



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

██████████
Candi R.,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(Office of the Secretary of Defense),
Agency.

Appeal No. 0120172238

Hearing No. 570-2016-00971X

Agency No. 2010PFPA004

DECISION

On June 14, 2017, 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 May 12, 2017, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of 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 AFFIRMS in part and REVERSES in part the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Police Officer, AD-0083-5, with the Pentagon Force Protection Agency (PFPA), located in Arlington, Virginia. On January 25, 2011, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her disability or perceived disability (allergies) when: (1) from December 3, 2009, to present, she has been on light duty status; (2) on August 27, 2010, she was notified by the

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.

Deputy Chief (DC)² who provided a written Notice of Determination that she was deemed not medically qualified to perform her duties as a Police Officer; and (3) on or about October 14, 2010, she was informed by her third-line supervisor (S3) that her request for a transfer to the Command Center dated September 30, 2010, was denied.³

After the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge. Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

FACTUAL BACKGROUND

The record shows that on November 5, 2009, Complainant had an allergic reaction, while working out at the Pentagon Athletic Center (PAC). She was transported to the Virginia Hospital Center for immediate medical treatment. The record reflects that the Emergency Room (ER) physician, diagnosed Complainant with asthma and allergic reaction. The ER physician prescribed Complainant an EpiPen⁴ and instructed her to carry it with her “at all times.” The ER physician also advised Complainant to take two puffs of Albuterol⁵ prior to any exercise and to avoid strenuous activity until she is tested and the source of the attacks is determined. The ER instructions to Complainant included a referral to a clinical allergist. Complainant was released from the hospital with no restrictions. Complainant also returned to regular duty without restrictions.

² DC is the Chairman of the Medical Review Board (MRB) and is charged with the evaluation of the Medical Review Officer’s oral and written guidance to determine medical fitness of PFPA Police Officers and provide the Notice of Determination.

³ The following claims were procedurally dismissed: (a) on or about September 30, 2010, the Agency found Complainant "not qualified – time in grade" for a Physical Security Specialist position, GS-0083-11112; and (b) on July 15, 2010, while on light duty, the Agency did not approve Complainant for an offsite FBI Washington Field Office training course. The Agency dismissed claim (a) pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim finding that Complainant was not aggrieved as the vacancy announcement was cancelled without a selection. The Agency dismissed Claim (b) pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely contact as Complainant did not contact an EEO Counselor within the requisite 45-day time-period. Complainant does not dispute the dismissals on appeal; therefore, we will not address them herein.

⁴ An EpiPen is a hypodermic device that administers a dose of epinephrine, used for the emergency treatment of an acute allergic reaction.

⁵ Albuterol is a bronchodilator that relaxes muscles in the airways and increases air flow to the lungs.

On November 12, 2009, a board-certified allergist-immunologist (AllergyMD) diagnosed Complainant with “anaphylaxis, exercise induced – primary Asthma, persistent, not controlled.” Complainant was prescribed various medication to control her symptoms (i.e., “Claritin or Zyrtec to prevent hives and reactions; Benadryl if reaction is severe; Epipen if trouble with breathing or swallowing; and inhalers). AllergyMD also listed the following instructions: “only walking/aerobics moderately, not running, for exercise; try to keep cool with fans,” and never exercise alone. She was also instructed to call her physician in two weeks to report her progress.

Approximately three weeks after the incident on November 5, 2009, management requested Complainant provide medical documentation concerning her visit to the ER and the subsequent initial appointment with AllergyMD. On December 3, 2009, a Contract Manager (CM),⁶ notified Complainant’s supervisors that in accordance with the MRO’s⁷ recommendation, Complainant was being placed on light duty status effective December 3, 2009.

Thereafter, on December 9, 2009, Complainant was seen by an Agency physician (AgencyMD) for a Fit for Duty Examination (FFDE). AgencyMD’s notes from the FFDE state:

[Complainant] related a similar episode of general itching and swelling after vigorous exercise though milder in intensity approximately [four] years ago. Exercise induced anaphylaxis once while training at the FLETC⁸ in June 2009. On November 5, 2009, she experienced another event for which she was transported to Virginia Hospital Center for treatment. The patient was subsequently referred to an allergist for consultation and allergy testing. The patient was found to be sensitive to common allergy triggers and prescribed a daily non-sedating antihistamine. She has a follow up appointment with her allergist scheduled for December 28, 2009.

Following the FFDE, AgencyMD issued Complainant a memorandum entitled Medical Specialist Information for Fit for Duty Assessment. The memorandum informed Complainant that she needed to have AllergyMD provide a description of her medical condition (i.e., diagnosis, etiology, prescribed treatment, and prognosis) to assess whether she was fit to perform the duties of her position. She was also instructed to have her physician complete the Agency’s PFPA Essential Tasks and Physical Capabilities (ETPC) checklist for clearance.

⁶ CM was responsible for coordinating the administrative requirements of the Fitness Program to include facilitating the Medical Review Officer's (MRO) requests for additional medical information from Police Officers, notifying supervisors of light duty placements, and coordinating fitness for duty examinations (FFDE) through the Dilorenzo TRICARE Health Clinic (DTHC).

⁷ MRO’s duties include providing clinical interpretation of Police Officer's medical history information and preparing a written summary to the Medical Review Board (MRB).

⁸ FLETC stands for the Federal Law Enforcement Training Center.

On January 28, 2010, AllergyMD provided a response to AgencyMD's request for additional information. AllergyMD noted that Complainant was evaluated on November 12, 2009 due to two episodes of hives and shortness of breath that developed after exercising. AllergyMD further noted that the November 2009 was the more serious event where Complainant was transported to an area hospital. AllergyMD also reported that Complainant had two additional, but less severe incidents in the past after strenuous exercise which cleared spontaneously after the administration of an Albuterol inhaler. In addition, AllergyMD also noted that Complainant was evaluated on December 15, 2009 where she reported to exercising moderately without further reactions.

AllergyMD also reported that Complainant was evaluated again on January 28, 2010. At that follow-up visit, AllergyMD stated that Complainant reported exercising at full capacity (regular 40-minute runs) without any allergic reactions while avoiding strenuous exercise at the PAC. AllergyMD noted that Complainant had no exposure to cats and the reported incidents did not occur during the spring/grass season.⁹ AllergyMD's impressions at this visit were as follows: "1. Anaphylaxis, exercised induced, mold allergy contributes. Stable at present on medication and with mold avoidance. 2. Asthma mild, persistent." AllergyMD also states that "[t]he prognosis is excellent that patient can perform her duties at work. She will continue on medications and environmental controls. At this time there is no exercise limitations for work or home except to avoid excessive exposure to molds as much as possible." AllergyMD also completed the ETPC requested by AgencyMD following the FFDE indicating that Complainant was fit to perform every essential task of the Police Officer position without restrictions.

The Agency's Medical Review Board (MRB), which is chaired by DC, met in approximately March 2010. The MRB concluded that Complainant did not meet the "immune system/allergic disorders standard for PFPA Police Officers." However, Complainant was not issued a formal "Medical Determination Notice" at that time.

On August 6, 2010, Complainant was issued a Notice of Determination (NOD) finding that Complainant did not meet the immune system/allergic disorders standard for PFPA Police Officers. Specifically, the NOD concluded that Complainant was unable to safely perform the following essential physical capabilities as described in Appendix B to the Occupational Medical and Physical Fitness Program:

1. Operate both as a member of an investigative team and independently at crime scenes which requires the ability to function in adverse environmental and climatic conditions including extreme heat & cold, possibly wearing an escape mask;
2. Safely apprehend individuals which requires the ability to run both short, quick bursts of speed and extended distances up to 1 ½ miles in pursuit and be able to then use appropriate force. Carry unwilling protestors;

⁹ Medical records indicate that Complainant had tested positive to allergies to cats, grasses and mold.

3. Perform surveillance activities which require the ability to function effectively including extended irregular periods of duty, prolonged standing, crawling, running, sitting, climbing, digging, lifting, carrying, and walking; and
4. Perform survival activities which require the ability to run with both short, quick bursts of speed and extended distances for up to 1.5 miles and then be able to use defense tactics and appropriate force including a weapon.”

The Agency gave Complainant thirty days to find a new job, stating that it would “assist” her in locating alternative employment. The Agency warned Complainant that permanent assignment to light duty/administrative leave status was not possible and that she was not qualified for the 083-job-series. On September 30, 2010, Complainant requested a reassignment to the Agency’s Integrated Emergency Operations Center (IEOC) after learning that IEOC was short-staffed. S3 notified her verbally that her request had been denied. On or about October 13, 2010, the Agency advised Complainant that her transfer request was denied because it “put others at a disadvantage.” DC also testified that Complainant's reassignment request "was denied because it would have afforded her an unfair advantage over others who would formally apply for IEOC staff vacancy announcement.

According to an Indoor Air Quality Assessment (IAQA) dated October 27, 2010, an indoor air quality assessment was conducted on October 8, and 13, 2010, in response to concerns regarding suspected mold growth on damaged sections of drywall walls in the PAC. The IAQA reported that visible mold growth was observed on all damaged sections of drywall. However, the IAQA noted that it was unclear how close these areas were to the area where Complainant was working out on November 5, 2009.

AllergyMD’s notes dated December 29, 2010 state:

[Complainant] had a normal exercise challenge study in the Pulmonary Department [early that month]. [She has] continued vigorous exercise in a number of indoor and outdoor settings without reaction. However, [she] report[s] adverse reactions on exposure to molds, outside of the context of exercise. ... [A]fter careful review of all the currently available information, it is my opinion that [Complainant’s] symptoms are consistent with severe allergy to molds, and that exercise is not necessarily a requirement for [Complainant’s] reactions.

AllergyMD instructed Complainant to continue to avoid areas with mold contamination and released her to engage in “full exercise with caution to avoid obvious or known mold contamination.”

On January 3, 2011, Complainant submitted a request for Redetermination for Full Duty Status with Current Medical and Other Valid Information. In her request, Complainant argued that the

air quality test revealed that there has been a mold problem in the gym for a “few years.”¹⁰ She further argued that she took a pulmonary examination in December 2010 which included breathing exercises and strenuous exercise with normal results. Complainant also offered that her blood tested positive for allergies to mold. The Agency denied Complainant’s redetermination request.

Complainant was offered and accepted a position as a GS-07 Physical Security Specialist effective May 22, 2011. Sometime thereafter, the Agency revoked her retained pay, resulting in a demotion.¹¹

The Agency’s Argument

DC asserts that in accordance with the Agency’s medical and physical fitness program, it is standard policy to place an officer on temporary light duty who fails to meet one or more medical standards. DC explains that the employee serves on light duty until a determination is made by the MRB about whether they can continue to safely and effectively perform the duties of their position without undue risk of harm to themselves or others. DC states that following Complainant’s FFDE, she was referred to an allergist for further evaluation. DC recalls that the allergist significantly reduced Complainant’s physical activities which would have likely interfered with Complainant’s ability to perform the essential functions of her position.

DC asserts that the medical documentation submitted by Complainant was considered by MRO and was presented during a subsequent MRB meeting. However, the issue remained that Complainant had been diagnosed with EIA; a “potentially life threatening medical condition.”

DC explains that the medical evidence presented to the MRB did not support Complainant’s assertion that the incident at the PAC was solely due to her exposure to mold. However, even if Complainant’s reaction was caused by mold, DC asserts that there is no way to limit her exposure to those areas with mold when there is an emergency. DC further states that Police Officers routinely respond to calls for service and medical emergencies at the PAC; the same place Complainant identified as the source of the mold that triggered her allergic reaction.

MRO asserts that Complainant’s allergist diagnosed her with EIA; a “potentially life threatening condition.” In addition, she asserts that the emergency medical staff and ER records support the EIA diagnosis. MRO further states that anaphylaxis is a “cascading sequence of biochemical reactions that if not managed emergently can result in shock, multiple organ failure, and death.” In addition, MRO refers to various books and professional journal publications that describe

¹⁰ The undisputed record also shows that after realizing that mold was a contributing factor in her allergic reactions, Complainant remembered that there was a severe mold issue during the summer of 2009 at the training facility dormitory where she was staying during the training. Complainant’s other less severe allergic reaction occurred at this dormitory.

¹¹ Complainant’s May 2011 reassignment is the subject of an appeal currently pending review by the Merit Systems Protection Board.

different aspects of EIA. Specifically, MRO asserts that according to medical journals, “the range of triggering physical activities is broad; the same exercise may not always result in anaphylaxis in a given patient – IT IS UNPREDICTABLE.” MRO further states that EIA symptoms can be triggered by mild to moderate physical activity and that most people develop symptoms within 30 minutes after initiating physical activity/exercise. MRO also notes that according to the medical journals, “frequency of [EIA] attacks can vary.”

MRO asserts that AllergyMD’s conclusion that mold is a contributing factor is based solely on Complainant’s statement that there was a connection between her allergic episodes and mold. Accordingly, MRO does not find this conclusion to be warranted from the totality of the medical records. MRO also asserts that the pulmonary examination that Complainant took in December 2010 was not a standardized “Exercise Challenge Test” using the American Thoracic Society protocol. Further, P1 notes that Complainant’s “forced expiratory flow” was abnormally low (25-75%) which indicates “compromised small airways.” Accordingly, MRO and the MRB found AllergyMD’s opinion that Complainant was fit for duty in all respects without restrictions was not supported by the medical evidence.

Complainant’s Argument

Complainant asserts that since the November 5, 2009 incident at the PAC, she has not experienced an allergic reaction. She further states that she currently has no limitations or restrictions on her physical activities. She regularly works out, runs, and engages in full physical activities as usual. Her fitness level is above average for her age group (45 years old). Complainant also asserts that Police Officers are not typically exposed to mold while performing their duties; thus, her condition should not impact her ability to function as a full-duty officer. She also asserts that she is fully capable of performing every task described in the Occupational Medical and Fitness Manual cited in the NOD.

Complainant also notes that despite being on light duty, she continues to perform the tasks of a Police Officer and even received a commendation for her performance surrounding a shooting incident at the Pentagon on March 4, 2010. In addition, she continued with scheduled training and passed her annual mask fit test on August 17, 2010.

Complainant also notes that DC failed to respond to the EEO investigator’s question about how her medical condition impacts her ability to perform police officer duties. Complainant asserts that although the NOD describes four areas of work that she is not capable of performing, the Agency continued to assign her many of the same duties during her light duty assignment.

Additional Documents on Appeal

In its response to Complainant’s appeal, the Agency attaches 899 documents primarily consisting of proposed hearing exhibits for the hearing that Complainant withdrew. Such documents are not part of the record. Complainant opposes the inclusion of such documents. For the purposes of

this decision, we have exercised our discretion and carefully reviewed and considered the documentation provided by the Agency.

ANALYSIS AND FINDINGS

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”).

The Rehabilitation Act prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. We note that, the events in this case arose after January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which expanded the definition of disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Under EEOC regulations implementing the ADAAA, an individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has record of such an impairment; or (3) is regarded as having such an impairment. See 29 C.F.R. § 1630.2(g)(1)-(3). A physical or mental impairment is defined as: (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability (formerly termed ““mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h) (2011).

Regarded as Substantially Limited in Working

We find that the Agency regarded Complainant as substantially limited in the major life activity of working. An agency regards an individual as substantially limited in a major life activity when it concludes that the individual has an impairment that significantly restricts him or her from currently performing a major life activity, even though the individual's impairment does not in fact substantially limit his/her ability to perform a major life activity; the impairment is only substantially limiting only as a result of the attitude of others; or the individual has no impairment. 29 C.F.R. § 1630.2(1). To be regarded as substantially limited in the major life activity of working, an individual must be regarded as having an impairment that significantly restricts him or her from currently performing a class of jobs or a broad range of jobs in various classes. 29 C.F.R. §1630.2(j)(3).

In the present case, MRO testified that Complainant’s diagnosis of exercised-induced anaphylaxis rendered her unable to perform the aerobic tasks that a Police Officer must be able to perform

immediately. However, should Complainant experience an anaphylaxis response to such aerobic task, it must be managed emergently rendering her unable to meet the requirements of her position.

We find the criteria used by the Agency for terminating complainant's employment - that she could not do aerobic or strenuous tasks immediately - does not apply to some unique aspect of a police officer job. Thus, we find the Agency not only regarded her as being unable to perform the job she held as a police officer at the Agency, but also regarded her as being significantly restricted from performing jobs requiring aerobic or strenuous exercise. See Brown v. U.S. Postal Serv., EEOC Appeal No. 01A45134 (June 1, 2006).

Qualified Individual with a Disability

The Agency does not contest Complaint's ability to perform the duties of the Police Officer position, but asserts that she is not qualified based upon the possibility of future injury to herself or others.¹² Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily. Bentivegna v. U.S. Dep't of Labor, 694 F.2d 619, 622 (9th Cir. 1982). To exclude an individual based on possible future injury, the Agency must show more than that an individual with a disability stands some elevated risk of future injury; rather, it must show that there is "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r); Selix v. United States Postal Service, EEOC Appeal No. 01970153 (March 16, 2000).

Moreover, such a finding must be based on an individualized assessment of the individual that considers: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r); See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of Rhode Island, Dep't of Mental Health Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the agency must gather information and base its decision on substantial information regarding the individual's work and medical history. See Chevron U.S.A. Inc. v. Echazabal, *supra*; Harrison v. Department of Justice, EEOC Appeal No. 01A03948 (July 30, 2003).

Applying these legal principles and policy considerations to the instant case, we find that the Agency was not justified in excluding Complainant from employment as a Police Officer. First, we find there is nothing in the record before us to indicate that Complainant's capability to perform the functions of a Police Officer was somehow impaired by her medical condition. AllergyMD (the only board certified Allergist-Immunologist to evaluate Complainant's medical condition) reviewed the essential tasks of the Police Officer position and found her qualified to perform all

¹² It is undisputed that Complainant has the knowledge and skills to perform her position and had done so in an outstanding manner throughout her tenure as a Police Officer.

essential tasks without restrictions.¹³ In addition, both of Complainant's supervisors testified that Complainant could perform every aspect of her Police Officer duties and continued to perform the same activities after November 5, 2009, without incident until she left the 6th Platoon in March 2011.¹⁴ S3 also states that Complainant continued to work out without any problems.

We also find that DC placed unwarranted reliance on MRO's non-expert opinion with respect to Complainant's medical condition. MRO is not a specialist in the field of Allergy/Immunology. In addition, she did not (nor did any MRB member) personally examine Complainant but instead heavily relied upon generic medical journals to form her recommendation to the MRB.¹⁵

Upon review of the record, we find that the Agency failed to show a significant risk, i.e., high probability of substantial harm. In the present case, the Agency did not make an individualized assessment of the alleged risk posed by Complainant and, instead, applied a blanket medical qualification standard without examining the specific application to Complainant when it found exercise/mold induced anaphylaxis disqualified her for the Police Officer position. Without such an individualized assessment, the Agency failed in its burden to show that Complainant would pose a direct threat. See Lovell v. Dep't of Justice, EEOC Appeal No. 01A41642 (May 26, 2006) (citing Holmes v. U.S. Postal Serv., EEOC Appeal No. 01977073 (Oct. 20, 2000)), req. for recon. den'd, EEOC Request No. 05A60874 (Aug. 23, 2006).

We note that for there to be a significant risk to herself or others, Complainant would have to experience a serious anaphylaxis event at the time she was performing a hazardous duty such as using a firearm or in hot pursuit of a lethal threat. The likelihood that both events would occur simultaneously appears quite remote. See Smith v. Dep't of the Interior, EEOC Appeal Req. No. 05880098 (Jan. 18, 1989); Vavrek v. Dep't of Justice, EEOC Appeal 07A40068 (Nov. 1, 2007). We also note that the Agency has failed to present evidence purporting to establish any level of probability of potential injury or seriousness of such injury. The record also does not contain evidence of the frequency of hazardous conditions in the work place for a PFPA Police Officer. The record shows that throughout her employment history as a Police Officer, Complainant had

¹³The record shows that MRO is a primary physician who does not specialize in Allergy or Immunology. The record is devoid of evidence that any individual on the MRB was specialized in Allergy or Immunology. In fact, the record shows that DC was not even a medical professional.

¹⁴ The only apparent change in Complainant's position after she was placed on light duty was that she was not permitted to carry a firearm.

¹⁵ We agree with Complainant that the MRB relied on a non-specialist's gross misunderstanding of her medical condition. The Agency adopted a patronizing attitude towards Complainant's perceived disability, refusing even to administer the Agency's own physical fitness examination, which is the Agency's standard, routine method of assessing whether a police officer is fit for duty, according to its own policy. DC explains that he denied Complainant's request to undergo the Agency's physical fitness examination believing it "would be an unacceptable risk that could result in a potentially life-threatening reaction."

never experienced an anaphylaxis reaction while on duty. It is important to note that in the event of an anaphylaxis reaction, Complainant would have sufficient time to self-administer an EpiPen injection and call an ambulance on her own.¹⁶ The only requirement was that she carry one with her.¹⁷

Although the evidence indicates that the risk of an anaphylaxis event cannot be eliminated, according to AllergyMD, it can be minimized by avoiding exposure to mold, especially during strenuous exercise. The Agency asserts that even if mold is a contributing factor, Complainant's job duties include responding to the PAC (i.e., the site of the November 2009 incident) for various reasons. While it seems unlikely that Complainant's Police Officer duties require her to perform strenuous duties for a lengthy duration in the PAC, the Agency can help minimize Complainant's risk by removing the excessive mold reported by the IAQA.

Therefore, notwithstanding the Agency's purported good-faith belief that Complainant's continued employment as a PFPA Police Officer would impose an undue risk, we conclude that the Agency has not sustained its burden of showing that Complainant posed a significant risk of harm to herself or others. Under the facts of this case, we find that Complainant was fully qualified to perform her position without an accommodation. Accordingly, for the reasons provided herein, the Commission finds that the Agency discriminated against Complainant based on her perceived disability by excluding her from continued employment as a PFPA Police Officer. Given this finding, it is unnecessary to resolve the question of whether Complainant's request for transfer to IEOC was improperly denied (i.e., claim (3)).

With respect to claim (1), we conclude that it was reasonable for the Agency to place Complainant in a light duty status following the November 5, 2009 incident pending the Agency's receipt of medical documentation addressing Complainant's fitness for duty. See Clinton C. v. Navy, EEOC Appeal No. 0120142575 (Dec. 2, 2016) (agencies have a reasonable amount of time to make a determination on direct threat). However, the record shows that such documentation was received by the Agency on January 28, 2010 (i.e., the date that AllergyMD provided the documentation requested from AgencyMD). Accordingly, we find that the Agency violated the Rehabilitation

¹⁶ Contrary to MRO's opinion, the potential harm to Complainant was not "incapacitation" and risk of death if not treated immediately. MRO greatly exaggerated and dramatized the nature and severity of the potential harm to Complainant without evidence to support such contention. The record shows that when Complainant had an allergic reaction in the PAC on November 5, 2009, she walked from the gym over to headquarters to seek assistance. She was not incapacitated. Medical reports show that she was "oriented," "alert," and able to communicate clearly with personnel during the entire incident. Complainant was released from the hospital that same day without restrictions.

¹⁷ Contrary to the Agency's assertion, we do not find the ability to carry an EpiPen (or inhaler) to be an accommodation. The record is devoid of evidence that Police Officers are prohibited from carrying such items. Accordingly, there is no reason to find that Complainant's choice to carry such items necessitates a special request from the Agency.

Act when it failed to return Complainant to the position of Police Officer in a full duty status as of January 28, 2010.¹⁸

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM in part and REVERSE in part, the final agency decision and REMAND this matter to the Agency for further processing in accordance with our ORDER below.

ORDER (D0610)

The Agency is ordered to take the following remedial action:

1. Within sixty (60) days of the date this decision is issued, the Agency shall offer Complainant reinstatement into the position of Police Officer with the PFFA, located in Arlington, Virginia.¹⁹ The Agency shall afford Complainant fifteen (15) days to determine whether to accept reinstatement. Should Complainant reject the offer of reinstatement, Complainant's entitlement to back pay shall terminate as of the date of her rejection.
2. Within sixty (60) days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 114.501. The back pay-period shall start on the date Complainant was reassigned to a new position (i.e. May 22, 2011) through the date of acceptance or rejection of the Agency's offer of reinstatement set forth in paragraph 1 above. 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 Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. 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. 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

¹⁸ Because we have found that the Agency discriminated against Complainant based on perceived disability, we need not address whether the actions also created a hostile work environment.

¹⁹ Complainant's grade-level should reflect the grade-level she likely would have risen to by now assuming she returned to full-duty on January 28, 2010 (i.e., the date the Agency received sufficient medical information to support a return to duty).

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.

4. Within ninety (90) days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages no later than thirty (30) days after the completion of the investigation.

5. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight (8) hours of in-person or interactive EEO training for MRO, DC and all other unidentified members of the MRB on the Rehabilitation Act. The training shall emphasize the Rehabilitation's Act's requirements with respect to the use of fitness-for-duty examinations and other selection criteria to ensure that similar violations do not occur.

6. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against MRO, DC and all other unidentified members of the MRB. 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 or employees have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

7. The Agency shall immediately post a notice in accordance with the paragraph below.

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 Arlington, Virginia facility 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)), she 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 (T0610)

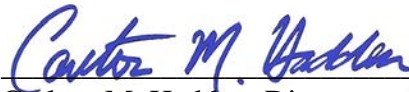
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the 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:



Carlton M. Hadden, Director
Office of Federal Operations

February 28, 2019

Date