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IN THE  
SUPREME COURT OF THE UNITED STATES

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Jehan Semper, Pro Se  
PETITIONER  
vs  
Yellen/Bessent, et al.  
RESPONDENT(S)

PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit

APPENDIX A

General Docket  
Tenth Circuit Court of Appeals

**Court of Appeals Docket #:** 25-4022  
**Nature of Suit:** 2442 Civil Rights Employment  
Semper v. Bessent, et al  
**Appeal From:** United States District Court for the District of Utah - Salt Lake City  
**Fee Status:** ifp granted

**Docketed:** 02/21/2025  
**Termed:** 07/22/2025

**Case Type Information:**

- 1) civil
- 2) USA as party
- 3) -

**Originating Court Information:**

**District:** 1088-2 : 1:22-CV-00070-TS  
**Trial Judge:** Ted Stewart, -, Senior U.S. District Judge

**Date Filed:** 05/23/2022

**Date NOA Filed:**  
02/21/2025

**Date Rec'd COA:**  
02/21/2025

02/21/2025 1 [11160402] Civil case docketed. Preliminary record filed. DATE RECEIVED: 02/21/2025 Notice of appearance due on 03/07/2025 for FNU Burnem, FNU Bushell, FNU Hill, Jordan Nielsen, Ogden City, Ogden Police, P. Thomas, Janet L. Yellen and Eric Young. Notice of appearance due on 03/24/2025 for Jehan Semper. --[Edited 02/21/2025 by MLB to correct to Utah case number][25-4022] [Entered: 02/21/2025 12:34 PM]

02/21/2025 2 [11160581] Minute order filed - Notice of appearance due on 03/07/2025 for Ryan Arbon, Weber County and Weber County Sheriff. (Text Only - No Attachment) [25-4022] [Entered: 02/21/2025 04:17 PM]

02/24/2025 3 [11160642] Jurisdictional review complete. Appellant's brief due on 04/07/2025 for Jehan Semper. Record on appeal 10th circuit due 03/17/2025 [25-4022] [Entered: 02/24/2025 08:00 AM]

02/24/2025 4 [11160893] Entry of appearance submitted by Nathan Jack and Tiffany Romney for Appellee Janet L. Yellen for court review. Certificate of Interested Parties: Yes. Served on 02/24/2025. Manner of Service: email. --[Edited 02/24/2025 by MLB to remove pdf from docket; entry filed on 02/24/2025][25-4022] NJ [Entered: 02/24/2025 02:11 PM]

02/24/2025 5 [11160906] Entry of appearance filed by Nathan Jack for Janet L. Yellen and Ms. Tiffany Romney for Janet L. Yellen. CERT. OF INTERESTED PARTIES: n (all parties previously disclosed). Served on 02/24/2025. Manner of Service: email [25-4022] [Entered: 02/24/2025 02:28 PM]

03/03/2025 6 [11162693] Consent to electronic service filed by filed by Jehan Semper. Served on 03/03/2025. Manner of Service: email. [25-4022] [Entered: 03/03/2025 01:14 PM]

03/03/2025 7 [11162695] Entry of appearance filed by Jehan Semper. CERT. OF INTERESTED PARTIES: n. Served on 03/03/2025. Manner of Service: email [25-4022] [Entered: 03/03/2025 01:15 PM]

03/05/2025 8 [11163366] Record on appeal filed. No. of Volumes: 1, Comments: Vol I - Pleadings. [25-4022] [Entered: 03/05/2025 11:40 AM]

03/07/2025 9 [11164266] Entry of appearance submitted by Richard Blake Hamilton; Janise Kekauoha Macanas for Appellees Ryan Arbon, Weber County and Weber County Sheriff for court review. Certificate of Interested Parties: Yes. Served on 03/07/2025. Manner of Service: US mail, email. --[Edited 03/10/2025 by MLB to remove pdf from docket; entry filed on 03/10/25][25-4022] RBH [Entered: 03/07/2025 04:33 PM]

03/07/2025 10 [11164268] Entry of appearance submitted by Matthew D. Church, Kendra M. Brown for Appellees Ogden City, Ogden Police, Eric Young, P. Thomas, Jordan Nielsen, FNU Bushell, FNU Hill and FNU Burnem for court review. Certificate of Interested Parties: No. Served on 03/07/2025. Manner of Service: email. --[Edited 03/10/2025 by MLB to remove pdf from docket; entry filed on 03/10/25][25-4022] MDC [Entered: 03/07/2025 04:39 PM]

03/10/2025 11 [11164322] Entry of appearance filed by Janise K. Macanas and Mr. R. Blake Hamilton for Weber County, Weber County Sheriff and Ryan Arbon. CERT. OF INTERESTED PARTIES: n (all parties previously disclosed). Served on 03/10/2025. Manner of Service: email [25-4022] [Entered: 03/10/2025 07:55 AM]

03/10/2025 12 [11164326] Entry of appearance filed by Kendra M. Brown and Matthew David Church for Ogden City, Eric Young, FNU Hill, Ogden Police, P. Thomas, Jordan Nielsen, FNU Bushell and FNU Burnem. CERT. OF INTERESTED PARTIES: n. Served on 03/10/2025. Manner of Service: email [25-4022] [Entered: 03/10/2025 08:00 AM]

03/21/2025 13 [11167899] Appellant brief filed by Jehan Semper. Served on 03/21/2025 by email. Required 10th Cir. R. 28.2 Attachments Included? n. Appellees' brief(s) due 04/21/2025 for Ogden City, Ogden Police, Eric Young, P. Thomas, Jordan Nielsen, FNU Bushell, FNU Hill, FNU Burnem, Ryan Arbon, Weber County Sheriff, Weber County and Janet L. Yellen [25-4022] [Entered: 03/21/2025 11:22 AM]

04/18/2025 14 This entry has been removed from the docket. Brief refiled. [DD] [11175295] Appellee/Respondent's brief filed by Ryan Arbon, Weber County and Weber County Sheriff. Served on: 04/18/2025. Manner of service: US mail, email. Oral argument requested? No. Word/page count: 4782. This pleading complies with all required privacy and virus certifications: Yes. [25-4022] RBH [Entered: 04/18/2025 08:13 AM]

04/18/2025 15 [11175308] Notice of appellees' deficient brief received from Ryan Arbon, Weber County and Weber County Sheriff. See attached letter for specifics. Appellees' brief now due 04/21/2025 for Weber County, Ryan Arbon and Weber County Sheriff [25-4022] [Entered: 04/18/2025 08:36 AM]

04/18/2025 16 [11175358] Appellee/Respondent's brief filed by Ryan Arbon, Weber County and Weber County Sheriff. Served on: 04/18/2025. Manner of service: US mail, email. Oral argument requested? No. Word/page count: 4782. This pleading complies with all required privacy and virus certifications: Yes. [25-4022] RBH [Entered: 04/18/2025 10:54 AM]

04/18/2025 17 [11175370] Minute order filed - the brief submitted by Weber County appellees is accepted for filing. The parties will be notified via separate docket entry if paper copies are required. (Text Only - No Attachment) [25-4022] [Entered: 04/18/2025 11:37 AM]

04/21/2025 18 [11175710] Appellee/Respondent's brief filed by Janet L. Yellen. Served on: 04/21/2025. Manner of service: email. Oral argument requested? No. Word/page count: 2031. This pleading complies with all required privacy and virus certifications: Yes. [25-4022] TR [Entered: 04/21/2025 01:22 PM]

04/21/2025 19 [11175833] Appellee/Respondent's brief filed by FNU Burnem, FNU Bushell, FNU Hill, Jordan Nielsen, Ogden City, Ogden Police, P. Thomas and Eric Young. Served on: 04/21/2025. Manner of service: US mail, email. Oral argument requested? No. Word/page count: 5962. This pleading complies with all required privacy and virus certifications: Yes. [25-4022] MDC [Entered: 04/21/2025 05:24 PM]

04/21/2025 20 [11175839] Minute order filed - the brief submitted by appellee Scott Bessent is accepted for filing. The parties will be notified via separate docket entry if paper copies are required. (Text Only - No Attachment) [25-4022] [Entered: 04/21/2025 06:06 PM]

04/22/2025 21 [11175979] Minute order filed - the brief submitted by Ogden City appellees is accepted for filing. The parties will be notified via separate docket entry if paper copies are required. Appellant's optional reply brief now due 05/12/2025 for Jehan Semper. (Text Only - No Attachment) [25-4022] [Entered: 04/22/2025 10:57 AM]

05/05/2025 22 [11179251] Minute order filed - the [23] reply brief submitted by appellant is accepted for filing. The parties will be notified via separate docket entry if paper copies are required. (Text Only - No Attachment) [25-4022]--[Edited 05/05/2025 by ART to add text] [Entered: 05/05/2025 04:28 PM]

05/05/2025 23 [11179252] Appellant's reply brief filed by Jehan Semper. Served on 04/26/2025 by US mail and 05/05/2025 by email. [25-4022] [Entered: 05/05/2025 04:32 PM]

07/22/2025 24 [11198906] Affirmed. Terminated on the merits after submissions without oral hearing. Written, unsigned, and published. Judges Tymkovich(authoring judge), Baldock, and Federico. Mandate to issue. [25-4022] [Entered: 07/22/2025 07:43 AM]

08/04/2025 25 [11202464] Plaintiff/Appellant Motion for Reconsideration/Rehearing filed by Jehan Semper. Served on 08/04/2025. Manner of Service: email. [25-4022] [Entered: 08/04/2025 11:46 AM]

08/25/2025 26 [11208203] Order filed by Judges Tymkovich, Baldock, and Federico denying petition for rehearing filed by Appellant Jehan Semper. [25-4022] --[Edited 09/11/2025 by AT to correct typo in attached order.] [Entered: 08/25/2025 11:56 AM]

09/05/2025 27 [11211821] Mandate issued. [25-4022] [Entered: 09/05/2025 07:56 AM]

PACER Service Center			
Transaction Receipt			
11/04/2025 14:43:52			
PACER Login:	js315legal	Client Code:	
Description:	Docket Report (filtered)	Search Criteria:	25-4022 Filed 1/1/2022 - 11/1/2025
Billable Pages:	2	Cost:	0.20

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 22, 2025

Christopher M. Wolpert  
Clerk of Court

JEHAN SEMPER,

Plaintiff - Appellant,

v.

SCOTT BESSENT, Secretary of the Treasury; OGDEN CITY; OGDEN POLICE; ERIC YOUNG, Police Chief Ogden Police; P. THOMAS, Police Officer; JORDAN NIELSEN, Police Officer; FNU BUSHELL, Police Officer; FNU HILL, Police Officer; FNU BURNEM, Police Officer; RYAN ARBON, County Sheriff; WEBER COUNTY SHERIFF; WEBER COUNTY; OFFICE OF CIVIL RIGHTS AND DIVERSITY; INTERNAL REVENUE SERVICE; SCOTT WALLACE, Acting Field Director; JAYLYNN MCQUIDDY, Operations Manager; CYNTHIA J. CROWELL, Department Manager; ALANA P. MITCHELL, Manager; MELISSA D. EVANS, Training Manager; ZACHARIAH A. PINKSTON, On the Job Instructor; MATTHEW G. HOWELL, TIGTA; ANDREW V. AUSTIN, TIGTA; ERIC C. REED, TIGTA; JONATHAN L. PRUETT, TIGTA; JAMES JEWETT, IRS Security Officer; NATHANIEL EYE, IRS Security Officer,

Defendants - Appellees.

No. 25-4022  
(D.C. No. 1:22-CV-00070-TS)  
(D. Utah)

## ORDER AND JUDGMENT\*

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Before **TYMKOVICH, BALDOCK, and FEDERICO**, Circuit Judges.

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Jehan Semper, proceeding pro se, appeals the district court's dismissal of her case against the Secretary of the Treasury and various city and county defendants. The district court dismissed the lawsuit because Semper failed to exhaust her administrative remedies before filing suit as required for Title VII claims, and she asserted claims under criminal statutes, which do not provide a private cause of action. Because we agree that the district court correctly dismissed Semper's case, we **AFFIRM**.

### I. Background

Semper was fired three months into her employment with the Internal Revenue Service in Ogden, Utah. She submitted an Equal Employment Opportunity (EEO) complaint, asserting discrimination claims based on her religion and age, and retaliation for prior EEO activity—all in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). The Department of the Treasury's Office of Civil Rights and Diversity (OCRD) investigated the

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\* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G)*. The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

matter and denied all of Semper's claims but one. In the Final Agency Decision (FAD), the OCRD found that Semper's protected EEO activity may have played a part in her firing<sup>1</sup> and therefore ordered the IRS to take certain actions, including to reinstate Semper and provide the appropriate amount of backpay.

On May 23, 2022, Semper filed suit because she believed that the IRS failed to comply with the FAD. According to Semper, the offer of reinstatement and backpay was not compliant with the FAD's terms. As a result, she sued the Secretary of the Treasury (then, Jannet Yellen, now Scott Bessent), the Ogden City Defendants,<sup>2</sup> and the Weber County Defendants.<sup>3</sup> She requested enforcement of the FAD through Title VII and asked the court to "write a letter" to "the appropriate entity" about her "18 USC criminal allegations" for prosecution. Aplt. Br. at 3–4, 7.

The district court granted each defendant's motions to dismiss.<sup>4</sup> As for the claims against the Secretary, the court held that Semper failed to exhaust her

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<sup>1</sup> According to the OCRD, the "timing of the drafting and issuance of the Termination Letter" suggested a retaliatory motive by management, since all this was done after discovering that Semper had "initiat[ed] an informal EEO complaint." R., Vol. I at 958.

<sup>2</sup> The Ogden City Defendants include Ogden City, Ogden City Police Department, Chief Eric Young, Officer P. Thomas, Officer Jordan Nielsen, Officer Bushell, Officer Hill, and Officer Burnem.

<sup>3</sup> The Weber County Defendants include Weber County, Weber County Sheriff, Ryan Arbon, and John/Jane Does Sheriff Deputies.

<sup>4</sup> The Weber County Defendants moved to dismiss based on a motion for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c). As the district court noted, "[w]e use the same standard when evaluating 12(b)(6) and 12(c)

administrative remedies before filing suit. Under the relevant federal regulations, if Semper believed that the IRS was not complying with the FAD, she was required to notify the EEO Director of this in writing. If she was still dissatisfied with the IRS's attempt to resolve the matter, she should have appealed to the EEOC for a determination on whether the agency was in compliance with the FAD. According to the district court, Semper had not exhausted these remedies before initiating this lawsuit. As for the Weber County and Ogden City Defendants, the court held that the only relevant claims against them were criminal allegations, and those claims fail because criminal statutes do not provide a private cause of action.

## II. Discussion

On appeal, Semper makes the same arguments that she made below. That is, she seeks enforcement of the FAD and argues that the district court erred by failing to refer her "18 USC Criminal Allegations" to the "appropriate entity" for prosecution. She also argues that the lower court tried to "silence" her by entering an order limiting her filing of documents due to the large number of documents that were being submitted. Aplt. Br. at 3.

### A. *Secretary of the Treasury*

Semper claims that the Secretary should be held liable for failing to comply with the FAD's terms and violating Title VII. The Secretary, in response, argues that

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motions." *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 n.2 (10th Cir. 2002). Thus, the district court analyzed the Weber County's motion no differently than a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Semper's claims should be dismissed because she failed to exhaust her administrative remedies.

As the Secretary acknowledges, “[s]overeign immunity does not bar employment discrimination claims against the federal government where the federal government is the employer.” *Freeman v. Raytheon Techs. Corp.*, No. 23-1133, 2024 WL 1928463, at \*5 (10th Cir. May 2, 2024). But before resorting to the courts, “[f]ederal employees alleging discrimination or retaliation prohibited by Title VII . . . must comply with specific administrative complaint procedures in order to exhaust their administrative remedies. These procedures are set forth in Part 1614 of Chapter 29 of the Code of Federal Regulations.” *Hickey v. Brennan*, 969 F.3d 1113, 1118 (10th Cir. 2020) (citations omitted). Relevant here, “[i]f the complainant believes that the agency has failed to comply with the terms of a settlement agreement or decision” that she has received in her favor, the complainant must “notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance.” 29 C.F.R. § 1614.504(a). If the Commission agrees that the “agency is not complying with a prior decision . . . the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA,” and others. 29 C.F.R. § 1614.503.

Semper has not followed all these procedures before filing suit. To be sure, the Secretary agrees that Semper took the first step in the administrative process by notifying the OCRD that the IRS was allegedly not complying with the FAD. But

Semper remained unsatisfied with the IRS's attempt to "resolve the matter." 29 C.F.R. § 1614.504(b). Thus, and according to 29 C.F.R. § 1614.504(b), she should have appealed to the EEOC for a formal determination on whether the IRS was following the FAD. She did not do so. Because Semper failed to exhaust her administrative remedies before resorting to the courts, her claim was properly dismissed.<sup>5</sup> *See Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003) (In an enforcement action, "the lack of an EEOC determination of non-compliance, which is a prerequisite to such a suit," is fatal).

The rest of Semper's claims against the Secretary similarly fail. First, she argues that the deadline to exhaust her administrative remedies should be tolled. Putting aside that she does not assert any legal grounds for such tolling, this argument fails for another reason. Namely, and as the Secretary explains, there is no deadline to toll. Under the relevant guidelines, if Semper is "not satisfied with the agency's attempt to resolve the matter," which was the case here, she can appeal to the EEOC "35 days after . . . she has served the agency with the allegations of noncompliance." 29 C.F.R. § 1614.504(b). Alternatively, if she has received a formal determination of noncompliance, Semper "must file an appeal within 30 days of his or her receipt of an agency's determination." *Id.*

Neither deadline is operative here. According to the Secretary, 35 days have passed since Semper served the agency with allegations of noncompliance. Thus,

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<sup>5</sup> Because the district court properly dismissed Semper's claims against the Secretary, Semper's motion for sanctions against the Secretary is moot.

Semper is free to appeal to the EEOC, and there is no deadline under the relevant guidelines to toll on that front. Moreover, because Semper has not received a formal determination of noncompliance, the mandatory 30-day deadline does not apply. Semper's argument on tolling is therefore immaterial.

Second, Semper argues that the magistrate judge tried to "silence" her by issuing certain conditions on her filing of documents. But Semper has waived this argument because she did not directly challenge this order below. *See Salcedo-Hart v. Birmingham*, 656 F. App'x 888, 894 (10th Cir. 2016) ("To preserve an issue for appellate review, a party must raise the issue in district court and seek a ruling. When a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review.") (cleaned up). And even if it were not waived, this argument fails on the merits. "District courts have broad power to manage their dockets, and their exercise of that power is reviewed only for abuse of discretion." *In re Peterson*, 338 F. App'x 763, 764 (10th Cir. 2009). Here, the district court temporarily barred Semper from submitting new filings because of the sheer volume of her submissions. The court noted that "[o]nce the existing motions have been decided, the court will, if needed, lift the ban on filings." R., Vol. I at 453. This decision falls within the district court's broad powers to manage its docket, and we discern no abuse of discretion.

Finally, Semper argues that the Secretary, among others, violated 18 U.S.C. §§ 241, *et seq.*, which are criminal statutes. But as the district court held below,

criminal statutes do not provide a private cause of action. *See Henry v. Albuquerque Police Dep’t*, 49 F. App’x 272, 273 (10th Cir. 2002) (affirming the district court’s dismissal of claims under 18 U.S.C. §§ 241 and 242 because “these criminal statutes, like other such statutes, do not provide for a private civil cause of action”); *Tucker v. United States Ct. of Appeals for Tenth Cir.*, 815 F. App’x 292, 294 (10th Cir. 2020) (“Sections 241 and 242 are criminal statutes that do not provide for private civil causes of action.”). Semper also argues that the district court should have referred her claims to the appropriate entity for prosecution, but she cites no authority holding that courts have the power to refer criminal allegations for prosecution. Her argument therefore fails.

The district court correctly dismissed Semper’s claims against the Secretary.

***B. Weber County and Ogden City Defendants***

Semper asserts similar claims against the Weber County and Ogden City Defendants. To start, Semper clarified below that she was not asserting Title VII claims against the Weber County and Ogden City Defendants. Nor could she, the district court held, because she did not have an employment relationship with these defendants.

Thus, the only relevant claims on appeal against the Weber County and Ogden City Defendants are criminal allegations. According to Semper, the Weber County and Ogden City Defendants violated 18 U.S.C. §§ 241, *et seq.*, and Semper argues that the district court should have referred her “18 USC criminal allegations” against these defendants to the appropriate authorities for prosecution.

This argument fails for the same reasons discussed above. First, criminal statutes do not provide a private cause of action. *See Henry*, 49 F. App'x at 273. Second, Semper cites no authority holding that courts have the power to refer criminal allegations for prosecution. Semper supplies no arguments in response. We find therefore that the district court correctly dismissed this claim.

Lastly, Semper makes two arguments in passing, neither of which have merit. First, she asks this court to “toll the time to file civil legal actions against Weber County and Ogden [City D]efendants.” Aplt. Br. at 10. But Semper provides no reason for such tolling and cites no legal authority to support her claim. Thus, this argument fails. Second, she argues that the district court “aided and abetted ‘spoliation’ of evidence” by “fail[ing] to order Weber County and Ogden [City D]efendants to preserve evidence.” *Id.* at 9. But Semper’s appeal only concerns the Weber County and Ogden City Defendants’ motion to dismiss her complaint, and that motion did not concern spoliation of evidence. This argument is irrelevant for present purposes.

Semper’s claims against the Weber County and Ogden City Defendants were properly dismissed.

### **III. Conclusion**

For the reasons stated above, we affirm.

Entered for the Court

Timothy M. Tymkovich  
Circuit Judge

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

August 25, 2025

Christopher M. Wolpert  
Clerk of Court

JEHAN SEMPER,

Plaintiff - Appellant,

v.

SCOTT BESSENT, Secretary of the  
Treasury, et al.,

Defendants - Appellees.

No. 25-4022  
(D.C. No. 1:22-CV-00070-TS)  
(D. Utah)

ORDER

Before TYMKOVICH, BALDOCK, and FEDERICO, Circuit Judges.

Appellant's Motion for Reconsideration/Rehearing construed as a petition for  
rehearing. As construed the petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Byron White United States Courthouse  
1823 Stout Street  
Denver, Colorado 80257  
(303) 844-3157  
Clerk@ca10.uscourts.gov

Christopher M. Wolpert  
Clerk of Court

Jane K. Castro  
Chief Deputy Clerk

September 05, 2025

Gary P. Serdar  
United States District Court for the District of Utah  
351 South West Temple  
Salt Lake City, UT 84101

**RE: 25-4022, Semper v. Bessent, et al**  
Dist/Ag docket: 1:22-CV-00070-TS

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's July 22, 2025 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court/agency.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert  
Clerk of Court

cc: Kendra M. Brown  
Matthew David Church  
R. Blake Hamilton  
Nathan Jack  
Janise K. Macanas  
Tiffany Romney  
Jehan Semper

CMW/mlb

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Jehan Semper, Pro Se  
PETITIONER  
vs  
Yellen/Bessent, et al.  
RESPONDENT(S)

PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit

APPENDIX B

**US District Court Electronic Case Filing System  
District of Utah (Northern)  
CIVIL DOCKET FOR CASE #: 1:22-cv-00070-TS**

Semper v. Yellen et al  
Assigned to: Judge Ted Stewart  
Demand: \$23,000,000  
Case in other court: Tenth Circuit, 25-04022  
Cause: 42:2000 Job Discrimination (Employment)

Date Filed: 05/23/2022  
Date Terminated: 02/20/2025  
Jury Demand: None  
Nature of Suit: 442 Civil Rights: Jobs  
Jurisdiction: U.S. Government  
Defendant

**Plaintiff**

**Jehan Semper**

represented by **Jehan Semper**  
PO BOX 86514  
LOS ANGELES, CA 90086  
(929) 266-5764  
Email: jehan.semper@gmail.com  
PRO SE

V.

**Defendant**

**Janet L. Yellen**  
*Secretary of the Treasury*

represented by **Tiffany M. Romney**  
US ATTORNEY'S OFFICE  
111 S MAIN ST STE 1800  
SALT LAKE CITY, UT 84111-2176  
(801)524-5682  
Email: tiffany.romney@usdoj.gov  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**Office of Civil Rights and Diversity**  
TERMINATED: 08/29/2023

**Defendant**

**Internal Revenue Service**  
TERMINATED: 08/29/2023

**Defendant**

**Scott Wallace**  
*Acting Field Director*  
TERMINATED: 08/29/2023

04/03/2023	<u>102</u>	Plaintiff's Reply to Weber County Defendants <u>100</u> Memorandum in Opposition to Motion, filed by Jehan Semper. (mh) (Entered: 04/03/2023)
04/03/2023	<u>103</u>	Plaintiff's Opposition to Weber County Defendants <u>99</u> Request to Submit for Decision, filed by Jehan Semper. (mh) (Entered: 04/03/2023)
04/03/2023	<u>104</u>	Plaintiff's RESPONSE to Weber County Defendants <u>101</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM and Memorandum in Support , filed by Plaintiff Jehan Semper. (mh) (Entered: 04/03/2023)
04/07/2023	<u>105</u>	ANSWER to <u>13</u> Amended Complaint,, filed by Janet L. Yellen.(Romney, Tiffany) (Entered: 04/07/2023)
04/10/2023	<u>106</u>	Plaintiff's REPLY to Yellen's <u>105</u> Answer to Amended Complaint, filed by Jehan Semper. (Attachments: # <u>1</u> Exhibit 14N)(mh) (Entered: 04/10/2023)
04/10/2023	<u>107</u>	RESPONSE to Motion re <u>98</u> MOTION to Compel Ogden City Defendants Rule 34, Rule 33 Responses filed by Defendants FNU Burnem, FNU Bushell, FNU Hill, Jordan Nielsen, Ogden City, Ogden Police, P. Thomas, Eric Young. (Church, Matthew) (Entered: 04/10/2023)
04/11/2023	<u>108</u>	Plaintiff's Third Compensation AFFIDAVIT. (Attachments: # <u>1</u> Exhibit 23D) (mh) (Entered: 04/11/2023)
04/11/2023	<u>109</u>	Plaintiff's REPLY to Ogden City Defendants <u>107</u> Response to Motion, filed by Jehan Semper. (mh) (Entered: 04/11/2023)
04/17/2023	<u>110</u>	REPLY to Response to Motion re <u>101</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM and Memorandum in Support filed by Defendants Ryan Arbon, Weber County, Weber County Sheriff. (Hamilton, R.) (Entered: 04/17/2023)
05/01/2023	<u>111</u>	Plaintiff's MOTION to Expedite Decision on <u>70</u> , <u>28</u> , <u>62</u> , <u>82</u> , <u>88</u> , <u>90</u> , <u>91</u> , <u>96</u> , <u>98</u> , filed by Plaintiff Jehan Semper. Motions referred to Cecilia M. Romero. (mh) (Entered: 05/01/2023)
05/03/2023	<u>112</u>	Plaintiff's MOTION to Compel Weber County Defendants Produce Video and All Evidence Related to Plaintiff Arising from 5/27/2021 at Weber County Facility Immediately, filed by Plaintiff Jehan Semper. Motions referred to Cecilia M. Romero.(mh) (Entered: 05/03/2023)
05/03/2023	<u>113</u>	Defendant's RESPONSE to Motion re <u>111</u> MOTION to Expedite <i>Decisions</i> filed by Defendant Janet L. Yellen. (Romney, Tiffany) (Entered: 05/03/2023)
05/04/2023	<u>114</u>	Plaintiff's REPLY to Yellen <u>113</u> Response to Motion, filed by Jehan Semper. (Attachments: # <u>1</u> Exhibit 26)(mh) (Entered: 05/05/2023)
05/05/2023	<u>115</u>	Plaintiff's Amended REPLY to Yellen <u>113</u> Response to Motion, filed by Jehan Semper. (Attachments: # <u>1</u> Exhibit 26)(mh) (Entered: 05/05/2023)
05/05/2023	<u>116</u>	<b>ORDER RESTRICTING FILINGS-</b> The court hereby notifies Plaintiff that <b>the court will not accept any new motions or filings as of the date of this order. Any document that is filed will be lodged and will not be considered.</b> Once the existing motions have been decided, the court will, if needed, lift the ban on filings. Signed by Magistrate Judge Cecilia M. Romero on 5/5/2023. (mh) (Entered: 05/05/2023)

06/05/2024	<u>197</u>	ORDER granting <u>194</u> Motion for Extension of Time to File Response/Reply <u>194</u> MOTION for Extension of Time to File Response/Reply as to <u>191</u> MOTION for Judgment on the Pleadings and Memorandum in Support . See Order for details. Signed by Magistrate Judge Cecilia M. Romero on 6/5/24. (jrj) (Entered: 06/05/2024)
06/06/2024	<u>198</u>	OBJECTION TO MAGISTRATE JUDGE DECISION to District Court by Jehan Semper re <u>196</u> Order on Motion for Extension of Time to File Response/Reply. (Attachments: # <u>1</u> Text of Proposed Order)(jrj) (Entered: 06/06/2024)
06/06/2024	<u>199</u>	OBJECTION TO MAGISTRATE JUDGE DECISION to District Court by Jehan Semper re <u>197</u> Order on Motion for Extension of Time to File Response/Reply, (Attachments: # <u>1</u> Text of Proposed Order)(jrj) (Entered: 06/06/2024)
06/25/2024	<u>200</u>	Nineteenth AFFIDAVIT of Jehan Semper filed by Jehan Semper. (jrj) (Entered: 06/25/2024)
09/12/2024	<u>201</u>	NOTICE of Change of Address by Jehan Semper (kpf) (Entered: 09/12/2024)
09/25/2024	<u>202</u>	AFFIDAVIT of Jehan Semper filed by Jehan Semper. (jrj) (Entered: 09/30/2024)
12/05/2024	<u>203</u>	ORDER REFERRING MOTION <u>176</u> MOTION for Partial Summary Judgment. Motions referred to Cecilia M. Romero. Signed by Judge Ted Stewart on 12/5/2024. (cg) (Entered: 12/05/2024)
12/06/2024	<u>204</u>	REPORT AND RECOMMENDATIONS re <u>181</u> MOTION for Summary Judgment and Memorandum in Support filed by Jehan Semper, <u>178</u> MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Eric Young, FNU Hill, Jordan Nielsen, Ogden City, FNU Burnem, Ogden Police, P. Thomas, FNU Bushell, <u>191</u> MOTION for Judgment on the Pleadings and Memorandum in Support filed by Jehan Semper, <u>176</u> MOTION for Partial Summary Judgment, <u>177</u> MOTION to Dismiss filed by Janet L. Yellen. See R & R for details. Signed by Magistrate Judge Cecilia M. Romero on 12/5/24. (jrj) (Entered: 12/06/2024)
12/06/2024	<u>205</u>	OBJECTION to <u>204</u> Report and Recommendations filed by Jehan Semper. (jrj) (Entered: 12/09/2024)
02/19/2025	<u>206</u>	MEMORANDUM DECISION AND ORDER ADOPTING REPORT AND RECOMMENDATIONS - It is therefore ORDERED that the Magistrate Judge's December 6, 2024, Report and Recommendation (Docket No. 204) is ADOPTED IN FULL. See Order for details. Signed by Judge Ted Stewart on 2/19/25. (jrj) (Entered: 02/19/2025)
02/20/2025	<u>207</u>	JUDGMENT- IT IS ORDERED AND ADJUDGED that Defendants' Motions to Dismiss are granted, and this action is dismissed. Case Closed. Magistrate Judge Cecilia M. Romero no longer assigned to case. Signed by Judge Ted Stewart on 2/20/25. (jrj) (Entered: 02/20/2025)
02/21/2025	<u>208</u>	NOTICE OF APPEAL as to <u>207</u> Judgment, <u>206</u> Memorandum Decision,, Order Adopting Report and Recommendations, filed by Jehan Semper.

		Appeals to the USCA for the 10th Circuit. Fee Status: Not Paid. Filing fee \$ 605. (jrj) (Entered: 02/21/2025)
02/21/2025	<u>209</u>	Transmission of Preliminary Record to USCA re <u>208</u> Notice of Appeal. (Attachments: # <u>1</u> Appendix)(jrj) (Entered: 02/21/2025)
02/21/2025	<u>210</u>	USCA Case Number CaseAppealed to Tenth Circuit Case Number 25-4022 for <u>208</u> Notice of Appeal filed by Jehan Semper. (jrj) (Entered: 02/21/2025)
09/05/2025	<u>211</u>	MANDATE of USCA as to <u>208</u> Notice of Appeal filed by Jehan Semper. According to the USCA the decision of the USDC for the Dist of UT is Affirmed. Judgment included with mandate: Yes. (Attachments: # <u>1</u> Mandate letter)(jrj) (Entered: 09/05/2025)

PACER Service Center			
Transaction Receipt			
10/27/2025 14:16:55			
PACER Login:	js315legal	Client Code:	
Description:	Docket Report	Search Criteria:	1:22-cv-00070-TS
Billable Pages:	20	Cost:	2.00

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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<p>JEHAN SEMPER, Plaintiff, v. JANET L. YELLEN, Secretary of the United States Department of the Treasury, et al., Defendants.</p>	<p>MEMORANDUM DECISION AND ORDER ADOPTING REPORT AND RECOMMENDATION  Case 1:22-cv-70 District Judge Ted Stewart Magistrate Judge Cecilia M. Romero</p>
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This matter is before the Court on the Magistrate Judge's Report and Recommendation<sup>1</sup> regarding motions to dismiss filed by Defendant Secretary Janet L. Yellen;<sup>2</sup> and Ogden City, Ogden Police, Chief Eric Young, Officer P. Thomas, Officer Jordan Nielsen, Officer Bushell, Officer Hill, and Officer Burnem ("Ogden Defendants").<sup>3</sup> Three motions from Plaintiff Jehan Semper also remain unresolved: a Motion for Partial Summary Judgment,<sup>4</sup> a Motion for Summary Judgment,<sup>5</sup> and a Motion for Judgment on the Pleadings<sup>6</sup> ("Plaintiff's Motions"). For the reasons discussed below, the Court will adopt the Magistrate Judge's Report and Recommendation in full.

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<sup>1</sup> Docket No. 204.

<sup>2</sup> Docket No. 177.

<sup>3</sup> Docket No. 178.

<sup>4</sup> Docket No. 176.

<sup>5</sup> Docket No. 181.

<sup>6</sup> Docket No. 191.

The Plaintiff filed her original Complaint on May 24, 2022.<sup>7</sup> The case was subsequently referred to the Magistrate Judge under 28 U.S.C. § 636(b)(1)(B).<sup>8</sup> After filing multiple amended complaints, Plaintiff filed the Operative Complaint on April 1, 2024.<sup>9</sup> The Magistrate Judge issued a Report and Recommendation on December 6, 2024.<sup>10</sup> Plaintiff timely filed an objection to the Report and Recommendation on December 6, 2024.<sup>11</sup>

The Magistrate Judge recommends granting Secretary Yellen's Motion to Dismiss because Plaintiff did not exhaust her administrative remedies, resulting in a failure to state a claim. The Magistrate Judge also recommends granting the Ogden Defendants' Motion to Dismiss. Accordingly, she recommends that the Court deny Plaintiff's motions as moot.

The Court reviews a Report and Recommendation de novo.<sup>12</sup> "In order to conduct a de novo review a court 'should make an independent determination of the issues; it is not to give any special weight to the prior determination'"<sup>13</sup> "The district judge is free to follow a magistrate's recommendation or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew."<sup>14</sup>

The Court has carefully reviewed and considered the record and pleadings in this case, along with the Report and Recommendation. For the reasons explained by the Magistrate Judge,

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<sup>7</sup> Docket No. 4.

<sup>8</sup> Docket No. 9.

<sup>9</sup> Docket No. 174.

<sup>10</sup> Docket No. 204

<sup>11</sup> Docket No. 205; *see* 28 U.S.C. § 636(b)(1)(C) (stating that party has 14 days after service to object to a Report and Recommendation).

<sup>12</sup> FED. R. CIV. P. 72(b)(3).

<sup>13</sup> *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967)).

<sup>14</sup> *Id.* (quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976)).

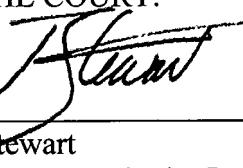
the Court agrees with the Magistrate Judge and will accordingly adopt the Report and Recommendation in full.

It is therefore

ORDERED that the Magistrate Judge's December 6, 2024, Report and Recommendation (Docket No. 204) is ADOPTED IN FULL.

DATED this 19th day of February, 2025.

BY THE COURT:



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Ted Stewart  
United States District Judge

# United States District Court

## District of Utah

JEHAN SEMPER,

Plaintiff

### JUDGMENT IN A CIVIL CASE

v.

JANET L. YELLEN, Secretary of the United  
States Department of the Treasury, et al.,

Case #1:22-cv-00070-TS-CMR

Defendants

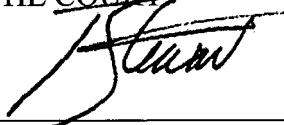
#### IT IS ORDERED AND ADJUDGED

that Defendants' Motions to Dismiss are granted, and this action is dismissed.

February 20, 2025

*Date*

BY THE COURT:

  
Ted Stewart  
United States District Judge

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

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JEHAN SEMPER,  v.  JANET L. YELLEN et al.,	Plaintiff,  Defendants.	ORDER RESTRICTING FILINGS  Case No. 1:22-cv-00070-TS-CMR  Judge Ted Stewart Magistrate Judge Cecilia M. Romero
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Thirteen motions are currently pending in this case, ten of which were filed by Plaintiff. In order to allow the court to resolve Plaintiff's multiple requests for relief, the court hereby notifies Plaintiff that **the court will not accept any new motions or filings as of the date of this order. Any document that is filed will be lodged and will not be considered.** Once the existing motions have been decided, the court will, if needed, lift the ban on filings.

IT IS SO ORDERED.

DATED this 5 May 2023.

  
Magistrate Judge Cecilia M. Romero  
United States District Court for the District of Utah

Jehan Semper  
1916 Pike Pl Ste 12 #1372  
Seattle, WA 98101  
jehan.semper@gmail.com  
929.266.5764

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U.S. DISTRICT COURT

page 1 of 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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Jehan Semper, Pro Se Plaintiff | **PLAINTIFF'S MOTION FOR SANCTIONS AGAINST VEXATIOUS RULE 34 RESPONSE FROM YELLEN FAILURE TO TRANSMIT PDF TEXT LAYER**

v.

Yellen, et al.  
Defendant(s)

CASE 1:22-CV-00070-TS

JUDGE STEWART, T

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**1. SUMMARY**

(a) Yellen's Rule 34 Response consists of more than 12,000 PDF files. As of this day, it is Plaintiff's belief that Yellen's catalog, in its entirety, is neither indexed nor text searchable because the PDFs do not include a text layer. A PDF with no text layer is an image. The only way to read an image is to actually read the image. It is not reasonable to believe that anyone would literally read 12,000 images, but that is the only method of reading the files Yellen produced (Exh 41A, **USA-RS-00029140, USA-RS-00029141**).

(b) **IMPORTANT:** On the basis of personal and professional experience, Plaintiff tells the court, it is possible that the court's document processing could perform OCR Optical Character Recognition and add a text layer to any PDF it uploads to ECF/PACER. With that being said,

understand that it is Plaintiff's belief that Yellen's "failure" was directed at Plaintiff in a sinister way, because it is likely that Yellen's treachery and "failure" would not be obvious to anyone once Plaintiff completes a filing with the court. Do you see? If the court would like to receive **USA-RS-00029140**, **USA-RS-00029141** by email to confirm their condition, Plaintiff is willing to do that.

(c) It is Plaintiff's belief that Yellen's failure to transmit the text layer of those 12,000+ PDFs is an attempt to fatally disadvantage Plaintiff in her effort to receive justice from the court because **the evidence of Yellen's wrongdoing is in the "images" Yellen was loath to index and make searchable**. See.

(d) Plaintiff would like to make certain the court understands: **Plaintiff's professional experience and blessings of the God of Israel are the reason she was able to neutralize Yellen's evil**. See (*Exh 41A, Plaintiff's Eleventh Affidavit*) filed in tandem with **MOTION**.

## 2. DETAILS

(a) **Inexcusable**. Yellen's failure is egregious, inexcusable and most likely deliberate because it is common knowledge among those who work with PDF files, such as Yellen's counsel, creating a searchable PDF with a text layer is a standard option presented when creating PDF files, especially when creating large catalogs such as Yellen's Rule 34 response. Yellen knew, or should have known, that the PDF text *Semper v Yellen, et al. CASE 1:22-CV-00070-TS JUDGE STEWART, T PLAINTIFF'S MOTION FOR SANCTIONS VEXATIOUS RULE 34 RESPONSE FROM YELLEN*

layer is required when the PDFs are presented for matters such as this case. The PDF text layer is so reasonably expected within modern, mundane PDF transmission, the option to create a text layer is usually toggled “on” as standard and can only be prevented by deliberately choosing not to create the text layer.

(b) Thinly Veiled Hatred. Within the more than 6 months Yellen has squandered, there was more than adequate time to “correct” the text layer matter, but she did not. It is more likely than not that Yellen’s failure to transmit the text layer is deliberate and thus malicious and bad faith.

(c) Nasty Tricks to Shield the Guilty. Yellen knew, or should have known, the tools available to Yellen within large company mass production of such a catalog are more sophisticated than those available to Plaintiff as an individual and thus the PDF text layer ought have been transmitted.

(d) The cost of overcoming Yellen’s evil is an unjust burden on Plaintiff’s time and modest resources. Because Yellen did not transmit a text layer as reasonably expected when transmitting 12,000+ files, Plaintiff sought additional tools and software, developed processes and implemented professional skills that would not be available to the usual Plaintiff, Pro Se (Exh 41A).

(e) Yellen knew, or should have known, the natural effect of her failure to transmit the PDF text layer could result in denial of *Semper v Yellen, et al. CASE 1:22-CV-00070-TS JUDGE STEWART, T PLAINTIFF’S MOTION FOR SANCTIONS VEXATIOUS RULE 34 RESPONSE FROM YELLEN*

justice to Plaintiff purely by virtue of making the evidence inaccessible within any reasonable amount of time invested. **Yellen must not be permitted to obstruct Plaintiff in her effort to receive the justice she has diligently sought from the court.**

(f) Cost and Effort. Yellen's failure to transmit the reasonably expected PDF text layer for 12,000+ PDF files resulted in the necessity that Plaintiff invest approximately 3 days of additional work at 8 hours per day (Exh 41A, Figure 1).

(g) Yellen's Rule 34 and its IRS 20 year email is the library of the evidence in this case. Yellen's "image only" PDF library is a hardship that Plaintiff was unjustly required to mitigate and Yellen deliberately caused that hardship (Exh 41A).

### **3. FINAL THOUGHTS**

4. Yellen ought be disciplined for her failure to transmit the text layer of the more than 12,000 PDF files. Yellen knows she and her employees are guilty of Plaintiff's allegations. Yellen's failure to COMPLY with the 3/14/2022 FAD, her inexcusable delays and time wasting in this case are disgusting examples of her fundamental lack of respect and recognition of me as a human deserving of life, liberty, the pursuit of happiness and JUSTICE. Yellen's culture of hate, antisemitism and utter disregard for my rights, which Plaintiff experienced with such intensity at IRS Ogden duty station, is

*Semper v Yellen, et al. CASE 1:22-CV-00070-TS JUDGE STEWART, T  
PLAINTIFF'S MOTION FOR SANCTIONS  
VEXATIOUS RULE 34 RESPONSE FROM YELLEN*

obviously expressed by way of this "failure". Yellen said clearly, "Yeah, we did it. So what? Go fish." See.

#### **5. PRAYER FOR RELIEF**

Plaintiff prays the court sanction and chastise Yellen with:

- (a) ORDER Yellen to pay Plaintiff a punitive amount of \$15,000 or an amount appropriate for the vexatious "failure" by the court's discretion, whichever is greater, the amounts to be paid by printed check in the amount and quantity Plaintiff directs; and
- (b) ORDER Yellen to pay Plaintiff for the additional effort incurred and described (Exh 41A, Figure 1) as a result of Yellen's "failure", the amounts to be paid by printed check in the amount and quantity Plaintiff directs; and
- (c) ORDER Yellen to CEASE her bad faith attempts to disadvantage Plaintiff and deny her the justice she has sought from the court; and
- (d) ORDER additional and appropriate relief in Plaintiff's favor.

I affirm, under penalty of perjury, that I have uttered the truth.

77  
/s/ Jehan Semper  
Plaintiff, Pro Se  
12/11/2023

*Semper v Yellen, et al. CASE 1:22-CV-00070-TS JUDGE STEWART, T  
PLAINTIFF'S MOTION FOR SANCTIONS  
VEXATIOUS RULE 34 RESPONSE FROM YELLEN*

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Jehan Semper, Pro Se  
PETITIONER  
vs  
Yellen/Bessent, et al.  
RESPONDENT(S)

PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit

APPENDIX C

## DEPARTMENT OF THE TREASURY FINAL AGENCY DECISION

In the matter of

Jehan Semper v. Janet L. Yellen, Secretary of the Treasury

TD Case No. IRS-21-0461-F

This decision concerns the above referenced complaint of discrimination against the Department of the Treasury. This complaint concerns alleged violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

### PROCEDURAL CHRONOLOGY

Alleged discriminatory actions:	March 2021 – June 2021
Counselor contact:	June 1, 2021
Notice of Right to File issued:	June 30, 2021
Notice of Right to File received:	June 30, 2021
Formal complaint filed:	July 4, 2021 <sup>1</sup>
Acceptance letter issued:	July 19, 2021
Investigation completed:	December 14, 2021
Distribution of Investigative File (IF):	December 17, 2021
Request for a Final Agency Decision	December 22, 2021
Supplemental Affidavits Obtained:	February 28, 2022
Request for a Final Agency Decision:	February 28, 2022
Authority:	29 C.F.R. § 1614.110(b)

### ISSUES

**Whether Complainant was subjected to discrimination, including harassment, based on age (over 40), religion (Jewish), and in retaliation for protected activity,<sup>2</sup> when:**

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<sup>1</sup> The record shows that on the same date, Complainant filed an appeal of her termination to the Merit Systems Protection Board (MSPB), Denver Field Office, Appeal No. 202102837, Docket No. DE-315H-21-0251-I-1, which was subsequently dismissed for lack of jurisdiction on July 28, 2021. The Administrative Judge held that Complainant was terminated during her one-year probationary period and, therefore, did not have regulatory MSPB appeal rights.

<sup>2</sup> Although Complainant did not formally raise the basis of retaliation during Counseling or in her formal complaint, Complainant clearly alleged in her testimony and evidence that she believes that retaliation for protected EEO activity factored into her termination. Since a complainant is allowed to add bases of alleged discrimination at any point prior to the completion of the Report of Investigation, and there is sufficient evidence developed in the record, we will address this basis as well in the instant decision.

1. Between March 29, 2021, through June 30, 2021, management refused to accommodate her observance of the Sabbath and directed her to work an unreasonable amount of overtime, which hindered her religious observance;
2. On May 17, 2021, she received a counseling memorandum regarding excessive time allocation;
3. On June 30, 2021, she was terminated during her probationary period;
4. On several dates between March 29, 2021, through June 30, 2021, she was subjected to various acts of harassment, including but not limited to:
  - A. Her manager described her religious practices as "ridiculous";
  - B. Her manager deliberately provided her with inaccurate training and instructions related to reporting time and attendance;
  - C. On May 24, and May 26, 2021, respectively, while walking home from work, she was harassed by the Weber Sheriff's Office and Ogden Police, which she alleged was initiated by IRS employees;
  - D. She was disproportionately scrutinized regarding daily activities, time reporting, and operator statistics; and
  - E. Her manager tried to coerce her into a schedule change rather than accommodate her religious observances.

## BACKGROUND

On March 29, 2021, Jehan Semper (Complainant) began her position as a Data Entry Clerk (Transcriber), GS-0356-04, for Data Conversion, Internal Revenue Service (IRS or the Agency) in Ogden, Utah. She named numerous Agency officials as responsible for the alleged harassment and discrimination between her start date and her termination on June 30, 2021. Her allegations primarily concern: first-level manager (herein S1), second-level manager/Department Manager (herein S2), Training Manager (herein TM), On-the-Job Instructor (herein OJI), third-level manager/Operations Manager (herein S3), and fourth-level manager/Acting Field Director (herein S4). Investigative File, Volume 1, pp. 270-75 (IF1, 270-76).<sup>3</sup>

Complainant indicated she was age 47 at the time of the events. None of the management officials indicated an awareness of Complainant's age prior to her termination. S1 guessed Complainant was around age 40. S2 guessed she was in her 30's. TM guessed she was in her late 20's/early 30's. OJI guessed age 25 to 30. Complainant stated that her age is published on the internet and that she had a discussion with S2 on April 8th that indicated she was beyond a certain stage associated with women over 40 years old.<sup>4</sup> Complainant stated that from the start of her employment, she clearly made known to her supervisors that she was of the Jewish

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<sup>3</sup> All citations are to the three-volume Investigatory File (IF), unless otherwise noted. Volumes 1, 2, and 3 are denoted by IF1, IF2, and IF3. Page citations refer to the Adobe PDF page numbers on the top of the PDF files, not necessarily the Bates numbers on the bottom.

<sup>4</sup> In a conversation with S2 on April 8, 2021, Complainant states she acknowledged being "beyond menopause." IF1, 277.

faith and practiced Jewish observances, which her supervisors acknowledged. IF1, 281, 306; IF2, 176, 257, 286; IF3, 335.

S1 (age 57) stated she is an active member of the Church of Jesus Christ of Latter-Day Saints (LDS). S2 (age 55) stated she also is a member of LDS. TM (age 39) stated she is Baptist. OJI (age 34) stated he is atheist. IF2, 176, 257, 286; IF3, 335.

***Claim 1: Between March 29, through June 30, 2021, management refused to accommodate her observance of the Sabbath and directed her to work an unreasonable amount of overtime, which hindered her religious observance.***

Complainant began working for the Agency on March 29, 2021, with a 40-hour per week tour of duty (TOD), eight hours per day, on the “swing shift” of 4:00 pm until 12:30 am. As background, Complainant explained that Jewish Sabbath starts just before sunset on Friday and continues until after sunset on Saturday. She stated that during these hours, her religion instructs her to abstain from working (i.e., performing tasks with the goal of earning wages) and traveling, and encourages her to observe Sabbath with other Jews, which means traveling to Salt Lake City or beyond. This requires her to begin traveling to Salt Lake City or beyond before the start of her 4:00 pm TOD to make sure she arrives at the place where she will spend Sabbath before the sun sets on Friday. She explained, “Thus, to perform complete Jewish Sabbath observance, in the company of Jews appropriate for my level of Jewish practice, I am instructed to abstain from working on Friday.” She explained that due to COVID, she has become accustomed to observing Sabbath in solitude, which does not require her to travel to Salt Lake City or beyond, and merely requires that she abstain from work and conduct all activities at home or near to home during the Sabbath hours. IF1, 287-88.

On April 1, 2021, Complainant emailed TM and S1 a request to work Sunday through Thursday, so that she can “properly observe Sabbath on Friday and Saturday.” She also offered to consider scheduling work earlier on Friday to allow her to leave in enough time to observe the Sabbath. She submitted an Alternative Work Schedule (AWS) Request form with four TOD options to accommodate her religious observance:

1. Sunday – Thursday 4:00 pm to 12:30 am (40 hours per week);
2. Monday – Thursday 4:00 pm to 12:30 am (32 hours per week);
3. Monday – Thursday 4:00 pm to 12:30 am, Friday 4:00 pm to 8:00 pm (36 hours per week, she noted this schedule “would work for summer”);
4. Monday – Thursday 4:00 pm to 12:30 am, Friday 11:00 am to 3:00 pm (36 hours per week) .

IF1, 281-82; IF2, 213-14.

Complainant stated that despite meeting for an hour with S2 on April 8, 2021 and being “interrogating” by S2 regarding her level of Jewish observance, S2 did not broach the topic of the above April 1 Sabbath accommodation schedule that Complainant saw sitting “unactioned” on S2’s desk. IF1, 283, 300-01, 306-08.

On April 14, 2021, Complainant submitted a second AWS Request form to S1 with three new possible schedule options:

1. Monday – Thursday 9:30 am to 8:00 pm (“4/10” schedule, 40 hours per week);
2. Monday – Thursday 11:30 am to 8:00 pm, Friday 4:00 pm to 8:00 pm (36 hours per week);
3. Monday – Thursday 11:30 am to 8:00 pm, Friday 11:00 am to 3:00 pm (36 hours per week).

IF1, 884; IF2, 215 (April 14 AWS form).

On April 14, 2021, S1 responded that she would submit the AWS Request to S2, who would then elevate it to S3 for a response. Complainant stated that in the weeks after submitting her AWS requests, she and S1 had multiple conversations about when management would respond to her requests. She paraphrased S1’s Skype and email communications during this timeframe as, “I don’t know what’s taking so long . . . sometimes things are slow around here . . . Your request(s) require a PAR which can take a while, there are a lot of things going on with internal processes that you don’t understand, be patient . . .” IF1, 313, 420, 884.

On April 26, 2021, while awaiting a response from management to her AWS requests, Complainant emailed S1 that she would like to use 8 hours of earned compensatory (comp) time to cover leave on Friday, April 30, to observe the Sabbath. S1 responded that this should work, and Complainant can either end the day at 8:00 pm (and use four hours) or take the whole day off. IF2, 246.

In an April 28, 2021, email to S1, Complainant communicated that her goals are to ensure she can observe Sabbath properly and to make sure she can use public transportation to and from work. She inquired whether there are other options that she has not yet considered. IF1, 457-58.

S1 responded to Complainant that switching to a “straight day shift,” i.e., a regular five-day 8-hours per day schedule with a start time of 5:00, 6:00, or 7:00 am, would be simpler and faster than getting an “unusual” AWS approved. She noted that if a day shift is requested as “a religious preference, they would have to approve it.” IF1, 457.

On April 29, 2021, Complainant emailed S1 (with a cc to S2) that she would like to implement a daytime TOD, from 7:00 am to 3:30 pm. She wrote that, “this schedule would naturally accommodate Jewish Sabbath observance and work all year[,] while also providing the opportunity to utilize public transportation at start and complete time. With that in mind, 7am to 3:30 pm would certainly be a religious preference.” IF1, 456.

On April 29, 2021, S2 responded to Complainant’s request that Complainant should be able to start a daytime schedule by the beginning of the next pay period. She noted that part-time is a possibility as well that many people use, such as two to four days per week on an 8-hour shift or a shortened shift. She wrote that Complainant would need to fill out a “shift change form” (not an AWS form) to switch to day shift and/or to go part-time. IF1, 451.

On April 29, 2021, Complainant responded requesting the proper form and indicating that "in the best scenario," she would not have to work on Fridays at all, to ensure that public transportation is always an option, and her Sabbath observance is not compromised. IF1, 450.

On April 29, 2021, S1 emailed Complainant a document titled, "Request for Shift Reassignment" (herein Shift Reassignment form). Complainant responded with uncertainty as to whether this was the appropriate form for her type of request (for a change to alleviate undue hardship) and whether she would agree to sign it. She also wrote that she would prefer to have a definitive response to one or both of her April 1 and April 14 AWS requests, before creating additional requests. She also requested an interim accommodation - to "eliminate the undue hardship" – of informally being allowed to start and end work earlier. IF1, 459-60.

On or about April 30, 2021, S1 brought the April 14 AWS Request form back to Complainant with the box marked for, "Disapproved," and showing that "Approved" had been initially marked and then crossed out. The "unactioned" April 14 request had several sticky notes on it signed by S2 with a handwritten message indicating that the organization is not currently approving 4/10 AWS, and that per the National Agreement (collective bargaining agreement between the IRS and the National Treasury Employees Union (NTEU)), Data Conversion only considers AWS requests in January and July, and even then, it only approves a certain percentage of employees based on Entry on Duty date order. If Complainant submits the Shift Reassignment form to switch to a day (or part time) shift, it would be effective by May 23, 2021. IF1, 420, 774 (copy of sticky notes), 180 (Shift Reassignment form).

On April 30, 2021, S1 emailed Complainant to inform her that management does not permit an AWS request per se until after the probationary year (including a 4/10 or 5/4/9 schedule). She then offered to bring Complainant a copy of the Shift Reassignment form to switch to day shift. IF1, 459.

Complainant averred that within days of receiving S1 and S2's "encouragement" to complete the Shift Reassignment form, S1 came to her desk with a printed copy of the form, and she sat waiting for Complainant to fill it out. Complainant felt pressured and would not agree to sign the form. She believes that the form was designed to disadvantage her by falsely indicating that she was unavailable for her TOD (it has a line for the "Manager Signature for Unavailable Employee"). IF1, 180, 420-21.

On May 7, 2021, Complainant emailed S1 to confirm instructions for using 4 hours of comp time to leave four hours early on the following Fridays, May 14, and May 21, 2021. She wrote that, "it is likely that I will continue this methodology for the entire season. IF1, 892-93.

On May 13, 2021, Complainant emailed S1 (cc to S2), to state that she has 4.25 hours of annual leave, and 8 hours of comp time, which she would like to use for Friday, May

14, 2021. She wrote that SETR is showing that she “can take just under 8 hours to cover tomorrow with no need for approval.” She inquired, “what are the steps to accomplishing this goal?” S1 responded that Complainant could use 8 hours of comp time for Friday, May 14. S1 said that moving forward, Complainant should fill out a leave request form with the Friday hours that she would like to take off for the following quarter, to be submitted to S2 for approval. IF1, 543, 889.

On May 14, 2021, S2 emailed Complainant to respond to past emails concerning “time off for religious observation.” She emphasized that although Complainant can use comp time for religious observance, it still must be approved in advance by her manager, the same as with any other type of leave Complainant wishes to use. Should Complainant approve her own time off without the prior notification and approval of her supervisor, she will be marked Absent Without Leave (AWOL), and it will be considered falsification of her timecard that may result in written counseling to termination. She noted that the current year has been extra busy, and as a result, the normal four-to-six-month season will likely be extended, in which case, Complainant may use her right to voluntarily furlough if she wishes. IF1, 542-43.

Complainant asserted that S2 sent the above May 14 “hostile” email in response to her receiving approval from S1 to use 8 hours of earned comp time to fully observe the Sabbath on May 14, 2021. IF1, 313-14.

On June 23, 2021, Complainant emailed S1 to request a TOD of 20 hours per week, with two 10-hour days, not to include Friday. She noted that because she wishes to keep her 4:00 pm to 12:30 am schedule (albeit on a part-time basis), there is no need for a Shift Reassignment form. S1 responded to Complainant the same day stating that Complainant still needs to fill out the Shift Reassignment form. IF1, 36-37.

On June 23, 2021, Complainant emailed S3 and S4, with S1 copied, and wrote that the Shift Reassignment form S1 presented is inapplicable, as she has clearly communicated to S1 that she is not requesting a shift reassignment, she is merely requesting to change to a 20-hour part-time schedule. IF1, 35-36.

On June 25, 2021, S4 responded to Complainant and wrote that he spoke with S2, and she will be processing the part-time schedule request and it is not necessary to complete another form. He requested that Complainant clarify her desired TOD to complete the 20 hours since her requested schedule of working two days per week, 4:00 pm to 12:30 am, only adds up to 16 hours. Complainant responded the same day that she wishes to work from 2:00 pm to 12:30 am, which is her usual practice. IF1, 802-03.

S2 responded to Complainant and the management chain that she will approve the schedule of 4:00 pm to 12:30 am on Monday and Tuesday, and 4:00 pm to 8:00 pm on Wednesday. She wrote that she will notify Complainant if 10-hour shifts become available. She noted that the PAR will be inputted the same pay period, and Complainant will begin the new schedule starting on July 18, 2021. IF1, 801.

### *Overtime*

On April 8, 2021, S2 and S3 issued a memorandum to Complainant indicating that due to extremely high inventories in the SCRIPS (Service Center Recognition/Image Processing System) programs and insufficient volunteers working overtime, all SCRIPS Data Entry Clerks (such as Complainant) will be directed to work 10 hours of overtime per week, effective April 11, 2021. On May 27, 2021, a subsequent memo changed the number of directed overtime hours per week to five (5) hours, effective May 30, 2021. Both memos indicated that if Complainant feels she cannot work the directed overtime, she may provide a written explanation to her manager. IF1, 783-84.

On May 25, 2021, Complainant wrote to S1 that after six weeks of having performed the 10 hours of directed overtime each week, she would like to be excused from the responsibility. She wrote that it is an undue hardship as it does not leave her with enough time to sleep and prepare kosher food. On May 26, 2021, Complainant reiterated her request to S1, writing that the combination of the directed overtime, the two-hour walking commute from work to home (due to lack of public transportation at 12:30 am when her shift ends), and the lack of time to sleep and eat, is taking a toll on her health, which manifested in multiple visits to the bathroom during her TOD. On June 3, 2021, S1 informed Complainant that S2 approved an exemption for Complainant from the directed overtime due to her health concerns. IF1, 894-96.

### *Management's Response to the Allegations*

S1 stated that Complainant's original two accommodation requests were not granted because (a) the schedules requested were "mid-shifts . . . and we do not do mid-shift schedules"; (b) Complainant was a new employee in her probationary period, and probationary employees "are not granted AWS . . . until they are out of their probationary period, which lasts 1 year"; and (c) management only approves AWSs twice a year, in January and July (so she would need to wait until July). S1 stated that management offered Complainant the option of switching to the day shift, which would have allowed her access to public transportation to and from work, and would have allowed her to end work early enough on Fridays to have plenty of time for her Sabbath observance. The other accommodation offered, which she accepted, was to use earned comp time or accrued annual leave that would enable her to leave at 8:00 pm on Fridays, which was early enough to travel home in time to observe Sabbath. S1 stated that Complainant's June 25, 2021, part-time schedule request was approved as well, and would take effect on July 18, 2021. IF2, 177-79.

S1 testified that on May 26, 2021, she responded to Complainant's request to be absolved of overtime for health reasons, that she did not have to work the overtime for the rest of that current week until an answer could be obtained from S2. S1 stated that on June 3, 2021, S2 approved Complainant's request to be absolved of the overtime requirement. IF2, 180.

S2 stated that in response to Complainant's initial request for religious accommodation to observe the Sabbath, she told Complainant that she could request an AWS, as well as use comp time to cover her religious observance. She explained that she disapproved of Complainant's AWS request because one of the schedules requested was part-time (32 hours), which was not within the definition of AWS per the National Agreement Article 23, Section 6 and the other schedules were 10-hour shifts that were not feasible options due to social distancing mandates and desk availability. She stated that she provided Complainant with a formal response to her April 14 AWS Request on April 30, 2021, which is within the two pay periods required by the National Agreement, Article 23.6.A.2. S2 confirmed that in response to Complainant's April 29 email indicating she wished to start and complete her shift earlier, she offered Complainant a day shift. She also offered Complainant the option of working part-time. Complainant responded that she wished to go to the day shift, however, she never filled out the Shift Reassignment form sent to her by S1 for implementation purposes. IF2, 287.

S4 testified that on June 25, 2021, Complainant's request for a schedule change to two 10-hour days on Monday and Tuesday was approved, and a personnel action was submitted by S2. IF3, 299.

#### *Complainant's Rebuttal*

Complainant noted that S4 told S2 to approve Complainant's 10-hour/day, two-day per week schedule, but on June 25, 2021, S2 refused to approve and complete a PAR for the 10-hour/day, two-day schedule, stating that 10-hour schedules were unavailable. Complainant asserts that this is not true, as 10-hour schedules are always available for religious and/or educational schedules, as described in the National Agreement, Articles 22.3.B.2(a) and (d) (recognizing that part-time employment are particularly appropriate for older employees and students who must finance their own education and training); 23.8.D (AWS provided to employees as a reasonable accommodation for disability will not be subtracted from the number of slots allocated for AWS) and 23.9 (employer is able to establish a special tour of duty (e.g., split shifts) for educational purposes, including courses approved under Tuition Assistance Program). S2 insisted that Complainant accept a three-day per week schedule, two 8-hour days, and one 4-hour day. Complainant also argued that S1's assertion that she was not entitled to an AWS because of not having worked there for a year is "preposterous," as religious accommodation is required regardless of how long the employee has worked and is not subject to scheduling quotas. IF2, 2, 15.

Complainant stated that she decided the day shift was not right for her and she was entitled to keep her 4:00 pm to 12:30 am shift and have her Jewish Sabbath as well. She believes it was a violation for S1 and S2 to insist on changing shifts. She asserted that S1 and S2's insistence that she obtain permission every week to use comp time to cover the bare minimum time needed to arrive home before sunset, with no guarantee of approval, was unreasonable. IF2, 30, 56.

***Claim 2: On May 17, 2021, Complainant Received a Counseling Memorandum Regarding Excessive Time Allocation.***

On May 17, 2021, Complainant received an Employee Counseling Record (ECR) from S1. The ECR indicates its purpose is to memorialize S1 and Complainant's meeting that day and "on more than on[e] occasion" in the past, when S1 communicated via email and Skype with Complainant about her "excessive use of overhead/administrative codes," including 59300 (meeting time), and 59256 (IRM time). It states that S1 has informed Complainant that she can take up to .5 under code 59300 for cleaning her desk, washing her hands, and checking her email, and up to .3 under code 59256, while she is still learning the job, for checking SERP/IRM (noting this is only when she is "actively using" the IRM). More than this amount of time requires supervisory approval. S1 wrote that Complainant has also been spoken to about her production time on the computer. When she is at work, especially on overtime hours, it is critical that she is on the SCRIPS system and typing. S1 wrote that Complainant, "is a valuable employee and we are honored that you would have a desire to work here in our department." S1 closed by writing that as a probationary employee, Complainant has been given training and on-the-job coaching to enable her to succeed. But, if Complainant is not performing at the fully successful level in quality and efficiency or demonstrates unacceptable conduct, she will recommend termination of Complainant's employment before the end of her probationary period. IF1, 776-77.

On May 18, 2021, Complainant emailed S1 to communicate her disagreement with the May 17 ECR. She asserted that she was being subjected to "disproportionate scrutiny, an eagerness to chastise, punish and otherwise discourage good faith communications." She asserted that her usage of codes 59256 and 59300 is the "direct result of specific and persistent circumstances within the environment" that are not within her control. IF1, 441-42.

Complainant testified that the May 17 ECR is "nothing but lies." Complainant believes S2 directed S1 to issue the ECR in response to Complainant having been approved by S1 to use 8 hours of comp time to observe the Sabbath on Friday, May 14, 2021. Complainant denies S1's assertion that the ECR was written to memorialize S1 and Complainant's May 17 meeting and past discussions about Complainant's "excessive time allocations" and method of time reporting, for which she claims she was never previously criticized. Complainant maintains that she initiated the May 17 meeting to talk with S1 about her previous communications to S1 and S2 on May 3 and 4, 2021 (described below), concerning how "operator statistics" (herein "op stats") was consistently underreporting the time she spent on SCRIPS. Complainant explained that op stats are metrics regarding the employee's use of SCRIPS, such as time worked, number of documents transcribed, and accuracy and speed of transcribing documents, among other data. IF1, 427, 441-42.

On May 3, 2021, Complainant emailed S1 to inform her that she had worked SCRIPS that day from 2:12 pm until 4:53 pm, which is 161 minutes, but the op stats reported that she worked only 136 minutes (approximately), resulting in a 25-minute discrepancy.

She explained that this approximately 20 minutes difference could result in 80 minutes of missing time from her op stats versus what she actually worked (20 minutes omitted from every 2.5 hours, with a 10-hour workday, would mean 80 minutes missing). She requested that management uncover the technical reason for this issue and that if no technical resolution is implemented, to at least factor in this issue when viewing Complainant's time in SETR. IF1, 498-99.

On May 4, 2021, Complainant emailed S1 a summary of the statements S1 made in their discussion the previous night: S1 provided S2 with the data Complainant gathered concerning an issue with the op stats underreporting her time; there may be a technical solution, there have been similar circumstances with computing systems and programs that were eventually resolved; and in the interim, each SCRIPS program code can be time allocated within SETR to match what is actually invested rather than the verbatim numbers printed within op stats. IF1, 492.

On May 4, 2021, Complainant emailed S2 and S1, to state that she and S1 spoke about her method of recording SCRIPS op stats within SETR. She wrote that from the start of her job in Data Conversion (March 29, 2021), SCRIPS has consistently underreported the time she invests working with SCRIPS. She cited her May 3 "test" as an example, when she specifically made sure to work continuously on SCRIPS and timed her work from 2:12 pm to 4:53 pm (161 minutes), yet op stats recorded 136 minutes. Complainant noted it was her practice to report the op stats "verbatim," and then allocate the discrepant time to codes 59256 (IRM time) and 59300 (meeting time), to make obvious the op stats' underreporting of her time. (in the above example, based on 161 minutes worked, Complainant would report 136 minutes to SCRIPS (in accordance with the ops stats) and the 25 "discrepant" minutes to codes 59256 and/or 59300). She explained that S1 advised her to record SCRIPS time within SETR according to the time worked, even though this number might be significantly higher than what the op stats report showed. Complainant wrote that this is the first time she has heard of this practice, and she would like S2 to confirm that this is the appropriate practice. IF1, 496-97.

On May 5, 2021, Complainant emailed S2 and S1 to state she will complete SETR for May 3 and 4 with "verbatim data until you confirm that you would like me to change this practice." IF1, 505-06.

On May 17, 2021, Complainant emailed S1 to summarize the content of their meeting that day. Among other comments, Complainant wrote that S1 communicated that "reducing the amount of time invested in 59256 and 59300 is a goal that we ought to accomplish," and that Complainant should "communicate necessity to utilize these codes when necessary." IF1, 544.

Complainant testified that she did not follow S1's verbal instructions to report the time she actually worked on SCRIPS (rather than the op stats reported time) for fear that management would use this as a trap to claim that she was fraudulently overreporting her SCRIPS time, by claiming her logged hours are more than the op stats reports

support. Complainant believes S1 and S2's bad faith was demonstrated by their unwillingness to confirm their instructions in writing. Complainant wrote that this discrepant time issue occurred throughout the time she worked at IRS Ogden, and despite imploring S1 on multiple occasions to implement a technical solution, the issue was never resolved. IF1, 314-18, 621.

Complainant stated that during her "bizarre" May 17 meeting with S1, they spoke for approximately one (1) hour before S1 presented the ECR, at which time she indicated that she was "encouraged" to issue it, and that she told Complainant that she "added the words that say [that Complainant is] valuable and we are honored to have you." Complainant stated that when their May 17 meeting concluded, S1 knew and did not object to the fact that Complainant would continue reporting the discrepant time to 59256 and 59300. Neither S1 nor S2 ever objected or commented on Complainant's SETR time reporting and their final SETR signature and approval was always provided. Complainant testified that based on the above explanation that there was never any "excessive" time allocated to time codes 59256 or 59300; "the additional time was discrepant time from operator statistics' incessant underreporting of [her] time invested." *Id.*

#### *Management's Response to the Allegations*

S1 stated that she issued the May 17 ECR to Complainant at the instruction of S2, due to Complainant's excessive use of overhead time. She stated that she had previously spoken with Complainant about the excessive use of overhead time, yet Complainant did not improve in this area. She explained that every working day, their employees are granted .5 (half an hour) of the "meeting" time codes (990 59300) to clean their desks, view emails and prepare for their day, up to .3 of the Internal Revenue Manual (IRM) time code (990 59256) for IRM review, and .5 of the break time code (990 59320), and .1 for inputting time each day using SETR or time keeping reports (990 59330). S1 stated that Complainant often used over 1 to 1.5 hours of each of these time codes per day. She stated that when she asked Complainant why she needed so much meeting and IRM time, Complainant responded that she needed to write emails to her, which took an hour at a time to compose, and that she was reading the National Agreement or union handbook, writing letters to the Treasury Inspector General for Tax Administration (TIGTA), and looking through the intranet. IF2, 182-85.

S1 stated that Complainant claimed the SCRIPS system was miscalculating her time by indicating less time and volume than she actually worked, and that it needed to be fixed. She testified that she looked into Complainant's assertion by verifying with other employees who started at the same time as Complainant and worked under the same conditions (location, environment, computer types), and these employees' time reporting was more accurate. S1 stated that management began looking further into Complainant's time reporting because it noted that several times, she would arrive early to work, and "leads" in the area witnessed she was not working on programs but instead was on email, intranet, or other non-work-related sites. She also averred that Complainant was earning overtime hours but was not doing the work, and she

continued to earn overtime hours after asking to be excused from overtime. She further claimed that Complainant would not ask for prior authorization to conduct the non-work activities but would inform her after the fact, and then document them under the “meeting” and “IRM” time codes. *Id.*

S2 stated that Complainant was issued the May 17 ECR because she had been warned and yet persisted in allocating an above-average amount of time to the overhead time codes 990-59300 and 990-59256. She stated that in an April 30, 2021, discussion with S1, Complainant stated that she was using those codes to account for time she invested in SCRIPS and that SCRIPS does not record. S1 also informed Complainant that when working overtime, she needed to spend that time working and not on email or intranet. She stated that the average time for the rest of Complainant’s team was 2.5 hours for under 59300, and 1 hour under 59256; whereas Complainant averaged 5 hours for 59300 and 3.5 hours for 59256. [Presumably S2 is comparing their average per pay period, though she did not clarify.] Regarding the alleged underreporting of Complainant’s time, S2 stated that she contacted the main manager responsible for the incorporation of the SCRIPS system 15 years ago, who contacted the System Analyst. She stated that management was informed that the SCRIPS system is accurate in its recordation of op stats. IF2, 293-94; Supplemental Affidavit of S2, 4.

#### *Complainant’s Rebuttal*

Complainant explained how she had no good option for dealing with the circumstance of “operator statistics inexplicably under reporting [her] time.” She chose to report verbatim the op stats, and to report the discrepant time to variable time codes 59256/59300, communicate the issue to her manager, and ask her manager to provide a solution. Complainant denies that she conducted unauthorized phone calls or activities on her work computer. IF2, 8-10, 16-17, 29, 43.

#### ***Claim 3: On June 30, 2021, Complainant was terminated during her probationary period.***

The June 30, 2021, Termination Letter from S2 states that it is a notice of the decision to terminate Complainant’s employment with the IRS effective that day. The reason given for the termination: “You provided false statements when recording your hours worked on the Single-Time Reporting System (SETR),” including the following.

- On May 24, 2021, you reported working 10 hours on the SETR. According to the Workstation Operator Statistics log, you worked a total of 8 hours and 1 minute.
- On May 25, 2021, you reported working 10 hours on the SETR. According to the Workstation Operator Statistics log, you worked a total of 7 hours and 13 minutes.
- On May 26, 2021, you reported working 10 hours on the SETR. According to the Workstation Operator Statistics log, you worked a total of 6 hours and 51 minutes.
- On June 3, 2021, you reported working 10 hours on the SETR. According to the Workstation Operator Statistics log, you worked a total of 8 hours and 17 minutes.
- On June 4, 2021, you reported working 9 hours on the SETR. According to the Workstation Operator Statistics log, you worked a total of 3 hours and 54 minutes.

The Termination Letter concludes that Complainant's "actions have resulted in management completely losing confidence in your integrity and ability to perform your IRS duties in an ethical, honest, and trustworthy manner." IF1, 879-80.

Complainant averred that the Termination Letter consists of "wholly false allegations," and insists that she has "always reported honest, correct, accurate time which is approved and signed by management." Complainant pointed out that the timing of the Termination Letter came soon after management learned of her engaging in Equal Employment Opportunity (EEO) Counseling, the same day she received a Notice of Right to (formally) File a Discrimination Complaint. The Counseling Report indicates that S1 and S2 were first notified of Complainant's informal EEO complaint on June 15, 2021. The record indicates that management drafted Complainant's termination letter the following day on June 16, 2021. Complainant asserts that S2 knew that Complainant received the Notice of Right to File a Discrimination Complaint letter on June 30, 2021, and later that day, at approximately 8:00 pm, S2 presented to Complainant the Termination Letter. The EEO Counseling Report confirms that on June 30, 2021, the Counselor notified S1 and S2 of the issuance of the Notice of Right to File to Complainant. IF1, 16, 20 (Counseling Report), 326, 375; IF2, 403 (draft Termination Letter dated July 16, 2021).

Complainant expressed that the Termination Letter was issued within days of S4 instructing S2 on June 25, 2021, to grant Complainant a 20-hour/week schedule to accommodate her Sabbath observance. She also averred it was a retaliatory response to her June 29, 2021, email to S4, in which Complainant went into detail explaining how “[S1] and her cohorts” provided her with “deleterious verbal instructions to improperly inflate the hours attributed to SCRIPS within [her] time reporting,” so that they could then use Complainant’s time reporting as a basis to terminate her (simply for following the verbal directives S1 provided). Complainant complained about the “ill-intentioned and unjust” May 17 ECR and requested S4’s help with making certain her employee file remains unblemished by the effect of inaccurate and deceptive training and time reporting instructions – instructions that S1 and S2 refused to confirm in writing, and which Complainant believes “are an expression of religious hatred, [and are] discriminatory and retaliatory.” IF1, 326, 375, 829-31 (June 29 email to S4).

Complainant asserts that the Agency is falsely claiming that the hours reported for each TOD are comprised of op stats log hours alone (coded as 470 and 480) and that it knows that the correct number of hours for each TOD also includes time allocated to code 990 (non-ops stats time codes). "Thus, the operator statistics are always less than the number of hours reported for the [TOD] and that is normal." According to Complainant, the correct number of hours for each TOD is the sum of time coded as 470, 480, and 990; but the Agency deceptively implied that the total hours must match the op stats log hours. Complainant asserts that both S1 and S2 signed the SETR transcript for pay period 11 (which includes the dates cited above May 24 – June 4, 2021) on June 5, 2021, and June 7, 2021, respectively. Before the final signature is added, both S1 and S2 had ample time to object to or comment on the op stats and

time reporting. Complainant states that the June 30, 2021, Termination Letter was the first and only time she was ever made aware that there was a problem regarding her time reporting for pay period 11. IF1, 329-30, 922.

The SETR Time and Attendance Record for pay period 11 (covering the dates of May 23, 2021, through June 5, 2021) shows that it was signed by S1 and S2 on June 5 and June 7, 2021, respectively. IF1, 958.

Complainant asserted that her time on June 4, 2021, demonstrates the falsehood of the Agency's statement that she clocked 9 hours, but op stats showed less than 4 hours. She explained that the Agency ignored the 3.7 hours of earned comp time (to leave early on Friday for the Sabbath) that she used that day, which, when combined with the 3.54 hours of op stats, regularly approved overhead time, and considering the underreporting of her time (allocated to overhead time), do not imply improper time reporting. IF1, 927, 958 (SETR showing 3.7 attributed to comp time).

#### *Management's Response to the Allegations*

S1 testified that the reason for Complainant's termination was excessive use of overhead times and "not enough proper time on the system [(SCRIPS)] for what she was getting paid for." She was getting paid for hours that she was using for personal unauthorized activities., e.g., she never asked if she could use extra time to write emails, explore the intranet, or read through the National Agreement for one to two hours per shift. S1 stated that on June 30, 2021, because Complainant declined the meeting with S2 and S3B, they went to her work area with security officers and pulled her aside to explain that she was being terminated. Complainant refused to sign the papers and was escorted off the property by the security officers. IF2, 190-91.

S2 stated she was responsible for the decision to terminate Complainant's employment during her probationary period on June 30, 2021. She quoted the Termination Letter to explain her reasons for terminating Complainant. She stated that Complainant was counseled for her time reporting on April 20, April 27, April 30, May 7, May 11, May 13, May 17, May 21, and June 4, 2021, including verbally, in written form (May 17), and via Skype (May 21). IF2, 297; Supplemental Affidavit of S2, 5.

#### *Complainant's Rebuttal*

In her rebuttal, Complainant noted that the day before receiving the Termination Letter, she received a "fully successful" performance rating, which made no mention of the "false allegations" from the June 30, 2021, Termination Letter, nor did it contain any negative comments. The performance rating "would have been the place to document and communicate factual allegations and performance matters, but [it had] no such allegations." IF2, 2-5.

The record contains a performance appraisal dated June 29, 2021. Complainant was rated "fully successful" on three out of the five Critical Job Elements, and apparently (it

is blurry and difficult to read) an overall average score of 3.2. On Element V, Business Results-Efficiency, Complainant received a 2 (apparently out of 5). Complainant believes this element rated her speed of transcribing (but she is not sure because there was no discussion of the rating). The performance evaluation is unsigned by management, and there is no overall rating given. On June 29, 2021, S1 sent an email to her employees (including Complainant) informing them of the Ad Hoc Reviews she conducted, noting that it is "a short evaluation . . . based on [their] monthly IPRs," and asking them to sign the review in HR Connect. Complainant wrote a note to herself that she refused to sign because of the 2 rating on Business Results-Efficiency, the average 3.20, and "scale and rating description required." IF1, 852-54; IF2, 24-25.

Complainant averred that despite being continuously subjected to false accusations, there were no incidents of S1 or S2 objecting to her time reporting, nor any communications regarding any alleged "false statements." Complainant pointed out that the Termination Letter accused Complainant of "false statements" while the ECR accused her of "excessive time" allocated to overhead. Complainant's Rebuttal to S2's Supplemental Affidavit, 7.

***Claim 4A: Her manager described her religious practices as "ridiculous."***

Complainant testified that S1 described her religious practices as "ridiculous" when the two were having a Skype conversation. [The alleged Skype conversation does not appear in the record.] Complainant asserts that the referenced communication involved her telling S1 that the IRS Ogden work environment "is saturated with conflicting information, instructions and directives." She stated that she, therefore, uses her "religious education and its methods" to make decisions about what is true and correct, and these methods include, "observation, analysis, direct communication with those presented as 'authority,' ask questions . . ." She stated that S1 responded plainly, "Well, that's just ridiculous," and then quickly said words to the effect of, "Oh, but that's just me. I usually just skate through life. I don't think about things so much." Complainant avers that S1 told her on multiple occasions, including their first meeting on April 9, 2021, that the transcriber job was "easy," and she should not sweat it or take it so seriously. IF1, 337-38.

Complainant stated that during a meeting with S1 on May 17, 2021, at the time S1 presented the ECR to Complainant (claim 2), she asked S1 to confirm her previous suggestion "that [she] just go with the flow." S1 quickly confirmed that that is what she would like Complainant to do. Complainant testified: "It was [at] that time that [S1] told me plainly to stop performing my Jewish religious analysis and just do what she told me to do . . ." S1 then communicated to Complainant that the reason she and others have successfully worked there for many years (15 years herself) is not because of performance or "numbers," (i.e., op stats) but because of "having friends." Complainant understood S1 as communicating: "Do you want to be Jewish, or do you want to work here?" and Complainant understood that she was communicating that the effort Complainant was investing to make sure her op stats are correct is a waste because all that matters is if the managers like you. Complainant further understood that S1 was

communicating that the ECR was a threat of further punishment if Complainant continues to complain about instructions for tracking her work, time reporting, unauthorized viewing of her personal information (described below) or the like. Complainant stated the conversations like the one above occurred within Skype or in private meetings in S1's workspace, without any witnesses. IF1, 338-40.

*Management's Response to the Allegations*

S1 denied having said that she thought Complainant's religion was "ridiculous," and stated, "those words would have never been something that [she] would say." She contended that she once said that she, "thought it was interesting, that [Complainant] being from New York, with what appeared to be a strong educational background, that she would come to a state (Utah) which is predominantly LDS, and her being Jewish must be a bit of a challenge." IF2, 195.

***Claim 4B: Her manager deliberately provided her with inaccurate training and inaccurate instructions related to reporting time and attendance.***

Complainant stated that S1 and S2 provided inaccurate training and instructions and/or condoned malevolent practices such as deliberately providing inaccurate training instructions by way of a colleague who trained new employees (herein the Trainer). Complainant averred that S2 provided inaccurate time reporting instructions and/or condoned malevolent practices such as deliberately providing inaccurate time reporting instructions by way of S1. IF1, 340-48.

Complainant contends that the Trainer specifically gave her inaccurate training instructions on name control, CCC (Computer Condition Codes) and receive dates. She contends that on or about June 20, 2021, she implemented the Trainer's "inaccurate training instructions" and confirmed they created errors. Complainant adds that on or about June 21, 2021, in response to S1's message regarding Complainant's errors, Complainant communicated that they were "solely the result of inaccurate training." Complainant avers S1 responded she did not know the reason for such errant instructions being given and confirmed that the instructions should not be followed. Complainant further asserts that once she ceased following the inaccurate training instructions, her accuracy returned to approximately 100%. *Id.*

Complainant testifies that on multiple occasions, S1 instructed her to report manual time, instead of, and in contradiction to, op stats time (as explained above). *Id.*

*Management's Response to the Allegations*

S1 testified that Complainant was taught in her primary training how to record her time and attendance with a group of almost 20 new hires, and she was the only one who seemed to struggle with the instructions. S1 stated that she was not involved in the training, but the training information was the same information that has been taught to many new hire classes and Complainant was the first one she is aware of who

struggled with understanding the directives. She stated that she tried to show Complainant the way she (S1) was taught to record her time and attendance, but Complainant said that her way made things more confusing and time consuming for her. IF2, 196.

S1 denies that Complainant received inaccurate training and asserted that Complainant simply did not understand and made things far more complicated than was necessary. S1 stated that TM reported to her that during the first night of formal training, the Trainer was upset and crying because Complainant refused to listen and was argumentative. She stated that none of the other 20 new employees in the same training as Complainant had any problems with what was being taught, including three other employees who worked under her. She recalled one time when Complainant received several errors on documents that she felt had the incorrect information, but S1 believes that Complainant "simply did not pick up the correct information in the correct way," despite having worked there for several months at that point. If the training was inaccurate, then Complainant should have received "many more errors than one after several weeks" on the job. IF2, 197-98.

S1 stated that when Complainant told her about the discrepancy between her "manual" time spent with SCRIPS and the ops stats, S1 advised her to write down her time spent, the batches of work and number of documents processed on a back-up sheet used in their department, "and then at the end of the day, verify it with her computer generated op stats, and if the op stats or the system were not accurate, then she could use her manual counts instead of her computer op stats." IF2, 196.

***Claim 4C: On May 24, 2021, and May 26, 2021, respectively, while walking home from work, she was harassed by the Weber Sheriff's Office and Ogden Police, which she alleged was initiated by IRS employees.***

Complainant explained that there were two possible incidents of inappropriate viewing of her personally identifiable information (PII) on April 6 and April 23, 2021, which she reported to the OJI as a possible precursor to UNAX (unauthorized access, attempted access, or inspection of taxpayer records). (The April 6 incident is described below, *infra* p. 22.) On April 23, 2021, in a Skype conversation with the OJI in which Complainant reported the PII incidents and requested that the OJI take appropriate steps to address the matter immediately, the OJI responded with anger and with what Complainant understood as a threat to direct S2's negative attention at her, so as to escape discipline for not addressing her PII report. Just after the OJI made the threat, at approximately 1:00 am on April 24, 2021, as she began her two-hour walking commute home from work, the Weber County Sheriff Deputy harassed her. IF1, 291, 301, 625.

The April 23, 2021, Skype discussion between Complainant and the OJI indicates that Complainant was very concerned about someone she saw (she did not provide the name) carefully reading the printouts of her op stats at the printer. The OJI tried to convince her that it was "benign," and the person probably meant to see if it was theirs.

Complainant wrote messages stating that this behavior must be addressed immediately otherwise it “will grow to include other unacceptable behavior,” that “maybe we need a refresher on the principles of UNAX,” and “I am messaging you to make sure you know,” and she “will message [S1] and [S2]” about the matter as well. The OJI responded, “I shall address this occurrence and your behavior to [S2].” IF1, 550-51.

Complainant testified that on May 25, 2021, she sent multiple emails to senior management which consisted of a massive archive of communications related to her experiences at IRS Ogden and formally reporting “incident(s) she believed to be discriminatory and/or inspired by discrimination.” Complainant declares that a few hours after communicating the May 25 message, while walking home at approximately 2:00 am on May 26, 2021, she was harassed by the Ogden Police. She stated that two Ogden Police officers maliciously cited her for an infraction that is not usually enforced (apparently for walking in the street rather than on the sidewalk), and minutes after, an Ogden Police officer in a SUV blocked her path, with lights flashing, horns blaring, and shouting at her in the loudspeaker. IF1, 349-63; IF2, 80, 96.

Complainant stated that on May 27, 2021, during her walk home from work in the early hours, she was physically injured by an Ogden Police officer, who maliciously arrested her for an infraction that is not usually enforced (again for walking in the road), and she was unlawfully detained by multiple Ogden Police officers. She stated that when she was taken to the Weber County facility, she was placed face down in a room with a swastika carved into the window; she was interrogated with personal questions and was forced to shiver in the cold room for over six hours with no food, water, or bathroom, and her religious head coverings were confiscated. She believes the three incidents were related to her communications regarding inappropriate viewing of her PII on April 24, 2021, and reporting discrimination at IRS on May 24, May 25, and May 26, 2021. She further stated she believes “IRS employees colluded and conspired with Weber County Sheriff and Ogden Police to harass, injure and maliciously arrest me because they wanted to intimidate me and deter me from pursuing my complaints regarding the inappropriate viewing of my personally identifiable information and religious discrimination at IRS Ogden . . .” *Id.*

#### *Management's Response to the Allegations*

The OJI (he was the SCRIPS trainer for new hires) testified that he received Complainant’s email regarding inappropriate viewing of her PII. He assured her that it was likely benign, as having a shared printer would inevitably result in someone accidentally picking up someone else’s op stats sheet. He told Complainant that no one would know what to do with the information if it did not pertain to them anyway, so it is not a “big deal.” He asserted that they work in a “cohesive work-environment where very seldom is anyone out to get anyone else. The document was picked up by accident, and no malicious intent was present.” He denies any knowledge of involvement by any IRS employees in the incident with the Weber Sheriff’s Deputy on April 24, 2021, or the Ogden Police on May 24, 2021. IF3, 336-37.

S1 maintains that she was not involved with the Weber County Sheriff's Office concerning Complainant and she has never contacted the police for the purpose of harassing Complainant. She also testified: "I do not know of anyone who had any reason to contact the police for any reason especially not for the purpose of harassing this Complainant, unless they saw that she was doing something that was questionable and called after they left work that night." IF2, 198-99.

S1 stated that on April 23, 2021, Complainant reported inappropriate viewing of her PII. When she asked Complainant what team the other person was on so it could be addressed with that person's manager, Complainant would not be specific, but she wanted management to speak to everyone about it. She stated that she informed the other area managers and asked each of them to speak to their employees and remind them that UNAX violations are not tolerated. *Id.*

S2 maintains she was not involved with the Weber County Sheriff's Office incident, nor has she had any contact with their Office. She also testified she is not aware of any other IRS employee(s) who communicated with the Weber Sheriff's Office or Ogden police concerning Complainant. S2 stated she received Complainant's April 23, 2021, email in which she reported inappropriate viewing of her PII. She acted in response to Complainant's email by reiterating to her managers that employees should set up a pin number to use to print and that no one else should be looking at anyone else's papers or printouts. S2 also noted that Complainant's op stats are listed under her SEID (Standard Employee Identifier), so unless someone knows her SEID, they would not know to whom the papers belonged. IF2, 302-03.

### **Complainant's Rebuttal**

Complainant noted that she is 47 years old; she has lived in many cities and states and the only negative incidents she has had with the law occurred while working at IRS Ogden; and each incident occurred within hours after her communications reporting events at IRS Ogden that could be considered “wrongdoing.” IF2, 28.

**Claim 4D: She was disproportionately scrutinized regarding daily activities, time reporting, and operator statistics.**

Complainant testified that S1 disproportionately scrutinized her regarding daily activities which started on or about April 1, 2021, when she communicated that she is Jewish to TM, S1, and S2. She perceived disproportionate scrutiny through employees persistently looking at her work desk monitor or manufacturing excuses to walk behind her and linger. She also experienced the disproportionate scrutiny when S1 and additional IRS employees, e.g., E1, repeatedly chastised her in response to multiple false allegations, such as that Complainant was conducting personal phone calls at her desk and that she activated a personal payment instrument at her desk. Complainant told S1 to cease acting on the false allegations and that she would swear the allegations were false. She stated that on one occasion, S1 stood at her desk and said, "You don't get computer time. Someone told me you were activating a credit card at your work

desk." She responded that the allegation was false and the "payment instrument" was the Transerv commuter transit card she received from IRS, which she believes can only be activated from her work desk because it required access to IRS email and intranet. Complainant also stated that S2 and the TM disproportionately scrutinized her SETR time reporting and op stats, which she learned of with S2's May 14 hostile email and the May 17 ECR. Complainant also asserted that the "fine tooth review of [her] SETR is the manifestation of the OJI's threat after . . . reporting the inappropriate viewing of my personally identifiable information on April 23, 2021." IF1, 367-71.

The record contains an April 27, 2021, Skype conversation between Complainant and S1. Complainant was concerned that her SCRIPS op stats may have been affected when her computer restarted. S1 stated that "unfortunately anything is possible," "sometimes weird things happen. . . it's like having a gremlin around or something." Complainant then wrote that her belief that she was being "snooped" on while activating her Transerv card was proven correct, is concerning, and asked if that happens often and how to avoid such circumstances. S1 responded that since they are in such close quarters, people seem to be a bit nosy and advised that Complainant to let her know when she is doing something outside of SCRIPS. S1 also wrote:

I apologize for everyone because this is not mature behavior at all. And honestly not everyone is as accepting of people who are 'different' from the norm that they are used to. You have a much different presence about you and perhaps it is intimidating but that's just my own opinion. As I stated, we need to educate a little better.

IF1, 508-09.

#### *Management's Response to the Allegations*

S1 testified she was contacted by another employee, she does not recall who, about Complainant being on the internet and the phone while sitting at her desk and apparently doing something with a credit card. She stated she reached out to Complainant via Skype and told her in a non-harsh manner, if she needed to make personal calls or take care of personal business she should do so in the hallway or a break room. Complainant explained she was activating her bus pass she had gotten from IRS and S1 told her, "Okay, but next time . . . be more aware of [your] surroundings and how things appear to others because everyone is told to keep phone conversations to a minimum and to take them out of the area if they will be longer than a few seconds." IF2, 199-200.

TM testified that she was the manager in charge of everyone's SETR during training and she "went through [(everyone's SETR entries)] with a fine-tooth comb." She avers the reason for the added scrutiny of Complainant was that she was inaccurately putting too much time under meeting and IRM time and was also putting all her volume under one program instead of splitting them evenly. TM stated she advised Complainant of

the inaccuracy of her SETR, showed her how it was supposed to be done, and how much time is allotted for IRM time and meeting/administrative time. IF2, 266.

S2 testified that she had Complainant's op stats reports pulled so she could verify her time, as S1 brought to her attention that Complainant's SETR showed larger than normal amounts of overhead time. She maintains that it was also brought to her attention by several managers and a team lead (probably TM) that Complainant was observed leaving early but her timecard showed her having worked her full TOD. She stated that the days they reported her leaving early varied – a Monday, a couple Tuesdays, several Thursdays – all of which Complainant reported full time and overtime worked. IF2, 304-05; IF Supplemental Affidavit of S2.

S2 asserts Complainant was inputting into her SETR an average of five hours of unapproved administrative time to read and compose emails (some of them personal), balance out her SCRIPS statistics, search the intranet, and read the National Agreement. She also avers that the time Complainant recorded in SETR for her SCRIPS programs (codes 470 and 480) did not coincide with the numbers on the Workstation Statistics (*i.e.*, op stats) report. S2 inquired about the possible discrepancy but was informed that "the system reports accurately the time and keystrokes when an operator is on the system." S2 stated that she advised Complainant of the inaccuracy of her SETR on multiple occasions and her response was that she was inputting time under codes 59256 and 59300 to account for time that is not accounted for within the SCRIPS system. She maintains that this is not something Complainant was instructed to do, and "in fact, what it does do is up her production efficiency numbers." IF2, 304-05.

#### *Rebuttal*

Complainant averred that S2's accusations of her leaving early without approval are vague due to their falseness. Rebuttal to S2's Supplemental Affidavit, 10.

#### ***Claim 4E: Her manager tried to coerce her into a schedule change rather than accommodate her religious observances.***

Complainant testified that after a month of being falsely led to believe that her Sabbath observance schedule would be approved, on or about April 30, 2021, she received the "un-actioned" April 14, 2021, AWS Request form, with notes from S2 insisting that she complete and sign a Shift Reassignment form, while also being told verbally that she would not receive a shift reassignment until after one year. She maintains that after S1 told her that her Sabbath observance schedule was not approved, she also insisted that Complainant complete the Shift Reassignment form, while she "sat near [her] work area." Complainant asserted that she informed S1 she would "not make such an important decision spontaneously, at her coercive behest." Complainant further asserts both S1 and S2 sent multiple emails suggesting she complete and sign the Shift Reassignment form to switch to day shift. She noted that the Shift Reassignment form

did not have a document control number and does not appear within the NTEU National Agreement. IF1, 382-88.

#### *Management's Response to the Allegations*

S1 testified she requested Complainant to fill out paperwork for a shift-change, as Complainant was requesting to move to a part-time schedule, which required a shift change, and they "needed paperwork to make anything official and to keep documentation for all changes being made to employees' schedules etc." S1 contends the communications to Complainant were not to coerce her, but were suggestions to help her, to address her transportation and Sabbath-observance issues. IF2, 202.

S2 testified that on April 29, 2021, to accommodate Complainant's religious observance, she provided Complainant with the options of switching to day shift or to a part-time schedule and told her she would need to fill out a shift change form to request a new daytime or part-time schedule. This new schedule would preclude the hardship of having to work extra hours to earn comp time for her Sabbath observance. S2 emphasized, "the choice was ALWAYS up to her." IF2, 306.

#### ***Other Harassment Allegations***

##### ***Safe Transport***

Complainant testified that she told S2 she would like to have access to safe transport for her 12:30 a.m. work-to-home commute, which would have provided her relief from her two-hour walking commute and provided her more time for religious observances such as preparing kosher food. Complainant averred that S1 insisted "van pool" and related safe transport options were not available. Complainant believes, however, that there are safe transport options available, but she was not assisted with those options because S1 and S2 "preferred to create an environment designed to constructively terminate me by refusing to do anything that would make it comfortable for me to continue working at IRS Ogden as an observant Jewish person." IF1, 292.

S1 testified that on April 1, 2021, Complainant met with her and TM and inquired about the area's public transportation. She stated that TM informed Complainant how to apply for an Agency subsidized bus pass. S1 is aware that Complainant applied for the program and successfully activated a bus card. S1 explained that it's not necessarily the Agency's responsibility nor would it be feasible to provide transportation, safe or otherwise, to its employees; all the Agency can do is to assist with applying for benefits. S1 added that Complainant's transportation concern was one of the main reasons that she recommended Complainant switch to a day shift. IF2, 207.

### ***Inappropriate Viewing of her PII***

Complainant testified that TM unnecessarily and inappropriately unencrypted and viewed a secured confidential file consisting of her W4 and payroll direct deposit information, including her full name, address, social security number, and banking information. She explained that on or about April 5, 2021, she received a secured message from an IRS HR payroll employee with her W4 and payroll direct deposit information. As the Training Manager, Complainant asked TM to help her with reading the message. Instead of telling Complainant she could configure secure certificates for her IRS email or telling her the steps to unencrypt and read the email, TM told Complainant to forward the secured message to her and then she unencrypted the secured message with Complainant's PII and sent the unencrypted file back to Complainant, and then she told Complainant that she can configure the certificates to read secured messages. IF1, 278-80, 321-22.

On April 7, 2021, Complainant reported to TM, S1, and OJI, that the print-out of her SETR on April 6, 2021, was not at the printer. This document had her complete name and last four social security number digits. IF2, 243-44.

Complainant averred that on or around April 23, 2021, when she reported to TM the possible incidents of inappropriate viewing of her PII, TM emphatically insisted that no such thing occurred, and it was Complainant's confusion or mistake. Complainant stated that she described the April 23 event in detail, including having witnessed the unnamed employee voraciously reading her documents with her PII, which he must have known did not belong to him. Complainant also reported the April 23, 2021, incident of an employee reading her op stats and SETR to S1 and S2 on April 24, 2021. S1 responded by asking if Complainant knows the identity or team of the person who did this. She stated that this issue "will be addressed and dealt with," and she plans to discuss this issue with other department managers in their staff meeting. Complainant responded that she did not identify (nor did she want to identify) the employee who was reading her printouts. IF1, 278-80, 321-22; IF2, 243-45.

TM testified that she received an email from Complainant stating she thought someone had looked at her PII and she then spoke with Complainant about sending things securely to the printers. She also testifies she did not unencrypt Complainant's email; however, she told her she would have to go through the steps of unencrypting her emails to read them and sent her step-by-step instructions on how to do secure messaging. IF2, 265, 275.

### ***Security Guard Harassment after Termination***

Complainant stated that after presenting her with the Termination Letter on the night of June 30, 2021, S2 asked two security guards, G1 and G2, to escort Complainant to the IRS Ogden 12th St. exit. She avers that while quietly walking through the parking lot toward the exit, G1 suggested that he would use his service weapon to lethally harm Complainant because she chose to walk within a particular parking space. Complainant

said she had gotten distracted and then pointed to the way she normally walks. Without Complainant mentioning anything about her religion, G1 then said, "If there's a religious reason for that, I can accommodate that." Complainant testified that she normally walks within certain numbered parking spaces due to the significance of their numbers in "gematria," i.e., Jewish numerology. Complainant stated the fact that G1 brought up accommodating her religion shows that there was inappropriate information sharing between IRS employees and G1 and that he knew the termination was related to her being Jewish. Complainant believes there was significant inappropriate sharing of Complainant's personal information among IRS Ogden employees, along with collusion and conspiracy to harass her. IF1, 324, 364-65.

## APPLICABLE LAW

### ***Disparate Treatment***

To prevail in a disparate treatment claim, a complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). A complainant must initially establish a *prima facie* case by demonstrating that he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 576 (1978). Proof of a *prima facie* case will vary depending on the facts of the particular case. *McDonnell Douglas*, 441 U.S. at 804 n.14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. *Texas Dep't of Cmtv. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To ultimately prevail, a complainant must prove, by a preponderance of the evidence, that the agency's explanation is a pretext for discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *St. Mary's Honor Ctr v. Hicks*, 509 U.S. 502, 519 (1993). At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted based on a prohibited reason. See *Hicks*, 509 U.S. at 519.

The Age Discrimination in Employment Act (ADEA) applies to individuals age, 40 and older. The Commission has held that the rules laid down by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* in proving a Title VII claim are also applicable in proving an age discrimination claim. *Alotta v. Department of Transportation*, EEOC Appeal No. 0120093865 (June 17, 2011). An inference of age discrimination can arise when a comparator is substantially younger than the complainant, even though they are in the same protected category. *O'Connor v. Coin Consolidated Caterers Corp.*, 517 U.S. 308, 312-13 (1996). While there is no bright-line test for what constitutes "substantially younger," the term generally has been applied to age differences in excess of five years. See *Blinick v. Department of Housing and Urban Development*, EEOC Appeal No. 07A20079 (February 3, 2004), request for reconsideration denied, EEOC Request No. 05A40497 (July 29, 2004).

### ***Retaliation***

The statutory anti-retaliation provisions prohibit any materially adverse action that is reasonably likely to deter a reasonable employee from engaging in protected activity. *Burlington N. and Santa Fe. Ry. Co. v. White*, 548 U.S. 53, 67-69 (2006); *Lindsey v. U.S. Postal Serv.*, EEOC Request No. 05980410 (Nov. 4, 1999). Typically, the prima facie case of retaliation requires evidence that: (1) the complainant engaged in protected activity; (2) the employer was aware of the protected activity; (3) the complainant was subsequently subjected to adverse treatment; and (4) a nexus exists between the protected activity and the adverse treatment. *Psak v. Dep't of the Interior*, EEOC Appeal No. 0120110118 (April 18, 2013). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such manner that a reprisal motive is inferred. See *Clay v. Dep't of the Treasury*, EEOC Appeal No. 01A35231 (Jan. 25, 2005).

### ***Religious Accommodation***

Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation is shown to impose an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1). An employer is not obligated to accommodate practices that are not compelled by a person's beliefs in the tenets of a religion but that reflect a mere preference or voluntary activity. See *Jacques v. Dep't of the Interior*, EEOC Appeal No. 0120083263 (July 17, 2012) (agency not required to accommodate complainant's request to rest on Mondays, the day after her religious obligations); *Cole v. U.S. Postal Serv.*, EEOC Appeal No. 0120064379 (Feb. 4, 2008) (driving the church bus and parking cars are optional, voluntary activities not compelled by a person's belief in the tenets of a religion).

The traditional framework for establishing a prima facie case of discrimination based on religious accommodation requires Complainant to demonstrate that: (1) she has a bona fide religious belief, the practice of which conflicted with their employment, (2) she informed the Agency of this belief and conflict, and (3) the Agency nevertheless enforced its requirement against Complainant. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

Once a complainant establishes a prima facie case, the agency must show that it made a good faith effort to reasonably accommodate complainant's religious beliefs and, if such proof fails, the agency must show that the alternative means of accommodation proffered by complainant could not be granted without imposing an undue hardship on the agency's operations. *Woodrow v. Soc. Sec. Admin.*, EEOC Request No. 0120141211 (Sep. 8, 2016) (citing *Tiano v. Dillard Dept. Stores, Inc.*, 139 F.3d 679, 681 (9th Cir. 1998); *Redmond v. GAF Corporation*, 574 F.2d 897, 902 (7th Cir. 1978); *Cardona v. U.S. Postal Serv.*, EEOC Request No. 05890532 (Oct. 25, 1989)); *White v. Dep't of Defense*, EEOC Appeal No. 0120080191 (May 7, 2010) (granting employee flexible scheduling did not demonstrate a good effort to reasonably accommodate complainant where these schedules would not allow her to attend Sunday school in the morning and afternoon church meetings as requested).

The Supreme Court ruled that any reasonable accommodation proffered by the employer is sufficient to meet its accommodation obligation. The employer is not required to accept any alternative reasonable accommodation favored by the employee short of undue hardship. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68 (1986). EEOC Regulation 29 C.F.R. § 1605.2(c)(2) provides that when there is more than one accommodation available which would not cause an undue hardship on the employer, the Commission will determine whether the accommodation offered is reasonable by examining the alternative which least disadvantages the individual with respect to his *employment opportunities*, such as compensation, terms, conditions or privileges of employment. See 29 C.F.R. § 1605.2(c)(2) (ii). An employer is not obligated to provide the most beneficial accommodation to an employee's religious practices if it has offered some other reasonable option. *Ansonia*, 479 U.S. at 69 (1986); *Johnson v. Dep't of Justice*, EEOC Appeal No. 0120100741 (Oct. 26, 2010) (holding the agency attempted to reasonably accommodate the manager's request for a schedule change to observe holy days of worship by offering two possibilities of overcoming the conflict, which the manager rejected); *Levin v. Dep't of Homeland Security*, EEOC Appeal No. 0120103001 (Oct. 15, 2010) (holding the agency not liable for religious discrimination when it denied complainant's request for Sundays off to attend church, because it offered her two different schedule options, which she rejected without showing that the offered options would have been ineffective).

#### ***Harassment/Hostile Work Environment***

To establish a claim of harassment, a complainant must show, by a preponderance of the evidence, that: (1) she belongs to a statutorily protected class; (2) she was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment 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. *Rachel F. v. USPS*, EEOC Appeal No. 0120150802 (Aug. 24, 2016) (citing *Henson v. City of Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982)).

Harassment is actionable only if the incidents complained of were sufficiently severe or pervasive to alter the conditions of the complainant's employment and create an abusive working environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)). Simple teasing, offhand comments, and isolated instances, unless extremely serious, do not amount to discriminatory changes in the conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. EEOC Enforcement Guidance on *Harris v. Forklift Systems, Inc.* at 6, 9 (March 8, 1994).

Therefore, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or

abusive. Complainant must also prove that the conduct was taken because of a protected basis, in this case, Complainant's age, religion, or prior protected activity. Only if Complainant establishes **both** of those elements: hostility and motive, does the question of Agency liability present itself. See EEOC Enforcement Guidance on Harris v. Forklift Systems, Inc. at 6, 9 (March 8, 1994).

## ANALYSIS

### *Disparate Treatment*

As a preliminary matter, Complainant demonstrated she is a member of the protected categories of religion (Jewish), over age 40 (age 47), and one who engaged in protected EEO activity (current case).

### *Claim 1 – Religious Accommodation and Overtime*

#### *Prima Facie Case*

We find that Complainant established a prima facie case of discrimination based on religious accommodation. She presented evidence that (1) she has a bona fide religious belief that requires her to observe the Jewish Sabbath, which conflicted with her work requirement to work late on Fridays, (2) she informed the Agency of this belief and conflict with her work schedule, and (3) the Agency failed to provide a reasonable accommodation for her religious observance when management failed to approve her requested schedules with Friday off.

#### *Management Articulation*

The Agency managers explained that Complainant was provided several options to accommodate her Sabbath observance. S1 and S2 explained that Complainant was provided with the option, which she often used, of requesting and being approved to earn and use religious comp time, as well as earned annual leave, to leave early or to miss work on Fridays. S1 and S2 explained that Complainant was also given the option of switching to a straight day shift, which would have allowed her to end work in plenty of time to be home long before sunset on Fridays. They also offered her a part-time work schedule that would not have required working on Fridays at all. These accommodation options were first offered to Complainant on April 28 and 29, 2021. To enact such a schedule, management required that Complainant complete a Shift Reassignment form with her preferred schedule, but Complainant did not wish to fill out the form, therefore no Sabbath observance schedule was granted. On June 23, 2021, Complainant contacted her fourth-level supervisor, S4, to request a part-time 20-hour per week schedule, with two 10-hour days, and no need to fill out a Shift Reassignment form. On June 25, 2021, S4 instructed S2 to approve the request. On June 25, 2021, S1 told Complainant that because 10-hour shifts were not currently available, she would grant Complainant a 20-hour per week schedule with two 8-hour days and one 4-hour