



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

[REDACTED]
Lacy R.,¹
Complainant,

v.

Jeff B. Sessions,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 0120152260

Hearing No. 451-2011-00070X

Agency No. FBI-2010-00070

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal from the January 15, 2015 final Agency decision (FAD) concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission's review is de novo. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the FAD.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Special Agent at the Agency's San Antonio Division, Austin Resident Agency in Austin, Texas. In February 2008, Complainant stated that he experienced injuries while attending undercover training that resulted in bilateral ulnar neuropathy, a cervical spine strain, and bilateral carpal tunnel syndrome. Complainant stated that he experiences difficulty performing routine tasks that involve his hands and arms, talking on the telephone, and typing. Complainant utilizes an electric stimulation device prescribed by his doctor to reduce swelling and control pain.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

Beginning in February 2008, Complainant claimed that he submitted medical documentation to the Agency detailing reasonable accommodations recommended by his doctor. Complainant submitted medical documentation and workers' compensation forms to the Human Resources Specialist (HRS) in February 2008. HRS submitted Complainant's medical documentation to the Department of Labor (DOL) and Agency Headquarters. Complainant first requested voice recognition software, and he stated that it was supplied in March 2008. Complainant claimed that he encountered problems with the software as his computer could not handle the size of the installation. Complainant claimed that he later received a newer computer that could run the software in May 2008. Complainant alleged that his supervisor later took the computer back to accommodate an incoming agent and he did not have a computer with operational speech recognition software until November 2009.

In April 2008, Complainant submitted medical documentation again recommending voice recognition software in lieu of continuous typing. HRS forwarded the documentation to DOL and Headquarters, but indicated that Complainant had received and was utilizing voice recognition software. In May 2008, Complainant's doctor recommended that Complainant undergo an ergonomic evaluation of his work area. HRS forwarded the documentation to DOL and Headquarters on June 2, 2008. On June 7, 2008, Complainant submitted medical documentation requesting an ergonomic workstation and chair. HRS forwarded the information and documentation to DOL on July 3, 2008. On September 23, 2008, Complainant submitted documentation again requesting an ergonomic workstation (including mouse and keyboard) and chair. HRS forwarded the information to DOL and Agency Headquarters on December 10, 2008.

Complainant alleged that the Agency failed to provide him the requested ergonomic evaluation and workstation; therefore, he obtained quotes for a workstation and submitted them to DOL in December 2008. Complainant claimed that he expressed his frustration to his supervisor (S1-1) and HRS, and HRS advised him to submit a reasonable accommodation form (FD-948). Complainant alleged that he submitted a request for a specialized workstation and equipment on March 27, 2009. The Assistant Special Agent-in-Charge (ASAC-1) signed the request on April 8, 2009, and the Agency ordered a workstation evaluation. On July 17, 2009, Complainant's workstation was evaluated for accommodations. The evaluation recommended that Complainant receive speech recognition software on one of his computers and training on the software, a microphone headset, an ergonomic chair, adjustable keyboard/mouse platforms, and a headset for his cell phone.

In July 2009, DOL authorized payment for an ergonomic workstation for Complainant. Complainant ordered the equipment, and it was delivered in October 2009. Complainant stated that most of his requested accommodations were installed on or about November 23, 2009, with the exception of the handsfree device for his cell phone and the keyboard/mouse platforms. Additionally, Complainant believed that he should have been given a laptop with text-to-speech capabilities to be used in secure spaces when he worked with sensitive information. Further, Complainant stated that his condition worsened while he waited for accommodations. Complainant began wearing an electrical stimulation device.

On January 11, 2010, Complainant emailed HRS to inquire about a Bluetooth/handsfree device for his cell phone and typing pool transcription services. HRS suggested that Complainant submit a request for the device to DOL and she would inquire about transcription services. HRS recommended that Complainant contact the Occupational Health Nurse (OHN) about his difficulties with some of the accommodations provided. Complainant contacted OHN and mentioned his need for a Bluetooth device, his difficulties with the speech-to-text software, and the possibility of transcription services.

On or around January 15, 2010, Complainant's doctor submitted medical documentation stating that Complainant was restricted to no defensive tactics, no use of firearms, and no pushing/pulling. Complainant's doctor later noted on another document that it appeared Complainant still had not been fully accommodated regarding workstation changes and handsfree devices which contributed to persistence of his symptoms. Additionally, Complainant's doctor recommended transcription services if available. Complainant received a wired handsfree headset for his cell phone in March 2010, and later a wireless headset in April 2010. Complainant stated that he received the keyboard tray and mouse accommodations in June 2010.

OHN received the January 15, 2010 documentation and, on January 22, 2010, emailed Complainant's supervisors informing them of Complainant's medical mandates (restrictions). Based on the submitted medical documentation, OHN stated that Complainant was restricted to no defensive tactics, no firearms, and no pushing/pulling including push-ups and pull-ups. Complainant stated that he discussed the email with his supervisor (S1-2) and S1-2 told him that they would monitor his condition and could offer him a support job if he could not return to full duty. Complainant stated that he found S1-2's statement to be belittling.

Later the evening of January 22, 2010, Complainant claimed that he was debriefing a witness at a hotel when S1-2 called to meet him in the lobby. Complainant alleged that he met with S1-2 and the Assistant Special Agent-in-Charge (ASAC-2) and they informed him that he would have to surrender his firearm because he had not qualified on it since March 2009. Complainant claimed that S1-2 confiscated his personal firearms along with his "alias identification." Complainant alleged that S1-2 later returned his personal firearms and alias identification, but instructed him to keep his personal firearms at home.

On January 26, 2010, Complainant asked S1-2 for permission to obtain his quarterly qualification by using a firearms simulator. Complainant claimed that S1-2 denied his request based on his belief that it would violate Complainant's restrictions. Complainant disagreed, and S1-2 referred him to ASAC-1. Complainant claimed ASAC-1 never responded to his request made on February 1, 2010. Complainant alleged that he contacted the Principal Firearms Instructor (PFI) requesting to qualify using the firearms simulator. PFI denied Complainant's request, and ASAC-1 concurred in the denial.

On April 30, 2010, S1-2 rated Complainant as "Minimally Successful" on his mid-term appraisal. Complainant alleged that S1-2 never observed him working, and based his appraisal

on “several sources [who] told him they did not appreciate how [Complainant] talked to them.” Complainant claimed that S1-2’s rating caused a different supervisor to rate him as “Minimally Successful” during a subsequent file review in the elements of “Intelligence Base” despite his generation of an above-average number of intelligence reports.

Complainant claimed that after filing his EEO complaint, S1-2 and ASAC-2 avoided him and began mistreating him. Complainant alleged that S1-2 yelled at him and used profanity. Further, Complainant claimed that S1-2 noted in a mid-year review that Complainant had a “disease” of over-explaining things.

In April 2010, Complainant claimed that S1-2 asked him what accommodations he still needed. Complainant responded that he still wanted to obtain his firearms qualification on the simulator. Complainant alleged that he submitted forms requesting use of the simulator as accommodation, but on May 7, 2009, ASAC-1 informed him that the simulator could not be used for that purpose, that the simulator was no longer operational after they attempted to load simulator software, and that Agency policy stated that SAs who were prohibited from firing live weapons could not be permitted to qualify with the simulator. In addition, Complainant claimed that his request for transcription services as an accommodation still had not been granted.

In May 2010, S1-2 was transferred, and an acting supervisor (S1-3) was appointed. On July 2, 2010, Complainant alleged that S1-3 sent him an email instructing him to provide complete documentation of his contacts with a source and to submit that documentation in one hour. Complainant responded that he had already sent that information to S1-2, but the documentation had been lost. Complainant believed that the request was unreasonable and unfair. Complainant claimed that S1-3 also required him to end the use of a source by the end of the day, and to report his work progress to her on a daily basis. Complainant stated that later that day he sent S1-3 an email stating that he had informed Agency Headquarters that he was ending the use of certain contacts at S1-3’s request, and S1-3 then sent him an email directing him to coordinate all contact with Agency Headquarters through her. In July 2010, Complainant alleged that ASAC-2 criticized him for interacting with Agency Headquarters without first addressing the matter with S1-3. Complainant stated that he told ASAC-2 that the matters were not “operational;” therefore, he did not need to address it first with S1-3, but ASAC-2 would not listen. Additionally, Complainant claimed that ASAC-2 criticized him sending emails to ASAC-1 about accommodation issues, and told him to make accommodation requests on official Agency forms.

In June and July 2010, Complainant alleged that S1-3 failed to respond to his requests for information. For example, Complainant claimed that he submitted a document reflecting his “statistical accomplishments,” but S1-3 never responded. Complainant stated that this prevented him from receiving proper credit for his work activities. In July 2010, Complainant claimed that he asked S1-3 for permission to conduct surveillance of a subject and to interview someone connected to the subject. Complainant alleged that S1-3 never directly responded to his request, and he conducted the requested interview. Complainant claimed that S1-3 frequently failed to respond to his requests to respond to emails from Headquarters.

On March 12, 2010 (and amended on July 19, 2010), Complainant filed a formal complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of disability and in reprisal for prior protected EEO activity when:

1. Since February 23, 2008 through December 30, 2009, his requests for reasonable accommodations were delayed, causing his medical condition to worsen;
2. On January 22, 2010, after being placed on a medical mandate, he was ordered to surrender his Agency-issued and personally-owned firearms, as well as his alias identification;
3. Since January 26, 2010, he has not received a response to his requests for a reasonable accommodation for firearms qualifications by using the Firearms Training Simulator (FATS);
4. On April 30, 2010, and on May 21, 2010, he received minimally successful ratings on his mid-term Performance Appraisal Report and on a file review, respectively, regarding the "professionalism" and "relating well to others" critical elements;
5. The Supervisory Special Agent (S1-2) and Assistant Special Agent in Charge (ASAC-2) mostly avoided talking to him, and when the SSA did so in April 2010, he yelled at him using profanity laced language and made derogatory comments;
6. On May 7, 2010, ASAC-1 denied his request for reasonable accommodation;
7. On July 2, 2010, the Acting Supervisory Special Agent (S1-3) instructed him to provide daily updates regarding his work assignments, and advised he did not use appropriate documentation regarding closing a case;
8. On July 3, 2010, S1-3 informed him that his continued disregard for her requests showed a clear lack of professionalism and was unacceptable;
9. On July 8, 2010, ASAC-2 angrily scolded him for not attending a meeting and for not previously completing an FD-865 form, reprimanded him for violating a policy by not obtaining approval from his supervisor regarding conversations outside the Agency, advised him to stop sending emails about reasonable accommodations, and ordered him to submit all accommodation requests via the FD-856 form only;
10. On or about July 12, 2010, he resubmitted lost documents and has not received the status, and S1-3 has prevented him from uploading email to his investigative case file;
11. On July 14, 2010, he had not received a response to his request to conduct a surveillance and interview an individual; and
12. S1-3 has not responded to his requests made on July 13, 2010 and July 14, 2010, to respond to requests for information outside his division.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing, but the AJ denied the hearing request because Complainant failed to comply with her orders. The AJ remanded the complaint to the Agency and the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b).

In the FAD, the Agency initially found that Complainant first contacted an EEO Counselor on January 29, 2010. As a result, the Agency found that Complainant's claims that occurred prior to December 2009 were untimely. Next, the Agency determined that management had not delayed providing Complainant reasonable accommodation. The Agency found that the record evidence indicated that Complainant made his accommodation requests through DOL for specific equipment, and Complainant made no direct effort to seek accommodation from the Agency until approximately March 27, 2009. Further, the Agency determined that the record evidence showed that Complainant only wanted Agency officials to facilitate his interactions with DOL from March 2009 until March 2010. It found that HRS was diligent in pursuing Complainant's claims and requests with DOL. Thus, the Agency determined that it was reasonable for Agency officials to construe Complainant's emails and statements to mean Complainant was pursuing accommodations through DOL, not the Agency. The Agency noted that it was perplexing and frustrating that DOL failed to accommodate Complainant in a timely manner; however, it asserted that the errors could not be attributed to Agency management officials. The Agency explained that management officials did not want to duplicate the efforts of DOL and that HRS assisted Complainant at each step of his requests.

With regard to Complainant's accommodation requests after October-November 2009, the evidence indicated that the longest hiatus between a request for accommodation from the Agency and Complainant's receipt of the accommodation was approximately two months. As Complainant's accommodation requests involved the purchasing of specialized equipment, it was reasonable for the FBI to require several weeks to approve the requests, make the needed purchases, and have the items shipped to Complainant.

Complainant claimed that the Agency failed to accommodate his request for a specialized laptop to use when dealing with sensitive information. While Complainant made that request on March 27, 2009, Agency managers believed that the voice recognition software provided to Complainant would enable him to carry out his responsibilities. No evidence corroborated Complainant's claim that his voice recognition software could not be used with the Agency computers that interacted with sensitive information. The July 17, 2009 assessment of Complainant's workspace led to the recommendation that the Agency install voice recognition software on Complainant's non-secure and secure computers. In May 2010, ASAC-1 asked Complainant to inform him of any requested equipment that had not yet been delivered, and Complainant did not indicate that he was awaiting a specialized laptop. Moreover, ASAC-1's email indicated that Complainant had received voice recognition software on both his secure and non-secure computers. Thus, Complainant had been accommodated, but not in the manner he had proposed. Accordingly, the Agency concluded that management had acted reasonably.

Regarding his request to use a simulator to qualify for firearms, management denied this request because the recoil from the simulated weapon could have exacerbated Complainant's condition, the simulator as it was configured at the time did not accurately simulate the firing of a weapon for certification purposes, and when they attempted to re-configure the simulator, they learned that the simulator lacked the software to run an accommodation test. Thus, the Agency found that it was reasonable for management to deny the request as it would present a medical risk to

Complainant, not accurately measure his skills, and could not be made to work as a technical matter. Nonetheless, management accommodated Complainant by permitting him to continue working as an agent, although he was not permitted to participate in arrests and other events that might require the use of a firearm, based on his restrictions. As soon as the restrictions were lifted, ASAC-1 arranged for Complainant to be immediately re-trained and to receive a certification test.

Finally, as to his May 7, 2010 request for transcription service, ASAC-1 accommodated Complainant's condition by providing him voice recognition software as discussed above. The Agency concluded that it was reasonable for management to accommodate Complainant's condition by giving him voice recognition software, even if that software was not Complainant's preferred form of accommodation.

As to Complainant's hostile work environment claim, the Agency concluded that the alleged incidents were insufficiently severe or pervasive to establish a hostile work environment. Furthermore, the Agency found that there was no evidence that the alleged conduct was based on discriminatory or retaliatory animus. In particular, as to the progress reviews, S1-2 and S1-3 stated that Complainant frequently circumvented their chain of command and did a poor job of documenting his investigative activities. The Agency noted the documentary evidence was consistent with those statements and supported the ratings. With respect to his claims that management subjected him to close scrutiny, S1-3 explained that Complainant's failure to improve his work performance required her to manage him more closely, so she required him to give her daily updates. The Agency concluded that it was clear that Complainant had personality conflicts with several management officials; however, the issues did not rise to the level of creating a hostile work environment. As a result, the Agency found that Complainant had not been subjected to discrimination, reprisal, or a hostile work environment as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the FAD omitted, misrepresented, and/or overlooked many facts. Complainant argues that there is ample evidence in the record supporting his complaint. Complainant claims that the Agency violated its own policies in denying him reasonable accommodation and that it should have forwarded his requests to Agency Headquarters. Complainant argues that the record evidence shows that it was ASAC-1 who told HRS to forward the requests to DOL in June or July 2008 because there was no money in the budget to purchase the requested items. Complainant asserts that Agency policy dictated that ASAC-1 should have then forwarded the request to Headquarters. Complainant contends that ASAC-1's reluctance and failure to forward the request to Agency Headquarters illustrates the personal and focused disregard for his disability. Complainant asserts that the record shows that on more than 30 occasions he and his medical provider provided the Agency, not DOL, requests to accommodate his condition. Complainant argues that the Agency wrongly took his Agency-issued and personal firearms and claims that he was able to participate in arrests or other assignments. Finally, Complainant contends that the record supports his claim that he was

subjected to a hostile work environment. Complainant argues that the FAD ignored evidence that he was subjected to higher scrutiny and that his performance since he entered duty has been stellar. Accordingly, Complainant requests that the Commission reverse the FAD.

ANALYSIS AND FINDINGS

The AJ's Dismissal of Complainant's Hearing Request

As an initial matter, the Commission will first address the AJ's dismissal of Complainant's hearing request as a sanction for Complainant's failure to comply with her September 18, 2011 order and failure to show good cause. The Commission notes that Commission regulations and precedent provide AJs with broad discretion in matters relating to the conduct of a hearing, including the authority to sanction a party for failure, without good cause shown, to fully comply with an order. See 29 C.F.R. § 1614.109(e); Equal Employment Opportunity Commission Management Directive 110 for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 7 (Aug. 5, 2015). However, such sanctions must be tailored in each case to appropriately address the underlying conduct of the party being sanctioned. A sanction may be used to both deter the non-complying party from similar conduct in the future, as well as to equitably remedy the opposing party. Complainant has presented no arguments on appeal regarding the AJ's sanction against him. In any event, the Commission finds that the AJ did not abuse her discretion by dismissing Complainant's hearing request as a sanction for Complainant's failure to comply with her orders and for failure to comply with the AJ's order to show cause.

Denial/Delay of Reasonable Accommodation

Under the Commission's regulations, an agency is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9. It is undisputed that Complainant is a qualified individual with a disability under the Rehabilitation Act.

As an initial matter, the Commission notes that an employer has an ongoing obligation to provide reasonable accommodation, and failure to provide such accommodation constitutes a violation each time the employee needs it. See EEOC Compliance Manual, Threshold Issues, at 2-73 (revised July 21, 2005). At the time that Complainant contacted an EEO counselor, he alleged that the Agency was denying him reasonable accommodation on an ongoing basis. Therefore, the Commission finds that, contrary to the Agency's finding in the FAD, Complainant's claim that the Agency denied and delayed him reasonable accommodation beginning in February 2008 was raised in a timely manner with the EEO Counselor.

The February 2008 through December 2009 Requests for Reasonable Accommodation

Turning to the merits of the complaint, Complainant claimed that Agency officials delayed granting his requests for reasonable accommodation from February 2008 through December

2009. Agency officials explained that Complainant submitted his requests for accommodation to DOL through Agency officials. The record reveals that Complainant experienced a work-related injury in February 2008. The record contains an email showing that Complainant notified S1-1 and HRS of his need for accommodation. ROI, at 171. On April 29, 2008, Complainant's doctor recommended that Complainant utilize voice recognition software in lieu of continuous use of a keyboard. *Id.* at 139. HRS stated that she forwarded the request to DOL and Agency Headquarters. *Id.* at 444-45. Complainant indicated that he received the software on a fully functioning computer in May 2008; however, it was later taken from him until late-2009. *Id.* at 74, 251. Additionally, Complainant alleged that he did not receive the necessary training on the software until November 2009. *Id.* at 74.

On May 27, 2008, Complainant's doctor recommended that Complainant receive an ergonomic evaluation of his workspace. HRS affirmed that she submitted this information to DOL and Agency Headquarters on June 2, 2008. ROI, at 445. Additionally, on June 7, 2008, Complainant submitted documentation from his doctor indicating that he needed an ergonomic workstation and chair. *Id.* at 535. HRS forwarded this information to DOL on July 3, 2008. *Id.* at 536. HRS subsequently contacted DOL several times to determine the status of the Complainant's requested accommodations; however, she learned that Complainant would need to submit three bids for the requested equipment and a medical necessity letter. *Id.* The record demonstrates that Agency officials took no direct action to obtain an ergonomic evaluation for Complainant, and instead waited for DOL to order the evaluation. Complainant subsequently learned that DOL could not order an ergonomic evaluation, and he ordered a "pseudo assessment" at his own expense in December 2008. *Id.* at 202, 344. Using that assessment, Complainant then submitted bids for the ergonomic equipment to DOL. The record reveals that Agency officials failed to act upon Complainant's requests for an ergonomic evaluation until July 17, 2009, over a year after the initial request. *Id.* at 251, 330-32. Agency officials did not order an ergonomic evaluation until July 2009, and Complainant did not receive any ergonomic equipment until November 2009. *Id.* at 77, 330. Further, Complainant did not receive all of the accommodations recommended by the ergonomic evaluation until June 2010. *Id.* at 78.

The Agency contended that Complainant did not officially request reasonable accommodation until he submitted a FD-856 form on March 27, 2009. The record is clear that Agency officials (including Complainant's supervisors and HRS) were aware of Complainant's requests for accommodation beginning in February 2008. While the record shows that HRS worked with Complainant to request accommodations through DOL, the Commission reminds the Agency that it had a duty to provide reasonable accommodation to Complainant irrespective of any decision or actions by DOL. The record reveals that Agency officials did not act diligently in ensuring that Complainant's requests for reasonable accommodation were addressed and they instead decided to rely upon DOL. Furthermore, there is evidence in the record showing that Agency officials at Headquarters were forwarded Complainant's medical documentation and requests for accommodation, yet Agency officials still failed to address Complainant's need for accommodations until July 2009. Therefore, based on the record evidence present, the Commission finds that the Agency unreasonably delayed addressing and implementing the reasonable accommodations Complainant requested beginning in February 2008.

The January and May 2010 Requests for Reasonable Accommodation

In January 2010, Complainant's restrictions included no defensive tactics, no firearms, and no pushing/pulling. ROI, at 272. Complainant requested the use of the Agency's firearm training simulator as an accommodation for firearms qualification. *Id.* at 295. ASAC-1 informed Complainant that the Agency did not initially have the software that would simulate firearms qualifications; however after it obtained it, the software crashed the simulator and made the machine inoperable. *Id.* at 322. Furthermore, ASAC-1 indicated that the firearms simulator would not be a suitable alternative for firearms qualification based on Complainant's restriction against the use of firearms. *Id.* PFI informed Complainant that based on his restrictions he would be excused from firearms qualification for the quarter. *Id.* at 298. ASAC-1 expressed to Complainant his willingness to ensure that Complainant's firearms qualifications were current once his doctor cleared him to carry a firearm. *Id.* at 322.

Additionally, in January 2010, Complainant requested transcription services as an accommodation for his case file details. ROI, at 335-36. ASAC-1 informed Complainant that typing pools were no longer available. *Id.* at 322. Instead, ASAC-1 stated that Complainant was provided speech recognition software on Complainant's secure and non-secure computers. *Id.* at 419, 642.

The requested accommodations were unavailable and/or unsuitable. Instead, as to the firearms simulator, Agency management excused Complainant from the firearms qualification until his restrictions permitted him to operate a firearm. With regard to transcription services, management ensured that Complainant's secure and non-secure computers were equipped with speech recognition software. While Complainant may not have been offered the exact reasonable accommodations of his preference, an employer is not required to provide the precise accommodation the employee or applicant wants, so long as the accommodation offered is an effective one under the circumstances of the situation. *U.S. Airways v. Barnett*, 535 U.S. 391, 400 (2002). Here, Complainant has presented no evidence that the provided alternative accommodations were ineffective. Accordingly, the Commissions finds that Complainant was not unlawfully denied these reasonable accommodations.

Hostile Work Environment

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove his harassment claim, Complainant must establish that he 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 his protected classes. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

The Commission does not have the benefit of an Administrative Judge’s credibility determinations after a hearing. Therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. Here, Complainant asserted that based on his protected classes, he was subjected to a hostile work environment due to several actions that seemed adverse or disruptive to him. The Commission concludes that the conduct alleged was insufficiently severe or pervasive to establish a hostile work environment. The Commission has consistently held that the discrimination statutes are not civility codes. Petty slights, minor annoyances, and simple lack of good manners occur in the workplace. Not every unpleasant or undesirable act which occurs constitutes a discrimination violation. See Shealey v. Equal Emp’t Opportunity Comm’n, EEOC Appeal No. 0120070356 (Apr. 18, 2011) (citing Epps v. Dep’t of Transp., EEOC Appeal No. 0120093688 (Dec. 19, 2009). What the discrimination statutes forbid is behavior so objectively offensive that it alters the conditions of a complainant’s employment. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, there is no persuasive evidence in the record that discriminatory or retaliatory animus played a role in any of the Agency’s actions. For example, S1-2 stated that he was instructed to retrieve Complainant’s firearm and alias identification because he had not qualified with his weapon in some time. ROI, at 362-64. Further, ASAC-2 had concerns that Complainant had only qualified twice in the past two years, had scored poorly during his last attempt, and that Complainant’s infrequent training and marginal scores could open the Agency up to liability if he were involved in a shooting incident. Id. at 391-92. As a result, the Special Agent-in-Charge directed ASAC-2 and S1-2 to recover all of Complainant’s Agency-issued firearms. Id. at 392. Additionally, ASAC-2 and S1-2 recovered Complainant’s alias identification based on allegations that Complainant failed to follow instructions for its

authorized use. Id. S1-2 later returned Complainant's personal firearm and advised him to not carry it on duty. Id. at 395.

With respect to the April 2010 mid-term performance review and the May 2010 file review, S1-2 stated that he rated Complainant as "Minimally Successful" because Complainant needed guidance to adjust his behavior and based on several poor interactions with others. ROI, at 372. S1-2 listed several incidents that led him to issuing Complainant this rating, including failure to follow instructions and lack of production. Id. at 366-71. S1-3 stated that she conducted a file review for Complainant in May 2010, and found that Complainant's paperwork contained an overwhelming amount of deficiencies. Id. at 455. S1-3 affirmed that Complainant's documents were often woefully inadequate, with grammatical and format errors. Id. at 456. S1-3 stressed that there were clearly enough deficiencies and overall lack of production to warrant rating Complainant as "Unsuccessful" in some of his critical elements, but she decided to give him the benefit of the doubt and counseled him hoping his performance would improve. Id.

With regard to the remaining incidents, the record reflects that the alleged incidents were more likely the result of routine supervision and general workplace disputes and tribulations. The Commission finds that Complainant has not shown that he was subjected to a hostile work environment. As a result, the Commission finds that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as alleged as to these claims.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to REVERSE the Agency's finding of no denial/delay of reasonable accommodation alleged in claim (1) and AFFIRM the Agency's finding of no discrimination, reprisal, or hostile work environment alleged in the remaining claims. The Commission REMANDS the matter to the Agency to take remedial action in accordance with this decision and the Order below.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 90 calendar days of the date this decision is issued, the Agency shall restore any leave used by Complainant due to the Agency's failure to provide him with an effective reasonable accommodation from February 23, 2008 through December 30, 2009.
2. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation into Complainant's entitlement to compensatory damages and shall issue a new agency decision awarding compensatory damages to Complainant. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages he is entitled to for the denial/delay of reasonable

accommodations, and shall provide all relevant information requested by the Agency. The Agency shall pay Complainant the determined amount of compensatory damages within 30 calendar days of the date of the determination.

3. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to S1-1, S1-2, ASAC-1, ASAC-2, and HRS with a particular emphasis on the Agency's obligations under Section 501 the Rehabilitation Act.
4. Within 60 calendar days of the date this decision is issued, the Agency shall consider disciplining S1-1, S1-2, ASAC-1, ASAC-2, and HRS. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
5. Within 30 calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

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

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H1016)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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

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

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for

reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

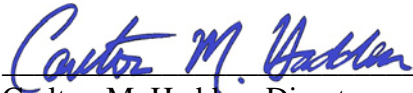
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

November 22, 2017

Date