



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

[REDACTED]
Jene M.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022004049

Agency No. 200H-0693-2021103847

DECISION

On July 21, 2022, 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 June 22, 2022, final decision concerning her 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. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUES PRESENTED

The issue is whether the Agency properly issued a final decision (FAD) concluding that Complainant was not discriminated against and subjected to a hostile work environment regarding terms and conditions that included workplace interactions with her supervisor based on sex (female) and reprisal (prior EEO activity).

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Ophthalmology Technician, GS-09 at the Agency's Wilkes Barre Healthcare System (WBHS) in Wilkes Barre, Pennsylvania. Report of Investigation (ROI) at 100-05. Complainant is female. She had engaged in prior EEO activity, having pursued a previous EEO complaint beginning in October 2020. ROI at 101-02.

Complainant's first-line supervisor (Supervisor 1) was the Chief, Ophthalmology. Complainant's second-line supervisor (Supervisor 2) was the Chief, Surgical Service. Supervisor 1 stated that he became aware of Complainant's prior EEO activity in October 2021. Supervisor 2 could not recall the date he became aware of Complainant's prior EEO activity. ROI at 126-29, 159-62, and 225.

Complainant initiated EEO contact on May 19, 2021. On June 25, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of sex (female) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On February 9, 2021, Supervisor 1 told Complainant "I expect a technician at your level should know what to do" when Complainant asked him his preference as to whether he wanted a patient's test to be done with or without dilation;
2. On an unspecified date between February 9 and April 28, 2021, although Supervisor 1 knew Complainant was "a bit rusty" when it came to the software input and timing navigation to perform an "A-scan" procedure, he assigned a task involving this procedure to Complainant and as Complainant approached Supervisor 1's room to get the instrument, he had already wheeled it outside his door and stated, "Here you go, take your best shot.";
3. On March 4, 2021, as Complainant was explaining the status of patients to Supervisor 1, Supervisor 1:
 - a. did not acknowledge Complainant;
 - b. continued to walk toward his room while shaking his head from left to right with "complete annoyance;"

- c. did not listen to Complainant when she told him Complainant had started a workup on a second patient and had that patient in an exam room; and
 - d. went to the waiting room, called the second patient and, when Complainant told Supervisor 1 she was "in the middle of working up this patient," Supervisor 1 completely ignored Complainant, removed the patient from the room in which Complainant was working, and seated patient in his room.
4. On March 4, 2021, Supervisor 1 accused Complainant of making a mistake with a patient and asked Complainant in an accusatory manner "Why was an order placed on the patient I have in my room?" and when Complainant began to explain, Supervisor 1 looked at Complainant, let out a loud sigh, shook his head, and began walking away;
5. On March 18, 2021, as Complainant was setting up a patient for an A-scan procedure, Supervisor 1 informed Complainant that she must perform "manual-K" readings prior to performing the procedure (an A-scan) and, as Complainant informed Supervisor 1 that Complainant would have to refer to the steps found in binder to perform the reading, Supervisor 1 grabbed the patient from Complainant's room and stated in a "very aggravated" tone, "I don't have time for this.";
6. On April 22, 2021, although Supervisor 1 had previously informed Complainant that manual- K readings were needed prior to the A-scan testing, a male coworker (Coworker [male, no prior EEO activity), Health Technician, Ophthalmology, GS-08, informed Complainant that he was not required to perform manual-Ks, and that Supervisor 1 stated that "automated-Ks" were acceptable;
7. On April 28, 2021, as Complainant was ending a discussion with Supervisor 1 regarding Supervisor 1's attitude and interactions with Complainant, Complainant stated, "There is never any meetings or huddles in the clinic on how we can come together," to which Supervisor 1 responded by "verbally attack[ing]" Complainant and stating, "OK, you want daily huddles. Fine! Tomorrow and every day at 7:45 a.m. when 'YOU' get here at work in the morning, we will have one.";
8. On April 29, 2021, when Complainant arrived for duty, Supervisor 1 stated, "Ok [Complainant's first name], here is your huddle, you got the floor" in a "very anxious and annoyed voice" and when Complainant

offered suggestions, Supervisor 1 "downplayed" and would not consider them, concluding the meeting by "loudly" stating "Why don't you just become chief of the clinic" to her.

The Agency conducted an investigation into the complaint. The investigation included Complainant's statement that she was performing an OCT test on a patient and asked Supervisor 1 if he preferred that the test be performed with or without dilation. According to Complainant, her question was met with "complete disgust and annoyance" by Supervisor 1's response. Complainant asserted that she asked Supervisor 1 what his preference was because he tended to be inconsistent on this matter. ROI at 104-06.

Coworker was a Health Technician, GS-08. ROI at 100 and 196. Coworker asserted that he had experience with Supervisor 1 being inconsistent with whether he wanted patients dilated when performing an OCT test; and that he had also asked Supervisor 1 whether he wanted the patient dilated. ROI at 199. Supervisor 1 denied telling Complainant that he expected a technician at her level should know what to do. ROI at 130.

Complainant stated that on a date she could not recall, Supervisor 1 asked her to perform an A-scan even though he knew she was "rusty" when it came to the software input and the timing navigation as she rarely used this instrument. According to Complainant, she did not have the courage to ask Supervisor 1 for assistance, fearing his response. Complainant asserted that as she approached his room to get the instrument, Supervisor 1 stated, "Here you go, take your best shot." ROI at 106-08. Supervisor 1 could not recall the alleged incident, denying that he would have used the alleged language. ROI at 130-31.

Complainant stated that she was working up a patient from Supervisor 1's schedule. While the patient was dilating, which took ten to 15 minutes, another patient had arrived and checked in. According to Complainant, she called the second patient back to start the workup. As Complainant explained the status of the two patients to Supervisor 1, Complainant asserted that he did not acknowledge her and continued to walk toward his room while shaking his head from left to right in "annoyance." Complainant asserted that Supervisor 1 went to the waiting room and called for the second patient, completely ignoring that Complainant had told him that she had already begun working up the second patient. ROI at 108-10. Supervisor 1 denied that the incidents occurred as alleged. ROI at 132.

Complainant stated that another doctor (Doctor), who was sharing a patient list with Supervisor 1, asked her to do an "IOL master" on a patient. According to Complainant, in the meantime, Supervisor 1 called the same patient without knowing Complainant was asked by doctor to perform the test on the patient. Complainant asserted that Supervisor 1 saw the order for the test in the system and immediately assumed that Complainant made a mistake. ROI at 110-12. Supervisor 1 stated that he could not recall these incidents. ROI at 132-33.

Complainant stated that she was treating a patient when it was determined that an A-scan test was needed. According to Complainant, she took the patient to set up for the A-scan procedure when Supervisor 1 "abruptly" came out of his office and told her that she must perform a manual-K (i.e., keratometry) reading, as opposed to an automated-K, prior to performing the A-scan test. Complainant explained that until the day of the alleged incident, she had never been asked to perform a manual-K, which requires a specific skill set to perform the correct measurement. Complainant stated that upon retrieving a binder in her room containing the steps required for the test, Supervisor 1 took the patient from her room. Complainant asserted that she politely asked Supervisor 1 why he was taking the patient and, in response, Supervisor 1 stated, "I don't have time for this." Complainant asserted that later in the day, she asked Supervisor 1 if from now on manual-Ks were needed prior to the A-scan testing, and Supervisor 1 abruptly responded, "Yes." Complainant noted that on April 22, 2021, Coworker told her that he was not required to do manual-Ks, and that Supervisor 1 told him that automated-Ks were "acceptable." ROI at 112-15.

Supervisor 1 could not recall the alleged incidents. However, Supervisor 1 stated that the policy has always been that immersion scans required a manual-K reading and that IOL Master readings could use the automated IOL Master (machine-derived) "K" readings. According to Supervisor 1, he would have given Coworker the same instructions, consistent with this policy. ROI at 133-34. Coworker stated that even though Supervisor 1 previously did not ask him to perform manual-K readings, Supervisor 1 asked him to do so after telling Complainant that "they must perform them from now on." ROI at 202-03.

Complainant stated that she asked Supervisor 1 why he shakes his head in disgust or exhibits negative body language towards her when she tries to communicate with him, noting that he does not treat Coworker the same way. According to Complainant, Supervisor 1 responded that this was her "perception" and told her to stop comparing herself to Coworker.

Complainant stated that she ended the meeting by telling Supervisor 1 that there were never any meetings or huddles in the clinic for everyone to come together as a team to provide better working relationships and conditions. Complainant stated that Supervisor 1 verbally attacked her by stating "Why don't you just become chief of the clinic" to her.

According to Complainant, on the following day, upon arriving to work, Coworker informed her that Supervisor 1 was pacing outside his door waiting for her to arrive to work. Complainant asserted that Supervisor 1 appeared in her doorway and, in an "anxious, annoyed, and loud" manner, made the alleged statements while "downplaying" Complainant's suggestions and explanations. ROI at 115-22.

Coworker asserted that he heard Supervisor 1 state "Ok [Complainant's first name], here is your huddle, you got the floor." According to Coworker, Supervisor 1's demeanor toward Complainant was "aggressive and derogatory." ROI at 203. Supervisor 1 stated that he agreed to early morning huddles as that is what Complainant wanted; however, the suggestions she made were not conducive to efficient clinic functioning. ROI at 135-36.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

Neither Complainant nor the Agency submitted an appeal statement.

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, 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

Disparate treatment based on sex and reprisal (Claim 6)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep’t of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep’t of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The Commission applies the McDonnell Douglas analysis to complaints involving retaliation claims. Orlando O. v. Department of Health and Human Services, EEOC Appeal No. 0120170253 (Aug. 8, 2018) (citing Hochstadt v. Worcester Foundation, for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff’d*, 545 F.2d 222 (1st Cir. 1976)).

In order to establish a prima facie case of retaliation, a complainant must demonstrate that: (1) she participated in EEO activity; (2) an Agency official(s) was aware of the protected activity; (3) a subsequent adverse action took place, and (4) there is a causal link between the adverse action and the employer’s knowledge of protected activity. Nida R. v. Dep’t of Def., EEOC Appeal No. 0120152884 (Apr. 22, 2016) (internal citations omitted); see also EEOC Enforcement Guidance on Retaliation and Related Issues, § II.C.2, n. 154 (Aug. 25, 2016) (citing Henry v. Wyeth Pharm., 616 F.3d 134, 148 (2d Cir. 2010)). Furthermore, “[t]he cases that accept mere temporal proximity between an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close’ [in time].” Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001) (citing to O’Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001); Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997) (finding

a three-month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174-1175 (finding a four-month period insufficient).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant has established a prima facie case of discrimination based on sex, and reprisal.

Complainant established a prima facie case of disparate treatment on the bases of sex because she is female. Complainant also meets the four elements to establish her prima facie case of reprisal because she had engaged in prior EEO activity of which Supervisor 1 was aware in October 2021. That was some seven months prior to Complainant initiating EEO contact in the instant complaint. We have held that a period of three months between the protected EEO activity and the adverse action is too long to infer a nexus. See Complainant v. Soc. Sec. Admin., EEOC Appeal No. 0720140001 (Jun. 2, 2015) (citing Clark County v. Sch. Dist. v. Breeden, 532 U.S. 268 (2001)). However, in this case, the lack of proximity in time can be overlooked in light of other evidence. Moreover, the record indicates that Complainant's EEO matters were pending at the time of the challenged incidents.

Complainant was also subjected to adverse action in Claim 6, one month before her May 19, 2021, EEO contact. Importantly, Coworker asserted that he witnessed what he believed was retaliation when Supervisor 1 mentioned Complainant's protected EEO activity. See ROI at 200. Complainant also identifies Coworker, a male with no prior EEO activity, as a similarly situated employee outside of her protected bases who was treated more favorably. Therefore, Complainant has established a prima facie case of discrimination and retaliation due to her protected bases. Moreover, we do not find persuasive the Agency articulated legitimate nondiscriminatory reasons for the challenged management actions; and Complainant has provided proof of pretext.

Regarding Claim 6, Supervisor 1 stated that the policy has always been that immersion scans required a manual-K reading and that IOL Master readings could use the automated IOL Master (machine-derived) "K" readings. Supervisor 1 noted that he would have given Coworker the same instructions (that he gave Complainant), consistent with this policy. ROI at 133-34.

The record includes Coworker's statement that even though Supervisor 1 previously did not ask him to perform manual-K readings, Supervisor 1 asked him to do so after telling Complainant that "they must perform them from now on." ROI at 202-03. Coworker also believed Supervisor 1's actions to be both discriminatory and retaliatory in nature, supporting a conclusion that Supervisor 1's intent was not to follow applicable Agency policy.

Regarding pretext, the Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K . v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant argued, and Coworker's statements confirm, that she has "always been treated inferior to Coworker," and that Coworker was not asked to perform the same tasks she was asked to perform. ROI at 106-07, 133-34, and 202-03. The Agency argued that Coworker was not employed in the same position as Complainant; and that he also worked at a different grade level.

However, that Complainant worked as an Ophthalmology Technician, GS-09, one grade higher than Coworker who worked as a Health Technician, GS-08 does not overcome record evidence showing that Supervisor 1 asked both employees to perform similar tasks as evidenced by his statements regarding Claim 6. Therefore, Complainant and Coworker were similarly situated, and she prevails.

In Claims 1-8, Complainant alleged that Supervisor 1 spoke to her aggressively; and ignored her comments. She alleged that she overheard Supervisor 1 refer to women as "stupid" or "brainiacs" when he conversed with Coworker who is male. ROI at 107-08.

In order to establish a prima facie case of harassment, Complainant must prove, by a preponderance of the evidence, the existence of five elements: (1) that she is a member of a statutorily protected class; (2) that she was subjected to unwelcome conduct related to her protected class; (3) that the harassment complained of was based on her protected class; (4) that the harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) that there is a basis for imputing liability to the employer. See Celine B. v. Dep't of Navy, EEOC Appeal No. 2019001961 (Sept. 21, 2020); Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998). See also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Flowers v. Southern Reg'l Physician Serv. Inc., 247 F.3d 229 (5th Cir. 2001). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

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

Here, Complainant established a prima facie case of harassment to the extent that she is female; and she engaged in prior EEO activity of which Supervisor 1 was aware. The record also reflects that Complainant, Coworker, and an Advanced Medical Support Assistant (female) all considered Supervisor 1's attitude inappropriate.

Coworker corroborated Complainant's allegations, stating that Supervisor 1 treated women differently, almost like he was above them. According to Coworker, there have been cases where females were treated differently. He repeatedly asserted his belief that Complainant's sex and EEO activity were factors in Supervisor 1's actions. For example, Coworker witnessed Supervisor 1 "became agitated and a little confrontational" with Complainant when training her on how to use a machine. Coworker was also asked to perform manual K readings by Supervisor 1 only after telling Complainant they must perform them from now on.

Prior to that, Coworker was not asked to perform manual K readings. ROI at 199-203. This observational testimony and disparate treatment is evidence of sex-based animus towards Complainant.

The Advanced Medical Support Assistant also heard Supervisor 1 tell Complainant "you have the floor" in a rude way. ROI at 191-92. Based on the foregoing pervasive incidents of repeated disparate treatment and remarks linked to Complainant's gender, Complainant has sufficiently demonstrated that Supervisor 1's conduct, which appears to be generally condescending toward women, was directed toward her due to her protected bases. We find that Complainant has met her burden of establishing that the Agency was liable for the harassment because it was committed by her Supervisor.

When the harassment does not result in a tangible employment action being taken against the employee, the employer may raise an affirmative defense to liability. The Agency can meet this defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (a) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (b) that Complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the Agency or to avoid harm otherwise. Burlington Industries, Inc., v. Ellerth, 118 S.Ct. at 2270; Faragher v. City of Boca Raton, 118 S.Ct. at 2293

We note record evidence showing that when Complainant reported Supervisor 1's inappropriate conduct, the Agency took some action to address the matter. For example, Supervisor 1 was not allowed on the floor when Complainant was present for about two months. ROI at 192-94. However, the record does not reflect that the Agency took any disciplinary action to address Supervisor 1's harassing conduct. Nor does it indicate that Complainant unreasonably failed to avail herself of the EEO process. Thus, the Agency remains liable for the harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's finding of no discrimination and REMAND the matter to the Agency for compliance with the remedies specified in the ORDER herein.

ORDER

The Agency shall take the following remedial actions:

1. The Agency shall take all necessary steps to ensure that Complainant has no contact with Supervisor 1, and provide her with a designated management official to inform if subsequent acts of alleged harassment occur by Supervisor 1 or by other individuals on his behalf.
2. Within ninety (90) calendar days of the date this decision is issued, the Agency shall complete a supplemental investigation concerning Complainant's entitlement to compensatory damages based on the finding of discrimination to determine the amount of compensatory damages due Complainant in a final decision with appeal rights to the Commission. The Agency shall pay this amount to Complainant within thirty (30) calendar days of the date of the determination of the amount of compensatory damages.
3. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
4. Within ninety (90) calendar days of the date this decision is issued, The Agency shall provide a minimum of four (4) hours of training on management's obligations under Title VII, particularly on the issue of harassment, for Supervisor 1 and the supervisors and managers in the work area where Complainant is currently assigned.
5. Within ninety (90) calendar days of the date this decision is issued, the Agency shall consider taking disciplinary action against Supervisor 1 with respect to our finding that he subjected Complainant to discrimination, retaliation, and harassment. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline. If Supervisor 1 has left the Agency's employ, the Agency shall furnish documentation of the departure date.

6. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

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 the VA Medical Center in Kansas City, Missouri, 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 (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 (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 (R0124)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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 8, 2025

Date