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

Adina P.,[1]
Complainant,

v.

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

Appeal No. 2023005054

Agency No. 20046882023148795

DECISION

On September 11, 2023, 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 August 15, 2023, 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

The issue is whether the Agency properly issued a final decision (FAD) concluding that Complainant was not subjected to discrimination and hostile work environment regarding salary reduction, training, telework, and terms and conditions based on her disability (mental and physical) 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 an Infectious Disease Registered Nurse (RN), Grade 2, at the Agency's VA Medical Center in Washington, DC. Report of Investigation (ROI) at 101. Complainant had mental and physical disabilities in the form of Spondylosis, asthma, and depression. ROI at 541. She asserted that she had engaged in prior EEO activity when she used the Family and Medical Leave Act (FMLA) to take leave every year. ROI at 102.

Complainant's first-line supervisor of record (Supervisor 1) as of September 2022, was the Section Chief for the Health Information Management Service.

Complainant submitted medical documentation indicating that she had a medical condition that prevented her from performing the essential functions of her position. As such, after engaging in the reasonable accommodation process, the Agency determined that Complainant could not be accommodated within nursing service. Therefore, an attempt was made to identify a permanent position that did not exceed Complainant's functional limitations. See ROI at 485-86.

Complainant initiated EEO contact on October 21, 2022. On November 28, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (mental/physical-multiple) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 Section 501 of the Rehabilitation Act of 1973 when:

1. On September 1, 2022, Complainant's salary was decreased;

2. On October 14, 2022, Complainant was notified that she would no longer be participating in the daily team huddles;

3. On November 9, 2022, Complainant was told she was not meeting her performance goals and to watch the time she spent talking to coworkers;

4. On November 9, 2022, Complainant was accused of engaging in disruptive behavior towards her supervisor who then threatened to call the VA police;

5. On May 9, 2022, and September 22, 2022, Complainant was denied telework; and

6. On May 9, 2022, and September 22, 2022, Complainant was denied training;

The Agency conducted an investigation into the complaint. The investigation revealed that Complainant had been with the Agency for about six years. Complainant could no longer perform the essential functions of her position as a RN due to her disabilities; and requested a reasonable accommodation. ROI at 485-86. On June 29, 2022, Complainant was offered a reassignment to a different position as a reasonable accommodation of last resort. The position offered was a Medical Records Technician in the Health Information Management Service (HIMS). The position offered was of a lower grade and lower pay. Complainant formally accepted the offered position on August 30, 2022. Complainant had been detailed to that same office for about a year (since August 2021). ROI at 103-04, 485-86, 488, and 490-93.

Complainant asserted that around September 1, 2022, she signed the papers, which came from her supervisor at the directions of her reasonable accommodation Human Resources team. According to Complainant, the papers stated to take the Medical Records Technician position with demoted pay due to there not being any positions in Acute Care Nursing department. She confirmed that she was told they had no nursing jobs in the entire building for her. She also affirmed that she was told to sign the papers because they could not accommodate her in Acute Care Nursing, and she would need to apply for any higher positions. ROI at 103-05.

Complainant stated that she would not have a job if she did not sign the papers. She stated that she disagreed with this but signed the papers because she was backed into a corner. She believed that she was being singled out and punished for expressing her struggles. She contended that she continued to get harassed, and the intent was never to train her to learn a new skill. According to Complainant, management wanted her to come to the office five days a week, which she struggled to do. ROI at 104-05.

According to Supervisor 1, she had been Complainant's detail supervisor since August 2021. Supervisor 1 stated that she was aware that Complainant was being reassigned to her office as a reasonable accommodation, but was unaware of Complainant's disability, and did not play a role in the reasonable accommodation process. ROI at 319 and 326-27.

According to Supervisor 1, the position of Medical Records Technician was not a telework or virtual position and required the physical scanning of medical documents from within the medical facility. Supervisor 1 also stated that none of the other records technicians were allowed to telework. She explained that the Agency was at the time testing whether the duties of "Scanning File Clerks across the Veterans Health Administration" could be performed virtually. Supervisor 1 stated that she had a clerk on detail that she used to test the feasibility of performing some of the position duties via telework. According to her, she was not able to complete the evaluation of whether telework could be effective implemented because Supervisor 1 was out of the office for two months on emergency medical leave. She also stated that Complainant was not a candidate to test telework because she had "serious attendance issues". ROI at 110-12 and 318.

Supervisor 1 stated that she initially intended for Complainant to take the training and that the "Group Management Practice staff" agreed to train Complainant. Supervisor 1 also stated that Complainant was scheduled to receive the training but on the scheduled day, Complainant "called out" and took unscheduled leave. Supervisor 1 asserted that afterwards on May 9, 2022, she had a meeting with Complainant to discuss her desire to take the training. According to Supervisor 1, Complainant informed her that Complainant did not intend to return to a nursing capacity, nor to the organization where the newly acquired skills would be applied. Supervisor 1 stated that because the training was specific to nursing duties, she and other Agency leadership determined that Complainant should not take the training if she was not going to be working in a nursing capacity or in the organization where the training could be utilized. ROI at 332-33.

According to Supervisor 1, Complainant was invited to attend all HIMS staff team huddles while serving in her detail although she was not officially a full-time Business Office employee and still assigned to Nursing Services. Supervisor 1 stated that unknown to her, Complainant was removed from the huddle. Later on, Supervisor 1 began receiving other complaints from staff who were also removed from the huddle erroneously. The Assistant HIMS Chief and Supervisor 1 eventually learned that while they were fixing issues on the Microsoft Teams Channels to include attempting to set up a routine HIMS monthly meeting, they unknowingly removed several of the employees from the huddle entirely.

Supervisor 1 asserted that an email was sent out to all HIMS staff members, and management joined the HIMS Staff huddle at 8:15 am one morning sharing with all staff that it was not intentional; and that in the future, "to please bring things like this" to management's attention instead of assuming and spreading false information. Supervisor 1 noted that Complainant remained on the channel huddle. ROI at 315.

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). In accordance with Complainant's request, on August 15, 2023, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, through counsel, Complainant contests the FAD, asserting that she provided sufficient facts to establish discriminatory animus. She argues that the Agency's decision to move her into a lower-paid clerical role that did not use her training or experience following her reasonable accommodation request was in and of itself discriminatory. Complainant also argues that she was subjected to a hostile work environment due to the Agency's allegedly severe and pervasive conduct. According to Complainant, she was "forced" to accept the lower paying position identified during the reassignment search. Complainant's Appeal Brief at 5. Complainant also attempts to challenge the Agency's reasonable accommodation process through which she was reassigned to a lower-graded position.

In response, the Agency requests that the Commission affirm its FAD, asserting that rather than addressing the FAD and the accepted issues, Complainant's appeal solely focused on the reassignment position provided to her at the conclusion of her reasonable accommodation process. In short, asserts the Agency, Complainant presented no argument (and more importantly cited no evidence) for why the FAD should be disturbed.

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

At the onset, we decline to address Complainant's attempt on appeal to challenge alleged deficiencies in the Agency's reasonable accommodation process, including that the Agency could have reassigned to a nursing position. In reassignment cases, Complainant has the evidentiary burden "to present sufficient evidence to support a finding that, more likely than not, there [existed] a vacant funded position, for which she was qualified and to which she could have been reassigned." Laurence L. v. USPS, EEOC Appeal No. 2019000894 (Apr. 19, 2019). Complainant presented no such evidence in this case.

Complainant also failed to raise any challenge regarding the effectiveness, deficiency or insufficiency of the Agency's reasonable accommodation process in her initial complaint. Complainant must seek EEO Counseling if she wishes to pursue this and other claims that were not previously addressed by an EEO Counselor. The Commission has held that a complainant may allege discrimination on all applicable bases, including sex, race, national origin, color, religion, age, disability, genetic information and reprisal, and may amend his or her complaint at any time, including at the hearing, to add or delete bases without changing the identity of the claim. See Almaguer v. Dep't of Agriculture, EEOC Appeal No. 0120130256 (Sep. 4, 2014); Dragos v. U.S. Postal Serv., EEOC Request No. 05940563 (Jan. 19, 1995). However, the Commission has held that new claims may not be raised for the first time on appeal. See Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004). Finally, the Commission determines that any concerns involving complaint processing in this matter have been resolved and an investigation is not warranted based on the record before us.

Disparate treatment based on disability and reprisal (Claims 1, 5-6)

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 Found, for Experimental Biology Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976)). The Commission also applies the McDonnell Douglas analysis to complaints involving disability claims. Kenneth M. v. Dep't of Justice, EEOC Appeal No. 2022004767 (Nov. 17, 2022).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539, (Aug. 17, 2023).

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 failed to establish a prima facie case of discrimination based on disability and reprisal.

Complainant has mental and physical disabilities. She had also engaged in protected activity, having used FMLA leave annually due to her disability. Complainant initiated EEO contact on October 21, 2022. The records includes a December 19, 2022, FMLA certificate issued by Complainant's doctor. ROI at 544-47. This was some 59 days (almost two months) after Complainant initiated EEO contact. Complainant had may have been on FMLA leave since January 3, 2022. Management was aware of Complainant's disabilities and protected activity. However, Complainant failed to demonstrate that any of the challenged management actions were taken due to discriminatory or retaliatory animus. Nor did she identify any other similarly situated employees outside of her protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on any of her protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the challenged management actions; and we find no persuasive proof of pretext.

Regarding Claim 1, the Agency asserted that Complainant's salary was decreased as a result of her accepting a reassignment to a lower-graded position as part of the reasonable accommodation process.

The record reflects that the June 29, 2022, offer to the position expressly stated the grade and step-level, and clearly specified that acceptance would result in a reduction of pay. See ROI at 303, 336, 485-86, 488, 493, and 852-53.

Regarding Claim 5, the Agency asserted that in both May and September 2022, Complainant was performing the duties of Medical Records Technician, a position that was not a telework or virtual position and required the physical scanning of medical documents from within the medical facility. This was applicable to all technicians. See ROI at 110-12, 316, 330-31, and 336.

Regarding Claim 6, the record reflects that Supervisor 1 had approved Complainant for training, but Complainant took unscheduled leave on the day of the training. When Complainant informed Supervisor 1 that she would not be returning to nursing or anywhere that the skills from the training would apply, Supervisor 1 determined that Complainant should not take the training. ROI at 318 and 332-33.

We next turn to Complainant to show 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 failed to show pretext because she failed to establish a link between the challenged management actions and any of her protected bases. Nor did she dispute management's explanations or demonstrate that their actions were motivated by discriminatory or retaliatory animus.

We note Complainant's appeal assertions and arguments that she was forced to accept the reasonable accommodation of a reassignment that resulted in her salary reduction. However, the record is devoid of any evidence that either Supervisor 1 or any other agency official took any action that was forceful before, during or after the reassignment occurred. Even assuming that Complainant is correct and the reassignment and her acceptance were forcefully carried out, Complainant could have refused to accept the reassignment.

Importantly, the position was the only vacant position Complainant qualified for as a reasonable accommodation reassignment that was not a promotional opportunity.

To the extent that Complainant alleged she was subjected to a hostile work environment, that allegation is also precluded by the determination above that the Agency's explanations demonstrate that Complainant's alleged incidents in Claims 1, and 5-6 did not involve discriminatory or retaliatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000).

Harassment and retaliatory harassment based on disability and reprisal (Claims 2-4)

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 disabilities 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.

Complainant belongs to protected classes based on her disabilities and prior protected EEO activity, and she was subjected to unwanted conduct.

However, Complainant did not show a connection between any protected basis and the alleged harassment. Complainant was inadvertently removed from the daily huddles along with several other staff members in Claim 2. Complainant alleged that she was told she was not meeting her performance goals and to watch the time she spent talking to coworkers (Claim 3). Complainant was also accused of engaging in disruptive behavior towards her supervisor who then threatened to call the VA police (Claim 4).

Complainant was upset by the alleged incidents, and she felt that her work was unappreciated. ROI at 106-17. However, while a supervisor threatening to call the Agency police on an employee may be severe (Claim 4), the record reflects that Complainant was having performance deficiencies, was counseled, and did engage in disruptive behavior. See ROI at 314-15, 320-22, and 328-30. Complainant presented no evidence to refute the record or demonstrate how the alleged management conduct was linked to her protected bases.

Beyond conclusory and speculative assertions, and even assuming that additional statements by the parties would have favored Complainant, Complainant has presented no other affidavits, declarations, or unsworn statements from other witnesses nor documents which contradict or undercut the explanations provided by Supervisor 1 (and the Agency) or which would cause us to doubt her veracity as a witness.

More importantly, to prevail in a retaliatory harassment claim, a complainant must show that a reasonable person would have found the challenged action materially adverse, i.e., an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination in the future. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

In the instant complaint, the record is devoid of any evidence to establish a nexus between Complainant's prior EEO activity which occurred annually and the management actions that form the basis of Complainant's retaliatory harassment allegations in Claims 1-6. Notably, Complainant failed to cite any reference made by Supervisor 1 or any other agency official to her use of FMLA, Complainant's prior protected EEO activity.

CONCLUSION

Accordingly, we AFFIRM the Agency's final decision.

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).

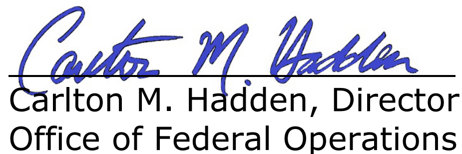
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by their full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint**.

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

December 17, 2024
Date