



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

[REDACTED]  
Edwardo V.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Department of Defense Education Activity),  
Agency.

Appeal No. 2021003546

Hearing No. 570-2020-00641X

Agency No. DD-FY18-103

DECISION

On June 4, 2021, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 6, 2021, final decision<sup>2</sup> concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., 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

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<sup>1</sup> 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.

<sup>2</sup> The Agency is advised that the version of EEOC Form 573, Notice of Appeal/Petition included with the final decision for Complainant's use provides an EEOC address for filing an appeal that has been out of date for more than a decade. The correct address is in the header of this decision.

amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

### ISSUE PRESENTED

The issue presented is whether the preponderance of the evidence in the record establishes that Complainant was subjected to discrimination or harassment based on race, national origin, sex, sexual orientation, color, age, disability, and/or reprisal.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a 0340 Teacher (Mathematics), AD-1710-16, at the Agency's Quantico Middle/High School (QMHS) in Quantico, Virginia. Report of Investigation (ROI) at 26, 254, 930. Complainant also served as the local union president. ROI at 264, 315-21, 705, 748.

Complainant identified his race as Hispanic, white, and mixed, his national origin as Hispanic and Puerto Rican, his sex and sexual orientation as gay and male, and his color as white and mixed. ROI at 26, 256-57. Complainant was born in September 1961. ROI at 257. Complainant alleged discrimination based on physical disability, stating that he was HIV positive and that taking medication for his condition caused nausea, diarrhea, fatigue, headache, weakness, muscle pain, difficulty breathing, coldness in the extremities, dizziness, lightheadedness, and fast or irregular heartbeat. ROI at 26, 257-59. According to Complainant, he engaged in prior protected EEO activity, including by filing a prior EEO complaint alleging discrimination by the QMHS Principal ("the Principal" – African American; non-Hispanic; male; Black; born in August 1955; no disability; prior protected activity). ROI at 259-61, 701-04.

Complainant identified Principal as his first-line supervisor and the Community Superintendent ("the Superintendent" – Caucasian; American; heterosexual female; born in January 1965; no disability; prior protected activity) as his second-line supervisor. ROI at 255, 747-52. The Principal identified himself as Complainant's supervisor. ROI at 701-04. The QMHS Assistant Principal ("the Assistant Principal" – African-American; American; heterosexual female; brown; born in April 1968; no disability; no prior protected activity) also stated that she was Complainant's first-line supervisor. ROI at 830-33.

On September 26, 2018, Complainant filed an EEO complaint, which he subsequently amended, alleging that the Agency discriminated against him on the bases of race (Hispanic/white/mixed), national origin (Hispanic/Puerto Rican), sex (gay male),<sup>3</sup> color (white/mixed), age (born in September 1961), disability (physical),<sup>4</sup> and reprisal for prior protected EEO activity when:

1. On August 16, 2018, the Principal did not select Complainant for the Extra Duty Assignment (EDA) of Math Honor Society, Mu Alpha Theta;
2. On August 28, 2018, the Principal and the Superintendent removed all of Complainant's teaching assignments and duties;
3. From 2017 through present, the Principal and the Superintendent subjected Complainant to harassment. The following incidents were provided in support of the claim of harassment:
  - a. On January 11, 2017, the Principal changed the stipend of the EDA Continuous School Improvement (CSI) chair contract to half the amount and asked Complainant to resign if he did not like it;
  - b. In school year 2017/2018 (August 2017-June 2018), the Principal harassed Complainant about his attendance and singled him out because of his visits to the doctors for treatment of his disability;
  - c. Between January and April 2018, the Principal gave a copy of Complainant's room key to all of the math teachers and never told him;
  - d. In February 2018, the Principal and the Superintendent denied Complainant CSI training;

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<sup>3</sup> In Bostock v. Clayton Cty., the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. 644 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

<sup>4</sup> The Agency framed Complainant's complaint as alleging discrimination based on "disability (physical: HIV positive)."

- e. On March 15, 2018, the Principal told Complainant that he would not be attending the training for math teacher leaders in April 2018 and had the Math Information System Specialist remove Complainant from all communications about the training;
- f. In June 2018, the Principal denied Complainant the Agency's mandatory late release training for math;
- g. From on or about August 14, 2018, to present, the Superintendent questioned Complainant about his medical condition<sup>5</sup> and continued to ask him about his health every time she met with him;
- h. On unspecified dates, the Superintendent and the Principal harassed Complainant and questioned him about his duties as a Math Teacher leader;
- i. On an unspecified date, the Superintendent told Complainant the office space he used as the president of the local union needed to be moved to another location and assigned him an office far away from the school in a secluded area where the Superintendent's office was located and where Complainant could not have contact with anyone;
- j. On an unspecified date, the Superintendent denied Complainant the use of the video teleconference room that she had granted him the year prior;
- k. On November 29, 2018, the Principal sent a Management Duty Reassignment letter to Complainant's personal email address while he was on sick leave in Puerto Rico and had limited or no access to his email. The Principal then sent a letter informing all seventh and eighth grade parents of his new reassignment and sent an email to the whole staff informing them of his reassignment and asking for their feedback;
- l. On December 3, 4, and 6, 2018, Complainant was given three days to move classrooms;
- m. On December 7, 2018, Complainant's first day of work as a middle school teacher, the Principal observed him in his

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<sup>5</sup> The Agency accepted for investigation Complainant's allegation that, "From on or about August 14, 2018, to present [the Superintendent] questioned you about your HIV positive condition, and continued to ask you about your health every time she met with you." ROI at 239.

- classroom for 30 minutes. He stormed into Complainant's room and started taking pictures of his boards and postings;
- n. On May 9, 2018, the Assistant Principal made disparaging remarks about Complainant;
  - o. On May 9, 2018, the Superintendent asked Complainant to provide her with data supporting his allegation that the Assistant Principal made disparaging remarks about him;
  - p. On September 13, 2018, the Assistant Principal made homophobic comments, to include remarking that Complainant could not supervise the boy's locker room;
  - q. On September 27, 2018, three teachers accused Complainant of not collaborating with them on a Spanish Pledge of Allegiance project;
  - r. Since September 27, 2018, a teacher (Spanish Teacher-1 – non-Hispanic Black; United States of America; heterosexual female; Person of Color; born in 1984; no disability; no prior protected activity)<sup>6</sup> has mocked Complainant by saying, "Hola, [Complainant]" and "There goes Mr. Transparent";
  - s. On November 29, 2018, the Assistant Principal reported Complainant to the Internal Review Division for harassment, resulting in an internal investigation;
  - t. On January 15, 2018, Complainant learned the Assistant Principal told employees she wanted to fire Complainant;
4. On November 29, 2018, the Principal issued Complainant a Management Duty Reassignment letter reassigning him to a full-time 0340 Teacher (Mathematics) position at QMHS; and
  5. On February 7, 2019, Complainant learned that the Principal and the Superintendent disclosed information about his EEO complaint to a teacher at QMHS (Math Teacher-1 – African-American; American; heterosexual (straight) female; Black; born in 1986; no disability; prior protected EEO activity).<sup>7</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing.

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<sup>6</sup> ROI at 882-84.

<sup>7</sup> ROI at 846-48.

At the initial conference, Complainant requested to amend his complaint to include an additional claim of discrimination, alleging that the EEO Investigator improperly disclosed confidential medical information to witnesses contacted for investigative affidavits. Complainant asserted that the disclosure of his medical information was improper because the witnesses did not have a need to know. The AJ assigned to the case denied Complainant's motion to amend in a March 15, 2021, Case Management Order, determining that the claim alleged dissatisfaction with the processing of a pending complaint and therefore needed to be raised initially with the agency.

The Agency filed a motion to dismiss Complainant's hearing request as untimely filed. In his opposition to the Agency's motion to dismiss, Complainant asserted that the Agency's EEO Manager misled him. According to Complainant, when he informed the EEO Manager that he needed to amend his EEO complaint to include the disclosure of his medical information, the EEO Manager told him that he could only challenge that disclosure after the Agency had issued its final action.

The AJ subsequently granted the Agency's motion to dismiss Complainant's hearing request as untimely filed. The AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency determined that Complainant did not establish that his claims occurred as alleged and that, even if he had established that the claims occurred, the actions were taken for legitimate, nondiscriminatory reasons. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

#### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue

its decision based on the Commission's own assessment of the record and its interpretation of the law").

### ANALYSIS

As a preliminary matter, we address the AJ's dismissal of Complainant's hearing request. On August 21, 2019, Complainant downloaded the Agency's transmittal letter notifying him of the right to request a hearing. Appeal Complaint File (CF) at 73. On August 21, 2019, Complainant emailed an Agency employee, confirming that he was able to open the transmittal letter but stating that he could not open the ROI, and the employee responded the same day that it might take time for the file to completely download. CF at 78-79. On November 21, 2019, Complainant emailed the EEO Manager, stating that he had never been able to open the ROI and requesting a hard copy. CF at 77. On January 17, 2020, the Agency sent him a copy of the ROI on a CD by certified mail. CF at 40-41. Complainant requested a hearing on February 17, 2020. CF at 82-84.

EEOC Regulation 29 C.F.R. § 1614.108(f) provides that a complainant has the right to request a hearing before an AJ within 30 days of receipt of the investigative file. The AJ found that, although Complainant asserted that he was unable to download the ROI, he was properly notified of his rights and responsibilities with respect to request a hearing yet did not take reasonable measures to have the ROI sent to him by another method until November 21, 2019, after the 30-day period to request a hearing had expired. Complainant acknowledged receipt of the letter notifying him of his right to request a hearing on August 21, 2019. We agree with the AJ that Complainant's February 17, 2020, request for a hearing was not timely filed.

#### *Complainant's Request to Amend: Claim of Improper Disclosure of Medical Information*

During the hearing process, Complainant requested to amend his complaint to allege that the EEO Investigator improperly disclosed his medical information to witnesses during the investigation of his EEO complaint.<sup>8</sup>

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<sup>8</sup> Complainant also alleged in his pleadings that the EEO Manager provided him with misleading information, but we find that the documents provided by Complainant do not substantiate this claim.

The AJ denied Complainant's motion to amend. Citing EEO MD-110 at Chapter 5, § IV.D, the AJ found that Complainant's additional claim alleged dissatisfaction with the processing of a pending complaint and therefore first needed to be raised with the Agency.

We disagree with the AJ's determination that this was a claim alleging dissatisfaction with the processing of an EEO complaint. Rather, Complainant asserts a violation of the Rehabilitation Act by the Agency in the form of an improper disclosure of confidential medical information. See Dahlman v. Consumer Prod. Safety Comm'n, EEOC Appeal No. 0120071670 (June 25, 2007) (reversing agency's dismissal of complaint pursuant to 29 C.F.R. § 1614.107(a)(8) for alleging dissatisfaction with processing of previously filed complaint). Accordingly, we find that the AJ erred in dismissing Complainant's motion to amend his complaint. Moreover, given the nature of Complainant's allegation that the improper disclosure of his medical information occurred during the investigation of his EEO complaint, we find that the record is sufficiently developed to adjudicate that claim.

The Commission's regulations implementing the Rehabilitation Act provide for the confidentiality of employee medical records. 29 C.F.R. § 1630.14(c)(1) provides, in pertinent part, that: "Information obtained . . . regarding the medical condition or history of any employee shall . . . be treated as a confidential medical record." By its terms, this requirement applies to confidential medical information obtained from "any employee," and is not limited to individuals with disabilities. See Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (April 13, 2000). Improper Agency disclosure of such medical information constitutes a per se violation of the Rehabilitation Act. Valle v. U.S. Postal Serv., EEOC Request No. 05960585 (Sept. 5, 1997). Although not all medically-related information falls within this provision, documentation or information of an individual's diagnosis is without question medical information that must be treated as confidential except in those circumstances described in 29 C.F.R. Part 1630. See Hampton, EEOC Appeal No. 01A00132; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 42, (Oct. 17, 2002); Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, No. 915.002 (July 27, 2000); Enforcement Guidance on the ADA and Psychiatric Disabilities, No. 915.002 (March 25, 1997); Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, No. 915.002, (Oct. 10, 1995).

Complainant alleges that the Agency committed a per se violation of the Rehabilitation Act when the EEO Investigator included confidential medical information on the interrogatories distributed to potential witnesses, including his supervisors, managers, and coworkers, during the investigation of his complaint. Specifically, Complainant alleges that prompting witnesses to address discrimination on the basis of “disability (HIV positive)” improperly revealed the confidential, specific nature of his disability.

The Commission has articulated limited exceptions to the Rehabilitation Act’s confidentiality requirements, including an exception for government officials investigating compliance with the Act who must be given relevant information. 29 C.F.R. § 1630.14(c)(1)(iii). Agency officials may share confidential medical information about an employee with other Agency officials on a “need-to-know” basis, if doing so is necessary to ensure compliance with the Rehabilitation Act. Compare Skarica v. Dep’t of Homeland Sec., EEOC Appeal No. 0120073399 (March 5, 2010) (finding the Agency did not violate the confidentiality provisions of the Rehabilitation Act when complainant’s supervisor consulted with a personnel official and agency physician to ascertain how to accommodate complainant’s medical condition because these officials had a legitimate need to know complainant’s medical information) with Griffin v. Dep’t of Homeland Sec., EEOC Appeal No. 0120073832 (May 15, 2009) (finding that agency management’s disclosure of complainant’s EEO medical information in an agency public chat forum constituted a per se violation of the Rehabilitation Act).

EEO MD-110 directs EEO investigators to gather information from witnesses that is “material to the complaint, relevant to the issue(s) raised in the complaint, and as reliable as possible.” EEO MD-110 at Chapter 6, § VI.A. Further:

During the investigation, the investigator may disclose information and documents to a witness who is a federal employee where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, for example, to explain the claims in a complaint or to explain a manager’s articulated reason for an action in order to develop evidence bearing on that reason.

Id. at Chapter 6, § VII.A. In Davis v. Dep’t of the Treas., we found the agency did not violate the Rehabilitation Act when its EEO investigators disclosed the complainant’s medical information by providing potential

witnesses with questions prompting the witnesses to address discrimination on the basis of “disability (recovering alcoholic, addict).” EEOC Appeal No. 0120102597 (June 21, 2012). We determined that the agency did not violate the Rehabilitation Act in Davis because the EEO investigators acted within their duty to fully investigate the complainant’s claims of discrimination, disclosed only the information that was necessary to gather specific information about the complainant’s claims of discrimination, and that the federal employees who received the interrogatories had a legitimate “need to know” the limited information provided about the bases of the complainant’s claims in order to give complete and reliable testimony.

Here, we find that there was no legitimate need for the EEO Investigator to disclose the specific nature of Complainant’s disability to all of the potential witnesses. Two of Complainant’s harassment allegations specifically referenced his disability: in allegation (3)(b), Complainant alleged that the Principal harassed him about his attendance and singled him out because of his disability-related medical visits and, in allegation (3)(g), Complainant alleged that the Superintendent questioned him about his medical condition and continued to ask him about his health every time she met with him. Therefore, we find that it was likely necessary for the EEO Investigator to pose questions regarding the specific nature of Complainant’s disability to the Principal and to the Superintendent to fully investigate these claims.<sup>9</sup>

However, the EEO Investigator submitted interrogatories containing the words “disability (physical: HIV positive)” to 10 additional witnesses. ROI at 798, 807, 816, 826, 844, 854, 871, 880, 899, 920.

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<sup>9</sup> The Principal and the Superintendent denied knowledge of Complainant having a disability. ROI at 703, 749. According to Complainant, when he applied for the Assistant Principal position in the summer of 2017, he listed his disability on his application, and both the Principal and the Superintendent interviewed him for the position. ROI at 259. Complainant stated that the Superintendent told him that she was aware that he was HIV positive. ROI at 259. When asked if she had reason to believe that anyone subjected Complainant to discrimination based on disability, one witness stated that the “supervisors had knowledge of complainant’s illness.” ROI at 803.

One witness to whom this information was disclosed stated that she was terminated on November 21, 2018, and it is not clear if she was a federal employee when the EEO Investigator disclosed Complainant's medical information during the investigation. ROI at 902. The limited exception to disclose information to a witness described in EEO MD-110 would not apply if the witness was not a federal employee. However, even if the witness was a federal employee at the time, disclosing the nature of Complainant's medical condition to this witness and the other nine witnesses not specifically named in Complainant's disability-related allegations was not necessary to obtain information from the witnesses. When asked if they were aware of Complainant having a condition, illness, injury, or disease that may be a disability, only one witness answered in the affirmative.<sup>10</sup> ROI at 803. Even the witness who stated she was aware that Complainant had a disability did not describe his disability or reference his specific medical condition in her affidavit. ROI at 801-06. Another witness, when asked if there was anything she would like to add at the conclusion of the interrogatory, stated, "I would like to add that information provided (PII) at the beginning of this statement about the Complainant's disability made me very uncomfortable. I am blocking that information before I print and scan this statement over." ROI at 852-53.

Under the specific circumstances of this case,<sup>11</sup> we find that disclosing "disability (physical)" as a basis for Complainant's claims would have been sufficient for the EEO Investigator to obtain information from the witnesses. Of the 11 witnesses who provided statements to the EEO Investigator, only one witness stated that she was aware that Complainant may have had a disability. ROI at 803.

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<sup>10</sup> One witness did not respond to the investigator's requests for a statement. ROI at 915-28.

<sup>11</sup> We note that, in the context of other disability discrimination claims, such as denial of reasonable accommodation or where a complainant alleges harassment based on an obvious disability, it may be necessary for an EEO investigator to disclose the specific nature of the complainant's disability to all witnesses. However, such disclosure should be limited to only the information necessary to gather specific information about the complainant's claims.

With the exception of the Principal and the Superintendent who, as discussed above, were specifically named in disability-related allegations,<sup>12</sup> the EEO Investigator did not need further information from the remaining witnesses regarding Complainant's claim that he was subjected to discrimination based on his disability. The EEO Investigator therefore did not need to disclose Complainant's confidential medical information to these witnesses, who did not have a legitimate "need to know" Complainant's diagnosis. Accordingly, we find that the preponderance of the evidence in the record establishes that the EEO Investigator improperly disclosed Complainant's confidential medical information in violation of the Rehabilitation Act.

We note that the record reflects that the EEO Investigator assigned to this case was a contractor. ROI at 2, 909. In Angeles C v. Dep't of Agric., we found the agency liable for reprisal when a third-party contract consultant conducting a climate assessment/management inquiry made statements to discourage complainant from utilizing the EEO process during their climate assessment meeting. EEOC Appeal No. 2020001072 (July 22, 2021), request for recon. denied, EEOC Request No. 2021004653 (March 2, 2022). Here, the Agency contracted the EEO Investigator's services to conduct the EEO investigation on its behalf, and the improper disclosure of Complainant's medical information occurred during the investigation, while the EEO Investigator was conducting official Agency business. Accordingly, we find that the Agency is liable for the improper disclosure of Complainant's medical information in violation of the Rehabilitation Act.

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<sup>12</sup> Despite being named in Complainant's disability-specific allegations, the Principal and the Superintendent responded "No" when asked, respectively, whether they addressed Complainant's attendance and medical appointments or questioned Complainant about his medical condition. ROI at 713, 758. The EEO Investigator did not follow up with these witnesses to obtain additional information about these claims or ask them if they were aware of Complainant's disability from his application for the Assistant Principal position as alleged by Complainant in his affidavit. ROI at 698-797.

### *Discrimination and Harassment*

The Agency found that Complainant is a qualified individual within the meaning of the Rehabilitation Act. We agree.

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, EEOC Request No. 05950842; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

To establish a claim of harassment a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), cited with approval in Meritor Savings Bank v. Vinson, 477 U.S. 57, 66-67 (1986); see generally Enforcement Guidance on Harassment in the Workplace, EEOC Notice No. 915.064 (Apr. 29, 2024). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Enforcement Guidance on Harassment in the Workplace, § III.B.3.d.

With respect to element (5), an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 764-765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998). However, where the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, 524 U.S. at 765; Faragher, 524 U.S. at 807-08; Enforcement Guidance on Harassment in the Workplace, at § IV.C.2. This defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) being taken against the employee. In the case of coworker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. Id.

Reprisal claims are considered with a broad view of coverage. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); see also Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Id. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. Id.; see also Carroll, EEOC Request No. 05970939. To ultimately prevail on a claim of retaliatory harassment, Complainant must show that she was subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington Northern and Santa Fe Ry. Co., 548 U.S. 53 at 57; EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Only if both elements are present, retaliatory motivation and a chilling effect on protected EEO activity, will the question of Agency liability for reprisal-based harassment present itself. See Janeen S. v. Dep't of Commerce, EEOC Appeal No. 0120160024 (Dec. 20, 2017).

*Harassment Based on Sexual Orientation: Allegation (3)(p)*

Complainant alleged that he was subjected to various instances of harassment based on his sexual orientation by the Assistant Principal. In allegation (3)(p), Complainant alleged that the Assistant Principal made homophobic comments about Complainant, including remarking that Complainant could not supervise the boys' locker room because of his sexual orientation. According to Complainant, a male teacher (Male Teacher-1 – non-Hispanic White; heterosexual male; White; born in 1962; no disability; no prior protected activity)<sup>13</sup> informed him that the Assistant Principal referred to Complainant as "that man" and said that "that man" could not supervise the boys' locker room. ROI at 445, 457. Complainant characterized the Assistant Principal's comments as "completely homophobic" and questioned whether the Assistant Principal was implying that, because he was gay, he was also a pedophile. ROI at 445. Complainant stated that he had worked for the school system for more than 30 years and had supervised children his whole life. ROI at 445. Complainant also suggested that the Assistant Principal may have been motivated by his HIV positive status. ROI at 438. Complainant alleged that the Assistant Principal made this comment based on the administration's discriminatory animus towards him as an older, Hispanic, gay male who was HIV positive, had lighter skin, and had challenged discrimination by filing EEO complaints. ROI at 445-48.

The record contains a February 4, 2019, signed written statement from Male Teacher-1, which states that, after a September 13, 2018, meeting with the Assistant Principal, he mentioned that locker room coverage for middle school boys' physical education remained an issue, as the Principal could not be expected to effectively cover the boys' locker room on a regular basis. ROI at 473. According to Male Teacher-1's statement, when he mentioned that there were only two male teachers available to do locker room coverage, including Complainant, the Assistant Principal "shook her head, and said (in a low, sort of half-chuckle), "no, no, no; that man cannot cover the boys locker room." ROI at 472. In his investigative affidavit, Male Teacher-1 stated that he had reason to believe that Complainant was subjected to discrimination based on sexual orientation. ROI at 812.

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<sup>13</sup> Male Teacher-1 did not specify the subject(s) he taught. ROI at 810-13. In the Workforce Profile in the record, all staff names, with the exception of Complainant's, are redacted. ROI at 929-30.

Male Teacher-1 confirmed that the Assistant Principal laughed and told him that there was “no way” that Complainant could conduct locker room coverage. ROI at 812-14. According to Male Teacher-1, the Assistant Principal made the statement in a demeaning manner, and he understood the Assistant Principal’s statement to mean that, “because Complainant is homosexual, he is not ‘fit’ to supervise the boys locker room.” ROI at 812-14. Male Teacher-1 stated that, in the 25 years he had worked at QMHS, he had never seen management subject anyone “to such gross and repeated harassment” as Complainant. ROI at 814-15.

The Assistant Principal stated that she first learned about Complainant’s sexual orientation in the fall of 2018 when Complainant told her that he was “a Puerto Rican gay male.” ROI at 833. Complainant denied telling the Assistant Principal that he was gay. ROI at 683. According to Complainant, he stopped talking to the Assistant Principal after sending her an email in May 2018 asking her to stop bad mouthing his candidacy for union president. ROI at 683.

The Assistant Principal generally denied subjecting Complainant to discrimination based on his sex and/or sexual orientation. ROI at 832-33. On this matter, the EEO Investigator asked the Assistant Principal if on “September 13, 2018, [you]... made homophobic comments to include remarking that [Complainant] could not supervise the boys locker.” The Assistant Principal responded, “I did not make homophobic comments on or about the date in question that may be interpreted as disparaging in nature.” ROI at 838. The EEO Investigator asked the Assistant Principal if she “specifically state[d] Complainant could not supervise the boys’ locker room,” and she responded, “I did not specifically state that the Complainant could not supervise the boys’ locker room.” ROI at 838. However, it appears Assistant Principal was not specifically asked if she made the statement reported by the witness (“no, no, no; that man cannot cover the boys’ locker room”). ROI at 838-39.

We note that there is other evidence in the record reflecting that Complainant’s sexual orientation was public knowledge, that there was animus towards Complainant, and that a homophobic environment existed at QMHS. When the EEO counselor asked the Principal to respond in writing to Complainant’s allegation that he was subjected to harassment after the Principal became aware of his sex (gay) and disability (HIV positive) in July 2017, the Principal stated, “I am not aware of his sexual preference.” ROI at 164. We note that “sexual preference” is an outdated term for sexual orientation. See GLAAD Media Reference Guide – Terms to Avoid, 11th Ed.

("The term 'sexual preference' is typically used to inaccurately suggest that being attracted to the same sex is a choice and therefore can and should be 'cured' or 'changed.'") available at <https://glad.org/reference/terms/>. Complainant also alleged that the Superintendent expressed her homophobia during a June 2018 union meeting where she expressed that she was upset that her teenage daughter had joined the "LGTB club" at school. ROI at 617. The teacher who Complainant stated witnessed this remark and spoke with Complainant after the meeting, wondering if the Superintendent made the comment because her daughter was gay, did not provide an affidavit despite multiple requests from the EEO Investigator, including three emails on which the EEO Manager was copied.<sup>14</sup> ROI at 307-08, 915-28.

A QMHS Information Specialist ("the Information Specialist" – White; United States; White; heterosexual female; born in 1970; no disability; prior protected activity)<sup>15</sup> stated, "I have heard rumors of people talking about the Complainants [sic] orientation and believe there are some that have issues with his orientation," but indicated that she was not sure if the rumors about Complainant's sexual orientation led to discrimination. ROI at 822. The Information Specialist continued that she believed there had "been harassment based upon the nonverbal actions" she saw coworkers and management make in reference to Complainant but stated that she could not remember any specific instances of such harassment. ROI at 824. The Information Specialist averred that the Assistant Principal made disparaging remarks about Complainant to her multiple times, including remarks about Complainant's ability to teach. ROI at 823.

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<sup>14</sup> The record reflects that this teacher was an Agency employee during the investigation. ROI at 916-19. We note that, when the Agency or its employees "fail without good cause shown to respond fully and in timely fashion to requests . . . for affidavits, or the attendance if witness(es) . . . . the Commission on appeal may, in appropriate circumstances [] draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information." 29 C.F.R. § 1614.108(c)(3); see also Lebron v. U.S. Postal Serv., EEOC Appeal No. 01943052 (Jan. 19, 1996); Scura v. U.S. Postal Serv., EEOC Appeal No. 01943381 (July 20, 1995).

<sup>15</sup> ROI at 820-22.

A teacher at an Agency school in Fort Campbell, Kentucky (KY Teacher-1 – White; American; White; straight/heterosexual female; disability; no prior protected activity)<sup>16</sup> stated that Complainant’s sexual orientation was public knowledge. ROI at 804. KY Teacher-1 referred to herself as a coworker who had weekly contact with Complainant by email or phone. ROI at 802. She described Complainant’s working relationship with management as “strained” based on emails, adding that management did not always address coworkers’ concerns. ROI at 805. KY Teacher-1 denied witnessing the Principal, the Superintendent, or any other Agency personnel make derogatory or otherwise inappropriate comments about Complainant’s membership in any protected class. ROI at 805.

The record contains a May 30, 2019, letter from Complainant to the Assistant Secretary of Defense for Manpower and Reserve Affairs (“the Assistant Secretary”) discussing, among other topics, homophobia at QMHS. ROI at 572-76. In the letter, Complainant stated that both the Principal and the Assistant Principal had both made homophobic remarks and engaged on homophobic behavior at school. ROI at 575. According to Complainant, the Principal justified the nonselection of a teacher for a position because the teacher “did not fit with the team.” ROI at 575. Complainant stated that the Assistant Principal told a teacher that she wanted to fire some teachers at the school, including a gay Hispanic teacher, and that she later referred to the same gay Hispanic teacher when she told another teacher, “No, no, no...That man cannot cover the boy’s locker room.” ROI at 575. Complainant averred that “the administrators’ homophobia reached its peak by attacking students at the school,” stating that the Principal forced an 11-year-old sixth grader to out himself as gay to his parents even though the student’s sexual orientation had nothing to do with the meeting with the parents. ROI at 575. Complainant alleged that the Principal subsequently shared this information with all staff and suspended the student for a few days, which Complainant characterized as “not only extremely homophobic but abusive (if not child abuse).” ROI at 575. At the conclusion of the letter, Complainant identified himself as the gay Hispanic teacher described in the letter. ROI at 576.

The record also contains an April 27, 2019, written statement from a parent (Parent-1) with identifying information redacted. ROI at 577-79. Parent-1 described the Principal as “an alarmist and very reactionary and I would even go as far as to say homophobic, three qualities that should not be prevalent in a person running a school full of hormonal pre-teen and

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<sup>16</sup> ROI at 802-04.

teenaged people, who are themselves rather reactionary due to their stages of development.” ROI at 578. Parent-1 stated that, during a November 8, 2018, meeting, the Principal accused their son of being sexually inappropriate with a girl in one of his classes before suddenly outing their son. ROI at 577. Parent-1 described the Principal as “out of nowhere and completely out of context” turning toward their son and asking, “Have you ever told anyone that you are gay.” ROI at 577. According to Parent-1, “My son looked startled, opened his mouth, then closed it again, looked at me and then started to cry and nod his head and [the Principal] smirked and said ‘Now we’re getting somewhere.’” ROI at 577. Parent-1 stated that both parents were appalled that the Principal outed their child, noting that their son had never discussed their sexuality with his parents and was forced to have a conversation with his parents before he was ready to do so. ROI at 577-78. Parent-1 described the Principal calling two guidance counselors into the office and outing their son to the counselors despite them being strangers to him. ROI at 578. According to Parent-1, the Principal denied any wrongdoing with respect to traumatizing their son and refused to provide any details about what their son allegedly did to a female student,<sup>17</sup> even after suspending their son for inappropriate behavior. ROI at 578. Parent-1 reported the Principal’s actions to the Superintendent and requested that the Principal undergo sensitivity training, which was required of members of the military working on base. ROI at 578. According to Parent-1, although the Superintendent did not guarantee the Principal would undergo training, he was required to apologize to their son and stated “that although he was trying to get to the bottom of a serious matter, he took a road in which, he guessed, he shouldn’t have.” ROI at 578. Parent-1 indicated that their son had since started therapy due to anxiety and that they were “still in the dark” about how the Principal got the information about their son’s sexual orientation used to interrogate him. ROI at 578-79.

Despite the Assistant Principal’s denial, we find that the preponderance of the evidence in the record establishes that the Assistant Principal made the remark as alleged. The remark was clearly based on Complainant’s sex. When Male Teacher-1 raised the limited number of male teachers who could provide boys’ locker room coverage, the Assistant Principal stated that Complainant could not do so based on his sexual orientation.

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<sup>17</sup> Parent-1 stated that the Superintendent subsequently informed them that a female student reported that their son put his hand on her knee and did not stop when she asked him to. ROI at 578.

We also find that Complainant has established that the alleged harassment was sufficiently severe or pervasive to constitute a hostile work environment. The Assistant Principal implied that, because Complainant is gay, he could not be trusted to supervise underage male students changing for physical education in the locker room, based on the offensive stereotypes that gay men and other members of the LGBTQ+ are pedophiles, child abusers, or groomers. See Eller v. Prince George's Cnty. Pub. Schs., 580 F.Supp.3d 154, 173-74 (D. Md. 2022) (finding that a reasonable jury could find that a transgender teacher was subjected to severe or pervasive harassment when she was called "tranny," "fag," gay, "homo," and "booty warrior," a term associated with pedophiles or child molesters, referred to as a pedophile and a prostitute, threatened with physical violence, and physically assaulted); see also Bates v. Pakseresht, No. 2:23-cv-00474-AN, 2023 WL 7546002, at \*8 n.6 (D. Or. Nov. 14, 2023) (citing history of LGBTQ+ individuals being accused of being pedophiles, child abusers, and groomers); Thomasina B. v. Dep't of Def., EEOC Request No. 2021002395 (June 9, 2021) (affirming finding that complainant was subjected to hostile work environment based on sex when coworker subjected her to anti-gay remarks, including saying complainant was harming her children and that her kids would grow up gay because she was dating a woman); GLAAD Media Reference Guide – Terms to Avoid, 11th Ed. (associating LGBTQ+ people with pedophilia, child abuse, and/or sexual abuse should be avoided because being LGBTQ+ is neither synonymous with nor indicative of any tendency toward pedophilia, child abuse, and/or sexual abuse and because "such claims, innuendoes, and associations often are used to insinuate that LGBTQ people pose a threat to society, to families, and to children in particular") available at <https://glaad.org/reference/terms/>. We find that the Assistant Principal's reliance on this stereotype is particularly egregious because Complainant is a teacher and, as part of his professional duties, regularly interacts with middle and high school students.

Concerning the Agency's liability for the Assistant Principal's harassment, we note that the record does not clearly show whether the Assistant Principal or the Principal was Complainant's supervisor during the period in question. See ROI at 255, 701, 747, 830. The EEO Investigator requested that the Agency provide organization chart(s) for QMHS that clearly indicated the relationships between Complainant, the Principal, and the Superintendent. ROI at 910-14. Despite this request, there are no organization charts in the record. EEOC Regulations provide that the Agency and any employee of a federal agency shall produce such evidence as the investigator deems necessary. 29 C.F.R. § 1614.108(c)(1).

The regulations further provide that, when the Agency or its employees “fail without good cause shown to respond fully and in timely fashion” to requests for documents, affidavits, the attendance of witnesses, or other evidence “the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal, may in appropriate circumstances: (i) draw an adverse inference that the requested information, or the testimony of the requested witness would have reflected unfavorably on the party refusing to provide the requested information; (ii) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party; (iii) exclude other evidence offered by the party failing to produce the requested information or witness; (iv) issue a decision fully or partially in favor of the opposing party; or (v) take such other actions as it deems appropriate.” 29 C.F.R. § 1614.108(c)(3). Accordingly, we draw an adverse inference that, if the Agency had provided the requested organization chart(s), this information would have shown that the Assistant Principal was Complainant’s first-line supervisor during the relevant timeframe.

We do not find that the Agency has established an affirmative defense. According to Complainant, while he was aware of the Agency’s anti-harassment policy from Agency training, he could not recall any such training provided at QMHS. ROI at 261. Although the EEO Investigator requested a copy of the Agency policy prohibiting discrimination and documentation, if any, concerning allegation (3)(t), the Agency did not provide a copy of the policy or any such documentation. ROI at 910-14. There is also no documentation in the record concerning the Agency’s anti-harassment policy or training records showing EEO and anti-harassment training provided to the Assistant Principal, the Principal, and/or the Superintendent.

The Principal stated that he did not know Complainant’s sexual orientation during the time of events giving rise to this complaint. ROI at 704. The Superintendent and the Principal both stated that they were unaware of the Assistant Principal making a remark about Complainant not being able to cover the locker room. ROI at 738, 796-97. The Superintendent stated that she properly addressed all harassment reported by Complainant. ROI at 753-54. Complainant stated that the Superintendent was “well aware” of the Assistant Principal’s homophobic comment but had “chosen to let them go” to cover her own homophobia. ROI at 668. Complainant stated that he reported unlawful harassment by the Assistant Principal and by the Principal to the Superintendent and to other Agency officials multiple times. ROI at 261-62.

Upon review, we do not find that the preponderance of the evidence establishes that the Agency exercised reasonable care to prevent and correct promptly any harassing behavior or that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Agency to avoid harm otherwise. We therefore find that the Agency is vicariously liable for the Assistant Principal's unlawful harassment of Complainant based on sex.

We note that Complainant also alleged that the Assistant Principal's remark was based on his race, national origin, color, age, disability, and prior protected activity. ROI at 445-48. Because a finding on these bases would not entitle Complainant to any additional relief, we need not address this allegation further.

*Reprisal: Claim (5)*

In claim (5), Complainant alleged that, on February 7, 2019, he learned that the Principal or the Superintendent had disclosed information about his EEO complaint to Math Teacher-1. The Principal and the Superintendent denied disclosing information about Complainant's EEO complaint to Math Teacher-1. ROI at 740, 789. According to Complainant, he learned that his protected EEO activity had been shared with Math Teacher-1 when the Principal issued him a Letter of Reprimand. ROI at 430. Complainant stated that the reprimand was based on a statement from Math Teacher-1 that recounted allegations from his EEO complaint, which he had not shared with Math Teacher-1. ROI at 430. Complainant averred that, because he had not disclosed his EEO claims to Math Teacher-1, the Principal or the Superintendent must have disclosed them to Math Teacher-1. ROI at 430.

The record reflects that, on February 6, 2019, the Principal issued Complainant a Letter of Reprimand, which Complainant signed on February 7, 2019, to acknowledge receipt. ROI at 466-69. The Letter of Reprimand was based on two charges: (1) "Making False, Malicious or Unfounded Statements Against Other Employees, Supervisors, Other Officials or Subordinates with the Intent to Destroy or Damage the Reputation, Authority or Official Standing of Those Concerned"; and (2) Lack of Candor. ROI at 466-68.

In support of charge (1), the Principal stated that, on January 31, 2019, he received a complaint from Math Teacher-1 about an incident that occurred on January 30, 2019. ROI at 466.

According to the Principal, Math Teacher-1 entered the classroom of another math teacher (Math Teacher-2 – African-American; heterosexual female; Black; born in 1973; no disability; prior protected activity),<sup>18</sup> where Math Teacher-2 and Complainant were talking about Complainant's feelings about the Principal and his complaints about class assignments, and Complainant said "we are all pawns in admin's game" and that the Principal was to blame for "the entire mess" that was in the Math Department. ROI at 466. The Principal averred that, when Math Teacher-1 told Complainant that she was frustrated with hearing him talk about wanting "his" classes back, stating she should not have certain classes because she was probationary, and insinuating that Math Teacher-1 was unqualified for the job, Complainant yelled, "teachers should be here because of their merit, NOT because of who they know or who their CLIQUE is because that's not right." ROI at 466. The Principal asked Math Teacher-2 to provide a statement, who stated that Complainant said that the Principal "purposely moved [Complainant] out of the math department to a virtual school position so that [the Principal] could give [Complainant's] classes to [Math Teacher-1] and [Math Teacher-2] because they were the 'same skin color'" as the Principal. ROI at 467.

The Principal determined that there was just cause to support the Letter of Reprimand. ROI at 468. Regarding charge (1), the Principal stated, "Your statements to [Math Teacher-1] and [Math Teacher-2] that I gave your classes to them because skin color as I do and that I was to blame for the entire mess that is in the math department was false, malicious, and unfounded with the intent to destroy or damage the reputation, authority or official standing of those concerned." ROI at 468. The Principal also reminded Complainant that "establishing and maintaining effective working relationships with students, administrators, staff, and parents" was a critical element of his position. ROI at 468.

Complainant alleged that it constituted retaliation for the Principal to issue him a reprimand for engaging in protected EEO activity, which included allegations that the Principal subjected him to discrimination based on, among other bases, color. ROI at 430.

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<sup>18</sup> ROI at 873-75.

In his letter to the Assistant Secretary, Complainant stated that the Principal issued a letter of reprimand to the gay Hispanic teacher based exclusively on the statements of two other teachers that the gay Hispanic teacher told them he filed an EEO complaint based on the Principal's preferential treatment of people with the same skin color. ROI at 575. Complainant described the reprimand as a violation of law, an abuse of power, and retaliation for prior protected EEO activity. ROI at 575-76.

We find that the Principal's statement regarding Complainant's protected activity in the Letter of Reprimand constitutes direct evidence of reprisal. The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co., 548 U.S. at 53. On the one hand, petty slights and trivial annoyances are not actionable. On the other, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 at II.B (Aug. 25, 2016).

Given the importance of maintaining "unfettered access to [the] statutory remedial mechanisms" in the anti-retaliation provisions in Title VII, our cases have found that a broad range of actions can fall into this category. Burlington N. and Santa Fe Ry. Co., 548 U.S. at 64 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997)). For example, we have held that a supervisor threatening an employee by saying "What goes around, comes around" when discussing an EEO complaint constitutes an adverse action. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), request for recon. denied, EEOC Request No. 0520090654 (Dec. 16, 2010). We have also found that a supervisor attempting to counsel an employee against pursuing an EEO complaint "as a friend," even if intended innocently, is an adverse action. Wolf v. Dep't of Energy, EEOC Appeal No. 0120083727 (June 4, 2009) (violation found when a labor management specialist told the complainant, "as a friend," that her EEO claim would polarize the office).

We note, however, that oppositional activity must be reasonable to constitute protected activity. The courts and the Commission balance the right to oppose employment discrimination against the employer's need to have a stable and productive work environment.

For this reason, the protection of the opposition clause only applies when the manner of opposition is reasonable. See EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016); see also Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000) (explaining that most circuit courts agree that “disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore cannot support a retaliation claim.”); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000) (“The EEOC has qualified the scope of the opposition clause by noting that the manner of opposition must be reasonable.”). The examination of whether an employee opposed discrimination in a reasonable manner is a context and fact specific inquiry, in which the right to oppose employment discrimination against the employer’s need to have a stable and productive work environment must be balanced. See Winfred C. v. Office of Personnel Mgmt., EEOC Appeal No. 0120142215 (Nov. 30, 2016).

We have found that oppositional activity was not protected when it was expressed in an unreasonable manner that was insubordinate, inflammatory, and derogatory. See Arthur F. v. U.S. Postal Serv., EEOC Appeal No. 2022001340 (Oct. 18, 2022) (complainant writing that his manager was a racist on an agency form did not constitute protected EEO activity because it was expressed in unreasonable, insubordinate manner); Winfred C., EEOC Appeal No. 0120142215 (complainant who called his supervisor a bigot during a phone call did not engage in EEO activity in a reasonable manner); cf. Devon H. v. Dep’t of Homeland Sec., EEOC Appeal Nos. 0120131649, 0120131684 (Dec. 18, 2015) (complainant who told manager that he intended to file an EEO complaint, challenged a selection decision by demanding to know why the selectee was chosen and said that he believed he was being treated unfairly engaged in oppositional EEO activity in a reasonable manner).

Here, we find that the Principal issuing Complainant a Letter of Reprimand that uses his allegations of discrimination as justification for a charge of “Making False, Malicious or Unfounded Statements Against Other Employees, Supervisors, Other Officials or Subordinates with the Intent to Destroy or Damage the Reputation, Authority or Official Standing of Those Concerned” constitutes reprisal. Essentially, the Principal reprimanded Complainant for opposing discrimination, as the Letter of Reprimand specifically referenced Complainant’s allegations that the Principal assigned math classes to Math Teacher-1 and Math Teacher-2 based on their color, and the Principal characterized Complainant’s allegations as “false, malicious, and unfounded with the intent to destroy or damage the reputation, authority or official standing of those concerned.” ROI at 468.

We find that the Principal's statement in the Letter of Reprimand was clearly based on a retaliatory motive and reasonably likely to deter a reasonable person from engaging in protected activity.<sup>19</sup> Further, we need not determine if the manner of opposition was reasonable because the Letter of Reprimand indicates that Complainant was disciplined not for the manner but for the content of his communication. Accordingly, we find that the Agency subjected Complainant to reprisal as alleged.

*Remaining Allegations of Disparate Treatment and Harassment*

For the remaining claims and instances of harassment, we find that Complainant has not established that some these incidents occurred as alleged. For other incidents, the Agency has provided legitimate, nondiscriminatory reasons for its actions. Where the Agency has provided a legitimate, nondiscriminatory explanation, the burden shifts to Complainant to show that the Agency's proffered explanation was a pretext designed to mask discrimination by preponderant evidence in the record.

Regarding claim (1), the Principal explained that he did not select Complainant for the EDA of Math Honor Society, Mu Alpha Theta in August 2018 because Complainant was not teaching math for the 2018/2019 school year. ROI at 706-07. The record shows that instead, per his request, he was scheduled to be a Virtual School Monitor for school year 2018/2019. As evidence of pretext, Complainant alleged that the administration modified the selectee Math Teacher-1's EDA application after the fact to justify her selection as the Mu Alpha Theta sponsor. ROI at 573, 580, 663-67, 670-75. Complainant also stated that it was not a requirement for a teacher to be currently teaching a subject to be the sponsor of the EDA activity. ROI at 264. We find that Complainant has not shown that the Principal's reason for selecting another teacher as the EDA sponsor was a pretext for discrimination based on his membership in any protected group.

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<sup>19</sup> Although we find below in claim (2) that Complainant did not establish discrimination based on color or any other basis when he was assigned to the Virtual School Monitor position and the classes were reassigned to Math Teacher-1 and Math Teacher-2, issuing Complainant a Letter of Reprimand characterizing his protected activity as false, malicious, and unfounded constitutes reprisal because of its chilling effect on protected activity.

In claim (2), Complainant alleged that on August 28, 2018, the Principal and the Superintendent unfairly removed all his teaching assignments and duties when he was reassigned to the Virtual School Monitor position. However, the Principal and the Superintendent agreed that the reason for reassigning Complainant to the Virtual School Monitor position was that he requested this assignment in writing, which constitutes a legitimate, nondiscriminatory reason. ROI at 709, 753-55. The record contains a copy of Complainant's February 2, 2018, Letter of Intent for School Year 2018-2019, in which Complainant requested a change of position in his present school for the next year, with his first choice listed as Virtual School Monitor, his second choice listed as teaching Spanish, and his third choice listed as remaining in his present position. ROI at 737. As evidence of pretext, Complainant alleged that the Principal "lured" Complainant out of the math department with a promise that Complainant could teach Spanish. ROI at 495. However, Complainant has not shown by the preponderance of the evidence that the Principal promised Complainant that he would be reassigned to a Spanish teacher position. We note that Complainant listed the Virtual School Monitor position as his first choice and Spanish as his second choice on his Letter of Intent. ROI at 737. Moreover, while Complainant stated that the Principal reassigned his math classes to younger Black female teachers, this is insufficient to establish that the Agency's legitimate, nondiscriminatory reason for reassigning Complainant was pretextual. ROI at 271-74.

Concerning incident (3)(a), the Principal denied changing the stipend associated with the EDA CSI chair contract. ROI at 711. The record reflects that the stipend for the full year was \$1650 and that Complainant was offered half of the stipend amount because he would be taking over as the CSI chair halfway through the contract year. ROI at 367-70. As evidence of discriminatory treatment, Complainant asserted that he applied for an announcement advertising the full stipend and that the former CSI chair did not perform a semester's worth of work before leaving. ROI at 367-69. Complainant also alleged that the Principal's email showed that he wanted to change the stipend amount after Complainant completed the work. ROI at 497. We find that Complainant has not shown that he was offered half the stipend because of his membership in any protected class.

On incident (3)(b), as found by the Agency, the preponderance of the evidence in the record does not reflect that the Principal singled Complainant out on his attendance as alleged. In support of this claim, Complainant referred to two emails.

In a November 30, 2017, email, the Principal stated he defended Complainant to a parent who complained his daughter had to teach herself because Complainant was out of the classroom so often by telling her parent that Complainant had other responsibilities. ROI at 372. In a March 15, 2018, email, the Principal shared for Complainant's situational awareness that his students were keeping "tick marks" to track days he was not in the classroom. ROI at 374. Neither of these emails reference Complainant's disability or doctor visits, nor do they establish that the Principal singled Complainant out to harass him about his absences as alleged.

Complainant alleged in (3)(c) that the Principal gave a copy of the key to Complainant's classroom to other math teachers without notifying Complainant. The Principal's legitimate, nondiscriminatory explanation for providing teachers with a key to Complainant's room was that there was a storage locker containing math materials that the department needed to access in order to inventory. ROI at 715-16. According to the Principal, he coordinated this with the chair of the math department and with the Administrative Officer, and Complainant was informed. ROI at 715. Complainant stated that he was never informed that teachers were given keys to access his room, which is why he complained. ROI at 502. Complainant noted that the Superintendent agreed that other teachers should not have access to his room without his knowledge and consent. ROI at 502. In a June 7, 2018, email, the Superintendent stated that teachers should not have access to another teacher's classroom when that teacher was present and that the materials in question should be moved to a supply room. ROI at 378. Although Complainant objected to other teachers having access to his room without his knowledge and the Superintendent shared his concern, Complainant has not shown by the preponderance of the evidence that this was based on his membership in any protected class.

On incident (3)(d), the preponderance of the evidence in the record does not establish that the Principal and the Superintendent denied Complainant CSI training. ROI at 717, 756. According to the Superintendent, Complainant had previously told her that he was concerned about the number of days of school he had to miss, so she offered that Complainant could send another representative to CSI training in his place if he wanted to. ROI at 756-57. An email exchange between Complainant and Superintendent explicitly documents that the decision on whether to attend the training was made by Complainant. ROI at 384-86.

Although Complainant denied that he told the Superintendent he was worried about the number of days he missed for training, we find that Complainant has not shown that he was denied CSI training as alleged or that the suggestion was based on his race, national origin, sex, sexual orientation, color, age, disability, and/or prior protected activity.

Allegations (3)(e), (3)(f) and (3)(h) concern the denial of math teacher leader and mandatory late release math training and an allegation that Complainant was questioned about his math teacher leader duties. The Principal stated that Complainant was not scheduled to attend the April 2018 math teacher leader training because he would not be a math teacher leader for the upcoming school year. ROI at 719. According to Complainant, the Principal selected Math Teacher-2, who is African-American, to attend the math teacher leader training in his place. ROI at 507. The record contains an April 9, 2018, email from the Principal to Complainant, confirming that Complainant would attend the training the following week as the current math teacher leader. ROI at 543. Complainant averred that the Principal told him he could not attend the late release training for math because he was not teaching math the following school year. ROI at 508. The Principal stated that "appropriate math staff" attended the training. ROI at 722. Complainant countered that his official personnel file still reflected he was a Teacher (Mathematics), but this technical argument does not undermine the Principal's legitimate, nondiscriminatory reason for not planning to send him to this training. Complainant alleged that the Superintendent had the Principal question him about his math teacher leader duties in order to harass him, but the Superintendent denied doing so. ROI at 760-61. The Principal stated that he questioned Complainant about his duties as a math teacher leader because he was supposed to serve as a resource for all math teachers but did not provide any additional content support to the math teachers. ROI at 724. Complainant stated that the stipend was associated with quarterly presentations and asserted that he performed his math teacher leader duties as required. ROI at 511-12. Upon review, we find that Complainant has not established that these instances of alleged harassment were based on his membership in any protected class.

Regarding incident (3)(g), the Superintendent denied questioning Complainant about his HIV positive condition and health, as alleged. ROI at 758. The Superintendent also stated that she was unaware that Complainant had a disability. ROI at 749.

The record contains a November 8, 2018, email from Complainant to the Superintendent, in which he stated that a staff member commented about his weight loss and asked if it was related to a health issue, which made Complainant "believe that the agency has shared with her my allegations on my EEO." ROI at 416. On November 8, 2018, the Superintendent responded that Complainant's claim was "without merit" because she had not seen or spoken to the staff member in question. ROI at 416. Complainant has the burden of proof, and he has not shown the Superintendent's statement was not credible. Accordingly, he has not established that the Superintendent questioned him about his HIV positive condition or his health.

Allegations (3)(i) and (3)(j) concern the location of Complainant's union office and the use of a video teleconference room as an office. The Superintendent stated that she offered Complainant an office in the Community Superintendent Office (CSO) because there was no available office space in the school buildings. ROI at 763-64. Regarding the video teleconference room Complainant had previously used as a union office, the Superintendent explained that the room was needed for video teleconferences, meetings, teacher collaboration, and training and could not be used for its intended purpose if Complainant used it as an office. ROI at 765-66. According to the Superintendent, if Complainant needed the video teleconference room for a meeting or video teleconference, he could reserve the room like other staff members. ROI at 765-66. As evidence of pretext, Complainant noted that there were other spaces designated for drama rehearsals or storage that he could have used as an office. ROI at 628-29. Complainant also stated that employees would not feel comfortable traveling to the CSO to meet with the union. ROI at 786. We find Complainant has not shown that the Agency's legitimate, nondiscriminatory reasons for offering him an office in the CSO and not continuing to allow him to use the video teleconference room as his union office were pretextual.

Incidents (3)(k) and (3)(l) and claim (4) involve the same event – the Principal reassigning Complainant from Virtual School Monitor to a full-time Mathematics teacher position in December 2018. Complainant alleged that the Principal did not discuss the reassignment with him in advance and sent him an email informing him of the reassignment while he was on sick leave taking care of his sick mother in Puerto Rico and had limited access to email. ROI at 327, 514.

In a November 29, 2018, memorandum sent to Complainant's Agency and personal email addresses, the Principal explained that he needed to reassign Complainant to replace a Mathematics teacher who departed. ROI at 396, 784-85. Complainant averred that his reassignment violated the Master Labor Agreement (MLA).<sup>20</sup> ROI at 522. The Principal stated that he reassigned Complainant because he was certified to teach the courses. ROI at 733-34. The Principal explained that he sent notification to Complainant's work and personal email addresses to make sure he received the communications, noting that it was common practice to do so when an employee was not in the building and unable to access their official email. ROI at 726.

Complainant stated that parents and staff were informed of his reassignment before he was, as the Principal sent a letter to all seventh and eighth grade parents about his reassignment and also sent an email to all staff about Complainant's reassignment and asking for feedback. ROI at 327, 343. The record contains a November 29, 2018, letter to seventh and eighth grade parents, notifying them that the former math teacher had departed and that Complainant would be the new teacher and begin instruction on December 6, 2018. ROI at 405. According to the Principal, he routinely communicated changes in teachers with parents, especially changes after the start of the school year. ROI at 726-27. Complainant has not shown that the Principal sent this email to seventh and eighth grade parents based on his membership in any protected class. The Principal denied asking staff for feedback about Complainant's reassignment, stating that his email addressed staff concerning inappropriate rumors and gossip. ROI at 726-27. The record contains a November 29, 2018, email from the Principal to all QMHS staff, with a copy of the letter sent to seventh and eighth grade parents attached. ROI at 560. In the email, the Principal stated, "I appreciate your feedback as I continue to work with our staff here and my supervisor to put all of the logistics in place. I sincerely appreciate each of you modeling professionalism and safeguarding of information." ROI at 560. The email does not mention Complainant or the former math teacher by name, although the Principal did state he had interviewed candidates for the position of another named former teacher. ROI at 560.

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<sup>20</sup> The Commission has no jurisdiction over claims related to the terms of a collective bargaining agreement or to enforce the terms of a collective bargaining agreement. See Herb P. v. Dep't of the Treasury, EEOC Appeal No. 2020000916 (July 15, 2021); Lawrence L. v. U.S. Postal Serv., EEOC Appeal No. 0120160893 (April 26, 2016).

We find that the email does not specifically solicit feedback about Complainant or Complainant's reassignment but rather seeks feedback about the logistics of replacing teachers.

Finally, Complainant stated that the Principal only allowed him three days to move rooms and set up his new classroom, in violation of the MLA but did not further explain his allegation. ROI at 333. The Principal explained that he provided Complainant three days to move classrooms based on the terms of the MLA regarding moving and setting up a classroom. ROI at 729. Complainant denied that the Principal followed the MLA. ROI at 517. We find that the Agency provided legitimate, nondiscriminatory explanations for reassigning Complainant, for informing him of his reassignment via his Agency and personal email addresses while he was on sick leave, for informing parents and staff of his reassignment, and for providing three days to move classrooms. We further find that he has not shown by preponderant evidence that the Agency's proffered reasons were a pretext to mask discrimination.

On incident (3)(m), Complainant contended that the Principal observed his classroom teaching on the first day of instruction after he was reassigned back to the classroom on December 7, 2018, and took photos of the board and the bulletin boards as though he expected something to be missing. ROI at 337-38. According to Complainant, no teachers were ever observed within the first four or five weeks of a new assignment, as teachers were given time to settle in and get to know their students. ROI at 337-38. Complainant averred that the Principal's observation note did not "point out anything wrong but the obvious from a teacher seeing his newly assigned students for the very first time." ROI at 337. The Principal countered that, as the instructional leader, he routinely observed all classrooms unannounced, which included taking photographs of the boards and postings. ROI at 731-32. According to the Principal, he would take photographs to share with the staff member and to showcase good teaching. ROI at 731-32. Complainant has the burden of proof and has produced no evidence other than mere speculation that the Principal's observation was motivated by any discriminatory animus.

In allegations (3)(n) and (3)(o), Complainant alleged that, on May 9, 2018, the Assistant Principal made disparaging remarks about him and, when he reported the disparaging remarks to the Superintendent, she asked Complainant to provide evidence to support his allegation.

Complainant alleged that the Assistant Principal tried to discourage teachers from voting for him as the union president, which violated the prohibition on management intervening in union affairs or processes. ROI at 436. Complainant stated that the Assistant Principal turned against him because he would not share official union documents with her and encouraged other members of the union to run against him for president. ROI at 436. The Assistant Principal denied making comments on or about May 9, 2018, that could "be interpreted as disparaging in nature." ROI at 836. According to Complainant, when he reported the Assistant Principal's actions to the Superintendent, the Superintendent stated that Complainant's claims were alarming and asked "what data" Complainant had to support his allegations. ROI at 441. The record contains a May 9, 2018, email from Complainant to the Assistant Principal, alleging that the Assistant Principal made negative remarks about him running for union president. ROI at 794. Complainant copied the Superintendent on the email and, on May 9, 2018, she responded to Complainant, "[Complainant] these claims are very alarming. What data do you have to support these allegations?" ROI at 794. According to the Superintendent, she asked Complainant for more information so she could investigate his allegations and, when he did not respond or provide her with any additional information, she was unable to conduct an inquiry. ROI at 791. Complainant has not established by preponderant evidence that the Assistant Principal made disparaging remarks on or about May 9, 2018, as alleged. Moreover, the preponderance of the evidence in the record does not establish that the Superintendent asked Complainant for more information about his allegations based on his membership in any protected class.

In allegation (3)(q), Complainant averred that three teachers accused him of failing to collaborate on a Spanish Pledge of Allegiance project. According to Complainant, he asked the Principal if a virtual school Spanish student could recite the Pledge of Allegiance in Spanish during announcements in observation of Hispanic Heritage Month, and the Principal approved the activity. ROI at 449. Complainant alleged that three teachers later attacked him and "ganged up" on him for not collaborating with Spanish Teacher-1, who was Black. ROI at 449. Complainant averred that a teacher (Female Teacher-1 - Asian, Korean; American citizen; tan in color, "Asian-colored"; "married and heterogenous" female; born in 1976; no disability; no prior protected activity)<sup>21</sup> attacked him via email for not collaborating and was supported by Math Teacher-2 and Spanish Teacher-1. ROI at 449.

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<sup>21</sup> Female Teacher-1 did not specify what subject(s) she taught. ROI at 855-58.

Complainant stated that the Principal allowed the teachers to gang up on him despite approving the activity and following the Principal's guidance "to the letter." ROI at 449, 530. The Principal stated that Complainant should have coordinated on this project with Spanish Teacher-1 from the beginning because she was the Spanish teacher but denied knowledge of anyone "ganging up" on Complainant. ROI at 739. According to Spanish Teacher-1, she had been discussing a similar activity for students in one of her Spanish classes. ROI at 886. Spanish Teacher-1 denied that there was any accusation towards Complainant, stating that the question of whether he was collaborating with her appeared to arise out of genuine curiosity. ROI at 886. Female Teacher-1 denied making any accusations, stating that she simply asked Complainant if he had discussed the idea with Spanish Teacher-1. ROI at 860. Math Teacher-2 also denied accusing Complainant of not collaborating on the Spanish Pledge of Allegiance project. ROI at 876-77.

The record contains a September 25, 2018, email from Complainant requesting for the virtual school Spanish student to recite the Pledge of Allegiance in Spanish on Fridays to celebrate Hispanic Heritage Month. ROI at 570-71. On September 26, 2018, the Principal responded that he appreciated "this effort to support Hispanic Heritage Month" and asked Complainant to coordinate with the senior sponsors/advisors who handled the morning announcements, so Complainant forwarded the email to Female Teacher-1 and Math Teacher-2. ROI at 569-70. On September 27, 2018, Math Teacher-2 asked if Complainant's students were partnering with Spanish Teacher-1, and Female Teacher-1 responded that she thought it was "important and appropriate" that Spanish Teacher-1's students be included, noting that Spanish Teacher-1 had planned a similar activity for her Spanish students. ROI at 569. On September 27, 2018, Complainant responded, asking why the other teachers were "making an issue" about the Spanish Pledge of Allegiance, stating that it was a common practice at other Agency schools yet had not been done at QMHS in years and characterizing the conversation as "just absurd." ROI at 568. Complainant noted that the Principal had praised him for his initiative and simply asked him to coordinate with the teachers in charge of the morning announcements. ROI at 568. On September 27, 2018, the Principal replied all, stating that his applause of Complainant's efforts was based on professionalism and collaboration with all affected parties, including Spanish Teacher-1, and that the activity needed to be a coordinated effort. ROI at 566. In a September 27, 2018, email to Complainant, the Principal stated, "There have been critical gaps in your communications/collaboration with other staff that need to be resolved before moving forward" with the activity. ROI at 564-65.

On September 28, 2018, Complainant responded, questioning whether he needed to “allow someone who has done nothing through the years until I decided to celebrate my Hispanic Heritage” to take over the activity. ROI at 564.

Upon review, we find that the record does not show that Female Teacher-1, Math Teacher-2, and/or Spanish Teacher-1 attacked or ganged up on Complainant as alleged. The record reflects that, when Female Teacher-1 and Math Teacher-2 asked if Complainant had included Spanish Teacher-1 in planning the activity, Complainant escalated the exchange, asking why they were “making an issue” about an activity that was “being blown out of proportion” and describing the situation as “just absurd.” ROI at 568. Although Complainant asserted that the Principal had approved the activity and he was merely following instructions, the Principal explained that he approved the activity and praised Complainant’s initiative based on his understanding that Complainant would collaborate with all relevant parties, including Spanish Teacher-1. ROI at 564-66, 739. Moreover, the preponderance of the evidence in the record shows that Female Teacher-1, Math Teacher-2, and/or the Principal raised the issue of collaborating with Spanish Teacher-1 because she taught Spanish classes at QMHS, not based on Complainant’s membership in any protected class.

Complainant alleged in (3)(p) that Spanish Teacher-1 mocked him by saying, “Hola, [Complainant]” and “There goes Mr. Transparent.” Complainant stated that he and Spanish Teacher-1 rarely talked and that she never addressed him in Spanish. ROI at 452. According to Complainant, shortly after Spanish Teacher-1 took over the Spanish Pledge of Allegiance project, he was talking to another teacher in the hallway when Spanish Teacher-1 yelled “Hola [Complainant]” from inside a classroom in a sarcastic tone. ROI at 453. Complainant averred that Spanish Teacher-1 also said “There goes Mr. Transparent” to mock him after using this phrase in an email to indicate that Complainant was not being transparent. ROI at 453. Spanish Teacher-1 denied making these comments, stating that she had not verbally communicated with Complainant since August 2018. ROI at 894. The record contains a September 27, 2018, response to emails about the Spanish Pledge of Allegiance project from Spanish Teacher-1 stating, “In the spirit of transparency. I think it is important to note that I noticed that this particular email on the email thread (see below) was altered by [Complainant] prior to my response.” ROI at 474. Spanish Teacher-1 denied yelling “Hola [Complainant]” or saying “There goes Mr. Transparent” to mock Complainant, and Complainant has not offered additional evidence beyond his own statement to substantiate his allegations.

We find that Complainant has not fulfilled his burden of establishing by preponderant evidence that Spanish Teacher-1 made these comments as alleged.

In (3)(s), Complainant alleged discrimination in connection with the Assistant Principal reporting him to the Internal Review Division for harassment, which resulted in an internal investigation. To the extent that Complainant alleges harassment with respect to the internal investigation, we note that the Agency is legally obligated to investigate a claim of harassment. See Rogers v. Dep't of Def., EEOC Request No. 05940157 (Feb. 24, 1995) (Commission found that a claim arising from the agency's investigation of a complaint of harassment failed to state a claim because the agency was legally obligated to investigate a complaint of harassment). Complainant stated that the Assistant Principal reported him for harassment in retaliation for his EEO complaint and for providing information about how the Assistant Principal falsified documents to justify the selection of Math Teacher-1 as the Mu Alpha Theta sponsor.<sup>22</sup> ROI at 457. According to Complainant, the Assistant Principal had been persecuting him for a long time. ROI at 457. The Assistant Principal stated that she reported Complainant to the Superintendent for harassment and denied that she did so based on Complainant's membership in any protected class, including that he had engaged in prior protected EEO activity. ROI at 840. Complainant only offers his unsupported assertion that the Assistant Principal's referral was based on his prior protected activity or his membership in any other protected classes, and we find that Complainant has not met his burden.

In allegation (3)(t), Complainant alleged that, on January 15, 2019, he learned that the Assistant Principal told employees that she wanted to fire Complainant. ROI at 461. According to Complainant, the Assistant Principal targeted him for termination because of discriminatory animus. ROI at 462.

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<sup>22</sup> To the extent that Complainant characterizes his participation in the union's grievance regarding the Assistant Principal allegedly falsifying Math Teacher-1's EDA application as prior protected EEO activity, we have long held that union activity, and/or status as a union official does not qualify as protected EEO activity where there is no evidence that the union activity involved an EEO matter. Filiberto H. v. U.S. Postal Serv., EEOC Appeal No. 2019001012 (Feb. 21, 2020).

The Assistant Principal denied advising employees that she wanted to fire Complainant. ROI at 842. According to Complainant, this denial was contradicted by the statement provided by a former math teacher (Former Teacher-1 – White Caucasian; Italian/Irish; heterosexual female; White Italian/Irish American; born in 1954; no disability; prior protected activity)<sup>23</sup> that the Assistant Principal targeted Complainant, among other teachers, to get them fired. ROI at 693. Former Teacher-1 stated that sometime in December 2016 or January 2017, the Assistant Principal told her that she wanted to fire Complainant. ROI at 907-08. According to Former Teacher-1, Complainant had said that the Assistant Principal was not qualified for her position, and the Assistant Principal took the things Complainant said about her qualifications personally. ROI at 907. Former Teacher-1 described Complainant as “very angry” that he was not selected for the Assistant Principal position. ROI at 906. Former Teacher-1 averred that she had no reason to believe that anyone subjected Complainant to discrimination based on race, color, national origin, disability, sex, sexual orientation, and/or age. ROI at 903-05. Former Teacher-1 stated that, while she did not know if anyone discriminated against Complainant based on his prior protected EEO activity, it was possible because QMHS administrators were very vindictive. ROI at 905. Even assuming that the Assistant Principal told Former Teacher-1 that she wanted to fire Complainant, the preponderance of the evidence in the record does not establish that the statement was based on Complainant’s membership in any protected class. Not only did Former Teacher-1 state that she had no knowledge that the remark was based on Complainant’s membership in any protected class, she also explained that, at the time the Assistant Principal made the remark, Complainant was upset he was not selected as Assistant Principal, and the Assistant Principal was offended that Complainant said she was not qualified for the position. Accordingly, Complainant has not established that this alleged harassment regarding firing Complainant was based on his membership in any protected class.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM in part the Agency’s decision finding no discrimination and REVERSE in part the Agency’s decision as it pertains to incident (3)(p), claim (5), and the improper disclosure of Complainant’s confidential medical information.

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<sup>23</sup> ROI at 903-05.

The matter is REMANDED for further processing in accordance with this decision and the ORDER below.

ORDER

The Agency shall take the following remedial action:

1. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall conduct and complete a supplemental investigation to determine whether Complainant is entitled to compensatory damages for this violation of Title VII and the Rehabilitation Act. In so doing, the Agency shall:
  - (a) Issue a notice to Complainant of his right to submit evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993) and request evidence from Complainant in support of compensatory damages.<sup>24</sup> The Notice shall provide Complainant with **thirty (30) calendar days** to respond (with an option and instructions to request an extension in the case of extenuating circumstances). Complainant has a duty to cooperate with Agency's investigation to determine compensatory damages, including responding to agency requests for documentation or completing agency forms.
  - (b) Issue a new final agency decision ("Compensatory Damages FAD") based on the findings of the supplemental

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<sup>24</sup> To establish entitlement to compensatory damages, the evidence must show a causal relationship between the Agency's discriminatory action and any pecuniary (monetary) or non-pecuniary losses/harm experienced by Complainant. For more information on evidence to determine compensatory damages: Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 11 § VII (Aug. 5, 2015), available at [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_11.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm) (provides the types of compensatory damages available under EEOC statutes 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").

investigation. The Compensatory Damages FAD shall state the amount (if any) of compensatory damages owed to Complainant and explain how the Agency determined that amount. The Compensatory Damages FAD shall include appeal rights to the Commission.

Within **sixty (60) calendar days** of the date the Compensatory Damages FAD is issued, the Agency shall pay Complainant the amount of compensatory damages it determined are owed. If there is a dispute over the exact amount of compensatory damages owed, the Agency shall pay the undisputed amount to Complainant. If Complainant disagrees with the agency's award, they may challenge the Agency's decision on the amount of compensatory damages by filing an appeal of the Compensatory Damages FAD with the Commission. Instructions on how to appeal, including the deadline to file, will be included in the appeal rights portion of the Compensatory Damages FAD.

2. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall rescind and expunge the Letter of Reprimand issued to Complainant on February 6, 2019, and any reference thereto, from Complainant's official personnel file, other records referencing the Letter of Reprimand,<sup>25</sup> and any other associated records.

The Agency shall issue written notice to Complainant that it rescinded the Letter of Reprimand and expunged all references to the Letter of Reprimand.

3. Within **ninety (90) calendar days** of the date this decision is issued, the individuals identified in this decision as the Assistant Principal and the Principal shall complete a minimum of four hours of in-person or interactive training on the Agency's obligations under Title VII. The training shall include an emphasis on workplace harassment, reprisal, and discrimination based on sexual orientation.

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<sup>25</sup> We note that Complainant provided with his appellate brief a copy of a February 21, 2020, Decision on Proposed Suspension that specifically considered the February 6, 2019, Letter of Reprimand in deciding to suspend Complainant.

For assistance in obtaining the necessary training, the Agency may contact the Commission's Outreach, Training and Engagement Division via email, at [FederalTrainingandOutreach@eeoc.gov](mailto:FederalTrainingandOutreach@eeoc.gov). The Agency shall provide the Compliance Officer with proof of attendance, as well as the contents and materials it used for the training. If these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

4. Within **ninety (90) calendar days** of the date this decision is issued, the Agency shall provide one hour of in-person or interactive training to its employees in the Diversity Management & Equal Opportunity Office in Alexandria, Virginia regarding the Agency's obligations under the Rehabilitation Act. The training shall include an emphasis on the requirements related to the confidentiality of medical records under the Rehabilitation Act and the limited exceptions under which confidential medical information can be disclosed.

For assistance in obtaining the necessary training, the Agency may contact the Commission's Outreach, Training and Engagement Division via email, at [FederalTrainingandOutreach@eeoc.gov](mailto:FederalTrainingandOutreach@eeoc.gov). The Agency shall provide the Compliance Officer with proof of attendance, as well as the contents and materials it used for the training.

5. Within **one hundred twenty (120) calendar days** of the date this decision is issued, the Agency shall consider disciplining the Assistant Principal and the Principal for the harassment based on sexual orientation and the retaliatory Letter of Reprimand in violation of Title VII that were found to have occurred in this decision. *The Commission does not consider training to constitute 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 these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure dates.
6. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order." The Agency shall provide the Compliance Officer with the original signed and dated notice, reflecting the dates that the notice was posted, along with evidence that the notice was physically posted at the facility and electronically.

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, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Quantico Middle/High School 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 (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are 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 receipt of this decision. 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the 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(f).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0124)

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 their 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

January 14, 2025

Date