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

[redacted]
Anne W.,[1]
Complainant,

v.

Nancy A. Berryhill,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 0120172935

Hearing No. 531201700024X

Agency No. HQ160038

DECISION

Complainant timely appealed, pursuant to 29 C.F.R. § 1614.403, from the July 28, 2017 Final Agency Decision ("FAD") concerning an equal employment opportunity ("EEO") complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an IT Specialist, GS-12, Office of Telecommunications and System Operations ("OTSO"), Infrastructure Architecture and Configuration ("IAC"), Division of Mainframe Systems Software ("DMSS"), at the Agency's National Computer Center in Baltimore, Maryland.

On December 29, 2015, Complainant filed an EEO complaint alleging disparate treatment and harassment by the Agency on the bases of race (African-American), sex (female), disability (physical), age (mid-50's), and--for Claim 2 only--reprisal for prior protected activity when:

[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.

1. Since May 22, 2015 and ongoing, she was subjected to non-sexual harassment in terms of training, working conditions, telework, and reasonable accommodation,

2. In September 2015, her workload increased after she filed a grievance,

3. On June 8, 2015, she was denied training under the Job Experience Learning Program ("JELP"),

4. On May 22 and 25, 2015, she was denied telework,

5. On or around September 8, 2015, she was denied telework,

6. On July 24, 2015, she was denied Work-At-Home-By-Exception ("WAHBE"),

7. From September 24, 2015 through October 2015, her supervisor increased her workload immediately after denying her accommodation request, and

8. From July 24, 2015, and ongoing, Complainant was denied WAHBE as a reasonable accommodation for her disabilities.[2]

When its investigation concluded, 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 ("AJ"). Complainant requested a hearing, and on March 29, 2017, the assigned AJ issued a Scheduling Order requiring the parties to participate in an initial teleconference on May 4, 2017. Complainant missed the initial teleconference, and did not respond to the AJ's subsequent voicemail and Order to Show Cause dated May 11, 2017, which provided Complainant 10 days to explain her absence. Citing her lack of response, the AJ dismissed Complainant's hearing request and remanded the complaint to the Agency, ordering it to issue a FAD on the matter pursuant to 29 C.F.R. § 1614.110(b). [3]

The record and submissions from the parties include the following relevant facts:

[2] Complainant does not challenge the dismissal of Claims 1, 2, 3, and 7, her harassment allegation, and the discriminatory bases of race, sex, age and reprisal. We include these elements of the original complaint for purposes of consistency and background only.

[3] The Commission's regulations afford broad authority to AJs for the conduct of hearings. 29 C.F.R. § 1614.109 et seq; EEO MD-110, Chap. 7, § III(D). Where a party does not respond to an order of an AJ, the AJ may, as appropriate, act against the non-complying party pursuant to 29 C.F.R. § 1614.109(f)(3). Although Complainant provides evidence she received medical attention for a dog attack between May 10, 2018 and May 22, 2018, we find the AJ acted within her discretion when dismissing Complainant's Hearing Request.

The essential functions of Complainant's IT Specialist, OTSO, IAC, DMSS, position included installing, implementing, testing, and validating system software changes, entering change records, and running reports. Generally, Complainant reported to the Branch Chief (female, other bases not specified), as her first level supervisor ("S1"). S1 distributed assignments, monitored the IT Specialists' workloads and granted leave and telework requests. Complainant could perform her position remotely, and regularly teleworked.

In or around 2012, Complainant was diagnosed with two severe, episodic physical conditions – fibromyalgia and chronic migraines. During a "flare up" or "episode" of fibromyalgia, Complainant experienced nerve pain, resulting in, among other things, difficulty walking and sitting. During a migraine, Complainant experienced dizziness and nausea, and needed to avoid bright lights, loud sounds, and other variations in her physical environment such as extreme motion or driving. At worst, these conditions prevented Complainant from working, however, during less severe episodes, Complainant could still work remotely. Teleworking allowed her to control the lighting, temperature, and sound in her environment, and, significantly, allowed her to avoid commuting, as the motion from driving exacerbated her symptoms.

From May 17, 2015 through October 4, 2015, Complainant's second level supervisor ("S2"), the Division Director (male, Caucasian, mid 50's, disability status not specified) took on S1's duties. S2 was aware that Complainant teleworked, and he knew about her fibromyalgia and chronic migraines. In May 2015, Complainant provided S2 with Family and Medical Leave Act ("FMLA") forms. The first form, dated April 23, 2015, was completed by Complainant's physician, and would allow her to take leave when experiencing episodes of fibromyalgia or migraines or for related treatment. Complainant's physician noted in the paperwork that teleworking could decrease Complainant's absences. The second FMLA form, dated April 24, 2015, would allow Complainant to take leave in order to care for her mother, a stroke survivor with diabetes and other conditions requiring ongoing care and monitoring.

On May 22, 2015, Complainant had to care for her mother, so, rather than take leave she asked S2 if she could telework. Complainant already started teleworking at 6:00 am, as she had an assignment due by 8:00 am. Complainant submitted the assignment and continued to telework. She had not heard from S2, and S1 would have granted such a request. Around 9:30 am, the acting Director granted Complainant's request because S2 was out of the office on vacation. Shortly afterward, S2, responding remotely, instructed the acting director not to grant Complainants request, and Complainant was required to take leave. S2 denied Complainant's requests to telework on May 25, and September 8, 2015 because both requests were to switch her telework day to another day in the week, as her telework day, Monday, fell on a federal holiday. S1 had always granted Complainant's request to switch her telework day when it fell on a federal holiday.

On July 24, 2015, Complainant provided S2 with a memo requesting an additional day of telework per week under the Work-At-Home-By-Exception ("WAHBE") program. She stated she intended to work no more than three telework days per week, and the request was for a period of eight months, beginning in August as a reasonable accommodation for her

fibromyalgia and migraines, as well as to care for her mother. She provided a new letter from her physician in support of telework as a reasonable accommodation and provided both FMLA documents. S2 denied her request, because caregiving is not a disability and does not warrant a reasonable accommodation. In what the Agency concedes was an erroneous interpretation of EEO law, S2 also denied Complainant's WAHBE request because he did not believe it constituted a "reasonable accommodation" for Complainant's migraines and fibromyalgia, reasoning that commuting was not an "essential function" under Complainant's position description. Instead, S2 suggested public transportation, ride shares, or a taxi.

In its FAD, the Agency dismissed Claims 1 through 4 on procedural grounds, specifically finding that Claims 1 and 2 failed to state a claim as required under 29 C.F.R. § 1614.107(a)(1), and Claims 3 and 4 were untimely under § 1614.107(a)(2). The Agency dismissed Claims 5 through 8 based on the merits, concluding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed, challenging the Agency's findings with respect to the following two issues:

1. Whether the Agency erred when it determined that the Complainant was not a qualified individual with a disability and denied her request for Work-At-Home-By-Exception ("WAHBE") as a reasonable accommodation (Claims 6 and 8).

2. Whether the Agency subjected the Complainant to disparate treatment on the basis of disability when it denied her request for telework (Claims 4 and 5).

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").

Timeliness: Claim 4

In relevant part, 29 C.F.R. § 1614.107(a)(2) provides that an agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the

effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45-day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent. See Complainant v. United States Postal Serv., EEOC Appeal No. 0120120499 (Apr. 19, 2012). The alleged discriminatory acts in Claim 4, denial of telework, occurred on May 22 and 25, 2015. Complainant did not initiate contact with an EEO Counselor until September 4, 2015, well past the 45-day limitation period.

However, Claim 4, involves a reasonable accommodation request. The Commission has specifically held that the denial of reasonable accommodation constitutes a recurring violation that repeats each time the accommodation is needed. See Harmon v. Office of Personnel Mgt., EEOC Request No. 05980365 (Nov. 4, 1999), see also EEOC Compliance Manual, Section 2, "Threshold Issues," p. 2-73, EEOC Notice 915.003 (July 21, 2005). Therefore, viewed as a recurring violation, the Commission finds that Complainant's EEO Counselor contact for Claim 4 is timely as to her reasonable accommodation claim.

Denial of Telework as Disparate Treatment: Claims 4 and 5

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a *prima facie* case 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. 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. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, 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. St. Mary's Honor Ctr. 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. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

The Agency's legitimate nondiscriminatory reason for denying Complainant's telework requests in Claims 4 and 5 was that the reason for her requests did not fall within the Agency's telework policy, or the Collective Bargaining Agreement ("CBA"). For Claim 4, documentation in the record, including a grievance Complainant filed on the matter, indicates that the only purpose of Complainant's request to telework on May 22, 2015 was to be home with her mother, who was ill. For Claim 5, Complainant's only reason for requesting to switch her telework day on May 25 and September 8, 2015 was because she would otherwise lose her telework day that week because both fell on Federal Holidays.

S2 cites Article 41 of the CBA and the Agency's telework policy, explaining that the Agency was not required to switch a telework day that fell on a federal holiday. Although Complainant argues that nothing in the CBA or Agency policy prevented S2 from granting her requests, and that S1 granted "all" of her telework requests for over a year. As S2 was acting in accordance with Agency policy and the CBA, and within his managerial discretion, we find no evidence of discriminatory intent. It is well established that the Commission "does not second-guess the business judgment of Agency officials regarding personnel decisions without a demonstrably discriminatory motive." See Camden v. Dep't of Justice, EEOC Appeal No. 0120093506 (Jul. 27, 2012) reconsideration denied EEOC Request No. 0520120603 (Jan. 31. 2013).

Complainant does not provide any comparator evidence to indicate discriminatory motivation.

Denial of Reasonable Accommodations: Claims 6 & 8

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. 29 C.F.R. § 1630.2(g). A physical 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. 29 C.F.R. § 1630.2(h)(1). The impairment must substantially limit the ability of the complainant to perform a major life activity as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). Major life activities include, in part, performing manual tasks, walking, standing, reaching, lifting, and bending. 29 C.F.R. § 1630.2(i)(1)(i).

The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with this, the definition of disability shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. 29 C.F.R. § 1630.1(c)(4).

Applying the above law, we find that the Agency erred when determining that Complainant fails to establish that she is an individual with a disability because her conditions are "not constant," and "manageable." The Agency also argues that although Complainant's medical documentation states that her conditions "can affect her nervous, digestive, respiratory and musculoskeletal systems," she has not shown it to "substantially limit" a major life activity. The Agency's argument that "[m]ost notably, Appellant's medical documentation failed to state the extent that Appellant's impairments interfered with her functioning in relation to a major life activity, including commuting. Reitman v. Dep't of the Air Force, EEOC DOC 01A10628 (Mar. 6, 2003) predates the ADAAA.

Under the Rehabilitation Act and the Commission's regulations, an agency is required to make reasonable accommodation of the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), 1630.2(p). A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. See Bryan R. v. United States Postal Serv., EEOC Appeal No. 0120130020 (Mar. 20, 2015), citing EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, Question 1 (Oct. 17, 2002).

The term "qualified" with respect to an individual with a disability means the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

The Commission has held that where an employee has a modified position for an extended amount of time, it is to be considered the position which is considered for purposes of determining whether the employee is a qualified individual with a disability. McConnell et al. v. United States Postal Serv., EEOC Appeal No. 0720080054 (Jan. 14, 2010).

It is undisputed, and the record supports that Complainant is "qualified." Moreover, Complainant had been granted telework by her previous supervisor as an apparent "modification" or informal reasonable accommodation before she started reporting to S2. The Agency's argument that some of Complainant's requests for telework were not related to her disability does not negate the fact that Complainant successfully performed the essential functions of the job when granted telework.

Complainant's July 24, 2015, WAHBE memo contained the subject "Work at Home by Exception (temporary telework for medical reason)" and expressly requested 1 additional telework day per week for a period of 8 months as a reasonable accommodation for her chronic migraines and fibromyalgia. S2 explained that he denied Complainant's request "because it was not a valid request for reasonable accommodations." Specifically, S2 noted that Complainant's request also stated that it was in part intended as a way for her to be available to care for her mother, not a disability, and because Complainant referenced "symptoms that prevent her from driving or enduring any extreme motion" when commuting to work was not a core function of

her position. Further, S2 reasoned that Complainant's requested accommodation of telework "was not substantiated by the documents provided by her medical provider." Here, S2 could have engaged Complainant in the "interactive process" by requesting more information, yet he failed to do so.

Our guidance provides that when an individual's disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, Question 6 (Oct. 17, 2002). The employer is entitled to know that the individual has a covered disability for which he needs a reasonable accommodation Id. Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has a disability within the meaning of the Rehabilitation Act and that the disability necessitates a reasonable accommodation. Id. If an individual's disability or need for accommodation is not obvious, and he refuses to provide the reasonable documentation requested by the employer, then she is not entitled to reasonable accommodation. Id. Here, Complainant provided FMLA medical documentation and a doctor's note identifying her conditions, and why telework would be a reasonable accommodation. Merely because her conditions were episodic, and at times manageable, did not disqualify them from classification as disabilities under the new ADAAA.

The Agency argues that it was not obliged to grant Complainant's WAHBE request, that is, to allow her to have the accommodation of her choice. However, it does not appear that the Agency was offering complainant any accommodation in the alternative, as S2 did not engage in the interactive process with Complainant. The Agency's contention on appeal, and in the FAD, that Complainant had been provided episodic telework as an alternate accommodation, is based on S2's unilateral decision-making on a case by case basis. The Agency acknowledges that S2 lacked understanding of Complainant's rights under the Rehabilitation Act, and that he failed to engage Complainant in the interactive process. Therefore, despite evidence that S2 granted Complainant's requests for telework on some occasions based on medical appointments or symptoms related to her disabilities, the Agency did not properly engage with Complainant and provide an alternate reasonable accommodation when it denied her WAHBE request.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's procedural dismissal of Claims 1, 2, and 3, and we AFFIRM the Agency's finding that no discrimination was proven as alleged for Claims 5 and 7. We find the record sufficiently developed to establish no discrimination occurred as alleged for Claim 4.

However, we REVERSE the Agency's finding that Complainant was not denied a reasonable accommodation in Claims 6 and 8.

The matter is hereby REMANDED to the Agency for further processing in accordance with the following ORDER.

ORDER (C0610)

The Agency is ordered to take the following remedial action:

1. 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 to under 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)[4] and 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 determination on the results of the investigation to Complainant with appeal rights, and,

   c. Pay Complainant the determined amount of compensatory damages within 30 calendar days of the date of the determination, explain to Complainant that she may accept the award and still appeal to this Commission if she disagrees with the outcome.

2. **Within 90 calendar days** of the date this decision is issued, restore any leave Complainant had to use in lieu of telework as a result of the Agency's failure to approve her accommodation request.

3. Consider taking appropriate disciplinary action against S2, **within 60 calendar days** of the date this decision is issued. Training does not count as disciplinary action. The Agency shall report its decision to the EEOC 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)

[4] **For more information on determining compensatory damages:** EEOC Mgt. 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 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").

for its decision not to impose discipline. If S2 has left the Agency, the Agency shall furnish documentation of his departure.

4. Provide at least 2 hours of one-on-one in-person training for S2, **within 30 calendar days** of the date this decision is issued. This single training session can be prepared/provided by an Agency HR or EEO employee or contractor with subject matter expertise to: (1) explain this decision and what, if anything, S2 should do differently if presented with a similar scenario, and (2) discuss when and how to engage in the interactive process for providing reasonable accommodations, and when it is appropriate to request additional medical documentation, under the Rehabilitation Act. If S2 has left the Agency, the Agency shall furnish documentation of his departure date.

5. Pay Reasonable Attorney's Fees and Costs, in accordance with the "Attorney's Fees" section below, and include reasonable associated administrative costs incurred by Complainant,

6. Post the attached Notice, in accordance with the "Posting Order" below.

7. Submit a Report of Compliance, as provided in the "Implementation of the Commission's Decision" section below. The Report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its National Computer Center 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)

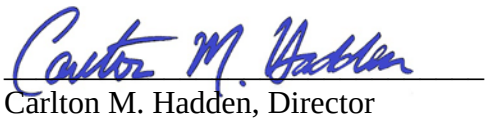
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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 26, 2019
Date