



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

████████████████████
Patricia W.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Headquarters),
Agency.

Appeal No. 0120172637

Agency No. HSHQ238652015

DECISION

The Equal Employment Opportunity Commission (EEOC or Commission) accepts Complainant's appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 23, 2017 final decision concerning an equal employment opportunity (EEO) complaint claiming 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.

BACKGROUND

During the period at issue, Complainant worked as a Management and Program Analyst/Contracting Officer Representative (COR), GS-14, at the Agency's Information Technology Services Office (ITSO), Acquisition Services Division (ASD), Acquisition Management Branch (AMB) in Washington, D.C.

In 2012, Complainant filed a prior EEO complaint (Agency No. HS-HQ-22346-2012) concerning the Agency's failure to provide her with reasonable accommodation for her disabilities. In that complaint, Complainant identified some of the same management officials as those more fully identified later in this decision as the responsible management officials in that present matter.

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.

In that prior complaint, this Commission concluded the Agency failed to demonstrate good faith efforts in providing Complainant with reasonable accommodations and had subjected Complainant to a hostile work environment over the period of January through December 2012. See Complainant v. Dep't. of Homeland Security, EEOC Appeal No. 0120141732 (December 30, 2016). In EEOC Appeal No. 0120141732, we found that the responsible management officials “abruptly revoked Complainant’s telework accommodation [from January 19, 2012 through July 1, 2012], inexplicably delayed restoring Complainant’s telework for four months [from March 3, 2012 to June 20, 2012], failed to respond to Complainant’s request for assistive technology, software, and training [as of August 2013, 8 months after DNS training was recommended], and subsequently penalized Complainant [around December 2012] for its own failure to reasonably accommodate her.”

In EEOC Appeal No. 0120141732, the Commission ordered that the Agency provide Complainant with reasonable accommodation, expunge all related written warnings, reprimands, and counseling issued to Complainant, restore all leave taken by Complainant as a result of the Agency’s failure to accommodate her, conduct a supplemental investigation to determine whether Complainant was entitled to compensatory damages, provide eight hours of training to the responsible management officials involved regarding their responsibilities under the Rehabilitation Act, and take appropriate disciplinary action against the responsible management officials.

On August 11, 2015, more than a year before the decision in Appeal No. 0120141732 was issued, Complainant filed another formal EEO complaint – the one at issue in the instant appeal. In that complaint, Complainant claimed that the Agency continued in its failure to accommodate her disabilities, as well as discriminating against her based on disability and in reprisal for her prior protected activity when:

1. From November 30, 2011 through present, management failed to provide Complainant with the necessary equipment, software, and formal training required for Complainant’s disability.
2. From December 2014 through present, in weekly status meetings and regularly exchanged emails, a Management and Program Analyst stated that Complainant’s work product was incomplete and incorrect.
3. From December 2014 through present, in weekly status meetings and regularly exchanged emails, the Acting Director and the Management and Program Analyst subjected Complainant to constant harassment in the form of inconsistent and vague instructions and criticisms
4. In or around February 2015, management reduced and altered Complainant’s workload to include additional administrative duties. Complainant stated that her workload was considerably smaller than that of other employees who held the same position and were not disabled or did not work from home as a reasonable accommodation.

5. On March 17, 2015, management issued Complainant a Performance Counseling Memorandum which warned her of termination of her full-time telework, which included unfounded allegations of deficient performance which would remain in her personnel file for one year and imposed a requirement that all correspondence with Complainant's assigned clients must go through the Management and Program Analyst. Complainant further stated that no other Contracting Officer Representative (COR) was required to comply with the requirement that all correspondence with assigned clients must go through the Management and Program Analyst.²
6. On March 17, 2015, and on or about April 20, 2015, the Acting Director stated that Complainant's continued connectivity and log-in issues were "unique" to her situation.
7. On April 20, 2015, the Acting Director stated that Complainant's position was not amenable to full-time telework, and that no positions in the Acquisition Support Division (ASD) lent themselves to full-time telework.
8. In May 2015, the Management and Program Analyst terminated Complainant's COR appointment on a contract due to alleged performance deficiencies.
9. On June 30, 2015, the Acting Director denied Complainant's requests for an air card, an additional external hard drive, and permission to maintain necessary software at Complainant's home.
10. On August 21, 2015, the Acting Director issued Complainant a Performance Improvement Plan (PIP) based on inaccurate allegations of deficiencies in Complainant's performance.

On February 25, 2016, Complainant amended the instant formal complaint to include the following three claims:

11. On December 3, 2015, the Acting Director determined that Complainant had not met the requirements imposed in the PIP and issued her a Notice of Proposal to Remove her from federal service;
12. On January 30, 2016, the Deputy Executive Director deactivated Complainant's Personal Identity Verification (PIV) access to her equipment, work emails, documents, and the DHS server.

² The Agency did not discuss this claim in its decision. The Agency stated that it was already under orders to expunge this counseling from Complainant's record in accordance with the Commission's December 30, 2016 decision instructing the Agency to expunge from Complainant's personnel file and from all official Agency records all written warnings, reprimands, and counseling issued to Complainant since November 28, 2011.

13. On February 9, 2016, the Deputy Executive Director terminated Complainant's employment with HQ, and did not consider Complainant's response to the proposed removal before making his decision.

After the investigations of Complainant's claims, the Agency provided Complainant with a copy of the reports of investigation and notices of the right to request a hearing before an EEOC Administrative Judge.³ In accordance with Complainant's request, the Agency issued a final decision on June 23, 2017, pursuant to 29 C.F.R. § 1614.110(b), finding no discriminatory or retaliatory harassment, as well as no support for the claim that the Agency denied Complainant's requests for reasonable accommodation.⁴

In its final decision, the Agency dismissed claims 11 and 13, pursuant to 29 C.F.R. § 1614.107(a)(4). The Agency found that on May 30, 2017, Complainant filed an appeal with the Merit Systems Protection Board (MSPB) regarding these claims which relate to Complainant's removal from Agency employment. The Agency determined that even though Complainant initially sought to pursue her removal as a mixed-case claim through the EEO complaint process, Complainant's MSPB appeal was filed before the Agency issued its final decision and therefore, Complainant elected to pursue a mixed-case appeal on her removal with the MSPB (claims 11 and 13 of her EEO complaint).

The instant appeal followed.

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").

³ There are two separate Reports of Investigation (ROI) in the record. The first ROI, submitted on February 23, 2016, covers claims 1 through 10. A supplemental ROI, submitted, June 17, 2016, covers claims 11 through 13.

⁴ The Agency limited its decision to accommodation requests that were outstanding as early as 2014.

Preliminary Matters

Effect of the MSPB Appeal

We take administrative notice that on December 28, 2017, an MSPB administrative judge issued a ruling in Complainant's appeal from her February 2016 removal that the Agency denied Complainant due process by failing to consider her response to the proposed removal. Complainant was reinstated to her position by order of the MSPB judge. MSPB Case No DC-0432-17-0536-I-1. The Agency filed a Petition for Review by the full Board of this Initial Decision on February 1, 2018. It appears that, to date, no decision has been issued by the MSPB on this Petition.

However, on February 15, 2018, the Agency issued a second proposal to remove Complainant based on her alleged failure to demonstrate adequate performance during the 2015 PIP. This time, Complainant was provided with the opportunity to respond to the proposal. On April 27, 2018, the Agency issued its final decision to remove Complainant from her position. Complainant again filed an appeal of the removal to the MSPB, which was docketed as MSPB Case No. DC-0432-18-0552-I-1. On November 28, 2018, the MSPB administrative judge in this second appeal dismissed it *without prejudice* for a period of up to 180 days⁵ because the full Board had not yet ruled on the Petition in Complainant's original appeal. The MSPB administrative judge further indicated that if no decision was rendered on the Petition within 180 days, the judge would automatically refile the appeal and initiate a status conference.⁶

Therefore, we conclude that the issue of Complainant's removal (claims 11 and 13) are still pending before the MSPB and will not be addressed in this decision. However, as the record is clear that claims 1-10 and 12 are not subject to the jurisdiction of the MSPB, we deny Complainant's request for a stay of the Commission's decision pending the adjudication of the MSPB appeals.

Analysis of Merits of Claims

Reasonable Accommodation Claims

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a

⁵ The 180-day period would end in May 2019.

⁶ It is unclear from the record whether or not Complainant is currently working at the Agency based on the original reinstatement order or whether she remains no longer employed by the Agency pending the adjudication of her appeals.

disability is an individual who can perform the essential functions of the position with or without an accommodation.

An employer should respond expeditiously to a request for reasonable accommodation. Enforcement Guidance on Reasonable Accommodation at Question 10. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible. Id. Similarly, the employer should act promptly to provide the reasonable accommodation. Id. Unnecessary delays can result in a violation. Id. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors include: (1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide.

A reasonable accommodation must be effective. See U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002) (“the word ‘accommodation’ . . . conveys the need for effectiveness”). If more than one accommodation will enable an individual to perform the essential functions of her position, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” 29 C.F.R. pt. 1630 app. § 1630.9; see also Enforcement Guidance on Reasonable Accommodation at Question 9.

Here, the evidence developed during the investigations shows that Complainant was involved in a car accident on November 29, 2011, and was diagnosed with lumbar sprain/strain, thoracic sprain/strain, cervical sprain/strain, and muscle spasms and suffers from nerve spasms, herniated discs, and fibromyalgia. The record indicates these conditions were ongoing, and includes physician assessments, dated December 4, 2012, May 10, 2012, June 11, 2012, and September 10, 2015, indicating that Complainant’s diagnoses had not changed. The assessments further indicate that Complainant’s limitations included driving, sitting, and standing not to exceed 20 minutes, walking not to exceed 50 feet, lifting no more than 10 pounds, and no repetitive stooping, bending, twisting, and reaching. The assessments explain that the “mobility, distance, time of actions and travel required [for Complainant to work in the office] all exceed her current medical limitations.” For this reason, the physician recommended that Complainant continue to work from home with proper accommodations. Based on this evidence, we find Complainant is a qualified individual with a disability within the meaning of the Rehabilitation Act.

As noted earlier in this decision, the Commission, in EEOC Appeal No. 0120141732, has already found that the Agency violated the Rehabilitation Act when it failed to accommodate Complainant’s disabilities by denying her request to telework full-time from home between January and July 2012. Our earlier decision also found that after Complainant was eventually granted the accommodation of full-time telework, she made repeated requests for assistive technology, software and training, which the Agency improperly denied. Finally, our prior decision expunged written warnings, reprimands and counseling memoranda issued over the

course of 2012, finding they were the direct result of the Agency's failure to provide Complainant with reasonable accommodation.

Assistive Technology, Equipment, Software and Training Necessary for Effective Telework Accommodation

In the instant complaint, Complainant alleges, among other things, that Agency management was still failing to reasonably accommodate her disabilities concerning her ongoing requests for assistive technology, software and training to allow her to work effectively from home. A February 2013 assessment of Complainant's position indicates it was, "sedentary and required researching and reviewing documents, composing contract documents and reports, managing acquisitions and awards, querying and inputting contract and financial data web-based systems, using DHS and outside training data web-based systems, producing complex documents such as Standard Operating Procedures, corresponding via email."

Complainant explained that in January or February 2012, the Agency's Office of Accessible Systems and Technology ("OAST") conducted a "Needs Assessment" and determined that Complainant required specific equipment to enable her to effectively telework from home. This equipment included government-issued laptop, Blackberry, printer and supplies, ergonomic keyboard, ergonomic and ambidextrous mouse, webcam, Dragon Naturally Speaking Software ("DNS"), DNS training, USB Hub-4 port, air card, encrypted storage drive (Iron Key) as well as a recliner chair, two medically adjustable tables, one computer table, laptop docking station, and PIV card reader. However, Complainant states that management has, as of 2015, provided her with inadequate or defective accommodations even though these accommodations were necessary for Complainant to perform her daily work functions while teleworking.

Specifically, Complainant stated that management has failed to adequately provide the following:

Flexible-time schedule, a reliable laptop computer (between December 2014 and May 2015, management replaced [her] laptop 4 to 5 times because of image problems, corrupted files, end-of-life computers and/or obsolete, not enough memory space/RAM, fire hazards, and network issues); encrypted external hard drive (received two years after request and it did not have enough storage); recliner chair (after great delay, [Complainant] purchased on for [herself] with [her] own funds); an additional computer table (after great delay, [Complainant] purchased on for [herself] with [her] own funds); an air card; timely and sufficient training for the DNS software; an additional computer monitor (the initial second monitor provided by management was broken and a functioning one was only provided in November 2015); a functioning docketing station (management issued [her] a faulty and defective docking station and only replaced it in May 2015); and periodic toner cartridges for the printer.

Complainant stated that, during the relevant time period, the Acquisition Support Division Acting Director (“Acting Director”) was her first-line supervisor, and an identified Management and Program Analyst (“M1”) became the Acting Branch Chief in 2014 and had reviewed Complainant’s work since January 2015.

A February 20, 2013 OAST assessment indicates that Complainant had received a DNS software and headset, ergonomic keyboard, webcam, laptop, printer, Blackberry, and air card,⁷ and Complainant had purchased a medical recliner chair and over-the-chair rolling table. The assessment further indicates that Complainant still required the following items: two additional hours of DNS training, Kensington expert mouse, adjustable keyboard lap tray, a 4 port USB Hub, Iron Key USB storage device, and use of an air card. Complainant had initially received prior training for an incorrect version of DNS software which “caused too many failures required more time to fix documentation and/or data.”

We find that the record supports a finding that the Agency unduly delayed Complainant’s access to technologies necessary for Complainant to effectively telework from home. The 2012 and a February 2013 OAST assessment determined that Complainant required a Kensington expert mouse and an ergonomic keyboard lap tray. Complainant could not operate a standard mouse due to her “dexterity limitations” and the expert mouse did not require movement of Complainant’s shoulder or arm and could be used with either her left or right. Because of right knee surgery and subsequent swelling, Complainant required an ergonomic keyboard tray to prevent her from resting her ergonomic keyboard on her legs. However, the record indicates that Complainant was not provided these items until April 2013, almost one year after the OAST determined that Complainant required these items in 2012.

The February 2013 OAST report also indicated that Complainant required additional DNS training. The record, however, indicates that the Acting Director approved this training eight months later on December 8, 2014 without additional explanation for the delay. Complainant required training on a new version of DNS software because she only knew “basic commands such as opening/closing applications, turning the microphone on/off/sleep/awake, and the most very basic text dictation in a Word document.” The record further indicates that Complainant was unable to schedule any DNS training as of March 11, 2015 because the DNS contactor had not received a signed quote or a Purchase Order from management for the amount of training services.

The February 2013 OAST assessment further indicated that Complainant required use of an air card and an external storage device (iron key USB storage), but the Acting Director waited almost two years, on June 30, 2015, to deny these requests. In his denial, the Acting Director stated that an air card was not a reasonable accommodation and that employees were responsible for providing their own internet access. However, the OAST assessment indicated that the

⁷ Complainant clarifies in her affidavit that she was in need of a replacement air card.

Agency had provided Complainant with an air card in 2009, but she was “recently instructed not to use it.”

The OAST identified the air card as “an alternative mode of internet service” necessary to allow Complainant to continue to work from home when she encountered connectivity issues. Presumably, a replacement air card would have helped Complainant on June 26, 2015, when an IT official determined that Complainant’s government furnished equipment “would not connect to her home internet either over WiFi or Ethernet cable.” Therefore, the air card was necessary equipment that would allow Complainant to effectively telework from home.

Similarly, the OAST assessment also identified the external hard drive as necessary equipment that would provide a safe repository for her to save all of her documents because the P drive was too small. The Acting Director stated in his denial, that an external hard drive was not a reasonable accommodation and did not affect Complainant’s ability to meet her performance expectations. However, the record supports that the IT official submitted a request on November 23, 2015, for Complainant to receive a replacement external hard drive because the external hard drive she had was failing and the replacement would ensure that her files would not get lost. Therefore, the record indicates that the external hard drive would have an impact upon Complainant’s ability to meet her performance expectations.

The record supports that the laptop Complainant received to telework from home was defective and the subsequent replacement laptop Complainant received still required additional repairs. In March/April 2013, Complainant stated that she received the first replacement laptop because her then-laptop was “end-of-life and there was a hole in the bottom of the machine.” Complainant, however, subsequently received “four or five replacement laptops between December 2014 and June 2015 because of “end-of-life issues.”

The record further supports that the Acting Director and M1 were aware of these defects. The Acting Director stated on January 29, 2015, that Complainant’s replacement laptop was “end-of-life.” Complainant notified the Acting Director on March 12, 2015, and again on April 20, 2015, that over a month had passed since a ticket had been issued to fix her replacement laptop and informed the Acting Director that the repairs prevented her from completing her work. Complainant further notified the Acting Director that she did not have “adequate IT equipment, software, and training to promptly complete [her] tasks.”

Although Complainant’s laptop was returned to her on May 1, 2015, she soon notified the Acting Director by email that “the past three days, [she had] been having WAAS network issues which have impeded on [her] professional performance. This has happened a few times during the day where it could last from 30 minutes to an hour each time.” Complainant further stated:

Besides trying to do my work and since I just received my laptop, I will be spending the next few business days working with IT to make sure that everything is working and transitioning files and emails over from WAAS to my Government furnished equipment. Please be advised again that besides not access to having certain software and certain web tools required to do my job in its entirety, a

WAAS user cannot save anything outside of the network drives or print while using WAAS on their personal laptop – which also impedes on my professional performance.

Also, be advised that the DHS-HQ remote team has informed me that both WAAS and the VPN must not work at the same time – otherwise, the network and/or software may crash at any point – which also impedes on my professional performance.

Complainant informed the Acting Director 26 days after getting her laptop back that she still was unable to save her files on the network. Complainant also informed M1 during a June 2015 one-on-one meeting that she has had “persistent IT issues which hinders her ability to perform work.” As late as September 2015, Complainant continued to notify M1 during a one-on-one meeting that she lost documents because her computer kept shutting down and her files would get deleted when attempted to save documents on her personal commuter while using WAAS.

On June 26, 2015, an IT support desk official determined that Complainant’s government furnished equipment “would not connect to her home internet either over WiFi or Ethernet cable.” A November 23, 2015 email indicates that an IT official determined that Complainant’s “external hard drive is failing,” she had “an older encrypted hard drive model,” and submitted a requested “to replace the current model with another encrypted hard drive to ensure there are no lost files.”

In sum, there is ample evidence in the record to support Complainant’s claim that she was not properly accommodated when her requests for assistive technology, equipment, software and training were either unreasonably delayed, denied or did not work properly. The record also establishes that the Acting Director, as well as M1 when she started reviewing Complainant’s work, were repeatedly and fully apprised by Complainant of these technological failures, and their continuing and significant impact on Complainant’s ability to perform her duties.

Performance Counseling Memorandum – Attempt to Rescind Telework

Despite his knowledge of the significant technological challenges Complainant was facing, on March 17, 2015, the Acting Director issued Complainant a performance counseling memorandum regarding his and M1’s concerns about Complainant’s work performance. The Acting Director explained that Complainant had “extensive and ongoing information technology problems related to [her] hardware, software, and connectivity to DHS networks” requiring that Complainant use time in troubleshooting these issues, and that this time-use prevented Complainant from completing her work. As such, the Acting Director determined that full-time telework has become “an unreasonable hinderance” in Complainant’s ability to perform her job and recommended that Complainant’s “part-time presence in the office should alleviate IT issues and facilitate quicker resolution through desktide assistance.” Consequently, the Acting Director reduced Complainant’s telework schedule to no more than three days per week, requiring her to come into the office two days per week effective March 31, 2015.

The Acting Director indicated at the time that no position in the Acquisitions Support Division was suitable for full-time telework.⁸ It appears, however, that the alteration to Complainant's telework schedule never became effective after Complainant reminded him of her medical documentation that supported her inability to travel into the office.

In the Performance Counseling Memorandum, the Acting Director further required that Complainant copy M1 "on all work-related emails, effective immediately." M1 stated that all AMB employees were required to copy her on "all contract action email communications," and this requirement was not unique to Complainant.

Performance Improvement Plan (PIP)

On August 21, 2015, the Acting Director notified Complainant of his decision to place her on a 60-day PIP.⁹ The Acting Director explained that Complainant needed to improve in Core Competency 2: customer service, Core Competency 5: technical proficiency, and Performance Goal 5: acquisition planning. The Acting Director stated that he believed that Complainant's technical proficiency was "contributing to delays" in Complainant's ability to complete her work and had caused "problems with the quality of [her] work products." Regarding acquisition planning, the Acting Director stated that Complainant's "work products were turned [in] late, incorrect and/or incomplete."

The record, however, supports a finding that the Acting Director used the PIP to undermine Complainant's accommodation of full-time telework when its imposition did not account for the ongoing failure to provide Complainant with technologies and training necessary to effectively support telework as a reasonable accommodation. The Acting Director did not account, in justifying the PIP, for any of Complainant's frequent repairs to her government-issued laptop, delayed DNS training, and her technological difficulties which resulted in her inability to save her files to the Agency network. The PIP is also devoid of any suggestion that Complainant had repeatedly notified the Acting Director that she lacked "adequate IT equipment, software, and training to promptly complete [her] tasks."

The record further supports a finding that the Acting Director improperly used Complainant's COR appointment removal as a reason for placing Complainant on the PIP. The Acting Director asserted that Complainant was removed as COR on a contract in May 2015 for "failure to process invoices timely and effectively administer the IAA." However, the May 2015 COR removal termination notice, issued by the Contracting Official, states:

⁸ However, Complainant, in her brief on appeal, submitted documentation that the Acting Director stated, in a January 7, 2016 email to M1, that "*none* of the positions in ASD require daily face-to-face contact with their supervisor, colleagues, client/customers or the general public [emphasis added]." He went on to opine that the positions did "require a *certain amount* of face-to-face contact [emphasis added]" without defining that amount.

⁹ Complainant's PIP was initially for a 60-day period but was extended to a total of 71 calendar days.

[Complainant] is hereby terminated as the COR under the subject IAA. This termination is not performance related. It is only to change the COR on record.

There was no mention in the COR termination that Complainant was removed from her appointment because of poor performance and the Acting Director, therefore, incorrectly determined that Complainant's removal was performance-related.

While the Acting Director references other instances in support of his determination that Complainant had unsatisfactory performance in Customer Service, Technical Proficiency, and Acquisition Planning, we are unpersuaded by the Agency's argument these instances were sufficient to legitimize placing Complainant on the PIP and does not negate the fact that the Acting Director failed to provide or delayed providing Complainant with adequate resources as part of her reasonable accommodation. These facts support Complainant's contention that the Acting Director penalized her by placing her on a PIP for alleged work deficiencies which Complainant explains were related to the Acting Director's own failure to adequately support her reasonable accommodation to telework from home.

On December 3, 2015, the Acting Director issued Complainant a Notice of Proposal to Remove her from her position. In the letter, the Acting Director indicated that Complainant had not demonstrated that she had met the expectations for the core competencies and performance goal identified in her PIP. A notification of personnel action indicates that Complainant's removal was effective February 9, 2016.

In sum, we conclude that the Agency failed in its duty to reasonably accommodate Complainant's disabilities by either not providing Complainant with adequate equipment, software and training, or unreasonably delaying the provision of necessary technologies, to support her accommodation of full-time telework which, in turn, negatively impacted Complainant's work performance. We further find that the performance counseling memorandum and the PIP summarizing Complainant's unsatisfactory work performance directly resulted from the Agency's failure to provide Complainant with adequate technologies required to effectively telework from home as a reasonable accommodation to her disabilities.

Based on our finding that the Agency failed to make good faith efforts to reasonably accommodate Complainant, we will remand the matter for a supplemental investigation into whether Complainant is entitled to compensatory damages. Under Section 102 of the Civil Rights Act of 1991, compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. However, this section also provides that an agency is not liable for compensatory damages in cases of disability discrimination where it demonstrates that it made a good faith effort to accommodate the complainant's disability. A good faith effort can be demonstrated by proof that the agency, in consultation with the disable individual, attempted to identify and make a reasonable accommodation. Schauer v. Soc. Sec. Admin., EEOC Appeal No. 01970854 (Jul. 13, 2001).

Here, the Agency temporarily and unreasonably revoked Complainant's telework accommodation, delayed providing Complainant with necessary telework equipment and training; provided defective equipment that required continuous repairs, and penalized Complainant for its own failure to reasonable accommodate her. These actions demonstrate a lack of good faith in the Agency's accommodation efforts.

Disparate Treatment: Claims 8 and 12

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).¹⁰

Here, the Agency articulated a legitimate non-discriminatory reason for its actions for claims 8 and 12.

Regarding the termination of Complainant's COR responsibilities (claim 8), the Acting Director and M1 denied being responsible for this action. Rather, the Acting Director and M1 stated that only the Contracting Official had the authority to remove an individual from a COR appointment. The record supports that the Contracting Official recommended and removed Complainant from her COR appointment. The record includes a May 11, 2015 email indicating that the Contracting Officer recommended terminating Complainant's COR appointment.

¹⁰ We presume, for purposes of analysis only and without so finding, that Complainant is an individual with a disability.

The May 2015 COR removal email states that, “[Complainant] is hereby terminated as the COR under the subject IAA. This termination is not performance related. It is only to change the COR on record.”

Regarding claim 12, the record supports that the Agency allowed Complainant to keep her government-furnished equipment until January 26, 2016 so that she could respond to the Agency’s proposal to remove her by the January 26, 2016 extended deadline. The record further supports that the Agency deactivated Complainant’s PIV card access on January 30, 2016, after the Agency had denied Complainant’s second extension request and after the January 26, 2016 deadline had passed.

The preponderance of the evidence in the record does not establish that these legitimate, non-discriminatory reasons for claims 8 and 12 are a pretext for discrimination.

Hostile Work Environment: Claims 2-4

To establish a claim of hostile environment harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she 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 her 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 Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case, her disabilities or prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Regarding Complainant’s weekly meetings with M1, M1 testified that she did not supervise any employees and was not in Complainant’s chain of command but served as a Team Lead and Acting Acquisition Management Branch (AMB) Manager from January 5, 2015 to November 30, 2015. In this role, M1 assigned, tracked, and reviewed work of AMB staff work assignments. M1 explained that several of Complainant’s work products (a March 10, 2015 Potomacwave Burn Rate Report, two ITSO Active Contract Lists submitted on June 2, 2015 and September 23, 2015, and an August 6, 2015 Invoice Status Report) were incomplete or inaccurate and she provided input to correct the deficiencies. M1 further stated that she provided feedback to Complainant through weekly meetings and emails.

The record includes minutes from a June 3, 2015 one-on-one meeting between Complainant and M1 indicating that Complainant stated, "I am playing catch-up, so that I can complete all of my outstanding work assignments." The minutes also indicate that Complainant informed M1 that "she has persistent IT issues which hinders her ability to perform work." Complainant also informed M1 that she "should not be given a new assignment to generate APDS Records . . . in addition to her other duties." Regarding Complainant's workload, M1 explained that Complainant stated that she had "too much work," but declined M1's offer to reassign two of her assignments. M1 clarified that the quantity of contracts assigned to each staff member varies because not all contracts are the same. M1 explained that Complainant was the COR on a major/complex project while other employees were assigned smaller contracts.

While we have already found that Complainant's perceived performance deficiencies were the direct result of management's failure to properly accommodate her disabilities, we do not find adequate evidence that discriminatory or retaliatory animus played a role in M1's monitoring of Complainant's work or assignment of tasks. Therefore, we conclude Complainant has not established she was subjected to unlawful harassment by M1.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed, we find that the Agency violated the Rehabilitation Act when it failed to adequately accommodate Complainant's disabilities by providing her with the necessary technological support to allow her to telework effectively, as well as by issuing her a performance counseling memorandum and a PIP. To remedy Complainant, we REMAND the complaint for further action in compliance with this decision and the ORDER below.

ORDER

The Agency is ordered to take the following remedial action:

1. **Within 45 calendar days of the date this decision is issued**, the Agency shall expunge from Complainant's personnel file and from all official Agency records the March 17, 2015 Performance Counseling Memorandum, as well as the August 2015 Performance Improvement Plan (PIP).
2. Conduct a supplemental investigation **within 90 calendar days of the date this decision is issued**, to determine whether Complainant is entitled to compensatory damages and if so, the amount of damages Complainant is entitled for this violation of the Rehabilitation Act.
 - a. Notify Complainant of her right to submit objective evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)¹¹ and

¹¹ **For more information on determining compensatory damages:** EEOC Management Directive 110, Ch. 11 § VII (Aug. 5, 2015), available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm (provides the types of

request objective evidence from Complainant in support of compensatory damages (providing an option and instructions to request an extension in the case of extenuating circumstances).

- b. Issue a written decision on the results of the investigation to Complainant with appeal rights to this Commission.
 - c. Pay Complainant the determined amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to the Complainant for the undisputed amount. 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. **Within 90 calendar days from the date this decision is issued**, the Agency shall provide at least eight hours of in-person training to the Acting Director regarding his responsibilities under the Rehabilitation Act with special emphasis on the Agency's obligation to provide reasonable accommodations.
 4. **Within 90 calendar days from the date this decision is issued**, the Agency shall consider taking appropriate disciplinary action against the Acting Director. 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 the Acting Director has left the Agency's employ, the Agency shall furnish documentation of his departure dates.
 5. **Within 30 calendar days from the date this decision is issued**, the Agency shall 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 supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

compensatory damages available under Title VII and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) *available at* <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

POSTING ORDER (G0617)

The Agency is ordered to post at its Headquarters - Acquisition Services Division (ASD) 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)

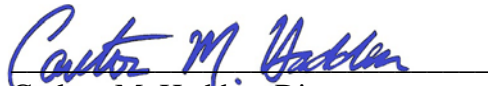
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from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

March 26, 2019

Date