Hearing Bench Decision and Order after a damages hearing was held on October 7, 2022. App. 28a.

2. On February 24, 2021, Petitioner filed his suit in the U.S. District Court for the District of Columbia for wrongful termination, again, claiming that the EPA unlawfully discriminated against him based on his age and gender and retaliated against him for complaining about a hostile work environment. On Jan. 13, 2023, the District Court stated they were not foreclosed from deciding whether Petitioner's termination was retaliatory because the "same issue" is not raised in in the EEOC case and District Court Case. App. 10. The district court thus ignored the EEOC's precedent, that found Petitioner was placed on the PIP as a retaliatory act and instead justified that the Agency terminated Petitioner for nondiscriminatory reasons and ruled in the Agency's favor on summary judgment. App. 4a-26a.

3. On August 10, 2023, the United States Court of Appeals for the District of Columbia ruled in Summary Affirmance for the Agency without deciding the June 9, 2022, ruling by the EEOC could be a basis for issue preclusion because the district court's summary judgment decision did not depend on the resolution of issues decided by the Administrative Judge's ruling, which concerned claims distinct from the asserted by Petitioner in the district court case. App. 1a.

4. On December 4, 2023, the United States Court of Appeals for the District of Columbia ordered that the petition for rehearing en banc be denied. App. 90a.

REASONS FOR GRANTING THE PETITION

In the annals of workplace disputes, the case at hand stands as a testament to the challenges faced by individuals seeking justice in the aftermath of wrongful termination. On the one hand there is outstanding victory by Petitioner recognizing the existence of a hostile work environment rooted in gender-based discrimination and retaliation for prior engagement in Equal Employment Opportunity (EEO) activities before the Equal Employment Opportunity Commission (EEOC). On the other hand, a District Court ruling that failed to recognize that it was the very same hostile work environment and retaliatory placement of Petitioner on a Performance Improvement Plan (PIP) that resulted in his unjust termination.

Petitioner contends that the District Court's ruling is fundamentally flawed, as it fails to recognize the inherent connection between the petitioner's claims before the EEOC and the subsequent legal proceedings.

This very Court has recognized the importance of collateral estoppel which prevents parties from re-litigating issues already resolved in a prior suit. This case underscores the importance of consistent legal decisions and their impact on subsequent legal challenges and should require federal district courts to uphold precedents previously set by this Court.

I. The District Court for the District of Columbia Circuit's Decision Is Seriously Mistaken And Conflicts With Settled Precedent From This Court And Other Circuits

Collateral Estoppel, often referred to as issue preclusion, is a cornerstone in the administration of justice. This doctrine serves a crucial role in promoting judicial economy, finality, and the efficient resolution of legal disputes. Issue preclusion operates on the principle that once a court has definitively determined an issue of fact or law, that determination should be binding in subsequent proceedings. In other words, if a specific issue was actually litigated and decided in a prior case, and that decision was essential to the judgment, the parties should not be allowed to relitigate that same issue in a later case. This principle not only conserves judicial resources but also ensures consistency and integrity in our legal system. A fundamental precept of common law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." *Montana v. United States*, 440 U.S. 147 (1979) (internal citations omitted).

1. Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). "Once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits [even if it

is] based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

2. There are three elements required to establish a preclusive effect of a prior determination of an issue: First (1), the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second (2), the issue must have been actually and necessarily decided by a court of competent jurisdiction in that prior case. . . . Third (3), preclusion in the second case must not work a basic unfairness to the party bound by the first determination. *Yamaha Corp. of America v. United States*, 295 U.S. App. D.C. 158, 961 F.2d 245, 254 (D.C. Cir. 1992) (citations and footnote omitted).

3. First, it is the very same issue raised in the EEOC case that was raised before the District Court. At base, the issue was whether the Performance Enhancement Plan (PIP) was valid. If the PIP was invalid (as it was found in the EEOC case) then the subsequent termination based on a failed PIP would be inherently wrong. The EEOC found the PIP to be invalid because it was a retaliatory action based on prior protected EEO activity; meaning there should have never been a PIP in the first place. *Borges-Silva v. Regan*, No. 570-2020-00896X, U.S. Equal Employment Opportunity Commission.

4. The EEOC AJ found the claims at issue to be: "Complainant alleges he was subjected to hostile work environment harassment (nonsexual) and discriminated against based on Sex (Male), Age (DOB: May 1965) and Retaliation (Previously filed complaint(s) using the Agency

4711 process for allegations of workplace harassment) when: In December 2018 and again since March 20, 2019 and continuing, his Supervisor, Mr. Gregory Siedschlag, Branch Manager, Office of Chemical Safety and Pollution Prevention/Office of Pesticide Program/Field and External Affairs Division (FEAD)/ Communication Services Branch, criticized, shamed and ridiculed him while being scornful of his experience, bullying and berating him. That Complainant alleges he was discriminated against based on Retaliation (Instant Complaint and previously filed complaint(s) using the agency 4711 process) when: On September 27, 2019, Mr. Siedschlag placed Complainant on a Performance Improvement Plan (PIP)." *Id.*

5. The District Court found the issues to be discrimination and retaliation and focused primarily on (1) Defendant's Legitimate Nondiscriminatory and Nonretaliatory Justifications and (2) Borges-Silva's Evidence of Pretext. *Borges-Silva v. Regan*, No. 23-5030

6. The district court explained Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits an employer from retaliating against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII]" or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a).

- The employee must first make out a prima facie case of retaliation or discrimination under Title VII. See *Iyoha v. Architect of the Capitol*, 927 F.3d 561, 566 (D.C. Cir. 2019).

- When the employer properly presents a legitimate nondiscriminatory and nonretaliatory reason for the challenged action, the district court "need not—and should not—decide whether the plaintiff actually made out a prima facie case." *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Because Defendant asserted legitimate nondiscriminatory and nonretaliatory reasons for the challenged actions, the Brady shortcut applies. See *Barry v. Haaland*, No. 19-cv- 3380, 2022 WL 4598518, at *6 (D.D.C. Sept. 29, 2022), appeal filed, No. 22-5268.

7. The EEOC AJ finding Petitioner established a prima facie case of harassment the EEOC AJ also found Petitioner had demonstrated that the Agency's rationales for taking the challenged actions are pretextual and that sex was a motivator behind those actions. Thus, [Petitioner] has established a hostile work environment based on sex and the Agency violated Title VII when it subjected Petitioner to retaliatory harassment based on his protected EEO activities.

8. The District Court summarily ruled: "This Court is not foreclosed from deciding whether Borges-Silva's termination was retaliatory because the "same issue" is not raised in Borges-Silva's EEOC case and this case. *Yamaha Corp. of Am.*, 961 F.2d at 254. By Borges-Silva's own omission, the issue in the EEOC case is: "[w]as the PIP valid?" Pl.'s Opp'n at 30. However, the issues here are (1) whether Defendant articulated legitimate nonretaliatory and nondiscriminatory reasons for removing Borges-Silva and (2) whether Borges-Silva rebutted Defendant's articulated reasons with evidence of pretext. See Def.'s

Reply at 15–16. Given that the AJ did not address these questions in his liability ruling, "[a]n assessment of the remaining elements of issue preclusion is, therefore, not necessary." *Lans*, 786 F. Supp. 2d at 312.

9. The appellant court ruled: First, assuming without deciding that the June 9, 2022, ruling by an Equal Employment Opportunity Commission Administrative Judge could be a basis for issue preclusion, the district court's summary judgment decision did not depend on resolution of issues decided by the Administrative Judge's ruling, which concerned claims distinct from those asserted by appellant in this case. See *In re Subpoena Duces Tecum*, 439 F.3d 740, 743 (O .C. Cir. 2006).

10. But it is overwhelmingly clear the issues were the same in both cases. The analysis in the district court case took a fundamentally different route which prejudiced Petitioner and ignored the findings of fact and law set out by the EEOC. The Respondent's case rests on the fact that Petitioner was terminated due to his performance during his PIP. Yet the entire argument is moot because the EEOC found the PIP itself was pretext because it was retaliatory to a protected activity.

11. Second, the EEOC is a competent court of jurisdiction. It has its own appeals process and if the Federal employee is dissatisfied with the EEOC process, only the Federal Employee has the right to bring that case in Federal Court. The Agency does not have that right. A judgment is final enough if litigation of a particular issue has reached a stage that a Court sees no really good reason for litigating it again. *Miller v. Hydro Group v. Popovitch*, 793 F. Supp 24, 28, (D. Me, 1992); *In re Brown*, 951 F.2d 564, 569-70 (3d Cir.1991).

12. Third, there was no prejudice to Respondent on this issue. The Respondent fully litigated that issue in the EEOC Administrative Court. The Respondent took the Petitioner's deposition in that case. There was a cross-examination of the Respondent at the hearing that lasted at least half a day. The Respondent appeared for depositions of the Agency witnesses and even asked questions of them. Even in the EEOC hearing, the Agency raised no issue with the Administrative Judge's fairness or some other issue that would have precluded from serving as an effective or fair fact-finder.

13.Thus, it is evidently clear that it was the same issue raised that had been contested by the parties and submitted for judicial determination in the prior case; the issue was actually and necessarily decided by a court of competent jurisdiction in that prior case and the preclusion in the district case did not work a basic unfairness to the party bound by the first determination. Therefore, issue preclusion establishes the PIP in and of itself was pretext and renders the district court's ruling fundamentally flawed.

II. The District Court Failed to Identify the Issue that if the Underlying Performance Improvement Plan was Discriminatory then too is the Resulting Termination

Plaintiff brought this case in Federal Court alleging he was wrongfully terminated, based on gender and age discrimination and that he was retaliated against for his protected activity. The Respondent has alleged that the Petitioner's termination was justified because he failed an Opportunity to Demonstrate Acceptable Performance, a/k/a, Performance Improvement Plan (PIP).

1. The decision on the proposed removal was pursuant to Title 5, United States Code, Chapter 43, and the implementing regulations at Part 432 of Title 5, Code of Federal Regulations (CFR). As such, this was a dismissal not for disciplinary reasons, but for performance and the Petitioner allegedly was given notice of his poor performance, was placed on a PIP because of it, then was dismissed because he allegedly failed the PIP. Per the regulation cited, the manner in which Respondent provides that notice to the Petitioner is through the PIP and the reasonable opportunity to demonstrate acceptable performance is through that PIP.

2. Before the District Court gets to the Petitioner's alleged poor performance during the PIP, the court has to determine whether the PIP was valid in the first place because pursuant to the regulations and code upon which Respondent relied, there could not have been a termination without the PIP. In the alternative, the District Court should determine whether the PIP was pretext for Petitioner's termination.

3. The District Court stated "First, Borges-Silva argues that "[t]here has been no objective documentation demonstrating [a legitimate basis for termination]." Pl.'s Opp'n at 34. However, record evidence consistently demonstrates that Defendant "notified [Borges-Silva] that his work was failing to meet expectations and provided him with performance evaluations, both formal and informal, during his employment." *Williams*, 2019 WL 3859155, at *13; see supra n.6." Again, the issue here wasn't that Petitioner did not perform to the level of his PIP. However, the termination itself was invalid because it relied on an illegitimate PIP.

4. The court's analysis relies on Petitioner's performance while he was on the PIP but does not take into account that Petitioner was placed on the PIP as a retaliatory act for protected EEO activity.

5. Thus, there could be no other finding that placing Petitioner on the PIP was the very pretext that the District Court failed to recognize in ruling for Respondent.

III. The District Court Ignored that Petitioner was Subjected to a Hostile Work Environment during the Performance Improvement Plan rendering him in Capable of its Successful Completion.

The District Court concluded that the Respondent had presented a legitimate nondiscriminatory and nonretaliatory reason for Petitioner's termination; Petitioner's poor work performance and that the District Court concluded that the Petitioner had not provided sufficient evidence by which a reasonable jury could find the Respondent's stated reasons for his termination were pretext for discrimination or retaliation.

1. The evidence of the Petitioner's mistreatment based on his gender and his EEO activity is overwhelming. The Respondent rests his case on Petitioner's inability to process 25 emails per day. However, Petitioner was subject to a hostile work environment throughout his PIP, making it impossible to adequately perform any work. When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris v. Forklift Sys, 510 U.S. 17, 21 (1993)* (internal citations omitted).

2. In determining whether an actionable hostile work environment claim exists, This Court will look to "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.

3. Again, the District Court ignores the underlying issue. That Petitioner was subjected to a hostile work environment as demonstrated by the abundant evidence in the record and the evidence the EEOC used to find a hostile work environment. Instead, the District Court presumes Respondent met his burden to only "raise a genuine issue of fact as to whether the employer intentionally discriminated [or retaliated against the employee." Although the PIP required Borges-Silva to prepare at least twenty-five webmail responses per workday, see Pl.'s PIP at 6, Borges-Silva completed an average of 13.6, see PIP Results at 5. "[Borges-Silva's] subpar performance [is] evidence that [Defendant] had a legitimate [nondiscriminatory and] nonretaliatory explanation for terminating [him]." *Williams v. Smithsonian Inst.*, No. 14-cv-1900, 2019 WL 3859155, at *7 (D.D.C. Aug. 16, 2019) (citing *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005)). Therefore, a factfinder "could believe the evidence and reasonably conclude that [Defendant] was motivated by the non-discriminatory [and nonretaliatory] reasons described [therein]." *Clinton v. Granholm, 2021 U.S. Dist. LEXIS 57472, 8*, at *8.

4. Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a), or "because he has made a charge . . . or participated in any manner in an investigation" of employment discrimination. 42 U.S.C. § 2000e-3(a). The Supreme Court has held that these provisions make it unlawful for an employer to "requir[e] people to work in a discriminatorily hostile or abusive environment." *Harris v. Forklift Sys.*, Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). A hostile work environment can amount to either discrimination or retaliation under Title VII. See, e.g., *Harris v. Wackenhut Servs.*, Inc., 419 Fed. Appx. 1, 1 (D.C. Cir. 2001) (discrimination); *Singletary v. District of Columbia*, 351 F.3d 519, 526, 359 U.S. App. D.C. 1 (D.C. Cir. 2003) (retaliation). *Wise v. Ferriero* 842 F. Supp. 2d 120, 125.

5. "To determine whether a hostile work environment exists, the court looks to the totality of the circumstances, including the frequency of the discriminatory conduct, its severity, its offensiveness, and whether it interferes with an employee's work performance." Id. at 1201 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998)). "The Supreme Court has made it clear that 'conduct must be extreme to amount to a change in the terms and conditions of employment.'" *George v. Leavitt*, 407 F.3d 405, 416, 366 U.S. App. D.C. 11 (D.C. Cir. 2005) (quoting *Faragher*, 524 U.S. at 788).

6. The Court's reasoning fails to take into account that the very pervasive and hostile acts that placed Petitioner on the PIP were active throughout the PIP rendering Petitioner incapable of "satisfactory" performance and thus fails to take into the totality of the circumstances

and that the PIP amounted to a change in the terms and conditions of employment

7. In short, the decisions below contravene the requirements of due process, depart from this Court's and other courts' decisions, and threaten to upend the standard of collateral estoppel. Further review is plainly warranted.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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March 4, 2024

APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED AUGUST 10, 2023

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-5030

QUENTIN BORGES-SILVA,

Appellant,

v.

MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee.

August 10, 2023, Filed

BEFORE: Henderson, Walker, and Garcia, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

Appendix A

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297, 260 U.S. App. D.C. 334 (D.C. Cir. 1987) (per curiam). Appellant has forfeited any arguments regarding the district court's August 8, 2022, minute order denying his motion for a stay. *See Totten v. Bombardier Corp.*, 380 F.3d 488, 497, 363 U.S. App. D.C. 180 (D.C. Cir. 2004). In addition, the district court correctly granted summary judgment to the Administrator of the Environmental Protection Agency (the "EPA").

First, assuming without deciding that the June 9, 2022, ruling by an Equal Employment Opportunity Commission Administrative Judge could be a basis for issue preclusion, the district court's summary judgment decision did not depend on resolution of issues decided by the Administrative Judge's ruling, which concerned claims distinct from those asserted by appellant in this case. *See In re Subpoena Duces Tecum*, 439 F.3d 740, 743, 370 U.S. App. D.C. 113 (D.C. Cir. 2006). Second, the district court correctly concluded that the EPA had presented a legitimate nondiscriminatory and nonretaliatory reason for appellant's termination: appellant's poor work performance. *See Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494, 380 U.S. App. D.C. 283 (D.C. Cir. 2008); see also *Allen v. Johnson*, 795 F.3d 34, 39, 417 U.S. App. D.C. 297 (D.C. Cir. 2015) (applying *Brady* to a retaliation claim); *Gilbert v. Napolitano*, 670 F.3d 258, 261-62, 399 U.S. App. D.C. 293 (D.C. Cir. 2012) (applying *Brady* to an Age Discrimination in Employment Act claim). Third, the

district court correctly concluded that appellant had not provided sufficient evidence by which a reasonable jury could find the EPA's stated reasons for his termination were pretext for discrimination or retaliation. *See Hairston v. Vance-Cooks*, 773 F.3d 266, 272, 413 U.S. App. D.C. 248 (D.C. Cir. 2014). Appellant has not introduced evidence demonstrating "that all of the relevant aspects of his employment situation were nearly identical to those" of the comparators he proffered in the district court. *See Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 301 (D.C. Cir. 2015) (internal punctuation omitted). Nor has appellant introduced evidence demonstrating that the EPA failed to follow established procedures when it permitted his direct supervisor to initiate work related contact with appellant after he filed an administrative complaint alleging workplace harassment. *See Allen*, 795 F.3d at 40. Finally, appellant has not shown that the temporal proximity between his protected activity and his termination from the EPA supports a reasonable inference in this case that the agency's stated reasons for his termination were pretext for retaliation.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JANUARY 13, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 21-cv-474-ZMF

QUENTIN BORGES-SILVA,

Plaintiff,

v.

JANE NISHIDA, FORMER ACTING ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendant.

January 13, 2023, Decided
January 13, 2023, Filed

MEMORANDUM OPINION

On February 16, 2020, the U.S. Environmental Protection Agency ("EPA") terminated Plaintiff Quentin Borges-Silva ("Borges-Silva") for unacceptable service. Borges-Silva sued the EPA Administrator ("Defendant") for wrongful termination,[1] claiming that the EPA

1. When Plaintiff filed this suit, Jane Nishida served as the Acting Administrator of the EPA. Now, Administrator Michael

unlawfully discriminated against him based on his age and gender and retaliated against him for complaining about a hostile work environment. Pending before the Court is Defendant's Motion for Summary Judgment, which the Court will GRANT.

I. BACKGROUND[2]

A. Factual Background[3]

S. Regan is the proper defendant in this case. *See* 42 U.S.C. § 2000e-16(c).

2. Although each exhibit and submission from the parties in support of and in opposition to the pending motions has been reviewed, only those exhibits necessary to provide context for the resolution of the pending motions are cited herein.

3. Plaintiff admitted thirty-eight out of forty-three of the statements in Defendant's Statement of Undisputed Facts. *See* Pl.'s Resp. Def.'s Statement of Material Facts ("Pl.'s Resp."), ECF No. 22-1. These admitted statements largely form the factual background. Embedded in Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Plaintiff included a twenty-four-page "Statement of Counter-Facts," listing 161 largely redundant statements that regularly mix argument and fact. *See* Pl.'s Opp'n to Def.'s Mot. Summ. J. ("Pl.'s Opp'n"), ECF No. 22. Most of the statements are immaterial, as they do not bear on whether: (1) Defendant had a legitimate non-pretextual reason to terminate Plaintiff; or (2) Plaintiff can rebut this reason with evidence of pretext. "[L]iberally mix[ing] facts with argument . . . does nothing to assist the court in isolating the material facts, distinguishing disputed from undisputed facts, and identifying the pertinent parts of the record." *Robertson v. Am. Airlines, Inc.*, 239 F. Supp. 2d 5, 9 (D.D.C. 2002) (citing *Burke v. Gould*, 286 F.3d 513, 518-19, 351 U.S. App. D.C. 1 (D.C. Cir. 2002)).

Appendix B

1. EPA Employment and Prior Protected Activity

Borges-Silva, a man born in 1965, *see* Def.'s Mem. P. & A. Supp. Mot. Summ. J. ("Def.'s Mem.") 6, ECF No. 14-1, was an Environmental Protection Specialist, GS-13,[4] in the EPA's Communication Services Branch ("Branch"), Field and External Affairs Division ("Division"), Office of Pesticide Programs, Office of Chemical Safety and Pollution Prevention ("Office"), *see* Def.'s Statement of Material Facts ("Def.'s Material Facts") ¶ 1, ECF No. 14-2. His primary responsibility was responding to "webmail inquiries," which members of the public submitted via the Office's "Contact Us" webpage. *See id.* ¶ 5-6. At all times relevant to the instant suit, Branch Chief Gregory

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Moreover, Plaintiff failed to comply with Local Civil Rule 7(h)(1) and the Court's Standing Order, which required him to "furnish precise citations to the portions of the record on which [he] rel[ies]." Standing Order in Civil Cases ("Standing Order") ¶ 13, ECF No. 10; *see* LCvR 7(h)(1). Plaintiff's Statement of Counter-Facts does not include proper citations to the record and instead relies on the original pagination of the documents. *See* Standing Order ¶ 13(b). As such, the Court will decline Plaintiff's invitation to sift through hundreds of pages of depositions and affidavits to determine what may, or may not, be a genuine issue of material disputed fact. *See Burke v. Gould*, 286 F.3d 513, 517-18, 351 U.S. App. D.C. 1 (D.C. Cir. 2002); *see also Lawrence v. Lew*, 156 F. Supp. 3d 149, 154-55 (D.D.C. 2016) (detailed discussion of Local Civil Rule 7(h) and litigants' obligation to comply).

4. The EPA largely pays employees on the General Schedule ("GS") pay scale, which has fifteen levels. *See* Salary Table 2023-GS, OPM.GOV, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/GS.pdf.

Siedschlag (male, born 1978) served as Borges-Silva's first-line supervisor, and Division Director Jackie Mosby (female, born 1960) oversaw the Branch. *See* Def.'s Material Facts ¶¶ 2-3; Def.'s Mem. at 8.

On June 28, 2019, Borges-Silva filed an Equal Employment Opportunity ("EEO") claim. *See* Pl.'s Opp'n, Ex. 5, Compl. Discrimination in Federal Government ("Pl.'s Compl.") 1, ECF No. 22-3. On June 9, 2022, Equal Employment Opportunity Commission ("EEOC") Administrative Judge ("AJ") Robert D. Rose ruled that Borges-Silva "was subjected to a hostile work environment based on his sex and prior EEO activity, and placed on a [performance improvement plan] in reprisal for his prior EEO activity." Pl.'s Mot. Issue Preclusion & Stay, Ex. 1, Liability Hearing Bench Decision & Order ("EEOC Liability Ruling") 18, ECF No. 16-1. AJ Rose dismissed the claim that Borges-Silva was harassed based on his age. *See id.* at 3.

2. Webmail Backlog Develops

During the 2019 federal government shutdown, which lasted from December 31, 2018, to January 29, 2019, the Office developed a backlog of approximately 300 unanswered webmail inquiries. *See* Def.'s Mot. Summ. J. ("Def.'s Mot."), Ex. 2, Dep. Quentin Borges-Silva ("Pl.'s 2021 Dep.") 6, ECF No. 14-6. On March 19, 2019—Siedschlag's second day as permanent Branch Chief—Siedschlag discovered this backlog. *See* Decl. Gregory B. Siedschlag ("Siedschlag Decl.") ¶ 6, ECF No. 14-3. The next day, Siedschlag expressed concerns

about the backlog to Borges-Silva. *See* Def.'s Material Facts ¶ 12. That same day, Siedschlag tasked three other employees—Enid Chiu (female, born 1988, GS-12 Environmental Protection Specialist), Marilyn St. Fleur (female, born 1985, GS-13 Environmental Protection Specialist), and Isabella Bennett (female, born 1993, GS-11 Environmental Protection Specialist)—with assisting Borges-Silva with the backlog. *See* Siedschlag Decl. ¶ 7; Def.'s Mot., Ex. 14, Table of Branch Employees 2, ECF No. 14-18. By March 29, 2019, the four employees reduced the backlog to forty-one webmail inquiries. *See* Def.'s Material Facts ¶ 18; Pl.'s Resp. at 2. Siedschlag requested that each employee track their time. *See* Siedschlag Decl. ¶ 8. Chiu completed seventy-five webmail responses in 400 minutes, for a rate of 5.3 minutes per response. *See* Def.'s Mot., Ex. 13, Table of Time Comparators 2, ECF No. 14-17. Bennett completed seventy webmail responses in 706 minutes, for a rate of 10.1 minutes per response. *See id.* St. Fleur completed seventy-two webmail responses in 725 minutes, for a rate of 10.1 minutes per response. *See id.* Borges-Silva did not provide usable data. *See* Siedschlag Decl. ¶ 8 n.3.

Over the next six months, the webmail backlog regrew. *See* Siedschlag Decl. ¶ 8. On May 22, 2019, the backlog totaled 134 unanswered inquiries. *See* Def.'s Mot., Ex. 4, Pl.'s Performance Notes 4, ECF No. 14-8. On July 5, 2019, the backlog totaled 234 unanswered inquiries. *See* Def.'s Mot., Ex. 3, Emails from Siedschlag to Pl. ("Siedschlag Emails") 3, ECF No. 14-7. By August 30, 2019, the backlog reached approximately 510 unanswered inquiries. *See id.* at 2. Throughout that time, Siedschlag repeatedly instructed Borges-Silva to address the

backlog. *See* Siedschlag Decl. ¶ 9. For example, on July 5, 2019, Siedschlag tasked Borges-Silva with eliminating the backlog of 234 inquiries by August 30, 2019. *See* Siedschlag Emails at 3. And on September 4, 2019, Siedschlag asked Borges-Silva to eliminate the backlog of 510 inquiries by November 13, 2019. *See id.* at 2. Siedschlag later adjusted this deadline to November 27, 2019, to provide Borges-Silva with official time to work on his EEO affidavit. *See* Def.'s Mot., Ex. 1, Dep. Quentin Borges-Silva ("Pl.'s 2022 Dep.") 25, ECF No. 14-5.

3. Defendant Places Borges-Silva on a Performance Improvement Plan

On September 27, 2019, Siedschlag informed Borges-Silva of his intention to place him on a performance improvement plan ("PIP") for unacceptable performance. *See* Siedschlag Decl. ¶ 10. On October 23, 2019, Siedschlag formally placed Borges-Silva on a PIP. *See* Def.'s Mot., Ex. 6, Performance Improvement Plan ("Pl.'s PIP"), ECF No. 14-10. The PIP period lasted from October 28, 2019 to November 27, 2019. *See id.* at 2. The PIP required Borges-Silva to prepare an average of at least twenty-five webmail responses per workday. *See id.* at 6. Siedschlag met with Borges-Silva weekly throughout the PIP period to provide feedback and guidance. *See* Pl.'s 2022 Dep. at 25. Siedschlag instructed Borges-Silva to prioritize simple inquiries that could be completed in twenty minutes or less. *See id.* at 25-26, 28-29.

During the PIP period, Borges-Silva sent a total of 244 webmail responses at an average of 13.6 per

day. *See* Def.'s Mot., Ex. 7, Notification of Performance Improvement Plan Results ("PIP Results") 5, ECF No. 14-11. Of these, Borges-Silva copied his responses from form response language 109 times verbatim and sixty-four times partially. *See id.* at 6. As of December 2, 2019, the Office had a backlog of approximately 700 webmail inquiries, some of which dated back to July 2019. *See* Pl.'s 2022 Dep. at 38; Siedschlag Decl. ¶ 15.

4. Defendant Terminates Borges-Silva

On January 17, 2020, Siedschlag proposed removing Borges-Silva for unacceptable service. *See* Def.'s Mot., Ex. 8, Notice of Proposed Removal for Unacceptable Performance ("Removal Notice") 2, ECF No. 14-12. Mosby served as the deciding official for the proposed removal. *See id.* at 7. On February 14, 2020, Mosby issued her decision to implement the proposed removal. *See* Def.'s Mot., Ex. 9, Decision on Notice of Proposed Removal ("Removal Decision") 2, ECF No. 14-13. On February 16, 2020, Defendant terminated Borges-Silva. *See* Def.'s Mot., Ex. 10, Notification of Personnel Action 2, ECF No. 14-14.

B. Procedural History

On February 24, 2021, Borges-Silva filed this suit. *See* Compl., ECF No. 1. On June 21, 2021, Defendant filed his Answer. *See* Answer, ECF No. 7. On July 20, 2021, the parties consented to proceed before a U.S. Magistrate Judge for all purposes, and the matter was referred to the undersigned. *See* Joint Notice Consent Assign. Mag. Judge., ECF No. 9; Min. Order (July 22, 2021).

Following discovery, Defendant moved for summary judgment. *See* Def.'s Mot. On July 27, 2022, Borges-Silva moved for issue preclusion based on the AJ's liability ruling and to stay the summary judgment briefing. *See* Pl.'s Mot. Issue Preclusion & Stay, ECF No. 16. On August 8, 2022, this Court denied Borges-Silva's motion and ordered him to raise any issue preclusion arguments in his opposition to Defendant's motion for summary judgment. *See* Min. Order (Aug. 8, 2022). On August 25, 2022, Borges-Silva filed his opposition. *See* Pl.'s Opp'n. On October 18, 2022, Defendant filed his reply. *See* Def.'s Reply Supp. Mot. Summ. J. ("Def.'s Reply"), ECF No. 25.

II. LEGAL STANDARD

To succeed on a motion for summary judgment, the moving party must show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Steele v. Schafer*, 535 F.3d 689, 692, 383 U.S. App. D.C. 74 (D.C. Cir. 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The moving party bears the initial burden of demonstrating that there is no genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets this burden, the nonmoving party must identify "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting

Fed. R. Civ. P. 56(e)). In evaluating motions for summary judgment, the Court must review all evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmoving party's favor. *See Tolan v. Cotton*, 572 U.S. 650, 656-57, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) (per curiam). In doing so, the Court must not assess credibility or weigh the evidence. *See Barnett v. PA Consulting Grp., Inc.*, 715 F.3d 354, 358, 404 U.S. App. D.C. 439 (D.C. Cir. 2013). However, the nonmoving party "may not merely point to unsupported self-serving allegations, but must substantiate his allegations with sufficient probative evidence[.]" *Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 790 (8th Cir. 2009) (quoting *Bass v. SBC Communs., Inc.*, 418 F.3d 870, 872-73 (8th Cir. 2005)). A genuine issue for trial must be supported by affidavits, declarations, or other competent evidence. *See* Fed. R. Civ. P. 56(c). If the nonmoving party's evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Liberty Lobby*, 477 U.S. at 249-50.

III. DISCUSSION

A. Issue Preclusion

Under "the doctrine of issue preclusion[,] . . . 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254, 295 U.S. App. D.C. 158 (D.C. Cir. 1992) (quoting *Allen v. McCurry*, 449 U.S. 90, 94, 101

S. Ct. 411, 66 L. Ed. 2d 308 (1980)). A prior holding has a preclusive effect when (1) "the same issue now being raised [was previously] contested by the parties and submitted for judicial determination in the prior case[,]" (2) "the issue [was] actually and necessarily determined by a court of competent jurisdiction in that prior case[,]" and (3) "preclusion in the second case [would] not work a basic unfairness to the party bound by the first determination." *Id.* "[T]he moving party bears the burden of proving all the elements of issue preclusion." *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 303 (D.D.C. 2011) (citing *Athridge v. Aetna Cas. and Sur. Co.*, 351 F.3d 1166, 1171, 359 U.S. App. D.C. 22 (D.C. Cir. 2003)).

This Court is not foreclosed from deciding whether Borges-Silva's termination was retaliatory because the "same issue" is not raised in Borges-Silva's EEOC case and this case. *Yamaha Corp. of Am.*, 961 F.2d at 254. By Borges-Silva's own omission, the issue in the EEOC case is: "[w]as the PIP valid?" Pl.'s Opp'n at 30. However, the issues here are (1) whether Defendant articulated legitimate nonretaliatory and nondiscriminatory reasons for removing Borges-Silva and (2) whether Borges-Silva rebutted Defendant's articulated reasons with evidence of pretext. *See* Def.'s Reply at 15-16. Given that the AJ did not address these questions in his liability ruling, "[a]n assessment of the remaining elements of issue preclusion is, therefore, not necessary." *Lans*, 786 F. Supp. 2d at 312. Accordingly, the Court will proceed to consider the remaining issues in this case.

B. Discrimination and Retaliation

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits an employer from retaliating against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII]" or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). If a plaintiff cannot present direct evidence of discrimination or retaliation, the court assesses his claims under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Under that framework, the employee must first make out a prima facie case of retaliation or discrimination under Title VII. *See Iyoha v. Architect of the Capitol*, 927 F.3d 561, 566, 441 U.S. App. D.C. 475 (D.C. Cir. 2019). To establish a prima facie case of discrimination, the plaintiff must show that "(1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Royall v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 548 F.3d 137, 144, 383 U.S. App. D.C. 331 (D.C. Cir. 2008) (cleaned up). To establish a prima facie case of retaliation, the plaintiff must show that (1) "he engaged in statutorily protected activity;" (2) "he suffered a materially adverse action by his employer;" and (3) "a causal link connects the two." *Iyoha*, 927 F.3d at 574. Next, the burden shifts to the employer to articulate a legitimate nondiscriminatory and nonretaliatory reason for its action. *See McGrath v. Clinton*, 666 F.3d 1377, 1383, 399 U.S. App. D.C. 110 (D.C. Cir. 2012). In doing

so, "the employer must 'articulate specific reasons for that applicant's qualifications such as seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work or any combination of such criteria.'" *Figueroa v. Pompeo*, 923 F.3d 1078, 1089, 440 U.S. App. D.C. 434 (D.C. Cir. 2019) (quoting *Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1076 (11th Cir. 2003)) (cleaned up). If the employer makes this showing, "the burden-shifting framework disappears." *Carter v. George Washington Univ.*, 387 F.3d 872, 878, 363 U.S. App. D.C. 287 (D.C. Cir. 2004). The "central inquiry" then becomes "whether the plaintiff produced sufficient evidence for a reasonable jury to find that the employer's asserted nondiscriminatory [and nonretaliatory] reason was not the actual reason and that the employer intentionally discriminated [or retaliated] against the plaintiff on a prohibited basis." *Iyoha*, 927 F.3d at 566 (quoting *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226, 381 U.S. App. D.C. 128 (D.C. Cir. 2008)). In other words, the employee must demonstrate "pretext." *Jones v. Bernanke*, 557 F.3d 670, 679, 384 U.S. App. D.C. 443 (D.C. Cir. 2009).

When the employer properly presents a legitimate nondiscriminatory and nonretaliatory reason for the challenged action, the district court "need not—and *should not*—decide whether the plaintiff actually made out a prima facie case." *Brady v. Off. of Sergeant at Arms*, 520 F.3d 490, 494, 380 U.S. App. D.C. 283 (D.C. Cir. 2008). Because Defendant asserted legitimate nondiscriminatory and nonretaliatory reasons for the challenged actions, the *Brady* shortcut applies. *See Barry v. Haaland*, No. 19-cv-3380, 2022 U.S. Dist. LEXIS 177748, 2022 WL 4598518,

at *6 (D.D.C. Sept. 29, 2022), *appeal filed*, No. 22-5268. Thus, the Court will proceed to step two.[5] *See id.*

1. Defendant's Legitimate Nondiscriminatory and Nonretaliatory Justifications

Four factors are "paramount in the analysis" of whether an employer has met its burden: (1) the employer

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5. At step one, Borges-Silva primarily relies on temporal evidence to establish causation. *See* Pl.'s Opp'n at 33-34. He argues that the proximity between his June 2019 EEO complaint and February 2020 termination establishes but-for causation. *See id.* Although "mere temporal proximity may establish causation," *Keys v. Donovan*, 37 F. Supp. 3d 368, 372 (D.D.C. 2014), to do so, "the temporal proximity must be very close," *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001) (cleaned up). Indeed, numerous courts have found that three and four-month periods between plaintiffs' protected activity and adverse employment actions were insufficient to establish causation based on temporal proximity. *See id.* at 273-74 (collecting cases).

Defendant terminated Borges-Silva eight months after Borges-Silva filed his EEO complaint. *See* Def.'s Material Facts ¶¶ 20, 40. The eight-month gap between the protected EEO activity and the challenged employment action "is too attenuated to establish causation based on temporal proximity alone." *Clinton v. Granholm*, No. 18-cv-991, 2021 U.S. Dist. LEXIS 57472, 2021 WL 1166737, at *10 (D.D.C. Mar. 26, 2021); *see also Kline v. Springer*, No. 07-0451, 2009 U.S. Dist. LEXIS 150163, 2009 WL 10701432, at *2 (D.D.C. June 29, 2009) ("No reasonable juror could find retaliation from these facts [where] there was a time lapse of from five to six months . . . ."). Therefore, Borges-Silva likely failed to establish causation. *See Clinton*, 2021 U.S. Dist. LEXIS 57472, 2021 WL 1166737, at *10.

must produce admissible evidence; (2) "the factfinder, if it believe[s] the evidence, must reasonably be able to find that the employer's action was motivated by a nondiscriminatory [and nonretaliatory] reason;" (3) the employer's justification must be "facially credible in light of the proffered evidence;" and (4) the employer must provide a "clear and reasonably specific explanation" for its action. *Figueroa*, 923 F.3d at 1087-88 (cleaned up). Defendant provided legitimate nondiscriminatory and nonretaliatory reasons for terminating Borges-Silva.

First, Defendant "has supported its justifications with evidence that the Court may consider at summary judgment, including deposition testimony [and] supporting emails[.]" *Arnoldi v. Bd. of Trs.*, 557 F. Supp. 3d 105, 115 (D.D.C. 2021) (cleaned up). Specifically, Defendant provided sworn statements from Siedschlag and Mosby; Borges-Silva's deposition testimony; comparator information; communications between Siedschlag and Borges-Silva about performance metrics; documents related to Borges-Silva's PIP; and documents related to Borges-Silva's removal.[6] Borges-Silva does not challenge the admissibility of this evidence. *See generally* Pl.'s Opp'n; Pl.'s Resp.

6. *See* Siedschlag Decl.; Pl.'s 2021 Dep.; Pl.'s 2022 Dep.; Siedschlag Emails; Pl.'s Performance Notes; Pl.'s Compl.; Pl.'s PIP; PIP Results; Removal Notice; Removal Decision; Notification of Personnel Action; Def.'s Mot., Ex. 11, Siedschlag's EEO Aff., ECF No. 14-15; Def.'s Mot., Ex. 12, Mosby's EEO Aff., ECF No. 14-16; Table of Branch Employees; Table of Time Comparators.

Second, Defendant need only "raise a genuine issue of fact as to whether the employer intentionally discriminated [or retaliated] against the employee" to satisfy its step two burden. *Figueroa*, 923 F.3d at 1087 (cleaned up). Defendant did so: evidence of poor work performance and "failure to follow supervisory instructions [are] legitimate reason[s] for . . . termination." *Arnoldi*, 557 F. Supp. 3d at 115. Between March 20, 2019, and September 19, 2019, Siedschlag expressed concerns to Borges-Silva on at least twelve occasions about his lackluster progress in eliminating the webmail backlog. *See* Def.'s Material Facts ¶ 12; Siedschlag Decl. ¶ 9. On September 27, 2019, Siedschlag notified Borges-Silva of his intention to place him on a PIP for unacceptable performance, having determined that Borges-Silva's "output was too low relative to both [his] expectations and to keep up with incoming webmail inquiries." Siedschlag Decl. ¶ 10. Although the PIP required Borges-Silva to prepare at least twenty-five webmail responses per workday, *see* Pl.'s PIP at 6, Borges-Silva completed an average of 13.6, *see* PIP Results at 5. "[Borges-Silva's] subpar performance [is] evidence that [Defendant] had a legitimate [nondiscriminatory and] nonretaliatory explanation for terminating [him]." *Williams v. Smithsonian Inst.*, No. 14-cv-1900, 2019 U.S. Dist. LEXIS 138869, 2019 WL 3859155, at *7 (D.D.C. Aug. 16, 2019) (citing *George v. Leavitt*, 407 F.3d 405, 412, 366 U.S. App. D.C. 11 (D.C. Cir. 2005)). Therefore, a factfinder "could believe the evidence and reasonably conclude that [Defendant] was motivated by the nondiscriminatory [and nonretaliatory] reasons described [therein]." *Clinton*, 2021 U.S. Dist. LEXIS 57472, 2021 WL 1166737, at *8.

Third, "the substantial evidence of [Borges-Silva's] substandard performance during his tenure . . . renders [Defendant's nonretaliatory and] nondiscriminatory explanation for separating him facially credible." *Williams*, 2019 U.S. Dist. LEXIS 138869, 2019 WL 3859155, at *8. Siedschlag placed Borges-Silva on a PIP, which Mosby deemed to be reasonable. *See* Removal Decision at 3. After Borges-Silva failed to meet the PIP's requirements, Mosby determined that Borges-Silva's "incidents of unacceptable performance . . . [were] fully supported by the evidence." *See id.* at 3. As a result, Mosby implemented the proposed removal of Borges-Silva. *See id.* "Defendant's explanation is therefore legitimate." *Albert v. Perdue*, No. 17-cv-1572, 2019 U.S. Dist. LEXIS 160618, 2019 WL 4575526, at *4 (D.D.C. Sept. 20, 2019) (citing *Figueroa*, 923 F.3d at 1088).

Fourth, Defendant's "explanations were sufficiently clear and specific to allow [Borges-Silva] ample opportunity to bring forward evidence to 'disprove . . . [D]efendant's reasons.'" *Clinton*, 2021 U.S. Dist. LEXIS 57472, 2021 WL 1166737, at *9 (quoting *Figueroa*, 923 F.3d at 1088). Siedschlag tasked Borges-Silva—the Office's only employee primarily focused on responding to webmail inquiries—with reducing a significant webmail backlog. *See* Siedschlag Decl. ¶ 4; Def.'s Material Facts ¶ 5-7. Borges-Silva does not contest that he failed to eliminate the backlog throughout 2019. *See* Pl.'s Opp'n at 34-35. "[Defendant's] consistent claim—one directly supported by the record—that it decided to discharge [Borges-Silva] because of his unsatisfactory job performance gave [Borges-Silva] a clear opportunity to challenge the

asserted justification as merely a pretext for unlawful . . . discrimination [and retaliation.]" *Williams*, 2019 U.S. Dist. LEXIS 138869, 2019 WL 3859155, at *8.

2. Borges-Silva's Evidence of Pretext

"The burden now shifts to [Borges-Silva] to provide sufficient evidence by which a reasonable jury could find [Defendant's] stated reason was pretext for discrimination [and] retaliation." *Albert*, 2019 U.S. Dist. LEXIS 160618, 2019 WL 4575526, at *5 (citing *Brady*, 520 F.3d at 494).

To establish pretext, a plaintiff may show that the defendant provided a "false" explanation for its employment decision. *Lathram v. Snow*, 336 F.3d 1085, 1089, 357 U.S. App. D.C. 413 (D.C. Cir. 2003). "It is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible." *Hogan v. Hayden*, 406 F. Supp. 3d 32, 46 (D.D.C. 2019) (quoting *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994)). Alternatively, an "employer's failure to follow established procedures or criteria" may also provide evidence of pretext allowing an employee to survive summary judgment. *Wang v. Wash. Metro. Area Transit Auth.*, 206 F. Supp. 3d 46, 68 (D.D.C. 2016) (quoting *Brady*, 520 F.3d at 495 n.3). Finally, a plaintiff may provide evidence of "variant treatment of similarly situated employees, discriminatory statements by decision[-]makers, [or] irregularities in the stated reasons for the adverse employment decision." *Bennett v. Solis*, 729 F. Supp. 2d 54, 60 (D.D.C. 2010) (citing *Brady*, 520 F.3d at 495 n.3).

First, Borges-Silva argues that "[t]here has been no objective documentation demonstrating [a legitimate basis for termination]." Pl.'s Opp'n at 34. However, record evidence consistently demonstrates that Defendant "notified [Borges-Silva] that his work was failing to meet expectations and provided him with performance evaluations, both formal and informal, during his employment." *Williams*, 2019 U.S. Dist. LEXIS 138869, 2019 WL 3859155, at *13; *see supra* n.6. Notably, Siedschlag expressed concerns about the webmail backlog as early as his second day as Branch Chief. *See* Def.'s Material Facts ¶ 12. And he continued to raise these concerns to Borges-Silva from March to November 2019. *See id.* ¶¶ 27, 30; Siedschlag Decl. ¶ 9. The concerns were based on objective metrics, including that lower-level employees cleared webmail inquiries significantly faster and that Borges-Silva could not clear the minimal threshold set in his PIP. *See* Removal Decision at 3; Siedschlag Decl. ¶ 8. Moreover, the deciding official, Mosby, independently vetted Siedschlag's recommendation before terminating Borges-Silva. *See* Removal Decision at 2-3. Borges-Silva does not "challenge[] these objectively measurable standards of his job performance." *Williams*, 2019 U.S. Dist. LEXIS 138869, 2019 WL 3859155, at *12. Based on this evidence, Borges-Silva had ample notice that the webmail backlog was a cause for Defendant's concern. *See* 2019 U.S. Dist. LEXIS 138869, [WL] at *13. "Because [Defendant's] stated belief about the underlying facts is reasonable in light of the evidence, a jury cannot conclude that [Defendant] is lying about the reasons for [Borges-Silva's] separation." 2019 U.S. Dist. LEXIS 138869, [WL] at *9 (cleaned up).

Second, Borges-Silva contends that Defendant disregarded established procedures by failing to transfer him to a different supervisor after he alleged harassment by Siedschlag, and by failing to give him adequate time to complete his complaint. *See* Pl.'s Opp'n at 34-35. In support, Borges-Silva cites a 1,577-page exhibit but provides no pin cite to the referenced policy. *See id.* This alone disqualifies this argument. *See Lawrence*, 156 F. Supp. 3d at 154. Nonetheless, Defendant—who provided the exact authority, *see* Def.'s Reply at 27 (citing Pl.'s Compl. at 1541-57)—"compl[ied] with established agency criteria or procedures in conjunction with [Borges-Silva's] separation." *Williams*, 2019 U.S. Dist. LEXIS 138869, 2019 WL 3859155, at *9 (citing *Wang*, 206 F. Supp. 3d at 68). Although Defendant's policy states that "corrective action . . . may include . . . reassignment of the alleged harasser[,]" it by no means makes this remedial measure mandatory on the agency. Pl.'s Compl. at 1550. And "failure to follow [Defendant's] own policies" where the "policy confer[red] substantial discretion on the decision maker . . . and [Borges-Silva] offered no evidence showing that [Defendant] applied the policy differently to [Borges-Silva] than it did to other employees" does not demonstrate pretext. *Chambers v. Fla. Dep't of Transp.*, 620 Fed. App'x 872, 879 (11th Cir. 2015).

Third, Borges-Silva asserts that colleagues of different ages and genders were not subject to the same scrutiny as him. *See* Pl.'s Opp'n at 37. "A plaintiff can establish pretext masking a discriminatory [or retaliatory] motive by presenting 'evidence suggesting that the employer treated other employees of a different [group] . . . more

favorably in the same factual circumstances.'" *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290, 301, 419 U.S. App. D.C. 313 (D.C. Cir. 2015) (quoting *Brady*, 520 F.3d at 495). "But to serve as a comparator, the other employee must be 'similarly situated' to the plaintiff." *Clinton*, 2021 U.S. Dist. LEXIS 57472, 2021 WL 1166737, at *11 (quoting *Burley*, 801 F.3d at 301). "Whether a comparator is similarly situated is typically a question for the fact finder, unless, of course, the plaintiff has no evidence from which a reasonable fact finder could conclude that the plaintiff met his burden on this issue." *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 895 (7th Cir. 2018).

Borges-Silva's proffered comparators—the three individuals assigned to assist with the 2019 federal government shutdown backlog—were not comparable. *See* Table of Branch Employees at 2; *see also Emami v. Bolden*, 241 F. Supp. 3d 673, 689-90 (E.D. Va. 2017) ("[A] showing of similarity to comparators 'would include evidence that the employees dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'") (cleaned up) (quoting *Haywood v. Locke*, 387 Fed. App'x 355, 359 (4th Cir. 2010)). The individuals who assisted Borges-Silva only worked on reducing the webmail backlog for nine days, while simultaneously completing their other full-time responsibilities. *See* Siedschlag Decl. ¶¶ 7-8. Yet Borges-Silva's primary responsibility throughout 2019 was to respond to webmail inquiries. *See id.* at ¶ 8. As such, "a reasonable jury could not find that [the proffered

comparators] and [Borges-Silva were] comparable 'in all material respects'" where the comparators "performed many of the same duties as [Borges-Silva,]" but not "all." *Day v. Carnahan*, No. 19-cv-5551, 2021 U.S. Dist. LEXIS 175381, 2021 WL 4192069, at *4 (N.D. Ill. 2021). The differences between the proffered comparators and Borges-Silva are underscored by the fact that the other three Environmental Protection Specialists cleared webmail inquiries at a far faster rate than Borges-Silva. *Compare* Table of Comparators at 2, *with* PIP Results at 5. Comparators are "not similarly situated" where they "performed at a higher level than [the plaintiff]." *Chambers*, 620 Fed. App'x at 879. Furthermore, the proffered comparators "had [not] been placed on a PIP" and had "no[t] required the level of assistance that [Siedschlag] described [Borges-Silva] as needing." *Chambers*, 620 Fed. App'x at 879. Because Borges-Silva "fail[ed] to produce evidence that the proposed comparators were actually similarly situated to him, an inference of falsity or discrimination [or retaliation] is not reasonable, and summary judgment is appropriate." *Walker v. McCarthy*, 170 F. Supp. 3d 94, 108 (D.D.C. 2016) (cleaned up).

Fourth, "there can be no reasonable inference of [] discrimination where an individual just happens to be a member of a protected class—actionable discrimination only occurs when any employer acts *because of* the plaintiff's status as a member of a protected class." *Washington v. Chao*, 577 F. Supp. 2d 27, 42 (D.D.C. 2008) (cleaned up) (emphasis added). As such, "[c]ourts in our District have repeatedly held that a decision-maker's

inclusion in the same protected class as the terminated plaintiff cuts against any inference of discrimination." *Ranowsky v. Nat'l R.R. Passenger Corp.*, 244 F. Supp. 3d 138, 144 (D.D.C. 2017). Here, Borges-Silva and Siedschlag are both men, and Borges-Silva and Mosby are close in age. *See* Def.'s Mem. at 8; *see also Perry v. Shinseki*, 783 F. Supp. 2d 125, 138 (D.D.C. 2011) (decision-maker's membership in the same protected class as the plaintiff "weighs further against an inference of discrimination") (citing *Kelly v. Mills*, 677 F. Supp. 2d 206, 223 (D.D.C. 2010)). Thus, Borges-Silva's claim that Defendant had a discriminatory or retaliatory animus when terminating him is unavailing.

Finally, the Court is not a "super-personnel department that reexamines an entity's business decisions." *Jackson v. Gonzales*, 496 F.3d 703, 707, 378 U.S. App. D.C. 112 (D.C. Cir. 2007) (cleaned up). "[F]or the most part, [Borges-Silva] concedes the facts underlying Defendant's proffered reasons[,]" and his "contentions boil down to justifications of [his] conduct." *Arnoldi*, 557 F. Supp. 3d at 115; *see* Pl.'s Opp'n at 34-37. Even so, "[t]he Court's task is not to decide whether [Defendant] made the right calls, only whether [his] stated reasons were not the actual reasons. And [Borges-Silva's contentions] do not undermine [Defendant's] stated reasons." *Arnoldi*, 557 F. Supp. 3d at 118 (cleaned up). Accordingly, summary judgment is appropriate. *See Clinton*, 2021 U.S. Dist. LEXIS 57472, 2021 WL 1166737, at *9-11.

IV. CONCLUSION

For the foregoing reasons, the Court will GRANT Defendant's Motion for Summary Judgment in an accompanying order. As such, judgment is entered as a matter of law in favor of Defendant.

Date: January 13, 2023

/s/ Zia M. Faruqui
Zia M. Faruqui
United States Magistrate Judge

APPENDIX C — OPINION OF THE UNITED STATES OF AMERICA, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NEW YORK DISTRICT, DATED OCTOBER 13, 2022

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
NEW YORK DISTRICT
33 Whitehall Street, New York, NY 10004-2112

IN THE MATTER OF:
QUENTIN BORGES-SILVA,

Complainant,

v.

MICHAEL S. REGAN, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,

Agency.

DATE: October 13, 2022

EEOC Hearing No.: 570-2020-00896X
Agency No.: 2019-0057-HQ

**FINAL POST-HEARING
BENCH DECISION & ORDER**

Appendix C

I. Introduction

Quentin Borges-Silva ("Complainant") alleges that the Environmental Protection Agency ("the Agency" or "EPA"), discriminated against him when it subjected him to a hostile work environment based on his sex, age and in reprisal for his protected EEO activity. Complainant also asserts that the Agency placed him on a Performance Improvement Plan ("PIP") in reprisal for his EEO activity. The claims were the subject of a liability hearing on May 18, 19, 23 and 26, 2022. A damages hearing was held on October 7, 2022.

As set forth below, the evidence shows that the Agency subjected Complainant to a hostile work environment based on his sex and his prior EEO activity, and placed him on a PIP in reprisal for his EEO activity. The age claim is not supported by a preponderance of the evidence and thus is dismissed.

II. Jurisdiction

Jurisdiction to decide this matter is predicated on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, ("Title VII"), the Civil Rights Act of 1991, the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16. Applicable rules and regulations promulgated by the Equal Employment Opportunity Commission ("EEOC" or the "Commission") appear at 29 C.F.R. §1614, *et seq.* (1999).

Appendix C

III. Procedural History

1. Complainant initiated contact with an EEO counselor on March 3, 29, 2019. ROI, p. 8.[1]

2. On June 28, 2019, Complainant filed a formal complaint, which he amended on September 18, 2019, and October 3, 2019. ROI, p. 59.

3. On September 1, 2020, the Commission issued an Acknowledgement Order.

4. The case was transferred to EEOC Administrative Judge Rose on November 14, 2020.

5. After discovery, the Agency filed a summary judgment motion which was granted in part and denied in part in a decision issued on November 5, 2021.

6. After unsuccessful attempts to settle the matter, a virtual hearing using the Microsoft Teams application was held by EEOC Administrative Judge Robert D. Rose on May 18, 19, 23 and 25, 2022.

7. A virtual damages hearing using the Microsoft Teams application was held by EEOC Administrative Judge Robert D. Rose on October 7, 2022

1. "ROI" refers to the Report of Investigation.

Appendix C

IV. Claims at Issue

Complainant alleges he was subjected to hostile work environment harassment (nonsexual) and discriminated against based on Sex (Male), Age (DOB: May 1965)[2] and Retaliation (Previously filed complaint(s) using the Agency 4711 process for allegations of workplace harassment) when:

> 2. In December 2018 and again since March 20, 2019 and continuing, his Supervisor, Mr. Gregory Siedschlag, Branch Manager, Office of Chemical Safety and Pollution Prevention/Office of Pesticide Program/Field and External Affairs Division (FEAD)/ Communication Services Branch, criticized, shamed and ridiculed him while being scornful of his experience, bullying and berating him by:
>
> > a. Stating he do not have enough work to do for an employee of his grade;
> >
> > b. Monitoring and micromanaging his work;
> >
> > c. Trying to control what he did in his personal life away from the office;
> >
> > d. Setting him up for failure;
> >
> > e. Interfering with his ability to successfully do your job;

2. Complainant withdrew disability as a basis in his response to the Agency's summary judgment motion.

f. Giving him unrealistic deadlines and expectations of completing assignments;

g. Instructing him to be responsive to a massive number of backlogged inquiries (webmail) in an impossibly short period of time;

h. Threatening him with disciplinary actions for failure to follow instructions;

i. Accusing him of lying and not informing his Team Lead about a large backlog of webmail;

j. Deterring him from working on EEO matters;

k. Reassigning another female employee's work to him.

Complainant alleges he was discriminated against based on Retaliation (Instant Complaint and previously filed complaint(s) using the agency 4711 process) when:

6. On September 27, 2019, Mr. Siedschlag placed Complainant on a Performance Improvement Plan (PIP).

V. Findings of Fact

1. Complainant had been with the EPA for about 16 years when the events at issue occurred. He remained in Communication Services for his entire tenure. He was the only male in the unit at all relevant times. Complainant's Liability Hearing testimony ("*Comp.*").

2. Anne Overstreet supervised Complainant from about 2012 through mid-2018. *Comp.*, Anne Overstreet Liability Hearing testimony ("*Overstreet*.").

3. Gregory Siedschlag was temporarily detailed to supervise Complainant's unit from March to July, 2018. *Comp.*, Gregory Siedschlag Liability Hearing testimony ("Siedschlag").

4. Katyhi Han and Robert Cornonage were temporarily detailed to supervise Complainant's unit after Mr. Siedschlag. *Comp.*, *Siedschlag*.

5. Mr. Siedschlag then took over that supervisory position permanently in March 2019. *Comp.*, *Siedschlag*.

6. Complainant's responsibilities included responding to webmail and communications with pollinators in connection with pesticide exposures. *Comp.*, *Siedschlag*.

7. As of the time of the filing of the complaint, Complainant had been responding to webmail for about 15-16 years. *Comp.*

8. There were backlogs of webmail responses at various times while Complainant was working on answering webmail.

9. There was a backlog around 2013 when Ms. Overstreet was supervising Complainant. *Comp., Overstreet.*

10. Complainant created a system for addressing that backlog with Ms. Overstreet's approval, which led over time to the elimination of the backlog. *Comp., Overstreet.*

11. Complainant has created templates or boilerplate responses for common webmail queries which have been used by Complainant and others when responding to webmail. *Comp., others*

12. The federal government shut down from December 2017 until January 2018. A webmail backlog emerged from that period. *Comp.*

13. Complainant began working on the shutdown backlog and immediately informed the acting supervisor, Kaythi Han, about it. *Comp.*

14. Shortly after Mr. Siedschlag started as supervisor, he assigned four female co-workers to assist with the remaining backlog. *Comp., Siedschlag.*

15. This was the only time that Mr. Siedschlag put a team in place to assist with any webmail backlog during the relevant time period for this complaint. *Siedschlag.*

16. Mr. Siedschlag instructed Complainant and the four female co-workers to track the amount of time they spent on each webmail response. *Siedschlag*, Enid Chiu Liability Hearing testimony *("Chiu").*

17. Mr. Siedschlag did not inform team members about why they were tracking their time. *Siedschlag; Chiu.*

18. Mr. Siedschlag used the tracking data to calculate an average response time for webmails to be met by Complainant. *Siedschlag.*

19. Mr. Siedschlag also relied on his experience with webmail in the Superfund unit in assessing how long it should take to respond to webmail. *Siedschlag.*

20. Some webmail queries are simple and can be answered using a boilerplate or a custom response in little time. *Comp.*

21. Some webmails pose complex issues which may require the assistance of Subject Matter Experts ("SME") in formulating an accurate response. SMEs sometimes were slow to respond. Responding to complex webmails typically required substantially more time compared to simple webmails. *Comp.*

22. Shortly after becoming the permanent supervisor, Mr. Siedschlag began to review drafts of all webmail responses prepared by Complainant. *Comp.*, *Siedschlag.*

23. After a period of time, Mr. Siedschlag stopped reviewing responses to simple emails which had been drafted by Complainant. *Comp.*

24. On various occasions, Complainant has corrected the draft webmail responses of female colleagues in his unit. *Comp.*

25. Mr. Siedschlag set numerous deadlines for Complainant to reduce the webmail backlog after he became permanent supervisor in 2019. *Comp., Siedschlag.*

26. Complainant found the deadlines unrealistic for various reasons and was consistently unable to meet them. *Comp.*

27. In 2019, webmail increased by about 100%. *Comp., Siedschlag.*

28. Complainant fairly consistently had technology issues which slowed down his work. *Comp.*

29. Complainant spent time serving as back-up and covering for colleagues. *Comp.*

30. In Spring of 2019, Complainant spent substantial hours preparing documents for his 4711 and EEO complaints. *Comp.*

31. Throughout the period at issue, Complainant also worked on his neonicotinoids and pollinator responsibilities. *Comp.*

32. Complainant also worked on other matters including rulemaking, web edits, press inquiries and more

during the time frame at issue. *Comp.*, *Complainant's Exhibit 7.*[3]

33. Overall, there were weeks in which Complainant had little time to work on webmail responses during the time frame at issue. *Comp.*, *Complainant's Exhibit 7.*

34. Upon learning that Mr. Siedschlag would become his permanent supervisor, Complainant asked Dian Moseby for a transfer. *Comp.*

35. Shortly after Mr. Siedschlag became permanent, he required Complainant to attend weekly meetings with him. *Comp., Siedschlag.*

36. The meetings often were followed by detailed emails from Mr. Siedschlag to Complainant reviewing issues and deadlines from the meetings. *Comp.; Various e.g., Agency Exhibit 2.*

37. For part of the relevant time frame, Mr. Siedschlag reviewed Complainant's draft webmail responses and made edits to them. *Comp., Siedschlag.*

38. Mr. Siedschlag sometimes gave advice to Complainant regarding how to respond to a webmail or reduce the backlog. Complainant often found the advice to be unhelpful or inaccurate. *Comp., Siedschlag.*

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3. The Agency objected to Complainant's exhibits 13 and 24 at the hearing. Those exhibits are admitted because they are relevant and non-repetitive. Parts of them are similar to the self-kept notes of Mr. Siedschlag, which were previously admitted.

39. Complainant felt as if he could not succeed in satisfying the demands Mr. Siedschlag placed on him. *Comp.*

40. In around April 2019, Complainant filed a complaint under Agency Order # 4711, which concerns harassment complaints. The allegations included disparate treatment based on sex.

41. Complainant compiled comprehensive documents in support of the case. *Comp.*

42. Anne Moseby was selected as the decision-maker for the complaint. Anne Moseby Liability Hearing testimony ("*Moseby*"); Tessa Bermania Liability Hearing testimony ("*Bermania*").

43. The Agency's 4711 Order requires that complainants and alleged harassers be separated during the pendency of the 4711 investigation. That did not occur in Complainant's case. *Comp.*, *ROI, p. 1541*

44. Before filing the 4711 complaint, Complainant attempted to meet with Ms. Moseby to complain about harassment by Mr. Siedschlag. Ms. Moseby refused to meet with him. *Comp.*

45. At the conclusion of the 4711 investigation, Ms. Moseby found that there was no harassment or unfair treatment of Complainant by *Mr. Siedschlag. Comp.*, *Moseby*, ROI, Ex.

46. Mr. Siedschlag contacted Tess Bermania in LER in the summer of 2019 about putting Complainant on a

performance improvement plan ("PIP"). *Siedschlag, Bermaina.*

47. Mr. Siedschlag issued a detailed PIP to Complainant in August 2019. *ROI, p. 698*

48. The PIP pointed to quality, quantity and timeliness issues regarding which Complainant was not performing satisfactorily. *Siedschlag*; *ROI, p. 698.*

49. Complainant demonstrated substantial knowledge on various substantive topics of concern to the EPA. *Various witnesses; various exhibits.*

50. Complainant received a performance appraisal rating of "Outstanding" in about six of the 10 prior years preceding the complaint. *Comp.*

51. Ms. Overstreet, who supervised Complainant for six years, testified that his work was excellent and that he was an outstanding performer. *Overstreet.*

52. Ms. Overstreet also stated that Complainant was flexible and professional, and that she received compliments about Complainant's work. *Overstreet.*

53. Co-worker Ms. Overby testified that Complainant was a diligent, reliable and versatile co-worker. *Overby.*

54. Ms. Overby testified that Mr. Siedschlag treated Complainant more harshly then she and the other female co-workers. *Overby.*

55. Ms. Overby stated that Mr. Siedschlag was less willing to work with Complainant or compromise with him, and that he scrutinized his work more than hers. *Overby.*

56. Co-worker Anne Hopkins testified that Mr. Siedschlag was hostile towards Complainant and that Mr. Siedschlag micro-managed Complainant. Anne Hopkins Investigation testimony ("Hopkins"), *ROI, p. 1202.*

57. Ms. Hopkins testified that Mr. Siedschlag gave Complainant a runaround with his edits and that some of Mr. Siedschlag's edits were incorrect. *Hopkins.*

58. Co-worker Enid Chiu testified that Complainant is reliable, professional, hard-working and knowledgeable. *Chiu.*

59. Ms. Chiu testified that Mr. Siedschlag did not criticize her for missing deadlines regarding the reduction of the backlog. *Chiu.*

60. The hostile work environment adversely impacted Complainant in various ways. *Complainant Damages Hearing Testimony (Comp-Dam); Emiko Borges-Silva Damages Hearing Testimony (E. Borges-Silva).*

61. The hostile work environment adversely impacted Complainant's marriage. *Comp-Dam; E. Borges-Silva.*

62. During and after the hostile work environment, Complainant interacted less frequently with Ms. Borges-Silva and treated her rudely. Their physical interactions became less frequent as well. *Comp-Dam.*

63. Complainant and Ms. Borges-Silva engaged in leisure activities less frequently during this time. *Comp-Dam; E. Borges-Silva.*

64. Complainant and Ms. Borges-Silva maintained a strong relationship throughout this time. *Comp-Dam.*

65. Complainant experienced negative mood changes as a result of the harassment. *Comp-Dam; E. Borges-Silva.*

66. Complainant stopped socializing within his community and instead watched television during his free time. *Comp-Dam.*

67. Complainant experienced insomnia due to the harassment. He would wake-up thinking about events at work, become angry and then be unable to get back to sleep. *Comp-Dam.*

68. Complainant increased his consumption of alcohol after the harassment started. He sometimes would drink late at night to try to get back to sleep. In addition to the increased alcohol consumption, Complainant began eating large quantities of junk food. *Comp-Dam.*

69. Complainant experienced weight gain over the course of the hostile work environment period. *Comp-Dam.*

70. Complainant had PTSD from prior bicycle accidents and for years had biked to work after rush hour for safety purposes. For the approximately six-week period when he was not permitted by his supervisor to ride to work after rush hour, Complainant's PTSD was exacerbated from his rush hours rides. *Comp-Dam.*

71. Complainant was embarrassed in front of his colleagues by some of the incidents which comprised the hostile work environment. Complainant believes his personal reputation suffered as a result. *Comp-Dam.*

VI. Applicable Legal Standards

A. Hostile Work Environment Law

To establish a *prima facie* case of hostile work environment harassment, a complainant must show that: (1) s/he belongs to a statutorily protected class; (2) s/he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment affected a term or condition of employment and/or 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. *Johnson, et al v. Department of the Navy*, EEOC Appeal No. 0120073487, et al. (November 14, 2007). The harassment standard applies to all protected classes.

The incidents comprising the hostile work environment must have been "sufficiently severe or pervasive to alter the conditions of complainant's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); see *also Oncale v. Sundowner Offshore Services, Inc.*, 23 U.S. 75 (1998). The Commission has repeatedly found that claims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See *Phillips v. Department of Veterans Affairs*, EEOC Request No. 05960030 (July 12, 1996); *Banks v. Health and Human Services*, EEOC Request No. 05940481 (February 16, 1995).

In determining whether an objectively hostile or abusive work environment existed, the trier of fact should consider whether a reasonable person in the complainant's circumstances would have found the alleged behavior to be hostile or abusive. Even if harassing conduct produces no tangible effects, such as psychological injury, a complainant may assert a Title VII cause of action if the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their protected status. *Rideout v. Department of the Army*, EEOC Appeal No. 01933866 (November 22, 1995) (citing *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993)), request for reconsideration denied, EEOC Request No. 05970995 (May 20, 1999). Also, the trier of fact must

consider the totality of the circumstances, including the following: 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. *Harris*, 510 U.S. at 23.

B. Retaliation Law

To establish a *prima facie* case of reprisal for participating in protected activity, a complainant typically must show that: (1) s/he engaged in protected activity; (2) the alleged discriminating official was aware of the protected activity; (3) s/he was affected adversely by an action of the agency contemporaneously with or after the protected activity; and (4) there is a causal connection between the protected activity and the agency action. *Walker v. Dept. of Health and Human Services*, EEOC Appeal No. 01983215 (Jan. 14, 2000). For an action to be adverse, it must be reasonably likely to deter individuals from engaging in protected activity. *Bennett v. Dep't of the Army*, EEOC App. No. 0120130117 (Feb. 27, 2013). The 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. *Lucas v. Dept. of the Navy*, EEOC Appeal No. 02-00242-004 (Aug. 10, 2006). The Commission generally has held that a nexus may be established if events occurred within one year of each other. *Patton v. Dept. of the Navy*, EEOC Request No. 05950124 (June 27, 1996); *Mallis v. United States Postal Service*, EEOC Appeal No. 01A55908 (Oct. 3, 2006); *but see Latham v. Postmaster General*, Appeal No.

0120102749 (December 23, 2010) (finding that a nine-month interval was insufficient to establish causal connection); *King v. Department of the Air Force*, EEOC Appeal No. 01A62609 (July 26, 2006) (finding that six-month interval of time did not support causal connection); *Knight v. Postmaster General*, EEOC No. 01A54821 (2006) (finding that a six-month interval did not support an inference of retaliation).

The Commission has a policy of considering retaliation claims with a broad view of coverage. *Carroll v. Dep't of the Army,* EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. *See* EEOC Compliance Manual Section 8, "Retaliation," No. 915.003 (May 20, 1998), at 8-15; *see also Carroll,* supra.

Furthermore, the Commission has found that any action by an agency manager that interferes with an employee's rights or has the effect of intimidating or chilling the exercise of those rights under the EEO statutes constitutes a *per se* violation. *Binseel v. Dep't of the Army,* EEOC Request No. 05970584 (October 8, 1998) (complainant told that filing an EEO suit was the wrong way to go about getting a promotion); *Marr v. Dep't of the Air Force,* EEOC Appeal No. 01941344 (June 27, 1996); *Whidbee v. Dep't of the Navy,* EEOC Appeal No. 0120040193 (March 31, 2005); *Thornton-Brown v. United States Postal Service,* EEOC Appeal No. 0120101790

(September 2, 2010). However, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. *Meeker v. United States Postal Service*, EEOC Appeal No. 01A12137 (Aug. 23, 2002).

If a complainant establishes a *prima facie* case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. *Texas Department of Community 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 pre-textual. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097 (2000); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 519 (1993).

VII. Analysis

The following findings are made after a thorough review and evaluation of the entire record, including the observation of testifying witnesses at the hearing. Credibility determinations are based upon the demeanor of the witnesses observed at the hearing and, where possible, corroborated by the evidence of record. *Willis v. Dep't of Treasury*, EEOC No. 05900589 (July 1990). As discussed below, the evidence shows that the Agency did not violate any EEO laws when it terminated Complainant and did not subject Complainant to a hostile work environment.

Appendix C

A. Sex-Based (non-sexual) Hostile Work Environment Claim

1. *Prima Facie* Case Analysis

Complainant meets element one of a *prima facie* case for a hostile work environment, as he is a male who alleges differential treatment based on sex. He asserts he was subjected to conduct that constituted harassment. The conduct included having his work closely-monitored and reviewed, and being subjected to micro-managing by his supervisor, Mr. Siedschlag. Complainant had 15-16 years of experience and acquired EPA knowledge when Mr. Siedschlag became his supervisor, but Complainant was treated almost like a new employee regarding the level of his supervision. Complainant's draft webmail responses were subjected to nit-picky review by Mr. Siedschlag, who mostly proposed only minor edits to the drafts. Complainant often was able to refute Mr. Siedschlag's concerns about his drafts. Mr. Siedschlag often told Complainant that he did not have enough work for an employee of his grade, and that he needed to take on more. Being subjected to this conduct slowed Complainant down and interfered with his ability to do job efficiently and effectively. Based on this conduct by the Agency, Complainant has established element two of a *prima face* case of harassment.

The testimony of Complainant and co-workers established that female co-workers were not treated like Complainant. The testimonies of Ms. Overstreet, Ms. Overby, Ms. Chiu and Ms. Hopkins (via affidavit) were particularly

credible as they had no stake in the matter. Further, the co-workers amongst them took the bold step of essentially testifying against their supervisor.[4] The consistency of the supporting testimony also bolsters the credibility of it. It is sufficient to establish differential treatment based on sex and thus Complainant has established element three of a *prima facie* case.

Regarding element four, when considered as a whole, the alleged harassing conduct unreasonably interfered with Complainant's work environment and his ability to do his work in a timely and efficient manner. Thus, element four of a *prima face* case has been established as well.

Finally, as to element five, there is a basis for imputing liability to the Agency as the harasser is a supervisor and the Agency took insufficient action in response to the oft-repeated complaints of harassment by Complainant. An employer is subject to vicarious liability for harassment when it is "created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998).

While the Commission has found that "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the

4. Ms. Hopkins averred that Mr. Siedschlag stopped responding to her greetings and acknowledging her after she became a witness in support of Complainant's case. *ROI, 1204*.

'terms and conditions of employment'" *Kozak v. United States Postal Serv.*, EEOC Request No. 01A63021 (Aug. 23, 2006), and that the discrimination statutes do not shield a complainant from a myriad of petty slights and annoyances. *Rizzo v U.S. Postal Service*, EEOC Appeal No. 01A53970 (Aug. 29, 2005), the conduct here amounts to more than petty, isolated incidents. For the alleged harassing conduct to be considered pervasive, it must be sufficiently continuous and not merely episodic. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). From the vantage point of the totality of the circumstances, the record shows that the harassment at issue pervaded Complainant's work environment on a regular basis throughout the time he was supervised by Mr. Siedschlag. Thus, Complainant can establish that the harassment at issue was pervasive.

Based on the foregoing, Complainant has established a *prima facie* case of harassment.

2. Agency Defenses and Complainant's Rebuttals

The Agency denies that some of the alleged conduct occurred and asserts that there were legitimate, non-discriminatory reasons for alleged actions which undisputedly occurred. First, the Agency aims to portray Complainant as an employee who became disgruntled after the arrival of a new supervisor. The Agency in essence asserts that Complainant was stubborn and would not adjust to the ways of a new supervisor, which gave rise to personality and work-style conflicts. Mr. Siedschlag was

simply a supervisor supervising an employee, by reviewing his work, providing advice and otherwise trying to assist Complainant.

As a long-term veteran of the EPA with substantial knowledge of the Agency's operations, Complainant admittedly was upset by the significant change in supervisory style that came with Mr. Siedschlag's arrival. Complainant's prior work experience and performance levels appeared to matter little to Mr. Siedschlag. Rather suddenly, Complainant was subjected to micro-level review of some of his simplest assignments (e.g., responses to simple webmail queries) and otherwise micro-managed on all levels. Complainant did not see the same happening to his female colleagues. He found fault with some of the suggested edits and changes to his work posed by Mr. Siedschlag, who had lesser knowledge on some EPA-related substantive matters. Complainant made efforts to work with Mr. Siedschlag and meet his deadlines, even though he felt like he was being set up to fail. This treatment left Complainant disgruntled and discouraged, and led him to consider seeking another job.

The Agency also points to alleged performance deficiencies of Complainant as justification for its actions. Most emphasized is Complainant's handling of the webmail backlogs and the quality and timeliness of his webmail responses. These points were the subject of substantial testimony at the hearing. For the post-shutdown backlog, Mr. Siedschlag's response was to assign other team members to assist with it. For all other back logs, the burden was shouldered by Complainant alone

with Mr. Siedschlag closely monitoring through the setting of deadlines, weekly meetings, and reporting requirements for Complainant. The evidence shows that Complainant repeatedly did not meet those deadlines. While Complainant might not necessarily have been set up to fail as he alleges, a full-scope review of Complainant's responsibilities and their impact on his ability to meet webmail deadlines reveals that Complainant had justification for missing the deadlines. Despite the Agency's insistence that Complainant had minimal other responsibilities, the record shows that Complainant had various other responsibilities including handling the neonicotinoids issue on his own in addition to involvement in rule-making, responding to press inquiries, providing back up coverage for colleagues, and more. Further, Complainant's productivity sometimes suffered due to technology problems, which on a few occasions led to the re-imaging of Complainant's computer. Complainant also had to spend time working on his 4711 and EEO complaints during the time frame at issue. Finally, the record shows that webmail volume was up by about 100% in 2019, the year at issue. Thus, there were numerous factors taking Complainant away from responding to webmail at the time he was being given the successive and tight deadlines to respond to webmail backlogs.

The Agency also asserts that the quality of Complainant's webmail responses was sometimes lacking. The Agency points to some purported examples of this in the PIP that was issued to Complainant in August 2019. This issue also was the subject of extensive testimony at the hearing. The criticisms of Complainant's responses

rarely concerned the substance of them. Instead, they often concerned minor issues in tone, word-selection and approach. Complainant hotly contested the examples put forth by the Agency. Whether Complainant was correct or not, what is clear is that Mr. Siedschlag was nit-picking the responses over minor issues which would have little impact on the overall response. The issues pointed out were not significant in that they never required significant overhauls in language or approach. This was just another example of micro-managing of questionable utility that slowed Complainant's pace of work.

Finally, the Agency asserts that none of the alleged actions were motivated by Complainant's sex. It argues that the female employees did not present the same performance issues as Complainant and thus any difference in supervision as to Complainant was justified by his unique performance problems. The Agency points out that female co-workers were brought in to assist with the backlog at one point, and that Mr. Siedschlag reviewed the work of female employees at some level as well. Moreover, Complainant does not allege that Mr. Siedschlag or anyone else made any offensive statements based on his sex. The Agency also points out that Complainant, a male, is alleging that another male harassed him based on Complainant being a male.

Overarchingly, these arguments are overcome by the credible, consistent testimony of the female employees, which emphasized the differential treatment of Complainant, while also being very complimentary of Complainant's professionality, knowledge and work habits.

The overall evidence makes clear that no females were supervised in the same manner as Complainant. The lack of any offensive statements based on sex does not undercut this evidence. And any inference based on the harassment being male on male is overcome by this evidence.

Finally, the Agency asserts it took appropriate action in response to Complainant's complaints of harassment when it conducted an investigation pursuant to Complainant's 4711 complaint. The deciding official, Ms. Moseby, found that all of the allegations were unsubstantiated. However, it is worthy of note that Complainant had asserted that Ms. Moseby had refused to meet with Complainant about his harassment allegations upon his request before he filed the 4711 complaint. This calls into question whether Ms. Moseby was the appropriate decision-maker for this complaint. Also, the Agency failed to abide by that portion of the 4711 Order requiring the separation of the complainant and alleged harasser during the pendency of the investigation. That simply did not happen here, and no explanation was offered. Instead, Complainant continued to work in the environment described above while the investigation was pending.

Based on the foregoing, Complainant has demonstrated that the Agency's rationales for taking the challenged actions are pretextual and that sex was a motivator behind those actions. Thus, Complainant has established a hostile work environment based on sex.[5]

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5. Regarding the age harassment claim, Complainant put forth minimal evidence related to it. The record evidence is insufficient to establish that age was a motivating factor for the Agency's conduct. Thus, the age claim must be dismissed.

B. Hostile Work Environment Claim Based on Retaliation

1. *Prima Facie* Case Analysis

The standard for retaliatory harassment contains a few different elements compared to the standard for a harassment claim based on sex. First, Complainant must show that he engaged in protected activity, which he has, at least in the form of the 4711 and EEO complaints. Second, there is no question that Mr. Siedschlag was aware of these complaints, if only because Complainant told Mr. Siedschalg of the complaints himself. Retaliatory intent may be inferred based on the close proximity in time between the EEO activity and the harassing conduct, plus the Agency took it to the next level by putting Complainant on a PIP after he engaged in EEO activity.

As per EEOC guidance, "[t]he threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the *Burlington Northern* standard even if it is not severe or pervasive enough to alter the terms and conditions of employment. If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC, Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016). In other words, in the retaliatory harassment context, the softer adverse action standard for retaliation operates to override the more

stringent requirement of the hostile work environment standard. Instead the retaliation-based requirement that the adverse action (here, harassment) must be "reasonably likely to deter a person from engaging in protected activity" applies. Here, the actions taken against Complainant went beyond the petty slights and trivial annoyances which the Commission has deemed unactionable. See *Davis v. U.S.P.S.* Appeal No. 01991852 (December 12, 2021) (Finding no retaliation where Complainant was given verbal announcement regarding a change in reporting time and others were given written notice). Instead, the harassment was of such a nature that it would be reasonably likely to deter an individual from engaging in EEO activity.

Based on the foregoing, the Agency violated Title VII when it subjected Complainant to retaliatory harassment based on his protected EEO activities.

C. Damages

1. General Compensatory Damages Standards

Compensatory damages may be awarded for the past pecuniary losses, future pecuniary losses, and non-pecuniary losses which are directly or proximately caused by the agency's discriminatory conduct. Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, EEOC Notice No. 915.002 (July 14, 1992), at 8. Pecuniary losses are out-of-pocket expenses that are incurred as a result of the employer's unlawful

action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. *Id.* Past pecuniary losses are the pecuniary losses that are incurred before the resolution of a complaint through a finding of discrimination, an offer of full relief, or a voluntary settlement. *Id.* at 8-9.

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Notice No. 915.002. Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994). The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. EEOC Notice No. 915.002 at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. *Id.* at 14.

2. Non-Pecuniary Damages Standards

The Agency is responsible for damages that are directly or approximately caused by the alleged discriminatory conduct. See *Damiano v. United Stated Postal Service*, EEOC Doc No. 05980311 (Feb. 26, 1999); *Roundtree v. Department of Agriculture*, EEOC Appeal No. 01941906 (July 7, 1995); Taylor v. *Department of the Navy*, EEOC

Appeal No. 01940376 (July 22, 1994). Nevertheless, "there are no definitive rules governing the dollar amounts to be awarded under emotional pain and suffering. *Aponte v. Department of Homeland Security*, EEOC Appeal No. 0120063532 (2008). However, the amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. EEOC Notice No. 915.002 at 14.

In *Carle v. Department of the Navy*, the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by Complainant explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (Jan. 5, 1993). Objective evidence may include statements from the complainant concerning the emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. *Sinnott v. Dep't of Defense*, EEOC Appeal No. 01952872 (Sept. 19, 1996). Statements from others, including family members, friends, and health care providers could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue or a nervous breakdown. *Id.* Objective evidence also may include documents indicating a complainant's actual out-of-pocket expenses related to medical treatment, counseling and so forth, related to the injury allegedly caused by discrimination. *Id.*

Evidence from a healthcare provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. *Lawrence v. U.S. Postal Serv.*, EEOC Appeal No. 01952288 (Apr. 18, 1996). The more inherently degrading or humiliating the agency's actions are the more reasonable it is to infer that a person would suffer humiliation or distress from that action. *Id.* Consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional damages. *Id.*

The Commission notes that, because there is no precise formula by which to calculate non-pecuniary damages, an AJ is afforded broad discretion in determining such damages awards. However, non-pecuniary compensatory damages are designed to remedy the harm caused by the discriminatory event rather than punish the Agency for the discriminatory action. Further, compensatory damages should not be motivated by passion or prejudice or be "monstrously excessive" standing alone, but they should be consistent with the amounts awarded in similar cases. See *Ward-Jenkins v. Dep't of the Interior*, EEOC Appeal No. 01961483 (Mar. 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F.2d 847, 848 (7th Cir. 1989)).

Thus, while precise rules are not appropriate to determine each award of compensatory damages in the same way, it is clear that the Agency is responsible for damages that are directly or proximately caused by the alleged discriminatory conduct. See *Damiano v. U.S. Postal Serv.*, EEOC Request No. 05980311 (Feb. 26, 1999); *Rountree v. Dep't of Agriculture*, EEOC Appeal No. 01941906 (July

7, 1995); *Taylor v. Dep't of the Navy*, EEOC Appeal No. 01940376 (July 22, 1994). And, if a complainant is in a fragile physical, emotional or financial state, any additional harm which is proximately caused by the agency's adverse action, even if a less fragile person would not be so harmed, the agency is liable for. *Wallis v USPS*, EEOC Appeal No. 01950510 (Nov. 13, 1995). Finally, courts have given "due regard" "to Congress's view that plaintiffs should be able to recover compensatory damages under Title VII so that plaintiffs would be appropriately compensated and to provide for more effective deterrence of unlawful behavior on the part of employers." *Nyman v. F.D.I.C.*, 967 F. Supp. 1562, 1584 n.7 (D.D.C. 1997).

3. Monetary Relief Award

a. Compensatory Damages

Here, Complainant seeks a non-pecuniary damages award. Complainant relies on his own testimony and that of his spouse to support his claim. Complainant provided credible testimony that the Agency's harassment of him was the proximate cause for the various kinds of harm he suffered. The record provides clear linkages between the harassment by the Agency and harm suffered by Complainant. For example, Complainant testified about various emotional and physical harms he suffered only after the harassment commenced. These were conditions and harms that he was not suffering from before the harassment began. Notably, the record is void of any other significant stressors in Complainant's life during the relevant time period. Thus, the record clearly shows

that the Agency's conduct was the predicate for the various harm suffered by Complainant.

Various factors must be considered in determining the appropriate amount of non-pecuniary damages. Regarding the nature and duration of the harm, Complainant testified that he suffered in various ways over the entire period of the hostile work environment and beyond. The physical effects of the harm included insomnia, weight gain and the temporary exacerbation of Complainant's PTSD. Complainant also suffered mental and emotional harm. His mood was adversely affected. During his testimony, he expressed anger, frustration and humiliation, all due to the harassment. Complainant also turned to alcohol during this period, increasing his consumption of it and using it to try to help him get back to sleep during periods of insomnia related to the hostile work environment.

Complainant clearly suffered a significant diminishment in the enjoyment of life. He and his wife testified about the various adverse changes in their interactions after the harassment began. Complainant admittedly treated his spouse rudely during this time period. Complainant's social life was significantly impacted as he essentially withdrew from socializing within his community, which was a regular activity before the harassment. Complainant also expressed concern about how his personal reputation may have suffered as a result of the harassment. Complainant testified that he was embarrassed by his treatment and made to look bad or like a poor performer within the purview of other employees. He credibly testified that there were no other stressors present at the time which might have caused or contributed to his pain and suffering.

Based on the foregoing, a non-pecuniary compensatory damages award of $45,000 for emotional harm is warranted. A comparison to cases similar in most respects shows that such an award fairly compensates Complainant and is not "monstrously excessive." *Butler v Department of Homeland Security* , EEOC Appeal No. 0720090010 (May 27, 2010)(Commission awarded $45,000 because discrimination reactivated complainant's PTSD symptoms, with complainant experiencing "anger, fear, depression, anxiety, hopelessness, poor concentration, physiological reactivity, nightmares and sleeplessness, and hives."); *McNeese-Ards v. Department of Veterans Affairs*, EEOC Appeal No. 0720090027 (April 15, 2010) (Commission awarded $45,000.00 to complainant upon showing that she had experienced depression, loss of sleep, severe emotional distress, and anxiety as a result of the retaliatory conduct of the agency); *Hem v. Department of Agriculture*, EEOC Appeal No. 0720060012 (March 10, 2008) (Commission awarded $50,000.00 where complainant established that he suffered emotional distress, depression, and anxiety as a result of the agency's discriminatory conduct); *Bowden v. Department of Veterans Affairs*, EEOC Appeal No. 01A00360 (June 22, 2000) (Commission awarded $45,000.00 where the agency subjected complainant to harassment which resulted in exacerbation of depression, injury to professional standing, character, reputation, and credit rating, humiliation, physical manifestations, loss of self-esteem, and marital and family problems); *Turner v. Department of Interior*, EEOC Appeal No. 01956390 (April 27, 1998) ($40,000.00 in non-pecuniary damages awarded where the agency subjected complainant to sexual harassment

and retaliation, which resulted in depression, anger, anxiety, frustration, sleeplessness, crying spells, loss of self-esteem and strained relationships).

This award is based on the actual harm experienced which was the result of the Agency's actions, and takes into account the nature, duration, and severity of the harm suffered. See, e.g., *Utt v. U.S. Postal Serv.*, EEOC Appeal No. 0720070001 (Mar. 26, 2009).

Any other relief sought by Complainant, except for attorneys' fees and costs, has been considered and is denied.

IX. Conclusions of Law

For the reasons set forth here, as well as record evidence and arguments not specifically addressed in this Decision, Complainant has established by a preponderance of the evidence that he was subjected to a hostile work environment based on his sex and prior EEO activity, and placed on a PIP in reprisal for his prior EEO activity. Because of that, he is entitled to damages related to harm and suffering as a result of the harassment.

X. Order

Judgment is entered for Complainant on all claims as to liability, except the harassment claim based on age which is dismissed.

Appendix C

Within 30 calendar days of the date that this decision becomes final, the Agency shall pay

Complainant $45,000 as non-pecuniary compensatory damages.

It is so Ordered:

For the Commission:

/s/_____
Robert D. Rose
Administrative Judge
U.S. Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor
New York, New York 10004-2112
929.506.5339
r.rose-efilebox@eeoc.gov

APPENDIX D — LIABILITY HEARING BENCH DECISION & ORDER OF THE UNITED STATES OF AMERICA EQUAL EMPLOYMENT OPPORTUNITY COMMISSION NEW YORK DISTRICT, DATED JUNE 9, 2022

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION NEW YORK DISTRICT
33 Whitehall Street, New York, NY 10004-2112

EEOC Hearing No.: 570-2020-00896X
Agency No.: 2019-0057-HQ

In the matter of:

QUENTIN BORGES-SILVA,

Complainant,

v.

MICHAEL S. REGAN, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,

Agency.

DATE: June 9, 2022

LIABILITY HEARING BENCH DECISION & ORDER

Appendix D

I. Introduction

Quentin Borges-Silva ("Complainant") alleges that the Environmental Protection Agency ("the Agency" or "EPA"), discriminated against him when it subjected him to a hostile work environment based on his sex, age and in reprisal for his protected EEO activity. Complainant also asserts that the Agency placed him on a Performance Improvement Plan ("PIP") in reprisal for his EEO activity. The claims were the subject of a liability hearing on May 18, 19, 23 and 26, 2022.

As set forth below, the evidence shows that the Agency subjected Complainant to a hostile work environment based on his sex and his prior EEO activity, and placed him on a PIP in reprisal for his EEO activity. The age claim is not supported by a preponderance of the evidence and thus is dismissed.

II. Jurisdiction

Jurisdiction to decide this matter is predicated on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, ("Title VII"), the Civil Rights Act of 1991, the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-16. Applicable rules and regulations promulgated by the Equal Employment Opportunity Commission ("EEOC" or the "Commission") appear at 29 C.F.R. §1614, *et seq.* (1999).

Appendix D

III. Procedural History

1. Complainant initiated contact with an EEO counselor on March 3, 29, 2019. ROI, p. 8.[1]

2. On June 28, 2019, Complainant filed a formal complaint, which he amended on September 18, 2019, and October 3, 2019. ROI, p. 59.

3. On September 1, 2020, the Commission issued an Acknowledgement Order.

4. The case was transferred to EEOC Administrative Judge Rose on November 14, 2020.

5. After discovery, the Agency filed a summary judgment motion which was granted in part and denied in part in a decision issued on November 5, 2021.

6. After unsuccessful attempts to settle the matter, a virtual hearing using the Microsoft Teams application was held by EEOC Administrative Judge Robert D. Rose on May 18, 19, 23 and 25, 2022.

IV. Claims at Issue

Complainant alleges he was subjected to hostile work environment harassment (nonsexual) and discriminated against based on Sex (Male), Age (DOB: May 1965)[2] and

1. "ROI" refers to the Report of Investigation.

2. Complainant withdrew disability as a basis in his response to the Agency's summary judgment motion.

Appendix D

Retaliation (Previously filed complaint(s) using the Agency 4711 process for allegations of workplace harassment) when:

2. In December 2018 and again since March 20, 2019 and continuing, his Supervisor, Mr. Gregory Siedschlag, Branch Manager, Office of Chemical Safety and Pollution Prevention/Office of Pesticide Program/Field and External Affairs Division (FEAD)/Communication Services Branch, criticized, shamed and ridiculed him while being scornful of his experience, bullying and berating him by:

a. Stating he do not have enough work to do for an employee of his grade;

b. Monitoring and micromanaging his work;

c. Trying to control what he did in his personal life away from the office;

d. Setting him up for failure;

e. Interfering with his ability to successfully do your job;

f. Giving him unrealistic deadlines and expectations of completing assignments;

g. Instructing him to be responsive to a massive number of backlogged inquiries (webmail) in an impossibly short period of time;

h. Threatening him with disciplinary actions for failure to follow instructions;

i. Accusing him of lying and not informing his Team Lead about a large backlog of webmail;

j. Deterring him from working on EEO matters;

k. Reassigning another female employee's work to him.

Complainant alleges he was discriminated against based on Retaliation (Instant Complaint and previously filed complaint(s) using the agency 4711 process) when:

6. On September 27, 2019, Mr. Siedschlag placed Complainant on a Performance Improvement Plan (PIP).

V. Findings of Fact

1. Complainant had been with the EPA for about 16 years when the events at issue occurred. He remained in Communication Services for his entire tenure. He was the only male in the unit at all relevant times. Complainant's Liability Hearing testimony ("*Comp.*").

2. Anne Overstreet supervised Complainant from about 2012 through mid-2018. *Comp.*, Anne Overstreet Liability Hearing testimony ("*Overstreet*.").

3. Gregory Siedschlag was temporarily detailed to supervise Complainant's unit from March to July, 2018. *Comp.*, Gregory Siedschlag Liability Hearing testimony ("Siedschlag").

4. Katyhi Han and Robert Cornonage were temporarily detailed to supervise Complainant's unit after Mr. Siedschlag. *Comp.*, *Siedschlag.*

5. Mr. Siedschlag then took over that supervisory position permanently in March 2019. *Comp.*, *Siedschlag.*

6. Complainant's responsibilities included responding to webmail and communications with pollinators in connection with pesticide exposures. *Comp.*, *Siedschlag.*

7. As of the time of the filing of the complaint, Complainant had been responding to webmail for about 15-16 years. *Comp.*

8. There were backlogs of webmail responses at various times while Complainant was working on answering webmail.

9. There was a backlog around 2013 when Ms. Overstreet was supervising Complainant. *Comp.*, *Overstreet.*

10. Complainant created a system for addressing that backlog with Ms. Overstreet's approval, which

led over time to the elimination of the backlog. *Comp., Overstreet.*

11. Complainant has created templates or boilerplate responses for common webmail queries which have been used by Complainant and others when responding to webmail. *Comp., others*

12. The federal government shut down from December 2017 until January 2018. A webmail backlog emerged from that period. *Comp.*

13. Complainant began working on the shutdown backlog and immediately informed the acting supervisor, Kaythi Han, about it. *Comp.*

14. Shortly after Mr. Siedschlag started as supervisor, he assigned four female co-workers to assist with the remaining backlog. *Comp., Siedschlag.*

15. This was the only time that Mr. Siedschlag put a team in place to assist with any webmail backlog during the relevant time period for this complaint. *Siedschlag.*

16. Mr. Siedschlag instructed Complainant and the four female co-workers to track the amount of time they spent on each webmail response. *Siedschlag*, Enid Chiu Liability Hearing testimony *("Chiu").*

17. Mr. Siedschlag did not inform team members about why they were tracking their time. *Siedschlag; Chiu.*

18. Mr. Siedschlag used the tracking data to calculate an average response time for webmails to be met by Complainant. *Siedschlag.*

19. Mr. Siedschlag also relied on his experience with webmail in the Superfund unit in assessing how long it should take to respond to webmail. *Siedschlag.*

20. Some webmail queries are simple and can be answered using a boilerplate or a custom response in little time. *Comp.*

21. Some webmails pose complex issues which may require the assistance of Subject Matter Experts ("SME") in formulating an accurate response. SMEs sometimes were slow to respond. Responding to complex webmails typically required substantially more time compared to simple webmails. *Comp.*

22. Shortly after becoming the permanent supervisor, Mr. Siedschlag began to review drafts of all webmail responses prepared by Complainant. *Comp., Siedschlag.*

23. After a period of time, Mr. Siedschlag stopped reviewing responses to simple emails which had been drafted by Complainant. *Comp.*

24. On various occasions, Complainant has corrected the draft webmail responses of female colleagues in his unit. *Comp.*

25. Mr. Siedschlag set numerous deadlines for Complainant to reduce the webmail backlog after he became permanent supervisor in 2019. *Comp., Siedschlag.*

26. Complainant found the deadlines unrealistic for various reasons and was consistently unable to meet them. *Comp.*

27. In 2019, webmail increased by about 100%. *Comp., Siedschlag.*

28. Complainant fairly consistently had technology issues which slowed down his work. *Comp.*

29. Complainant spent time serving as back-up and covering for colleagues. *Comp.*

30. In Spring of 2019, Complainant spent substantial hours preparing documents for his 4711 and EEO complaints. *Comp.*

31. Throughout the period at issue, Complainant also worked on his neonicotinoids and pollinator responsibilities. *Comp.*

32. Complainant also worked on other matters including rulemaking, web edits, press inquiries and more during the time frame at issue. *Comp., Complainant's Exhibit 7.*[3]

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3. The Agency objected to Complainant's exhibits 13 and 24 at the hearing. Those exhibits are admitted because they are relevant

33. Overall, there were weeks in which Complainant had little time to work on webmail responses during the time frame at issue. *Comp.*, *Complainant's Exhibit 7.*

34. Upon learning that Mr. Siedschlag would become his permanent supervisor, Complainant asked Dian Moseby for a transfer. *Comp.*

35. Shortly after Mr. Siedschlag became permanent, he required Complainant to attend weekly meetings with him. *Comp., Siedschlag.*

36. The meetings often were followed by detailed emails from Mr. Siedschlag to Complainant reviewing issues and deadlines from the meetings. *Comp.; Various e.g., Agency Exhibit 2.*

37. For part of the relevant time frame, Mr. Siedschlag reviewed Complainant's draft webmail responses and made edits to them. *Comp., Siedschlag.*

38. Mr. Siedschlag sometimes gave advice to Complainant regarding how to respond to a webmail or reduce the backlog. Complainant often found the advice to be unhelpful or inaccurate. *Comp., Siedschlag.*

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and non-repetitive. Parts of them are similar to the self-kept notes of Mr. Siedschlag, which were previously admitted.

39. Complainant felt as if he could not succeed in satisfying the demands Mr. Siedschlag placed on him. *Comp.*

40. In around April 2019, Complainant filed a complaint under Agency Order # 4711, which concerns harassment complaints. The allegations included disparate treatment based on sex.

41. Complainant compiled comprehensive documents in support of the case. *Comp.*

42. Anne Moseby was selected as the decision-maker for the complaint. Anne Moseby Liability Hearing testimony ("*Moseby*"); Tessa Bermania Liability Hearing testimony ("*Bermania*").

43. The Agency's 4711 Order requires that complainants and alleged harassers be separated during the pendency of the 4711 investigation. That did not occur in Complainant's case. *Comp.*, *ROI, p. 1541*

44. Before filing the 4711 complaint, Complainant attempted to meet with Ms. Moseby to complain about harassment by Mr. Siedschlag. Ms. Moseby refused to meet with him. *Comp.*

45. At the conclusion of the 4711 investigation, Ms. Moseby found that there was no harassment or unfair treatment of Complainant by *Mr. Siedschlag. Comp.*, *Moseby*, ROI, Ex.

46. Mr. Siedschlag contacted Tess Bermania in LER in the summer of 2019 about putting Complainant on a performance improvement plan ("PIP"). *Siedschlag, Bermaina.*

47. Mr. Siedschlag issued a detailed PIP to Complainant in August 2019. *ROI, p. 698*

48. The PIP pointed to quality, quantity and timeliness issues regarding which Complainant was not performing satisfactorily. *Siedschlag*; *ROI, p. 698.*

49. Complainant demonstrated substantial knowledge on various substantive topics of concern to the EPA. *Various witnesses; various exhibits.*

50. Complainant received a performance appraisal rating of "Outstanding" in about six of the 10 prior years preceding the complaint. *Comp.*

51. Ms. Overstreet, who supervised Complainant for six years, testified that his work was excellent and that he was an outstanding performer. *Overstreet.*

52. Ms. Overstreet also stated that Complainant was flexible and professional, and that she received compliments about Complainant's work. *Overstreet.*

53. Co-worker Ms. Overby testified that Complainant was a diligent, reliable and versatile co-worker. *Overby.*

54. Ms. Overby testified that Mr. Siedschlag treated Complainant more harshly then she and the other female co-workers. *Overby.*

55. Ms. Overby stated that Mr. Siedschlag was less willing to work with Complainant or compromise with him, and that he scrutinized his work more than hers. *Overby.*

56. Co-worker Anne Hopkins testified that Mr. Siedschlag was hostile towards Complainant and that Mr. Siedschlag micro-managed Complainant. Anne Hopkins Investigation testimony ("Hopkins"), *ROI, p. 1202.*

57. Ms. Hopkins testified that Mr. Siedschlag gave Complainant a runaround with his edits and that some of Mr. Siedschlag's edits were incorrect. *Hopkins.*

58. Co-worker Enid Chiu testified that Complainant is reliable, professional, hard-working and knowledgeable. *Chiu.*

59. Ms. Chiu testified that Mr. Siedschlag did not criticize her for missing deadlines regarding the reduction of the backlog. *Chiu.*

Appendix D

VI. Applicable Legal Standards

A. Hostile Work Environment Law

To establish a *prima facie* case of hostile work environment harassment, a complainant must show that: (1) s/he belongs to a statutorily protected class; (2) s/he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment affected a term or condition of employment and/or 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. *Johnson, et al v. Department of the Navy*, EEOC Appeal No. 0120073487, et al. (November 14, 2007). The harassment standard applies to all protected classes.

The incidents comprising the hostile work environment must have been "sufficiently severe or pervasive to alter the conditions of complainant's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); see *also Oncale v. Sundowner Offshore Services, Inc.*, 23 U.S. 75 (1998). The Commission has repeatedly found that claims of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See *Phillips v. Department of Veterans Affairs*, EEOC Request No. 05960030 (July 12, 1996); *Banks v. Health and Human Services*, EEOC Request No. 05940481 (February 16, 1995).

Appendix D

In determining whether an objectively hostile or abusive work environment existed, the trier of fact should consider whether a reasonable person in the complainant's circumstances would have found the alleged behavior to be hostile or abusive. Even if harassing conduct produces no tangible effects, such as psychological injury, a complainant may assert a Title VII cause of action if the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their protected status. *Rideout v. Department of the Army*, EEOC Appeal No. 01933866 (November 22, 1995) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993)), request for reconsideration denied, EEOC Request No. 05970995 (May 20, 1999). Also, the trier of fact must consider the totality of the circumstances, including the following: 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. *Harris*, 510 U.S. at 23.

B. Retaliation Law

To establish a *prima facie* case of reprisal for participating in protected activity, a complainant typically must show that: (1) s/he engaged in protected activity; (2) the alleged discriminating official was aware of the protected activity; (3) s/he was affected adversely by an action of the agency contemporaneously with or after the protected activity; and (4) there is a causal connection between the protected activity and the agency action. *Walker v. Dept. of Health and Human Services*, EEOC

Appeal No. 01983215 (Jan. 14, 2000). For an action to be adverse, it must be reasonably likely to deter individuals from engaging in protected activity. *Bennett v. Dep't of the Army*, EEOC App. No. 0120130117 (Feb. 27, 2013). The 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. *Lucas v. Dept. of the Navy*, EEOC Appeal No. 02-00242-004 (Aug. 10, 2006). The Commission generally has held that a nexus may be established if events occurred within one year of each other. *Patton v. Dept. of the Navy*, EEOC Request No. 05950124 (June 27, 1996); *Mallis v. United States Postal Service*, EEOC Appeal No. 01A55908 (Oct. 3, 2006); *but see Latham v. Postmaster General*, Appeal No. 0120102749 (December 23, 2010) (finding that a nine-month interval was insufficient to establish causal connection); *King v. Department of the Air Force*, EEOC Appeal No. 01A62609 (July 26, 2006) (finding that six-month interval of time did not support causal connection); *Knight v. Postmaster General*, EEOC No. 01A54821 (2006) (finding that a six-month interval did not support an inference of retaliation).

The Commission has a policy of considering retaliation claims with a broad view of coverage. *Carroll v. Dep't of the Army,* EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. *See* EEOC Compliance Manual Section 8, "Retaliation," No. 915.003 (May 20, 1998), at 8-15; *see also Carroll,* supra.

Furthermore, the Commission has found that any action by an agency manager that interferes with an employee's rights or has the effect of intimidating or chilling the exercise of those rights under the EEO statutes constitutes a *per se* violation. *Binseel v. Dep't of the Army,* EEOC Request No. 05970584 (October 8, 1998) (complainant told that filing an EEO suit was the wrong way to go about getting a promotion); *Marr v. Dep't of the Air Force,* EEOC Appeal No. 01941344 (June 27, 1996); *Whidbee v. Dep't of the Navy,* EEOC Appeal No. 0120040193 (March 31, 2005); *Thornton-Brown v. United States Postal Service,* EEOC Appeal No. 0120101790 (September 2, 2010). However, petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity. *Meeker v. United States Postal Service*, EEOC Appeal No. 01A12137 (Aug. 23, 2002).

If a complainant establishes a *prima facie* case, the burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. *Texas Department of Community 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 pre-textual. *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 120 S.Ct. 2097 (2000); *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 519 (1993).

VII. Analysis

The following findings are made after a thorough review and evaluation of the entire record, including

the observation of testifying witnesses at the hearing. Credibility determinations are based upon the demeanor of the witnesses observed at the hearing and, where possible, corroborated by the evidence of record. *Willis v. Dep't of Treasury*, EEOC No. 05900589 (July 1990). As discussed below, the evidence shows that the Agency did not violate any EEO laws when it terminated Complainant and did not subject Complainant to a hostile work environment.

A. Sex-Based (non-sexual) Hostile Work Environment Claim

1. *Prima Facie* Case Analysis

Complainant meets element one of a *prima facie* case for a hostile work environment, as he is a male who alleges differential treatment based on sex. He asserts he was subjected to conduct that constituted harassment. The conduct included having his work closely-monitored and reviewed, and being subjected to micro-managing by his supervisor, Mr. Siedschlag. Complainant had 15-16 years of experience and acquired EPA knowledge when Mr. Siedschlag became his supervisor, but Complainant was treated almost like a new employee regarding the level of his supervision. Complainant's draft webmail responses were subjected to nit-picky review by Mr. Siedschlag, who mostly proposed only minor edits to the drafts. Complainant often was able to refute Mr. Siedschlag's concerns about his drafts. Mr. Siedschlag often told Complainant that he did not have enough work for an employee of his grade, and that he needed to take on more. Being subjected to this conduct slowed Complainant

down and interfered with his ability to do job efficiently and effectively. Based on this conduct by the Agency, Complainant has established element two of a *prima face* case of harassment.

The testimony of Complainant and co-workers established that female co-workers were not treated like Complainant. The testimonies of Ms. Overstreet, Ms. Overby, Ms. Chiu and Ms. Hopkins (via affidavit) were particularly credible as they had no stake in the matter. Further, the co-workers amongst them took the bold step of essentially testifying against their supervisor.[4] The consistency of the supporting testimony also bolsters the credibility of it. It is sufficient to establish differential treatment based on sex and thus Complainant has established element three of a *prima facie* case.

Regarding element four, when considered as a whole, the alleged harassing conduct unreasonably interfered with Complainant's work environment and his ability to do his work in a timely and efficient manner. Thus, element four of a *prima face* case has been established as well.

Finally, as to element five, there is a basis for imputing liability to the Agency as the harasser is a supervisor and the Agency took insufficient action in response to the oft-repeated complaints of harassment by Complainant. An employer is subject to vicarious liability for harassment

4. Ms. Hopkins averred that Mr. Siedschlag stopped responding to her greetings and acknowledging her after she became a witness in support of Complainant's case. *ROI, 1204.*

when it is "created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc., v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2292-93 (1998).

While the Commission has found that "[s]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" *Kozak v. United States Postal Serv.*, EEOC Request No. 01A63021 (Aug. 23, 2006), and that the discrimination statutes do not shield a complainant from a myriad of petty slights and annoyances. *Rizzo v U.S. Postal Service*, EEOC Appeal No. 01A53970 (Aug. 29, 2005), the conduct here amounts to more than petty, isolated incidents. For the alleged harassing conduct to be considered pervasive, it must be sufficiently continuous and not merely episodic. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). From the vantage point of the totality of the circumstances, the record shows that the harassment at issue pervaded Complainant's work environment on a regular basis throughout the time he was supervised by Mr. Siedschlag. Thus, Complainant can establish that the harassment at issue was pervasive.

Based on the foregoing, Complainant has established a *prima facie* case of harassment.

2. Agency Defenses and Complainant's Rebuttals

The Agency denies that some of the alleged conduct occurred and asserts that there were legitimate, non-discriminatory reasons for alleged actions which undisputedly occurred. First, the Agency aims to portray Complainant as an employee who became disgruntled after the arrival of a new supervisor. The Agency in essence asserts that Complainant was stubborn and would not adjust to the ways of a new supervisor, which gave rise to personality and work-style conflicts. Mr. Siedschlag was simply a supervisor supervising an employee, by reviewing his work, providing advice and otherwise trying to assist Complainant.

As a long-term veteran of the EPA with substantial knowledge of the Agency's operations, Complainant admittedly was upset by the significant change in supervisory style that came with Mr. Siedschlag's arrival. Complainant's prior work experience and performance levels appeared to matter little to Mr. Siedschlag. Rather suddenly, Complainant was subjected to micro-level review of some of his simplest assignments (e.g., responses to simple webmail queries) and otherwise micro-managed on all levels. Complainant did not see the same happening to his female colleagues. He found fault with some of the suggested edits and changes to his work posed by Mr. Siedschlag, who had lesser knowledge on some EPA-related substantive matters. Complainant made efforts to work with Mr. Siedschlag and meet his deadlines, even though he felt like he was being set up to fail. This

treatment left Complainant disgruntled and discouraged, and led him to consider seeking another job.

The Agency also points to alleged performance deficiencies of Complainant as justification for its actions. Most emphasized is Complainant's handling of the webmail backlogs and the quality and timeliness of his webmail responses. These points were the subject of substantial testimony at the hearing. For the post-shutdown backlog, Mr. Siedschlag's response was to assign other team members to assist with it. For all other back logs, the burden was shouldered by Complainant alone with Mr. Siedschlag closely monitoring through the setting of deadlines, weekly meetings, and reporting requirements for Complainant. The evidence shows that Complainant repeatedly did not meet those deadlines. While Complainant might not necessarily have been set up to fail as he alleges, a full-scope review of Complainant's responsibilities and their impact on his ability to meet webmail deadlines reveals that Complainant had justification for missing the deadlines. Despite the Agency's insistence that Complainant had minimal other responsibilities, the record shows that Complainant had various other responsibilities including handling the neonicotinoids issue on his own in addition to involvement in rule-making, responding to press inquiries, providing back up coverage for colleagues, and more. Further, Complainant's productivity sometimes suffered due to technology problems, which on a few occasions led to the re-imaging of Complainant's computer. Complainant also had to spend time working on his 4711 and EEO complaints during the time frame at issue. Finally, the record shows

that webmail volume was up by about 100% in 2019, the year at issue. Thus, there were numerous factors taking Complainant away from responding to webmail at the time he was being given the successive and tight deadlines to respond to webmail backlogs.

The Agency also asserts that the quality of Complainant's webmail responses was sometimes lacking. The Agency points to some purported examples of this in the PIP that was issued to Complainant in August 2019. This issue also was the subject of extensive testimony at the hearing. The criticisms of Complainant's responses rarely concerned the substance of them. Instead, they often concerned minor issues in tone, word-selection and approach. Complainant hotly contested the examples put forth by the Agency. Whether Complainant was correct or not, what is clear is that Mr. Siedschlag was nit-picking the responses over minor issues which would have little impact on the overall response. The issues pointed out were not significant in that they never required significant overhauls in language or approach. This was just another example of micro-managing of questionable utility that slowed Complainant's pace of work.

Finally, the Agency asserts that none of the alleged actions were motivated by Complainant's sex. It argues that the female employees did not present the same performance issues as Complainant and thus any difference in supervision as to Complainant was justified by his unique performance problems. The Agency points out that female co-workers were brought in to assist with the backlog at one point, and that Mr. Siedschlag reviewed

the work of female employees at some level as well. Moreover, Complainant does not allege that Mr. Siedschlag or anyone else made any offensive statements based on his sex. The Agency also points out that Complainant, a male, is alleging that another male harassed him based on Complainant being a male.

Overarchingly, these arguments are overcome by the credible, consistent testimony of the female employees, which emphasized the differential treatment of Complainant, while also being very complimentary of Complainant's professionality, knowledge and work habits. The overall evidence makes clear that no females were supervised in the same manner as Complainant. The lack of any offensive statements based on sex does not undercut this evidence. And any inference based on the harassment being male on male is overcome by this evidence.

Finally, the Agency asserts it took appropriate action in response to Complainant's complaints of harassment when it conducted an investigation pursuant to Complainant's 4711 complaint. The deciding official, Ms. Moseby, found that all of the allegations were unsubstantiated. However, it is worthy of note that Complainant had asserted that Ms. Moseby had refused to meet with Complainant about his harassment allegations upon his request before he filed the 4711 complaint. This calls into question whether Ms. Moseby was the appropriate decision-maker for this complaint. Also, the Agency failed to abide by that portion of the 4711 Order requiring the separation of the complainant and alleged harasser during the pendency of the investigation. That simply did not happen here, and no

explanation was offered. Instead, Complainant continued to work in the environment described above while the investigation was pending.

Based on the foregoing, Complainant has demonstrated that the Agency's rationales for taking the challenged actions are pretextual and that sex was a motivator behind those actions. Thus, Complainant has established a hostile work environment based on sex.[5]

B. Hostile Work Environment Claim Based on Retaliation

1. *Prima Facie* Case Analysis

The standard for retaliatory harassment contains a few different elements compared to the standard for a harassment claim based on sex. First, Complainant must show that he engaged in protected activity, which he has, at least in the form of the 4711 and EEO complaints. Second, there is no question that Mr. Siedschlag was aware of these complaints, if only because Complainant told Mr. Siedschalg of the complaints himself. Retaliatory intent may be inferred based on the close proximity in time between the EEO activity and the harassing conduct, plus the Agency took it to the next level by putting Complainant on a PIP after he engaged in EEO activity.

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5. Regarding the age harassment claim, Complainant put forth minimal evidence related to it. The record evidence is insufficient to establish that age was a motivating factor for the Agency's conduct. Thus, the age claim must be dismissed.

Appendix D

As per EEOC guidance, "[t]he threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the *Burlington Northern* standard even if it is not severe or pervasive enough to alter the terms and conditions of employment. If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC, Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016). In other words, in the retaliatory harassment context, the softer adverse action standard for retaliation operates to override the more stringent requirement of the hostile work environment standard. Instead the retaliation-based requirement that the adverse action (here, harassment) must be "reasonably likely to deter a person from engaging in protected activity" applies. Here, the actions taken against Complainant went beyond the petty slights and trivial annoyances which the Commission has deemed unactionable. See *Davis v. U.S.P.S.* Appeal No. 01991852 (December 12, 2021) (Finding no retaliation where Complainant was given verbal announcement regarding a change in reporting time and others were given written notice). Instead, the harassment was of such a nature that it would be reasonably likely to deter an individual from engaging in EEO activity.

Based on the foregoing, the Agency violated Title VII when it subjected Complainant to retaliatory harassment based on his protected EEO activities.

Appendix D

IX. Conclusions of Law

For the reasons set forth here, as well as record evidence and arguments not specifically addressed in this Decision, Complainant has established by a preponderance of the evidence that he was subjected to a hostile work environment based on his sex and prior EEO activity, and placed on a PIP in reprisal for his prior EEO activity.

X. Order

Judgment is entered for Complainant on all claims as to liability, except the harassment claim based on age which is dismissed. A damages hearing will be held pursuant to a subsequent order.

It is so Ordered:

For the Commission:

_____

Robert D. Rose
Administrative Judge
U.S. Equal Employment Opportunity Commission
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APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED DECEMBER 4, 2023

No. 23-5030

QUENTIN BORGES-SILVA,

Appellant,

v.

MICHAEL S. REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee.

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

Appendix E

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/_____
Daniel J. Reidy
Deputy Clerk

APPENDIX F — RELEVANT CONSTITUTIONAL PROVISION

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.