



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

[REDACTED]
Cheryll K.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2022001648

Hearing No. 450-2017-00465X

Agency No. HS-CBP-26564-2016

DECISION

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 January 6, 2022, final decision concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked as an Agriculture Specialist, GS-12, at the Agency's Laredo Port of Entry Field Office in Laredo, Texas.

On July 8, 2016, Complainant filed a formal EEO complaint claiming that the Agency discriminated against her and subjected her to discriminatory harassment based on sex (female/pregnancy), disability (depression and anxiety), and/or in reprisal for prior protected EEO activity (instant complaint) when:

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. From July 7, 2015, to June 30, 2016:
 - a. The Assistant Port Director (Assistant Port Director – 1) and a second Assistant Port Director (Assistant Port Director – 2) denied Complainant's reasonable accommodation requests of July 7 and July 28, 2015, to allow her to take Leave Without Pay (LWOP) for an unspecified period of time, and she was required to return to duty prior to receiving a medical release from her physician in order to extend her request for maternity leave.
 - b. Periodically, from October 1, 2015, to April 2016, an Agriculture Specialist (Co-worker–1) subjected Complainant to comments regarding her use of the lactation room.
 - c. From October 1, 2015, to June 20, 2016, a Supervisory Agriculture Specialist (Supervisory Agriculture Specialist–1) required Complainant to obtain the key to the lactation room from the Chief's office, where many men worked, which required her to inform them of the reason for needing the key.
 - d. On October 6, 2015, a male Entry Specialist walked in on Complainant while she was in the lactation room expressing breastmilk.
 - e. During the first week in February 2016, a Supervisory CBP Officer (Supervisory CBP Officer-1) failed to collect the keys to the lactation room from approximately 20-30 mostly male employees, although during the week of February 15, 2016, Supervisory Agriculture Specialist-1 and Supervisory CBP Officer–1 conveyed that the keys had been collected from the employees.
 - f. On February 15, 2016, Supervisory Agriculture Specialist–1 informed Complainant that Headquarters mandated the use of a log sheet to sign in and out wherever she used the lactation room, although Complainant later learned that there was no such mandate and believes this was an attempt to intimidate her from using the lactation room and to keep track of the number and duration of the times she used the lactation room.
 - g. Between February 15 and 19, 2016, on two occasions, Complainant saw feet outside the door of the lactation room and overheard Supervisory Agriculture Specialist-1 and Co-worker–1 and believes they were trying to listen to what Complainant was doing.
 - h. On March 30, 2016, a second Supervisory CBP Officer (Supervisory CBP Officer–2) asked Complainant to inform management whether she would be released to full duty and to provide medical documentation.

2. From October 1, 2015, to May 25, 2016, to May 26, 2016, a second Supervisory Agriculture Specialist (Supervisory Agriculture Specialist-2) and the Chief forced Complainant to go on light duty in order to use the lactation room at the World Trade Bridge.
3. Management did not provide Complainant reasonable lactation room accommodations due to the following:
 - i. During the last week in January 2016, Supervisory CBP Officer-1 denied Complainant's request to have a key to the lactation room.
 - ii. On various dates from March 7, 2016, through May 12, 2016, Complainant did not have immediate access to the lactation room because the Chief's office containing the key was locked, or the key was lost.
4. On or about May 23, 2016, Supervisory CBP Officer-2 requested unnecessary medical documentation from Complainant.
5. Beginning on May 25, 2016 through June 10, 2016, Complainant was required by management to use leave in the following incidents:
 - i. On May 25, 2016, the Chief of Staff released Complainant from work early and Complainant was required to take leave for the remainder of the day because she had not been released to work full duty.
 - ii. Between May 25, 2016, and June 10, 2016, the Chief of Staff did not allow Complainant to work, and she was forced to use her annual and sick leave.
 - iii. On June 10, 2016, Supervisory CBP Officer-2, the Chief of Staff, and the Port Director denied Complainant's request to remain on light duty so she could continue to use the lactation room at the World Trade Bridge, forcing her to use her leave in order to use the lactation room.
6. On June 14, 15, and 17, 2016, Supervisory CBP Officer-2 and/or the Chief of Staff charged Complainant with Absent Without Leave (AWOL).
7. On September 7, 2016, Complainant learned she was not selected for the position of Mission Support Specialist, GS-0301-11, advertised under Vacancy Announcement (VA) Number MHCMP-MMS, located in Laredo, Texas.
8. On October 25, 2016, management required Complainant to undergo a Fitness for Duty Examination (FFDE).

9. On December 12, 2016, management required Complainant to undergo a second FFDE.
10. On or about March 9, 2017, Complainant learned that the Agriculture Specialist Chief (Chief) and Supervisory Agriculture Specialist-1 provided a negative employment reference check, which resulted in her non-selection to the position of Investigative Analyst, GS-1805-07/09, for the Bureau of Alcohol, Tobacco, Firearms and Explosives, as advertised under Vacancy Announcement (VA) number: 15-DEU-361-WEST.
11. On or about March 28, 2017, management issued Complainant an Options Letter.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant initially requested an AJ hearing, but subsequently withdrew her request.

On January 6, 2022, the Agency issued the instant final decision, pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination or unlawful retaliation was established as alleged.

The instant appeal followed.

ANALYSIS AND FINDINGS

Reasonable Accommodation

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p).

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation.

Complainant testified that she had her second child on March 31, 2015, and on June 24, 2015, she was diagnosed with postpartum depression.

Complainant further testified that she was diagnosed with Major Depressive Disorder on June 13, 2016, generalized anxiety disorder on June 14, 2016, adjustment disorder on September 12, 2016, post-traumatic stress disorder on November 11, 2016, and panic disorder on June 2, 2017. Complainant indicated that she is undergoing treatment for all these conditions which substantially limit her ability to work, concentrate, care for herself and her children, and impacted her memory. Complainant explained that she informed management of her conditions as they occurred.

Our review of the record reflects that Complainant made three accommodation requests for leave without pay on June 30, 2015, July 28, 2015, and September 19, 2016.² We address each of these requests separately below.

June 30, 2015, Request

Complainant explained that she used twelve weeks of maternity leave provided through her rights under the Family & Medical Leave Act (FMLA). Thereafter, on June 30, 2015, Complainant requested a reasonable accommodation to extend her leave for thirty days in LWOP status “due to a personal injury.” Medical documentation, dated June 24, 2015, from Complainant’s physician, noted that “patient will not return to work until further notice.” Complainant provided another physician’s note dated July 7, 2015, that stated, “due to patient’s medical condition please provide extended medical leave until further notice.” Contrary to Complainant’s testimony and statements on appeal, there was no mention of her medical condition (or the extent of her personal injury) provided on the June 24, 2015 or July 7, 2015 physician notes to substantiate her request for continued absence from work.

Our review of the record reflects that the Agency engaged in the interactive process and provided Complainant with the requested accommodation even when the medical records failed to indicate that Complainant had a diagnosis (postpartum depression) limiting her ability to return to work after completing twelve weeks of maternity leave. The record does reflect that the Assistant Port Director initially denied Complainant’s request because she had a combined leave balance of twenty-seven hours which needed to be exhausted before she could take leave without pay. However, management later determined that in this instance, Complainant’s request for leave without pay could be granted. On July 8, 2015, management granted Complainant’s accommodation for extended leave, even without medical documentation substantiating Complainant’s need for additional leave due to her postpartum depression, a condition not mentioned in Complainant’s request or in her physician’s notes.

² We acknowledge that these three dates vary from the dates identified previously, in claim 1(a). For example, the June 30, 2015, request contains a physician’s note dated July 7, 2015 (the date identified in claim 1(a)). The July 28, 2015, request also included an August 7, 2015, email requesting additional leave but is in essence the same July 28, 2015, request. Finally, the September 29, 2016, request was not expressly referenced in claim 1(a), but was raised in Complainant’s testimony and on appeal. Therefore, we address *all* reasonable accommodation requests that Complainant argues, had been denied.

Therefore, we find that the Agency correctly determined that Complainant failed to demonstrate that the Agency denied her June 30, 2015, accommodation request for extended leave.

July 28, 2015, Request

Complainant testified that she submitted a second request for leave on July 28, 2015, but she was notified two weeks later that the Assistant Port Director (Complainant could not recall this management official's name) had denied her request and informed her that she had to return to work.

The record includes an August 7, 2015, email from Complainant requesting an additional "40 hours of leave without pay." In the email, Complainant informed management that her next evaluation with her physician was scheduled for August 17, 2015. Complainant explained that on August 11, 2015, the Agriculture Specialist Chief extended her leave by two weeks by assigning those weeks as annual leave. After these two weeks had passed, Complainant stated that she returned to work.

Contrary to Complainant's assertion on appeal that the Agency denied her accommodation for extended leave, the record reflects that Complainant's leave request was granted for two weeks without her providing additional medical documentation. Although management was aware that Complainant had previously been on maternity leave, Complainant's extension requests for leave without pay as an accommodation were based on a "personal injury," the details of which were not included on any of the medical documentation Complainant had provided. Additionally, the physician's note requested that Complainant be placed on extended leave for an indefinite period of time. Consequently, the Agency was unaware of the nature of Complainant's condition or the duration of her condition. The Agency, in this case, was not obligated to approve Complainant's request for an additional 40 hours  of leave without pay without additional medical documentation supporting the request. Therefore, we find that the Agency properly determined that Complainant failed to demonstrate that the Agency violated the Rehabilitation Act when it granted her two more weeks of additional leave instead of her requested 40 hours of leave without pay when Complainant had not provided adequate medical documentation to support her request.

September 19, 2016, Request

The record reflects that Complainant had previously requested a reasonable accommodation under the FMLA on June 22, 2016, which the Agency approved on June 23, 2016. From June 23, 2016, through September 2016, Complainant was on FMLA leave. Complainant testified that on September 15, 2016, the Chief informed her that she was scheduled to return work on September 22, 2016. On September 19, 2016, Complainant, through her attorney, requested a reasonable accommodation for "additional leave from the workplace" to obtain additional treatment for her diagnoses of anxiety and depression. Complainant submitted medical documentation to substantiate her need for additional leave.

A September 7, 2016, letter from Complainant's Licensed Clinical Social Worker diagnosed Complainant with stress, anxiety, and depression. The Licensed Clinical Social Worker explained that Complainant's conditions were "related to unresolved work issues." The Licensed Clinical Social Worker further explained that after six weeks of treatment, Complainant had not made sufficient progress to overcome her symptoms completely, and therefore, the Licensed Clinical Social Worker recommended that Complainant "take leave until the symptoms are alleviated and/or the work situation is resolved." Similarly, a September 29, 2016, note from Complainant's gynecologist recommended that Complainant "continue extended leave due to major depressive disorder, recurrent severe without psychotic features."

In response, the Agency determined that Complainant appeared to be requesting an indefinite period of leave as there was no indication from the medical documentation as to when Complainant was expected to return. Consequently, on October 4, 2016, the CBP Supervisor requested that Complainant provide a date she expected to return to work. Thereafter, Complainant provided an October 7, 2016, note from her physician indicating she "would benefit from some time off of work until her problem stabilizes and feels less level of stress." Specifically, the physician recommended that Complainant could "take up to 12 weeks or less to return to work."

Contrary to Complainant's assertion, the record supports that the Agency responded to Complainant's accommodation request for twelve weeks of leave without pay. After Complainant submitted documentation indicating that she had major depressive disorder, anxiety, and depression, the Port Director recommended, on October 25, 2016, Complainant for a fitness for duty examination to determine Complainant's "ability to perform the full range of duties for which she was hired." The Port Director explained that Complainant's position required that she be able to "interact with carriers, other agencies, and foreign entities to exchange information and provide guidance of admissibility and or compliance." The Port Director further explained that ultimately the results of the General Medical Fitness for Duty Evaluation and subsequent Independent Medical (Psychiatric) evaluation revealed that Complainant's depressive and anxiety disorder would prevent her from performing the essential functions of her position. As a general rule, a reasonable accommodation should enable an employee to perform the essential function of his/her position. In Complainant's case, her mental conditions prevented her from performing the essential functions of her position with or without accommodation. Therefore, Complainant failed to demonstrate that the Agency violated the Rehabilitation Act when it ordered a fitness for duty examination in response to her request for twelve weeks of leave without pay.

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a *prima facie* of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action.

See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

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

Lactation Support Program

Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination. See EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, Section 1(A)(4)(b) June 25, 2015. Additionally, an employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. Id. As further discussed below, our review of the record supports that the Agency subjected Complainant to disparate treatment based on sex when it failed to provide Complainant a private space to express milk and when it inhibited Complainant's ability to access designated areas to express milk.

The record reflects that Complainant returned to work, full duty, sometime in mid-September 2015, and she took breaks as needed to express milk for her son who was still nursing. During this period, Complainant informed her World Trade Bridge managers that she was participating in the Agency's Lactation Support Program as her need to express milk. The Agency's Lactation Support Program provided the following accommodations to participating members:

- (1) A reasonable break time for employees who are nursing mothers to express breast milk for their nursing child for up to one year after the child's birth each time such employee has the need to express the milk; and
- (2) A private place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public for employees to express breast milk.

However, the record reflects that the Agency failed to secure Complainant with a lactation room that was “private” and “free from intrusion.” As confirmed by the Assistant Port Director, the room that Complainant had been directed to use had been originally designated as the storage room for the Entry Specialists, all of whom had a key to gain access to this room. Complainant asserted that as many as 20 to 30 Entry Specialists had keys. However, the Assistant Port Director clarified that the existing Entry Specialist staff included 11 employees (one male and ten females). Regardless, the lactation room was not private because other employees outside of those participating in the Lactation Support Program had access to this room. As a result, the record indicates that an Entry Specialist walked in on Complainant while she was using the lactation room on October 6, 2015, and the Entry Specialist stared at her half-naked body.

During the October 6, 2015, incident, Complainant stated that the Entry Specialist knocked on the door and opened the door anyway despite her warnings for the employee not to and despite an eye-level sign at the door that read “lactation room,” as well as an eye-level tag hanging for the door that read “in use.” Complainant stated that she felt humiliated, violated, and embarrassed after the employee entered the lactation room where she stood half-naked. Complainant testified that she reported the incident to every manager in her chain of command, but no corrective action was taken. After reporting the incident, Complainant stated that the Chief explained that the Entry Specialist entered the room despite Complainant’s warnings, because he “just wanted to use the microwave” stored inside the lactation room. Complainant further stated that the Chief acknowledged that employees should have been aware that what was originally designated as the storage room was now the lactation room as employees were emailed about the change. However, the Entry Specialist testified that as of October 6, 2015, he had no recollection of “official posting of the supply room being the lactation room.” Similarly, Complainant explained that even if staff had been notified of the change, staff still had keys to access the now designated lactation room.

On October 15, 2015, Complainant testified that management installed a “small flimsy lock” on the inside door to the lactation room. However, Complainant explained that employees still had keys to the room and still attempted to open the door even with the interior lock installed. After this event, Complainant indicated that her stress level increased, she experienced nightmares, and she developed her subsequent medical conditions.

The record further reflects that management implemented new policies to address Complainant’s concerns. However, as further explained below, these changes did not address Complainant’s need to express milk in a private area, free from intrusion.

Assistant Port Director – 2 explained that Supervisory CBP Officer - 1 was instructed to collect the keys from the Entry Specialists. Complainant asserted that these keys were never collected. Nevertheless, the record indicates that management had the lock to the lactation room changed. The Assistant Port Director further explained that the new lock, unlike the prior lock with a universal key, was limited to three keys. Assistant Port Director – 2 stated that two keys were placed in the Commander’s office and only one key was placed in the Chief’s office.

Complainant testified that her first level supervisor, Supervisory Agriculture Specialist – 1, informed her at the end of October 2015, that the key to the lactation room would be stationed in the Chief's office. Complainant further testified that she and one other employee, CBP Officer, were the only two employees who used the lactation room. Consequently, Complainant explained that she and the CBP Officer coordinated with each other throughout the day about sharing the key without issue. Complainant noted that the door to the lactation room would remain open, they would retrieve the key from the Chief's office, and they would pass the key to each other throughout the day. As a result, neither Complainant nor the CBP Officer would return the key to the Chief's office until the end of the day.

This system worked until the CBP Officer, on behalf of Complainant and the other nursing employee, sent a January 28, 2016, email to Supervisory CBP Officer – 1, which was entitled “Lactation Room Issues.” The CBP Officer revealed several concerns regarding parties accessing the lactation room who were not participants in the Agency’s Lactation Support Program. Specifically, the CBP Officer stated that staff: removed the only chair in the lactation room, depleted the sanitation and cleaning supplies provided for Lactation Support Program participants, and used a box for shredding materials located inside the lactation room as a garbage can. The CBP Officer further indicated that there were two paper shredders stationed inside the Lactation Room and one shredder was stationed next to the lactation table which produced a “fine white powder” that covered the lactation table. The CBP Officer voiced concerns that the fine powder could be potentially toxic especially if the powder got into the breastmilk. The CBP Officer also explained that she had notified three World Trade Bridge management officials about these issues on January 21, 2016. However, the CBP Officer stated that Assistant Port Director – 1 “flatly refused to move the shredders out of the lactation room because she felt they were too noisy.” Although the CBP Officer acknowledged that Supervisory CBP Officer – 1 addressed many of her concerns, Complainant noted that Supervisory CBP Officer – 1 denied her request, that same month, for a key to the lactation room.

Less than one month later, management informed Complainant, and the CBP Officer, that they would be required to retrieve the key to the lactation room from the Chief's office every time they needed it and they would be required to sign-in and sign-out their key use on a log sheet, effective February 16, 2016. Assistant Port Director – 2 explained that sign-in and sign-out procedures were implemented to “simply to account for the employee’s location in the event of an emergency.” The Port Director testified that managers in Complainant’s chain of command required her to obtain a key for the lactation room to “ensure personal accountability and to ensure another employee was available to cover her regularly assigned duties while she was provided time to lactate.” Supervisory Agriculture Specialist – 1 further testified that the log was to “ensure that management was aware of employee whereabouts when away from the inspectional areas, to help address the issues of the alleged attempted walk-ins, identify who had the key last if the key went missing again, and the sanitation issues.”

However, the preponderance of the evidence reflects that these proffered reasons for requiring Complainant to request the lactation key and record her use of the key were retaliatory after Complainant, through the CBP Officer’s behalf, complained about sanitation and privacy issues

with the lactation room. As previously discussed, Complainant and the CBP Officer had already established a system to ensure that they both could use the lactation room without conflict. Additionally, the Lactation Program Manager confirmed in a February 17, 2016, email that, contrary to what management stated, Headquarters did not implement a sign-in/sign-out log sheet to track employees using the lactation room. Instead, the Lactation Program Manager indicated that the Agency allowed employees to reserve a room by registering for it. However, the Lactation Program Manager clarified that “many locations may not do this sort of tracking.” Supervisory Agriculture Specialist – 1 acknowledged that he was aware that Headquarters had a process that allowed employees participating in the Lactation Support Program to reserve a room online via the SharePoint page. Supervisory Agriculture Specialist – 1 testified that he believed that the log sheet would be used as a way for employees to “discreetly schedule their needed time” for the lactation room.³ However, the log sheet that was used at World Trade Bridge was far from discrete, as this procedure would require Complainant to ask and record use of the key from management every time. Regardless, the Lactation Program Manager established that sign-in/sign-out tracking procedures were not commonly used for scheduling access to a lactation room. Consequently, these tracking procedures were only specific to the lactation room Complainant and the CBP Officer had been assigned to use.⁴

Complainant testified that the new procedures were a “strategy management used to intimidate women participating in the Lactation Support Program” as the log sheet was not used at any other locations. Complainant further testified that the new procedures required her to request the lactation key from whichever male CBP Office Administrator who was on duty. Complainant further testified that every time she had to explain to the Administrator why she needed to access the Chief’s office to locate the key, and in doing so, the male Administrators would ask her personal questions. For example, she had been asked: Was she breastfeeding? Did she produce enough milk to feed her baby? Was her milk warm enough for the baby? Complainant further testified that these questions were accompanied by a “long stare at [her] chest.”⁵ Complainant

³ However, testimony from CBP Officer, provided in Complainant’s appellate brief, indicates that Supervisory Agriculture Specialist – 1 approached the CBP Officer and asked her how long she took to pump. The CBP Officer stated that Supervisory Agriculture Specialist – 1 believed that Complainant spent “2 hours in the lactation room” which resulted in her only working “2 – 3 hours a day.” The CBP Officer further stated that Supervisory Agriculture Specialist – 1 told her that he had tried contacting the Office of Chief Counsel on how to investigate the matter and he was directed to “take notes as to when she would go to the lactation room and when she would come back.”

⁴ Supervisory Agriculture Specialist – 1 testified that no one used the log sheet and one week after implementing these procedures, he was notified that the log sheet was not mandatory and participants in the Lactation Support Program did not need to sign.

⁵ In her statement attached to Complainant’s appellate brief, the CBP Officer testified that when she requested the key from the Chief, the Chief would ask her “approximately how long will you

stated that she felt “embarrassed, humiliated, and singled out.” In contrast, Complainant explained that when she and the CBP Officer were allowed to effectively pass the key to each other throughout the day, they both “avoided embarrassment and humiliation from male personnel.”

In addition to the embarrassment and humiliation Complainant experienced from having to request the key each time she needed it, Complainant also indicated that these new procedures delayed her ability to gain access to the lactation room. In March 2016, Complainant testified that she attempted to retrieve the key from the Chief’s office, but no one was in the Chief’s office and the Chief’s office door was locked.⁶ Complainant had to seek assistance from another management official who returned with the key approximately twenty-five minutes later. Complainant explained that when she received the key she had already begun lactating and “[her] shirt got wet and [she] had to walk around with milk smell and stains for the remainder of the day.” Complainant explained that this incident reoccurred several times from March 2016 through May 2016, resulting in delays up to thirty minutes as well as pain because her breasts became engorged while waiting to get access to lactation room to express the milk.

While Complainant battled her ability to gain access to the lactation room while complying with the new procedures, the record indicates that Complainant requested two extensions of her participation in the Lactation Support Program. The record reflects that Complainant was participating in the Lactation Support Program while on light duty as there was a concern that she would not have access to a lactation room because her position required that she work off-sight at local warehouses during regular hours and overtime, where lactation rooms may not be available. The light duty assignment, in contrast, ensured that Complainant had access to a lactation room at her assigned location. The record further reflects that participation in the Lactation Support Program was temporary as participants were only provided reasonable break time for up to one year after the child’s birth. Consequently, on March 30, 2016, Supervisory CBP Officer -2 asked Complainant if she had planned to return to fully duty status after being on light duty through her participation in the Lactation Program for one year following giving birth to her son. Supervisory CBP Officer – 2 noted that Complainant’s baby would turn one year old in April 2016.

On April 19, 2016, Complainant requested extension of her light duty assignment because she was still participating in the Agency’s lactation support program, and she was still breastfeeding her son even though he turned one on April 1, 2016.

be?” before handing her the key. The CBP Officer further testified that she heard comments from staff saying, in Spanish, “there goes the cow” and “how’s your milk coming along?”

⁶ Supervisory Agriculture Specialist – 1 acknowledged that Complainant had informed him of this incident after it happened. Supervisory Agriculture Specialist – 1 explained that there is a spare key to the Chief’s office located in an office adjacent to the Chief’s office, and a supervisor or Chief is always on duty to access the key to the Chief’s office.

Complainant explained that she was in the process of having her son make the transition to whole milk, but he refused to drink any other liquids than the milk she produced. Complainant was therefore afraid that he could become dehydrated if she were to stop breastfeeding. With the extension request, Complainant attached an April 18, 2016, physician's note indicating that:

[Complainant] is in the process of transition from breast feeding to whole milk. Infant has refused to take formula, H2O or any other type of liquid. [Complainant] is afraid [her son] might get dehydrated. It may take several days to accomplish the transition.

The physician's note also stated that Complainant needs to use "the breast pump while at work . . . to express milk to avoid pain and engorgement." The record reflects that the Agency approved Complainant's extension request through May 16, 2016. The Agency informed Complainant she would need to submit additional documentation if she needed another extension.

On May 23, 2016, Complainant requested another extension of her light duty assignment as she was still trying to transition her baby to whole milk and needed to use the lactation room to express breast milk. At the time, Complainant could not provide additional medical documentation because her physician was ill and out of the office. Supervisory CBP Officer – 2 had informed Complainant that she needed to submit a doctor's release indicating that she could return to full duty or else Complainant would be sent home, on personal leave. Complainant testified that she did not believe that this request for documentation was necessary because her difficulty with transitioning her baby from breastmilk to whole milk had not changed. However, Supervisory CBP Officer – 2 testified that previously submitted documentation did not comply with CBP Directive No. 51810-009, and consequently, Complainant was required to submit new documentation from her physician. Because Complainant did not comply, she was sent home on May 25, 2016.⁷

Supervisory CBP Officer – 2 testified that Complainant ultimately submitted medical documentation on June 1, 2016. However Supervisory CBP Officer – 2 denied Complainant's request for extension of her light duty assignment on June 10, 2016. Supervisory CBP Officer – 2 reasoned that the Agency had accommodated Complainant, per CBP Directive No. 51711-004 (Lactation Support Program) for one year as stated by the directive. The record supports that Supervisory CBP Officer – 2 reached this determination after consulting with other divisions. The Medical Fitness Branch determined that Complainant's request was "strictly an administrative one" because there was:

no CBP Directive or Program that would support an employee in a position with medical standards and physical requirements to be excused from full duty on the basis that the employee breastfeeding, after the employee's child reached the age of one year. . . . We believe the OCC (Office of Chief Counsel) would be in a better position to advise management as to who this issue may be addressed, perhaps through encouraging the

⁷ Complainant remained on sick leave through June 10, 2016.

employee to explore placement in an alternate position, one without specific medical standards and physical requirements.

However, Supervisory CBP Officer – 2 explained that the Office of Chief Counsel recommended that she request (1) the expected duration of the request and (2) the next appointment date. Supervisory CBP Officer – 2 indicated that she had requested this information from Complainant as early as May 1, 2016. However, Complainant wanted her to use medical documentation that was previously submitted and proceed with the request. Supervisory CBP Officer – 2 further stated that Labor Employee Relations recommended that Complainant be “charged Annual Leave for to [sic] time used if continued use of the Lactation Support Program should be necessary as the agency has already complied with the one-year requirement.” After seeking guidance from these sources, Supervisory CBP Officer – 2 denied Complainant’s request, instructed Complainant to return to regular duty on June 13, 2016, and advised that Complainant could use sick or annual leave during the time used for lactation if it was determined that she required use of the Lactation Support Program upon her return to full duty. The record supports that on June 20, 2016, Complainant submitted a request to return to full duty.

Supervisory CBP Officer – 2 clarified that Complainant returned to full duty without submitting medical documentation because in this case, Complainant had no medical restrictions, and that the only medical documentation Complainant had provided indicated her request to use her breast pump at work. Consequently, Supervisory CBP Officer – 2 explained that although her light duty request was denied, Complainant was still allowed to use leave when she used the lactation room.

However, this proffered reason directly conflicts with Supervisory CBP Officer – 2’s *initial* instruction for Complainant. Specifically, CBP Officer – 2 instructed Complainant to provide medical documentation from her physician stating that she was cleared for full duty to avoid being sent home on personal leave. We find it unclear why Supervisory CBP Officer – 2 required Complainant to provide a medical release in May 2016, but did not require her to provide a medical release in June 2016. Additionally, it is unclear why Complainant was forced to take leave full time in May 2016, but she was offered the option in June 2016 to take leave as she needed to express milk. The Agency could have denied Complainant’s request on May 25, 2016, and then alternatively permitted her to use annual or sick leave as needed to access the lactation room instead of sending her home which resulted in her taking 94 hours and 45 minutes of sick leave from May 25, 2016, through June 10, 2016.

Therefore, given the facts and circumstances of this case, we find that the Agency subjected Complainant to disparate treatment based on sex when it treated Complainant less favorably because of her need to lactate when it (1) failed to provide a private area for Complainant to express milk, (2) implemented new procedures that delayed Complainant’s access to the lactation room, and (3) sent Complainant home from May 25, 2017 through June 10, 2016 instead of allowing her to work and use annual or sick leave as needed during the periods she needed to express milk at work.

Light Duty

Complainant testified that she returned to work full duty to World Trade Bridge sometime in mid-September 2015, and took breaks as needed to pump breast milk for her son who was still nursing. Contrary to Complainant's assertions, the record reflects that management did not force her to go on light duty to use the lactation room at the World Trade Bridge. Complainant testified that during a meeting where she, management, and the union representatives were present, there was a general discussion as to Complainant's ability to complete overtime assignments at a warehouse (contractor) that did not have a lactation room while simultaneously participating in the Agency's Lactation Support Program.⁸ The Lactation Support Program guaranteed participating employees access to a private lactation room. Complainant testified that her overtime assignment had been reassigned to another employee because of her inability to complete this assignment because of her need for access to a lactation room. During the meeting, Complainant testified that the union vice-president, not management, recommended that she go on light duty which Complainant ultimately agreed to do.

Supervisory CBP Officer – 2 testified that Complainant requested to be placed on light duty in order to have access to a lactation facility while working off-site at local warehouses during regular hours and overtime where lactation rooms may not be available. In this case, Supervisory CBP Officer – 2 explained that Complainant was granted light duty to enable her to remain at her assigned location, World Trade Bridge, where she would have access to a lactation room.

A copy of the October 7, 2015, light duty request reflects that Complainant requested, "to be placed on light duty from 10/7/2015 until I finish nursing my child approximately six to eight months. I will provide the necessary documentation as requested." Medical documentation, dated October 5, 2015, accompanying the request indicates that the physician noted for management to "take into consideration [Complainant's] current situation, and allow proper or adequate accommodations to be able to nurse every 3 to 4 hours."

Documentation in the record further reflects that the Agency offered Complainant a light duty position on October 7, 2015. The light duty position included, but was not limited to, answering phones, collecting fees, and assisting the scheduling documentation at any of the Laredo Ports of Entry. The offer also specified that the light duty assignment would accommodate Complainant's request to be able to lactate every three to four hours. The light duty assignment was temporary and would not exceed thirty days. However, if Complainant wanted an extension, the offer specified that she was "required to submit a written request for the extension through [her] chain of command with a medical statement." The record supports that Complainant requested a light duty to access the lactation facilities to express milk for her son who she was still nursing at the time and the Agency granted Complainant's initial request.

Non-Selections

⁸ The contractor facilities were not required to provide a lactation room.

(a) Mission Support Specialist

The Selecting Official explained that there were no interviews for the position. Instead, applications were reviewed for recommendation by the Assistant Director of Field Operations and the Deputy Assistant Director of Field Operations, who submitted their recommendations to the Selecting Official. The Selecting Official explained that applicants were reviewed for selection based on the strength of their application as well as supporting documents. The Selecting Official further clarified that there were no reference checks made for this position because it was a collective bargaining position. The Selecting Official indicated that the Selectee (female) was chosen for the position based on her experience, however, the Selectee declined the position. Although the position was later re-announced, the Selecting Official stated that Complainant did not apply.

(b) Non-Selection (Investigative Analyst)

Contrary to Complainant's assertions, the Chief testified that he never spoke to anyone at the Bureau of Alcohol, Tobacco, Firearms and Explosives regarding Complainant's application for the Investigative Analyst position. The Chief explained that Complainant may have listed him as a reference, but he clarified that he never provided, and was not contacted to provide, a reference for her. Similarly, Supervisory Agriculture Specialist – 1 testified that he was never made aware that Complainant had applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Options Letter

The record indicates that the Port Director issued Complainant an Options Letter on March 28, 2017. In the letter, the Port Director explained that he intended to remove Complainant from federal service, unless Complainant chose one of the following options within seven days: (1) apply for disability retirement, (2) voluntarily resign from the Agency, or (3) request reassignment to another position. In response, Complainant, through her attorney, informed the Agency that it could not force her to resign or retire. Instead, Complainant's counsel advised the Agency to propose a removal for medical inability to perform if the Agency determined that it could not accommodate Complainant.

On April 13, 2017, the Port Director issued a proposed, non-disciplinary, notice to remove Complainant from the Agency on the grounds of medical inability to perform the essential functions of her position. The notice indicated that the results of a psychiatric independent medical examination revealed that Complainant could not perform most of her duties due to persistent and severe depression and anxiety. Specifically, the examination results indicated that Complainant's conditions caused her to isolate and not be participatory, become irritable, have a fear of driving, and develop a poor ability to adapt to stress. Complainant did not reply to the notice and on May 22, 2017, the Port Director issued his decision to remove Complainant from federal service for medical inability to perform the duties of her position, effective May 22,

2017. Therefore, the record reflects that Complainant concedes that she could not perform the essential functions of her position due to her depression and anxiety.

Therefore, the record shows that neither during the investigation, nor on appeal, has Complainant proven, by a preponderance of the evidence, that these proffered reasons resulted from disparate treatment based on her sex or reprisal for protected EEO activity.

Absent Without Leave Charge

The record indicates that Supervisory CBP Officer – 2 instructed Complainant to return to the office for full duty on June 13, 2016. The record further indicates that Complainant did not return to the office until June 20, 2016, and was absent from work on June 14, 15, and 17, 2016. Consequently, Complainant was charged absent without leave.

However, the record reflects that Complainant notified management of her absences. On June 12, 2016, Complainant emailed Supervisory CBP Officer – 2 that she had a medical appointment on June 13, 2016, and that she would be absent from work. During her June 13, 2016, appointment, Complainant was diagnosed with Major Depressive Disorder “due to constant harassment from work” and she was referred to a specialist. On June 14, 2016, at 4:00 pm, Complainant emailed the Chief and informed him of her doctor’s appointment the day before. Complainant explained that she was referred to a specialist who she saw on June 14, 2016, and who ordered laboratory work and another appointment with a different specialist, all scheduled for June 15, 2016. Therefore, Complainant informed the Chief that she would return to the office on June 16, 2016.

On June 16, 2016, Complainant testified that she suffered a panic attack on her way to work and she requested sick leave for that day, as well as for June 17, 2016. Complainant indicated that she requested leave through the appropriate channels, however, she was still charged absent without leave. Supervisory CBP Officer – 2 explained that Complainant’s absent without leave charge occurred because Complainant emailed the Chief about her absence during the period that the Chief was on annual leave, and consequently, the Chief did not advise the port administrative office that Complainant had notified management that she was absent due to medical issues. However, the record clearly indicates that a supervisor emailed Supervisory CBP Officer – 2 on June 17, 2016, confirming that Complainant had properly reported her absences from work. Moreover, the absent without leave charges occurred immediately after Supervisory CBP Officer – 2 denied Complainant’s request for extension of her light duty assignment on June 10, 2016, and required Complainant to report to full duty on June 13, 2016. Considering the proximity of these charges, the denial of accommodation for extended light duty, and documentation supporting that Supervisory CBP Officer – 2 was aware that Complainant had requested leave for medical purposes, we find that Supervisory CBP Officer – 2 exhibited discriminatory animus, based on Complainant’s sex when she charged Complainant absent without leave.⁹ Therefore, we remand this matter to the Agency in accordance with our Order below.

⁹ Ultimately, Complainant’s absent without leave charge was changed to annual leave.

Harassment

To establish a claim of discriminatory environment harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Complainant testified that Co-worker – 1 made several inappropriate comments about Complainant using the lactation room. Specifically, Complainant stated that Co-worker – 1 asked her why she was on light duty when their division was short staffed. Complainant further alleged that Co-worker – 1 questioned Complainant about how long she intended to breastfeed her baby. On several occasions, Complainant asserted that Co-worker – 1 asked these questions in the presence of Supervisory Agriculture Specialist – 1, who Complainant stated did nothing to stop Co-worker – 1's harassment. However, both Co-worker – 1 and Supervisory Agriculture Specialist – 1 denied that these incidents occurred. Both Co-worker – 1 and Supervisory Agriculture Specialist – 1 further denied standing outside of the lactation room while Complainant was using this room. Complainant asserted that she saw feet outside her door and could hear Co-worker – 1 and Supervisory Agriculture Specialist – 1's voices. Supervisory Agriculture Specialist – 1 explained that the lactation room was located in a hallway that was a high trafficked area. So, while it could have been possible for Complainant to hear their voices, Supervisory Agriculture, Specialist – 1 denied that he and Co-worker – 1 were talking directly outside the lactation room while Complainant was using it.

Our review of the record supports that Co-worker-1's repeated questions regarding Complainant breastfeeding her baby and need to be on light duty to address her lactation needs is behavior that is sufficiently severe and pervasive enough to constitute a hostile work environment based on sex. However, even if the events occurred as alleged, there would be no basis to impute liability in this instance. Complainant testified that she never reported Co-worker – 1's actions as harassment. It is undisputed that Co-worker – 1 was not Complainant's supervisor. In the case of co-worker harassment, as here, 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. In this case, Complainant testified that she did not report Co-worker – 1's actions as harassment because she believed that Supervisory Agriculture Specialist – 1 was aware even though he testified that he was not. Complainant further testified that she did not notify any other management official about Co-worker – 1's actions.

We acknowledge that Complainant's testimony regarding comments Co-worker – 1 made and her testimony regarding Co-worker – 1 and Supervisory Agriculture Specialist – 1 standing outside the lactation room while she used it are in direct conflict with the statements provided by Co-worker – 1 and Supervisory Agriculture Specialist – 1. Here, however, Complainant effectively waived her right to have this matter considered before an EEOC AJ when she withdrew her hearing request and elected that the Agency to issue a final decision in the instant complaint. If Complainant had not withdrawn her initial requested for hearing, then the AJ may have developed the record more through discovery and cross-examination of witness. Moreover, we lack the possible benefits of an EEOC AJ's credibility determinations. We are left with Complainant's version of events and that of Agency management which are completely at odds. As such, the evidence of record was at best, in equipoise. See Complainant v. Dep't of Health and Human Servs., EEOC Appeal No. 0120122134 (Sep. 24, 2014) citing Lore v. Dep't of Homeland Sec., EEOC Appeal No. 0120113283 (Sep. 13, 2013) and Brand v. Dep't of Agric., EEOC Appeal No. 0120102187 (Aug. 23, 2012).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we determine that the Agency violated Title VII on the basis of sex when it engaged in the following:

- (1) treated Complainant less favorably on the basis of her gender when it failed to provide her a private space to express milk and when it inhibited her ability to access designated areas to express milk from October 2015 through June 20, 2016,
- (2) failed to offer Complainant the option of using annual or sick leave in the event she needed continued participation in the Lactation Support Program and instead sent her home from May 25, 2016, through June 10, 2016, and
- (3) failed to accurately process Complainant's June 2016 leave requests related to her medical conditions.

We therefore REVERSE the Agency's finding of no discrimination regarding these claims and REMAND these claims to the Agency for further action in accordance with this decision and the ORDER below.

However, we AFFIRM the Agency's finding of no discrimination on the following matters:

Complainant's accommodation requests of June 30, 2015, July 28, 2015, and September 19, 2016;

Complainant's election to enter into a light duty status beginning in October 2015;

Supervisory CBP Officer – 2's March 30, 2016, initial inquiry regarding whether Complainant intended to return to full duty;

Complainant's two non-selections;

the Agency's issuance of the options letter; and

the Agency's finding that Complainant did not establish that she was subjected to a hostile work environment by Co-worker – 1.

ORDER

The Agency is ordered to take the following remedial action regarding the remanded claims as referenced above:

1. **Within 90 calendar days of the date this decision is issued**, restore the 94 hours and 45 minutes of sick leave Complainant took when the Agency sent her home from May 25, 2016, through June 10, 2016.
2. **Within 90 calendar days of the date this decision is issued**, conduct an investigation to determine whether Complainant is entitled to compensatory damages and if so, the amount of damages Complainant is entitled for the violations of Title VII herein found which include the period Complainant was denied a private space to express breastmilk from October 2015 through June 20, 2022, the period Complainant was sent home from May 25, 2016 through June 10, 2016, and the period in June 2016 where Complainant's leave requests were not correctly processed.
 - a. Notify Complainant of her right to submit objective evidence based our guidance in *Carle v. Dep't of the Navy*, EEOC Appeal No. 01922369 (Jan. 5, 1993) and request objective evidence from Complainant in support of compensatory damages (providing an option and instructions to request an extension in the case of extenuating circumstances).
 - b. Based on the results of the investigation, issue a written decision on Complainant's entitlement to an award of compensatory damages with appeal rights to this Commission.
 - c. Pay Complainant the determined amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to the Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Office, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

3. **Within 90 calendar days of the date this decision is issued**, provide at least eight (8) hours of interactive in-person EEO training to all managers at Laredo Port of Entry Field Office and World Trade Bridge on responsibilities under Title VII with respect to the treatment of female employees and their ability to utilize the agency's Lactation Support Program in a non-discriminatory manner as well as the prohibition against other forms of disparate treatment. The Agency may contact our Training and Outreach Division for Assistance in obtaining the necessary training via <https://www.eeoc.gov/federal-sector/federal-training-outreach>.
4. **Within 90 calendar days of the date this decision is issued**, consider taking appropriate disciplinary action against the responsible management officials who were responsible for overseeing Complainant's use of the Lactation Support Program as well as the other disparate treatment identified in this decision. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure dates.
5. **Within 30 calendar days of the date this decision is issued**, the Agency shall post a notice in accordance with Paragraph (G0617) below.
6. **If Complainant was represented by an attorney**, the Agency shall pay reasonable attorney's fees for this complaint in accordance with Paragraph (H1019) below.¹⁰

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its at Laredo Port of Entry Field Office 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.

¹⁰ Complainant may also be entitled to additional attorney's fees for legal assistance in preparing this appeal and her subsequent request for compensatory damages.

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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of 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 (M0920)

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

Alternatively, Complainant can submit his or her 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 his or her 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 13, 2023

Date