



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

[REDACTED]
Irina T.,¹
Complainant,

v.

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

Appeal No. 0120180568
Agency No. 200I-0614-2016101883

DECISION

On October 25, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from a final Agency decision dated October 3, 2017, 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., 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 a Pharmacy Technician (Telephone Care), GS-0661-06, at the Veterans Affairs Medical Center (VAMC), Pharmacy Service - Telephone Care Service in Memphis, Tennessee.

On May 9, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her based on her disabilities (diabetes, gastroparesis disease, and chronic pain²), and age (57) 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.

² Complainant wrote that she has chronic pain from nerve damage as a result of breast cancer in 2000. She did not specifically connect this to any of the events at issue in her complaint.

1. By letter dated January 25, 2016, she was ordered by her second line supervisor, the Assistant Chief, Pharmacy Service, GS-14 (“S2” – age 31), to return to duty no later than January 28, 2016, or face administrative action, up to and including removal.
2. On March 1, 2016, S2 issued Complainant a written reprimand for being absent without official leave (AWOL) for part or all of each workday (except one) from January 4, 2016 through January 27, 2016, and February 5, 2016 – a total of 115 hours.
3. On February 19, 2016, S2 found that Complainant was ineligible for excused leave under the Family and Medical Leave Act (FMLA) because she did not satisfy a required FMLA waiting period.

The Agency accepted the complaint and conducted an investigation.

Complainant recounted as follows. She was hospitalized and diagnosed with diabetes type II in February 2014, and in time was able to control her blood sugar with oral medication. In June 2014, she started having symptoms of severe stomach pain with continuous nausea and vomiting, for which she was hospitalized in September 2014. She was diagnosed with gastroparesis causing her to be unable to properly digest food, which is associated with her diabetes. Starting with this hospitalization, she was out of work for almost a month.

In February 2015, according to Complainant, her blood sugar became unstable again. She was prescribed additional medication, including NovoLog (a rapid acting insulin) but her blood sugar stayed unstable, and she was hospitalized in May 2015 for six days. After leaving the hospital, she was required to monitor her blood sugar level six times daily, which led to her being diagnosed with “dawn phenomenon,” where her blood sugar was always between 400 and 500 in the mornings. A good blood sugar level for her is 180. Her medication was adjusted again. She returned to work more than three weeks after her May 2015 hospitalization began. In late July 2015, her blood sugar became unstable again, and her endocrinologist suggested an insulin pump. As of November 17, 2015, she was not given an insulin pump because she needed to be on insulin using other methods for a while before the pump would be approved. When her blood sugar levels are high, she indicated she can get dizzy and cannot drive to work. She was hospitalized again from February 19, 2016, for some period, and later returned to work on March 22, 2016. S2 stated that she had medical notes indicating Complainant was seen by her physician on February 24, 2016, and could return to work on February 27, 2016, that she was seen on February 29 through March 18, 2016, and could return on March 21, 2016, and a medical note dated March 21, 2016, that Complainant could return to work on March 22, 2016. On May 11, 2016, she went into a diabetic coma while driving and hit a pole, damaging her vehicle.

A Memphis VAMC Supervisory Human Resources (HR) Specialist, GS-13 (age 54), who advised the Pharmacy Service, was aware Complainant had diabetes. She stated that the leave policy is that when an employee has no leave balance, the service chief (who in this case was Complainant’s third line supervisor – “S3”, age not identified) has authority to grant leave without pay (“LWOP”),

which is discretionary. She added that in exercising this discretion, a service chief will look at whether the continued absence will cause a hardship on work getting done.

A Memphis VAMC Policy Memorandum entitled Leave for Medical Center Employees, issued on March 22, 2016, shortly after the events in this case, is consistent with the Supervisory HR Specialist's recitation of leave policy. Regarding LWOP for medical reasons, the Memphis VAMC Policy Memorandum provides that granting LWOP is discretionary and cannot be demanded by an employee as a matter of right, except by disabled veterans who need it for medical treatment of their service-connected medical condition or under FMLA. The Memphis VAMC officials authorized to approve LWOP are service chiefs, who may approve it up to 30 calendar days. For more than 30 days of LWOP, the Medical Center Director is the approving official. LWOP may be granted under the same circumstances as sick leave when there is a reasonable expectation that the employee will return to duty. ROI, Section 7-14, at Bates Nos. 435 – 436.

Complainant invoked FMLA on February 18, 2015. By letter dated July 31, 2015, S2 notified Complainant that she exhausted the maximum protective FMLA coverage of 480 hours on July 21, 2015. ROI, Section 7-10, at Bates Nos. 329, 331. The Supervisory HR Specialist stated that under FMLA, an employee is entitled to use 480 hours of unpaid leave per rolling calendar year. ROI Section 7-4, at 13, Bates No. 236. On February 8, 2016, Complainant sent an email to the Medical Center Director's interim executive secretary that she was advised by S3 on February 8, 2016, that once her FMLA coverage expired, he would not approve LWOP and she would be charged AWOL.

Complainant wrote a letter to the Medical Center Director dated August 13, 2015, asking for an additional 30 days of "FMLA" to receive an insulin pump. The record does not indicate how the Director responded, but Complainant was not charged any AWOL from at least July 23, 2015 through January 3, 2016. Instead, she took paid leave, mainly donated, for absences during this period.

In her transcribed EEO investigatory affidavit, S2 stated that the leave that was donated to Complainant expired on December 31, 2015, and Complainant did not reapply for it until after she accumulated the AWOL at issue in the instant EEO complaint. The expiration date is corroborated in an email S2 sent to Complainant on February 12, 2016, recounting her discussion with Payroll. ROI, Section 7-5, at Bates No. 270. On February 5, 2016, S2 notified Complainant that Pharmacy management was informed the day before that the Medical Center Director (age unidentified) denied her request to participate in the Voluntary Leave Transfer Program (donated leave) for January 2016 through May 2016. ROI, Section 7-5, at Bates Nos. 272, 274.

After consulting with HR and S3, by letter to Complainant dated January 26, 2016, S2 ordered her to return to work the day after her receipt of the letter. The letter indicated that Complainant was off work since January 11, 2016, and as of January 6, 2016, exhausted all her leave – annual, sick, family care, and donated, that her FMLA protective coverage ran out, and she was AWOL because she had no leave.

It was asserted that in the past six months Complainant used 469.75 hours of leave, largely donated, but also substantial leave without pay (LWOP), as well as some sick and annual leave. S2 did not dispute the validity of Complainant's illness but indicated that her excessive unplanned absences caused the Telephone Care Service an undue hardship. According to S2, during Complainant's absence, Telephone Care Service answer times and caller abandonment rates increased due to decreased staffing, and the Pharmacy incurred over 600 hours of overtime in the Telephone Care Service since January 2015 to maintain adequate customer service for veterans. S2 notified Complainant that she would continue to be charged AWOL so long as she had insufficient leave to cover her absences due to illness.

S2 stated that it was decided to order Complainant to return to work because they had no medical documentation or other information on when she planned to return.

Complainant returned to work on January 28, 2016, but her frequent absences continued, albeit generally for a lesser number of full days.

On February 11, 2016, after consulting with HR and informing or consulting S3, S2 proposed reprimanding Complainant for incurring AWOL hours as follows. On January 4, 2016 – 4; January 5, 2016 - 1½; January 6, 2016 - 2½; January 8, 2016 – 3; from January 11, 2016 through January 27, 2016 – 8 each workday, and February 5, 2016 – 2. Complainant worked half days on January 4 and 5, 2016. She had less AWOL on January 5, 2016, because she used 2½ hours of sick that day. For the portion of the days she was not charged AWOL on January 6, 2016, January 8, 2016, and February 5, 2016, Complainant worked.

In the proposed reprimand, each AWOL charge was broken down by date with each explicitly charged solely because Complainant had insufficient leave balances to be absent from duty. On March 1, 2016, S2 sustained the proposal, and reprimanded Complainant.

S2 knew Complainant had diabetes. However, she indicated that absent LWOP being approved, her understanding of Agency policy was that when an employee exhausted all leave and was off work, they are charged AWOL. She stated that S3 had discretionary authority to approve LWOP for up to 30 days, and more LWOP required the Medical Center Director's approval. S2 stated that in previous instances similar to this one, the service chief would not approve discretionary LWOP.

Regarding the absences covered in the reprimand, S2 stated Complainant submitted documentation for one week of her absence. ROI, Section 7-2, at 52, Bates No. 162. This refers to a letter by Complainant's physician indicating Complainant was off work from January 11, 2016 through January 15, 2016 for hyperglycemia caused by diabetes. In the reprimand, Complainant was not charged with failure to timely call in to request leave or charged with failing to submit requested medical documentation.

At times when the EEO investigator asked about the reprimand, Complainant got confused about which AWOL period was covered thereby, the one which started on January 4, 2016, or one that started on February 19, 2016.

This confusion likely arose from the way Complainant alleged her claims in her EEO complaint and how the Agency framed it. Complainant identified issue 2 in her EEO complaint as receiving a reprimand on March 1, 2016, for the AWOL period of February 19, 2016 – March 22, 2016. But the reprimand actually covered the AWOL starting on January 4, 2016, which is how the Agency captured issue 2. Nevertheless, Complainant sometimes talked about the later AWOL period when the EEO investigator asked about the reprimand.³ ROI, Section 7-1, at 9 – 11, Bates Nos. 66 – 68.

This in turn sometimes confused the EEO investigator when she prefaced her questions about the reprimand to witnesses. When she asked S2 about the reprimand, she prefaced the question by relaying Complainant said her husband notified Complainant's first line supervisor, the Pharmacy Technician Supervisor (Telephone Care), GS-07 (S1 – age 56 and 57) of her hospitalization throughout it – referring to the AWOL period starting on February 19, 2016, and asked S2 if she was aware of Complainant's status while she was out. S2 responded that she was not aware Complainant was hospitalized, and did not see any medical documentation on this.⁴ ROI, Section 7-2 at 11, 13 – 14, Bates Nos. 121, 123 – 124. The EEO investigator then asked a follow up question about the reprimand, and S2 responded that the VAMC is very flexible when it comes to hospitalizations, and would not charge an employee with AWOL which could lead to discipline if they are in the hospital. Id., at 16, Bates No. 126.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notified her of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). She did not request a hearing. The Agency then issued a final Agency decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). It found no discrimination.

In its FAD, the Agency applied a disparate treatment legal analysis to Complainant's entire EEO complaint. Citing United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-17 (1983) the Agency bypassed a disparate treatment prima facie analysis because management articulated legitimate, nondiscriminatory reasons for its actions. It found S2 explained that she ordered Complainant to return to work because she continued to have unplanned absences and did not notify S1 when she would return to work. It found that S2 explained that she charged Complainant the AWOL for which she was reprimanded because she was absent, had exhausted all her leave, and failed to follow proper leave procedures. Complainant said she was hospitalized for all the AWOL, but did not provide documentation of this, and she missed work for extended periods. On issue 3, the Agency credited S2's statement that she informed Complainant on February 19, 2016, that she was not eligible for FMLA because she was unaware of the Memphis VAMC's current FMLA policy.

³ On appeal, Complainant does not discuss the AWOL charged from February 19, 2016 through March 21, 2016.

⁴ Regarding claim 2, S1 stated that she did not believe Complainant was hospitalized in January 2016.

The Agency found that Complainant failed to prove the management's explanations were pretexts to mask discrimination, nor that she was disparately treated.

The instant appeal from Complainant 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”).

Reasonable Accommodation – Issues 1 and 2

Preliminarily, we note that the Agency analyzed this entire matter as a complaint of disparate treatment. However, on appeal, Complainant argues that she alleged that she was denied reasonable accommodation, and this was not addressed by the Agency in the FAD. We agree.

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, the operation of a major bodily function, including functions of the digestive, genitourinary, bowel, bladder, and endocrine. 29 C.F.R. § 1630.2(i)(1)(ii).

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).

In March 2015, Complainant's health care provider completed an FMLA form certifying that Complainant had a serious health condition. The provider wrote that Complainant was under the provider's care since February 2014, and struggles to control her blood sugar, with multiple episodes of hypoglycemia and hyperglycemia. In February 2016, the same provider again completed a FMLA medical certification form writing that Complainant had uncontrolled diabetes with complications, including gastroparesis with episodes of abdominal pain, nausea, and vomiting two to three times per two or three months, and chronic regional pain syndrome. We find that Complainant is an individual with a disability because she has diabetes and gastroparesis disease. Commission regulations explicitly state diabetes substantially limits endocrine function, a major life activity. 29 C.F.R. § 1630.2(j)(3)(iii).

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). In determining whether an individual is qualified for a job, the Commission asks whether that person can perform the essential functions of the job when at work. Gilberto S. v. Homeland Security, EEOC Petition No. 0320110053 (Jul. 10, 2014). There is no indication in the record that Complainant did not perform the essential functions of her job when at work.

Under the Rehabilitation Act and the Commission's regulations, an agency is required to make reasonable accommodation to 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).

Complainant requested a reasonable accommodation – continued LWOP for her disability-related absences from work. To determine an appropriate reasonable accommodation, it is often necessary for an agency to initiate an informal, interactive process with the individual with a disability who needs accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(3). There is no indication in the record that, in anticipation of cutting off Complainant's LWOP under its blanket leave policy, the Agency initiated or engaged in any sort of interactive process with Complainant to explore means of accommodating her disability, which was well known to her management. Instead, the Agency simply applied its blanket leave policy to charge Complainant AWOL because she exhausted all her available paid leave and her FMLA coverage ran out.

The Agency's failure to engage in an individualized assessment of Complainant's circumstances, rather than its automatic application of its general leave policy, has resulted in the Agency being unable to meet its burden of proving that granting Complainant additional LWOP would have created an undue hardship on its operations. The Commission has taken a clear position that, absent proof of undue hardship, reasonable accommodation includes "making modifications to existing leave policies and providing leave when needed for a disability even where an employer does not offer leave to other employees."

See EEOC's guidance *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016) (footnote 1 indicates that this guidance applies to federal employees). Relevant to this case, the guidance indicates that granting leave⁵ as a reasonable accommodation may be required even when the employee has exhausted the leave the employer provides as a benefit, including leave exhausted under the FMLA. EEOC's guidance also emphasizes that engagement in the interactive process with the employee is specifically designed "to enable the employer to obtain relevant information to determine the feasibility of providing the leave as a reasonable accommodation without causing an undue hardship." Here, the Agency failed in its duty to engage Complainant an individualized discussion of her needs for more leave without pay as an accommodation.

Moreover, in Complainant's October 2017 appeal brief submitted by and through her attorney, she wrote that she now works in the Pharmacy Service three hours a day, and her attendance has been good because she is less stressed. In her EEO investigative transcribed affidavit, Complainant stated that being under stress causes her blood sugar level to increase, and indicated the Agency's enforcement of its leave policy caused her stress which raised her blood sugar levels. Had the Agency endeavored to engage in the interactive process with Complainant, it might have discovered this other viable accommodation – part-time work. See 29 C.F.R. § 1630.2(o)(2)(ii) (reasonable accommodation can include part-time or modified work schedules).

In sum, we find that the Agency discriminated against Complainant based on her disability when it did not reasonably accommodate her, charged her with AWOL in the reprimand, and took the actions in issues 1 and 2.

In so finding, we note that in its FAD, the Agency found that one reason management charged Complainant the AWOL in the reprimand was because she did not submit medical documentation to support her absence regarding her hospitalization. We disagree. S1 and S2 indicated that they were not aware that Complainant was allegedly hospitalized during the AWOL charged in the reprimand (meaning AWOL starting January 4, 2016). Neither the return to work order letter nor the reprimand mention anything about insufficient medical documentation. Further, in the January 25, 2016 return to work order, S2 stated she did not dispute the validity of Complainant's illness. S1 stated that when Complainant was not going to report to duty, either she or her husband would text with detailed information, relaying that Complainant's blood sugar level was over 400 and the like. ROI, Section 7-3, at 12, 16, 32, Bates Nos. 176, 180, 196. Moreover, S2 stated that she had medical documentation excusing Complainant's absence for one week of the above AWOL period. The AWOLs charged in the reprimand included this week.

Likewise, we disagree with the finding in the FAD that one reason Complainant was charged the AWOL in the reprimand was because she failed to follow proper leave procedures. This was not mentioned in the order to return to work letter or the reprimand, and management did not state this was a reason for these actions.

⁵ Reasonable accommodation does not require the employer to provide *paid* leave beyond what it provides as part of its paid leave policy. We note in this case, Complainant was requesting leave without pay.

Rather, S2 stated Complainant was reprimanded because she used up all her leave and was absent from work, and this was the only reason mentioned in the reprimand, i.e., she was absent from duty and was out of leave, including “leave without pay for FMLA use.”

Disparate Treatment – Issue 3

On Issue 3 of the complaint, we agree with the Agency’s finding that S2’s communication to Complainant on February 19, 2016, that she determined Complainant was ineligible for FMLA coverage because she did not satisfy a required waiting period was because of a mistake, not bias. At the time, the Memphis VAMC’s memorandum leave policy, which was expired but not replaced yet, stated that for an employee to be eligible for FMLA coverage, they must have worked for the Agency for over 1250 hours in the previous 12 months. ROI, Section 7-14, at Bates Nos. 402, 410. S2 relied on this. But this policy guidance was incorrect – this applied to the private sector. The guidance was replaced in March 2016. Five hours after relaying her incorrect determination, S2 sent Complainant an email advising that per HR she was eligible to invoke FMLA coverage and apologized for her error.

CONCLUSION

The FAD is AFFIRMED in part and REVERSED in part. Complainant was subjected to disability discrimination regarding issues 1 and 2 due to a failure to provide her with reasonable accommodation, but not issue 3.

ORDER (D0617)

The Agency is ordered to take the following remedial actions:

1. Within 40 calendar days of the date of this decision, the Agency shall expunge the referenced return to work order, the reprimand and the actual AWOL charges from Complainant’s official personnel file/official attendance records, and any other personnel or attendance related files maintained by her supervisors.
2. Within 120 calendar days of the date of this decision, the Agency’s Memphis VAMC shall update its leave policy memorandum 05-27, if it has not already done so, to indicate that LWOP may be granted as a reasonable accommodation for a disability.
3. Within 120 calendar days of the date of this decision, the Memphis VAMC shall provide at least two hours of interactive training to the Human Resources professionals at the Memphis VAMC who write policy and/or advise on leave policy and reasonable accommodation, as well as the Memphis VAMC Director, S3, S2, and S1, on the duty to reasonably accommodate individuals with disabilities, including providing leave as an accommodation.
4. To the extent Complainant lost any pay as a result of the Agency’s discriminatory actions, the Agency shall determine the appropriate amount of back pay, with interest, and other

benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision was issued. The back pay period is January 4, 2016 through February 5, 2016. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

5. The issue of Complainant's entitlement to compensatory damages is remanded to the Agency. On remand, the Agency shall gather facts on compensatory damages, and provide Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages regarding the Agency's failure to provide her with reasonable accommodation. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov.) The Agency shall complete gathering facts and issue a FAD appealable the EEOC determining the appropriate amount of damages within 120 calendar days after the date of this decision.

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 and include evidence that all the corrective actions ordered above have been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Memphis, Tennessee VAMC copies of the attached notice, in the office areas of its Director, Pharmacy Service, and HR. 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)

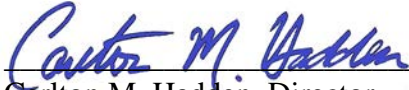
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from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

April 3, 2019
Date