



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

[REDACTED]
Stanton S.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120170582

Agency No. 200H-0646-2015-104577

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 9, 2016, final decision 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. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency properly found that Complainant did not prove he was subjected to unlawful harassment for which the Agency is liable.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Plumber, WG-9, at the Agency's Oakland Medical Center (University Drive) in Pittsburgh, Pennsylvania. Complainant began working in this position on or about October 5, 2014.

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.

On September 22, 2015, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him and subjected him to harassment on the bases of race (African-American), disability, and in reprisal for prior protected EEO activity when:

1. On August 19, 2015, he was denied continuation of pay (COP);
2. On July 24, 2015, his request for a reassignment as a reasonable accommodation was denied; and
3. From October 2014 to July 2015, he was subjected to a hostile work environment when:
 - a. coworkers (C1 and C2) took his toolbox, misplaced his tools, and left him negative notes;
 - b. in May 2015, C1 attempted to restrain Complainant in a chair with a metal hose clamp;
 - c. in June 2015, C1 showed Complainant a picture of a ceiling beam on his telephone and told Complainant that someone wrote that African-Americans smell like goats; and
 - d. on June 11, 2015, C1 and C2 duct-taped and restrained him to a chair and took pictures of him that were used as computer screensavers.

In an investigative interview, Complainant testified that he had been employed with the Agency for about a year. He further testified that he has Post Traumatic Stress Disorder because of harassment experienced at work, which results in a lack of sleep and concentration.

Regarding his hostile work environment claim, claim 3, Complainant stated that his coworkers took his toolbox, took the tools out, and left negative notes in the toolbox that said that African-Americans did not have the skill set to be plumbers. Complainant testified that he was told by C2 that C1 left the note in his toolbox. Complainant stated that he was the only African-American plumber at the facility, and his Caucasian coworkers did this to strip him of his dignity and to humiliate him. Complainant further stated that he reported the incident to his supervisor (S1) by calling S1 to the toolbox and having him look at the notes about African-Americans and plumbing left in the toolbox. Complainant also stated that he gave the notes to S1, and he did not have copies of them. Complainant stated that C1 was initially terminated from his job, but people have told him that C1 was rehired by the Agency as a contractor.

Complainant also testified that in May 2015, C1 attempted to restrain Complainant in a chair with a metal hose clamp. Complainant stated that C2 held him in the chair, and Complainant then got up and pushed C2 from him.

Complainant testified that when C1 began tightening the hose clamp, he got up with the hose clamp still around him, and C2 hovering over him while trying to hold down Complainant. He stated that C2 wanted the other plumbers to “jump” him and said, “Let’s get him, boys.” Complainant stated that he reported the incident to management. Complainant testified that on August 19, 2015, he contacted the police and informed them that he wanted to file criminal charges against C1 and C2, but the police never got back to him.

Complainant further testified that in June 2015, C1 showed Complainant a picture of a ceiling beam on his telephone and told Complainant that someone wrote that African-Americans smell like goats. Complainant stated that C1 had often asserted that there was a beam in the “penthouse” that said, “Black people smell like goat,” and he took a picture of the beam on his phone and showed it to Complainant. He stated that all that week, C1 referred to him as a goat and said African-Americans smell like goat, which made S1 and other coworkers laugh. Complainant also stated that S1 told him that he hired him for his attitude, not his ability, and that Complainant was “a pain in his left nut.” Complainant stated that S1 did not do anything about the harassment after it was reported.

Complainant also testified that on June 11, 2015, C1 and C2 duct-taped and restrained him to a chair and took pictures of him that were used as computer screensavers. Complainant testified that as he sat at the computer inside the working case, C1 came behind him and wrapped him in masking tape. Complainant stated that he busted through the tape, but C1 laid on him and kept him in the chair. He further stated that C2 then handed C1 a roll of duct tape and duct-taped Complainant to the chair. Complainant testified that he had on a short sleeve shirt, and the tape injured his skin.

Complainant further testified that when he was taped to the chair, he inadvertently left his identification in the computer. He stated that someone then put a picture of person bound and gagged as the screensaver on his computer. Complainant stated that he had to get Information Technology (IT) to remove the screensaver a month after the incident. Complainant testified that he then tried to call his second-level supervisor (S2), but he was not in the office at that moment. He stated that S2 later told him to go to S1 about the incident. Additionally, Complainant stated that he reported the incident to Agency police, who took pictures.

S1 testified that Complainant once reported that his tools were missing during the night shift, and when he came into work the next morning, a note was left in the toolbox. S1 stated that the note said something similar to, “How do you like this?” S1 testified that he then told the staff to stop the conduct and made C1 place the tools back in order. S1 further testified that Complainant did not tell him that the incidents were based on his race or disability. Regarding the incident wherein Complainant alleged that C1 attempted to restrain him in a chair, S1 stated that he did not learn of this incident until he saw an information packet attached to his Letter of Proposed Removal on June 17, 2015. Regarding the picture of the ceiling beam, S1 stated that he did not find out about this incident until Complainant told him about it on June 11, 2015 when S1 typed a report of contact for the police.

S1 further stated that he called the Agency police, took Complainant's report of contact, walked with Complainant to the police station, and left Complainant at the station.

Regarding the duct tape incident, S1 testified that learned of this incident when Complainant told him about it on June 11, 2015. S1 testified that employees put a picture of somebody taped in a chair on Complainant's computer screen, but the person in the picture was not Complainant. S1 stated that after Complainant reported the incident, he contacted Complainant, wrote a report of contact, and called the Agency police.

S2 testified that he had no knowledge of the toolbox or metal clamp incidents, and these matters were not reported to him. S2 further testified that he did not learn about the ceiling beam and "goats" incident until after the investigation for the duct taping incident had begun. S2 testified that after the duct tape incident, Complainant contacted him and told him that he had been duct-taped and was sick of employees harassing him. S2 stated that he then told S1 to immediately go to Complainant. S2 also stated that he contacted the Facilities Management Service Line Vice President (FMSLVP), told her what occurred, and agreed to contact the police. S2 testified that Complainant did not indicate to him that harassment occurred because of his race or disability.

FMSLVP testified that S2 told her about the duct tape incident on the date it occurred, and she instructed S2 to immediately call police and have Complainant go to the police. She further stated that she then followed up with a telephone call to the police to inform them that Complainant was on his way, and that leadership needed to start a "full-blown investigation." FMSLVP stated that she believed that the incident occurred as alleged. FMSLVP also stated that Complainant mentioned that he was being harassed because of his race and was visibly very upset, and the Agency sent him home on administrative leave for the remainder of the day. FMSLVP further stated that on the day of the duct tape incident, Complainant also told her that coworkers had commented that African-Americans smell like goats and that the harassment was racially motivated.

FMSLVP further testified that Complainant returned to work at a different location after being on paid leave. She stated that Complainant was placed in a position he felt was like a clerical position, but Human Resources (HR) could not find him a position within his skills that gave him the same pay as a Plumber. FMSLVP testified that C1 and S1 were terminated, and C2 was suspended for 14 days under a last chance agreement.

The HR Officer stated that she first became aware of the harassment allegations after Complainant and C2 reported them, or after the duct tape incident. The HR Officer further stated that the employees involved were then placed on administrative leave until the completion of the investigation, and Complainant remained on leave, and subsequently, on Continuation of Pay (COP) during the period. She stated that fact-finding inquiries were conducted the week of June 13, 2015. The HR Officer stated that during the fact-finding inquiry, C1 indicated that he hid Complainant's toolbox as horseplay and pranks, which was not unusual. She also testified that she believed the duct tape incident occurred similarly to what Complainant had reported, but Complainant only mentioned a racial motive when he reported the "goat" incident.

Regarding claim 2, Complainant stated that his psychiatrist recommended that he return to work for only three days a week because he did not want Complainant in the Plumbing Department or at the Oakland Medical Center where the harassment occurred. Complainant testified that after he went to the Workers' Compensation Specialist and told them about his restriction, the Office of Workers' Compensation Programs (OWCP) stipulated that he could not work in the Plumbing Department or at the Oakland facility. Complainant further testified that when he returned to work, management sent him back to the Plumbing Department, "right back to the same chair I was taped to [during a harassing incident]." Report of Investigation (ROI), Tab B-1, p. 145.

Complainant stated that after he returned to Oakland, he only stayed there for an hour and 26 minutes because he became sick about being at the facility. He stated that he was granted sick leave for this time. Complainant further stated that he then informed the Director about what was going on, and the Director summoned an HR Specialist and said she wanted him to pursue a reasonable accommodation through the Family and Medical Leave Act (FMLA). Complainant also stated that the Director recommended that he be given a comparable job with comparable pay, to which he agreed. Complainant testified that after he filed this complaint, the Deputy Director (DD) told him that management would reassign him to the Plumbing Department as a Water Specialist, which was contrary to what the psychiatrist had recommended. Complainant stated that he only got out of going to the Plumbing Department because his physician wrote management a note that said that his psychological trauma precluded him from returning to the Plumbing Department.

The HR Officer stated that after Complainant verbally requested a reasonable accommodation, HR actively worked with him. She stated that Complainant had a workers' compensation and reasonable accommodation claim at the same time regarding the same issue. The HR Officer stated that the Agency later placed Complainant in a position within his restrictions until a permanent placement could be found close to his pay grade. The HR Officer testified that Complainant's initial July 24, 2015 restrictions only said that he could not work full-time, but it did not say he could not work as a Plumber. She stated that after Complainant returned to work at the University Drive/Oakland facility where he originally worked, he said that he could not work at University Drive, could not work with the Facilities Management Service Line, and could only work at the Heinz facility. The HR Officer stated that Complainant's physician then indicated that he could not work at the site where the harassing incidents occurred.

The HR Officer stated that the Agency tried to find Complainant a job with pay comparable to his Plumber position, but there were not many positions to which a Plumber could transfer. The HR Officer testified that Complainant could not work at Facilities Management, where all the trade positions were; therefore, it was not easy to find him a position where he just worked at Heinz and would not encounter Facilities Management employees.²

² The record reveals that in a letter to the Agency dated August 6, 2015, Complainant's psychologist indicated that Complainant was being treated for trauma-related symptoms because of his coworkers' physical assault. The psychologist recommended that Complainant work a part-

The HR Officer stated that Complainant was assigned to scan information in the Health Administration Service on August 25, 2015 but was paid as a WG-10 Plumber. She stated that Complainant then indicated that the Health Administration Service assignment was beneath him because it was GS-5 level work, but a couple of weeks later, he told the Acting Director that the assignment was too stressful. She stated that she set up several meetings with Complainant to discuss his interests and opportunities, and the Agency continued to look for job for him over a 90-day period.

Regarding claim 1, Complainant testified that on August 19, 2015, when he inquired about workers' compensation benefits for leave, a HR Director advised him that he could only use leave or leave without pay (LWOP). Complainant stated that he asked why he had to use his leave after being assaulted at work, and he insisted that he did not have to take leave. Complainant testified that he did not request leave before he was approved for workers' compensation.

The HR Officer stated that on August 5, 2015, Complainant was notified by OWCP that his traumatic injury claim was accepted, and he had 45 days of COP. She stated Complainant had already used up this time, and if he wanted to claim compensation for the additional time, he had to claim compensation by filing a form CA-7. However, the HR Officer stated that Complainant had not yet filed a CA-7 claim for compensation. The HR Officer stated that in the period between when Complainant's COP expired until Complainant filed a CA-7 form, OWCP told him that he needed to use his own leave or LWOP.

The HR Officer further stated that on November 12, 2015, Complainant's physician recommended that Complainant be off work until his symptoms were better controlled. She stated that from that point, Complainant has not returned to work and has been paid by OWCP.

S1 stated that on July 17, 2015, he was issued a Letter of Proposed Removal and placed on administrative leave. He stated that he was terminated on August 1, 2015. S1 stated that C1 was also terminated.

Final Agency Decision

After the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). Regarding claim 1, the Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Regarding claim 2, the Agency found that Complainant was not denied a reasonable accommodation for his disability because the Agency promptly provided him with alternative assignments within his restrictions. Regarding claim 3, the Agency found that Complainant's allegations of harassment were supported by witnesses and corroborated by a fact-finding investigation.

time schedule, be assigned to the Heinz Campus, and not be assigned to work with any of the individuals involved in his harassment.

However, the Agency concluded that it was not liable for the harassment because it promptly and effectively responded to the reported harassment by placing the harassers on administrative leave, granting Complainant administrative leave, and ultimately terminating and suspending the harassers.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that he reported the harassment to S1 six months before the final “duct tape” incident, and the first incident he reported was racially motivated because they involved notes left in his toolbox that referred to African-Americans as not having skills to be plumbers. Complainant maintains that he was subjected to additional harassment because the Agency failed to take prompt and effective action after he reported the toolbox incident. Complainant further argues that S1’s assertion that he was unaware that the toolbox incident was racially motivated is not credible because S1 was terminated because of the harassment. The Agency does not present any arguments on appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency’s decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

ANALYSIS AND FINDINGS

Hostile Work Environment

Although the Agency analyzed Complainant’s complaint as consisting of three distinct claims of hostile work environment, disparate treatment, and denial of a reasonable accommodation, we determine that Complainant’s complaint is more appropriately viewed as a single hostile work environment claim. In order to establish a claim of hostile-environment harassment, 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).

In this case, Complainant, who is African-American, alleged that in one incident, his coworkers took his toolbox, took the tools out, and left notes in the toolbox that said that African-Americans did not have the skill set to be plumbers. Complainant further alleged that on another occasion, C1 attempted to restrain Complainant in a chair with a metal hose clamp. Additionally, Complainant alleged that C1 showed him a picture of a beam that said that African-Americans smell like goats and referred to him as a goat, which made S1 and coworkers laugh. Further, Complainant alleged that C1 and C2 duct-taped and restrained him to a chair.

Additionally, Complainant stated that he reported the incident to his supervisor (S1) by calling S1 to the toolbox and having him look at the notes about African-Americans and plumbing left in the toolbox. Complainant also stated that he gave the notes to S1, and he did not have copies of them. Regarding the ceiling beam incident, Complainant claimed S1 laughed after C1 referred to him as a goat and said African-Americans smell like goats. Complainant further stated that S1 knew about the harassment, but he was so scared that Complainant would report the harassment that S1 told him that if he complained, he would lose his job because he was on probation. ROI, p. 132.

We note that in contrast to Complainant's account of events, S1 maintains that Complainant reported that his tools were missing during the night shift, and when he came into work the next morning, a note was left in the toolbox. However, S1 maintains that he was not aware of any racial component to this incident at the time it occurred. Instead, he maintains that the note left in Complainant's toolbox merely said, "How do you like this?" Further, S1 maintains that he was unaware of the ceiling beam incident until Complainant reported the duct tape incident on June 11, 2015. Likewise, S2 testified that Complainant did not indicate that harassment occurred because of his race or disability.

Upon review, we find it significant that Complainant's coworkers generally attest that Complainant's toolbox was moved or tampered with; C1 attempted to restrain him in a chair with a metal hose clamp; C1 referred to Complainant as a goat; and C1 and C2 duct-taped Complainant to a chair. Further, a fact-finding inquiry found Complainant's allegations to be credible overall. Additionally, the HR official reported that C1 admitted that he hid Complainant's toolbox, which was not unusual. The HR Official also testified that she believed the duct-tape incident occurred similarly to what Complainant had reported.

The only discrepancy in the accounts is that Complainant contends that the first three incidents involved a racial element of which S1 was aware, whereas management denies awareness of a racial element to the harassment until Complainant reported the June 11, 2015 duct tape incident. We note that not only do witnesses attest to the overall veracity of Complainant's accounts of harassment, but the Agency suspended one employee and proposed to terminate two others based on its determination that Complainant's allegations were credible. We find it highly unlikely that Complainant would be credible regarding every detail of the incidents, except for the racial component. Moreover, as Complainant testified that he was the only African-American plumber in the facility, so if true, it strains credibility that neither S1 nor S2 thought there was no racial animosity behind these incidents.

As such, we find Complainant's account of the incidents to be wholly credible, including his claim that since late 2014, he was subjected to unwelcome comments and conducts tinged with racial animus and bias.

Further, we note that Complainant was subjected to physical assaults in which a coworker attempted to restrain him in a chair with a metal hose clamp, and he was duct-taped and restrained to a chair. Additionally, Complainant, the only African-American plumber in his office, was subjected to racially insensitive and provocative comments. Moreover, the record reveals that Complainant suffered severe psychological trauma because of these incidents that resulted in his inability to return to the workplace for an extended period. These incidents are particularly intimidating and offensive because Complainant was singled out to receive such conduct. Consequently, we find that Complainant was subjected to conduct that created a hostile work environment based on race. See Sanford v. Department of Veterans Affairs, EEOC Appeal No. 0120093442 (November 27, 2009) (finding that a claim of a single act of touching was sufficiently severe to state a claim); Nichols v. U.S. Postal Serv., EEOC Appeal No. 0120092008 (June 25, 2009) (finding that physical assault was sufficient to support a claim of a hostile work environment); Czubakowski v. U.S. Postal Serv., EEOC Appeal No. 0120065036 (May 15, 2007) (finding that physical assault accompanied with defamatory language was sufficiently severe to state a claim of hostile work environment).

Because Complainant established that he was subjected to racial harassment, our next inquiry is whether the Agency is liable for the actions of C1 and C2. In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can be shown that it took immediate and appropriate corrective action. See Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999). An agency can raise an affirmative defense when it shows that it took immediate and appropriate corrective action. Id. What is appropriate remedial action will necessarily depend on the particular facts of the case, such as the severity and persistence of the harassment and the effectiveness of any initial remedial steps. Taylor v. Dep't Of Air Force, EEOC Request No. 05920194 (July 8, 1992).

In this case, we find that the Agency became aware of the racial harassment when Complainant reported that coworkers took his toolbox, took the tools out, and left notes in the toolbox that said that African-Americans did not have the skill set to be plumbers. Although the precise date of the reported toolbox incident is unclear, the record indicates that it occurred about five or six months before the June 11, 2015 duct tape incident. As such, we find that S1 was aware that Complainant was being harassed well before the duct tape incident.

The Agency did not respond to the harassment until after the duct tape incident. S1 claimed that he verbally told employees to cease their behavior after Complainant reported the toolbox incident, but the fact that other harassing incidents occurred thereafter indicates that S1's response was inadequate. We conclude that the Agency's inadequate response after the toolbox incident likely emboldened C1 and C2 to further target Complainant for harassment.

Consequently, we find that the Agency did not take immediate and appropriate corrective action after the harassment was initially reported. Therefore, the Agency is liable for the racial harassment.

Further, to the extent that Complainant contends that he was denied the reasonable accommodation of reassignment and subjected to disparate treatment when he was denied continuation of pay, we find that these matters are consequences or outgrowths of the Agency's failure to promptly and effectively respond to the harassment. Therefore, these matters will be addressed in our order of remedies below. Finally, regarding Complainant's claim that he was also subjected to reprisal and disability discrimination, we decline to address these issues because no additional relief would be available to Complainant if he were to prevail on those bases.

CONCLUSION

Accordingly, based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final decision. The Commission REMANDS this matter to the Agency to undertake further actions consistent with this decision and the ORDER set forth below.

ORDER

To the extent it has not already done so, the Agency is ordered to undertake the following remedial actions:

1. Within sixty (60) calendar days after this decision is issued, the Agency shall offer Complainant reassignment to a Plumber position at the Heinz Campus, or a substantially equivalent position, with all the rights, benefits, and privileges of his position of record. The Agency shall not reassign Complainant to the same office where the harassment occurred, or where any of the harassers work. The Agency shall afford Complainant fifteen (15) days to determine whether to accept this position. Complainant shall cooperate with the Agency's efforts to find a suitable position in which he can be placed.
2. Within sixty (60) calendar days from the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, if any, pursuant to 29 C.F.R. § 1614.501. The back pay award shall reflect all career ladder promotions to which an employee in Complainant's position who performed in a fully successful manner was entitled. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."

3. If Complainant ultimately rejects the Agency's offer of reassignment, Complainant's entitlement to back pay will terminate as of the date of his rejection of the reassignment.
4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
5. Within one hundred and twenty (120) calendar days of this decision, the Agency shall restore any leave Complainant took because of the harassment. In addition, the Agency shall compensate Complainant for any Leave Without Pay taken because of the unlawful harassment, if any.
6. Within one hundred and twenty (120) calendar days from the date this decision is issued, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages, and will afford him an opportunity to establish a causal relationship between the harassment and pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
7. Within one hundred and twenty (120) calendar days after this decision is issued, the Agency shall provide at least eight hours of in-person EEO training to all managers and supervisors who oversee Plumbers in the Agency's Pittsburgh Veterans Healthcare System, with a special emphasis on management's duty to prevent, respond to, and correct harassment. The training shall also emphasize management's duties to prevent retaliation under EEO regulations.
8. The Agency reportedly proposed to terminate S1 and C1. The Agency shall report its ultimate decision on S1's and C1's discipline. If the Agency ultimately decides not to terminate S1 or C1, it shall identify the actions taken and its reasons for not terminating S1 or C1, or for taking alternative discipline. Further, the Agency shall place a copy of this Commission decision and an accompanying letter identifying S1 by name as the responsible management official in S1's personnel file. The Agency shall also place a copy of this Commission decision and an accompanying letter identifying C1 by name in C1's personnel file. If C1 has returned to the Agency as an employee in any capacity, such as a contractor, the Agency shall take steps to keep C1 and Complainant from coming into contact with one another.

9. The Agency shall consider taking disciplinary action against C2 with regard to his participation in the duct tape incident. The Agency shall report its decision. 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 C2 is no longer in the Agency's employ, the Agency shall furnish evidence of his departure date(s).
10. The Agency shall pay Complainant reasonable attorney's fees and costs as set forth in the paragraph below entitled "Attorney's Fees."
11. The Agency shall post the notice referenced in the paragraph below entitled, "Posting Order."

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

POSTING ORDER (G0617)

The Agency is ordered to post at its Pittsburgh facilities 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 (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents

in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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

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

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

April 16, 2019
Date