



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

[REDACTED]  
Sherrie M.,<sup>1</sup>  
Complainant,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Northeast Area),  
Agency.

Appeal No. 0120182523

Hearing No. 510-2017-00314X

Agency No. 4B-006-0048-16

**DECISION**

On July 12, 2018, 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 29, 2018, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

**ISSUE PRESENTED**

The issue presented is whether Complainant has shown by a preponderance of the evidence that the Agency subjected her to a hostile work environment and discrimination based on her disability and/or her association with a person with a disability.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a City Carrier at the Agency's Post Office in Ponce, Puerto Rico.

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

On August 30, 2016, and later amended, Complainant filed an EEO complaint alleging that the Agency subjected her to a hostile work environment and discriminated against her on the basis of her disability<sup>2</sup> (right knee, back, fibromyalgia) when:

1. on July 14, 2016, Complainant's request for sick leave was charged as Leave Without Pay (LWOP);
2. on July 18, 2016 through July 22, 2016, Complainant's scheduled vacation (Annual Leave) was charged as Leave Without Pay;
3. on or about January 17, 2017, Complainant was denied auxiliary assistance, management would not sign her PS Form 1571, and she was instructed to provide documentation for leaving work;
4. on December 9, 2016, management did not comply with National Association of Letter Carriers (NALC) grievance #643C033116;
5. on December 9, 2016, December 13, 2016, and January 17, 2017, management placed notifications of Pre-Disciplinary Interviews at Complainant's case and gave notices to her in front of co-workers; and,
6. on December 16, 2016, during a service talk, Complainant was called out by name for calling the 1-800 Leave System.

On January 30, 2017, the Agency issued a Partial Acceptance and Partial Dismissal/Amendment of the Formal Complaint. Regarding Claim 4, the Agency determined Complainant was lodging a collateral attack on the proceedings of another forum, specifically proceedings related to the Collective Bargaining Agreement and the negotiated grievance process. Therein, the Agency dismissed Claim 4 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

The Agency accepted the rest of the claims for investigation. The investigative record reflects the following pertinent matters relating to the subject claims.

On July 12, 2016, Complainant requested sick leave. On July 14, 2016, Complainant's request for sick leave was charged as Leave Without Pay (LWOP). Complainant alleged that the Supervisor of Customer Service (no disability) (S1) inappropriately changed her leave. S1 stated that on that date, Complainant was assigned to perform mandatory overtime pursuant to the collective bargaining agreement. At the time other carriers had already maximized their hours but overtime was still needed. S1 asserted that upon receiving the overtime assignment, Complainant alleged that she felt sick and was leaving.

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<sup>2</sup> The record demonstrates that Complainant's allegations of disability discrimination was based on her own disability. However, she also referenced her association with her daughter's disability during the investigation.

S1 denied being involved in the decision to change Complainant's leave and asserted that Postmaster2 decided not to grant Complainant's sick leave request, and instead altered it to LWOP. Postmaster2 did not respond to an affidavit that was sent to her.

On July 18, 2016 through July 22, 2016, Complainant's scheduled vacation (Annual Leave) was charged as LWOP. Complainant was not sure which management official was responsible. A second Supervisor of Customer Service (S2) affirmed that Complainant had annual leave scheduled for July 18, 2016 through July 22, 2016. S2 acknowledged that he entered Complainant's absence as LWOP. S2 noted that he was under a lot of work-related stress and could not recall why he entered the time as LWOP. S1 stated that he was not involved, but that Postmaster2 had charged it as LWOP.

On January 17, 2017, Complainant asserted that the Supervisor of Customer Service (S3) denied her auxiliary assistance, that Postmaster1 and S3 would not sign her PS Form 1571<sup>3</sup>, and that she was instructed to provide documentation to Postmaster1 for leaving work after her normal eight-hour shift. Complainant explained that management made a blanket instruction for everyone to work overtime. Complainant noted that after five minutes, S3 eventually signed her auxiliary paperwork. Complainant informed management that she could not work the overtime shift because she had to care for her daughter. Complainant noted that she is a single parent and that she had to take her daughter to the hospital that day, she also noted that she has FMLA paperwork on file for her and her daughter's medical needs. Complainant noted that management did not give her a reason for refusing to sign her PS Form 1571.

S3 stated that he initially denied the auxiliary assistance because there was mandatory overtime for all employees that day. With mandatory overtime, Complainant would have been able to complete the work, which is why he initially denied the assistance request. However, soon after her request, S3 approved Complainant's auxiliary assistance request as overtime, allowing her to leave after her eight-hour shift. Additionally, after a brief discussion, he signed Complainant's PS Form 1571. S3 stated that Complainant left prior to taking the signed PS Form 1571. Postmaster1 acknowledged that he requested documentation from Complainant for leaving work prior to completing the mandatory overtime shift, but that she failed to follow up with any documentation, and he did not pursue the matter further.

On December 9, 2016, December 13, 2016, and January 17, 2017, S3 placed notifications of Pre-Disciplinary Interviews (PDI) at Complainant's case and gave notices to her in front of coworkers. S3 acknowledged placing the PDI notices in Complainant's case and issuing other notices to Complainant publicly. S3 wanted to make sure Complainant was getting the notices and noted that Complainant never told him she was dissatisfied with the way she was receiving the notices. Complainant later received a Letter of Warning dated February 10, 2017 associated with the PDIs.

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<sup>3</sup> PS Form 1571 Undelivered Mail Report Form is submitted for any mail that is not or cannot be delivered.

On December 16, 2016, during a service talk, Complainant asserted that S3 called her out by name for using the 1-800 Leave System. S3 stated that Complainant was absent on December 16, 2016 and is unsure if she is referring to another day. S3 denied calling out Complainant on December 16, 2016, or any other day, for using the leave system.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected her to harassment and discrimination as alleged.

### CONTENTIONS ON APPEAL

Complainant argued that she has been subjected to constant harassment, and that the Agency has intentionally ignored evidence that she has provided. Complainant argued that management is fully aware of her disability and harassed and discriminated against her because of it. Additionally, Complainant asserted that the Agency is also fully aware that her daughter has extensive medical needs. Complainant asserted that due to this knowledge of her daughter, management also subjected her to harassment and discrimination. Complainant noted that she has previously filed FMLA paperwork with the Agency regarding her and her daughter's care.

The Agency asserted that its final decision fully addresses the issues in detail and should be affirmed.

### STANDARD OF REVIEW

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

### ANALYSIS AND FINDINGS

As a preliminary matter, we note that the Agency procedurally dismissed Claim 4 for failure to state a claim. Based on the record, we do not find it necessary to disturb the Agency's procedural dismissal.

### Disparate Treatment

Complainant alleges that she was subjected to 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 a complainant to prevail, she must first establish a *prima facie* case 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. McDonnell Douglas, 411 U.S. at 802, n. 13; 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. 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. 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 its actions, 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. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

### Disparate Treatment Based on Disability

Generally, claims of disparate treatment based on disability are examined under the three-step analysis articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Additionally, to establish a *prima facie* case of disparate treatment based on disability, complainant must show that: (1) she meets the regulatory definition of a person with a disability, 29 C.F.R. § 1630.2(g); (2) she is a qualified person with a disability, 29 C.F.R. § 1630.2(m); and (3) she was subjected to an adverse personnel action under circumstances giving rise to an inference of discrimination, i.e. complainant must make a plausible showing that there is a nexus or causal relationship between the disabling condition and the disputed adverse action. See Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981); Bridges v. United States Postal Service, EEOC Appeal No. 01891679 (January 24, 1990).

An "individual with a disability" is defined by the statute as one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include activities such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

### Disparate Treatment Based on Association with an Individual with a Disability

A complainant attempting to establish a prima facie case of discrimination by association under the Rehabilitation Act must establish: (1) that she was subjected to an adverse employment action; (2) that she was qualified for the job at that time; (3) that her employer knew at that time that she had a relationship with an individual with a disability; and (4) that the adverse employment action occurred under circumstances which raised a reasonable inference that the disability of the individual with whom she had a relationship was a determining factor in [the employer's] decision. Den Hartog v. Wasatch Academy, 129 F.3d at 1085 (10th Cir. 1997) (applying the Americans with Disabilities Act, or ADA). In Polifko v. Office of Personnel Mgt., EEOC Request No. 05940611 (Jan. 4, 1995), the Commission observed that it is unlawful under the association provision to “exclude or deny equal jobs or benefits to, or otherwise discriminate against” an individual based on the individual's association with an individual with a known disability. 29 C.F.R. § 1630.8.

### Unlawful Harassment

Complainant also alleged that she was subjected to unlawful harassment. A harassment claim is examined under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). To establish this claim, a 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.

The Supreme Court in Harris explained that an “objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive” and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation must be determined by looking at all the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” Id. at 23.

A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the condition of the complainant's employment. See Harris, *supra*; see also Oncale v. Sundowner Offshore Svcs., Inc., 523 U.S. 75, 78 (1998).

With respect to element (5) of a harassment claim, an agency is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742 (1998); Faragher v.

City of Boca Raton, 524 U.S. 775 (1998); Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

### Analysis

#### *Disparate Treatment - Claims 1 and 2*

As a preliminary matter, we note that in its Final Agency Decision, the Agency framed Complainant's entire complaint as a denial of reasonable accommodation because the Agency determined that "the underlying issue is that the complainant does not want to work overtime." We disagree with the Agency's assessment as it regards claims 1 and 2. In claims 1 and 2, we find that Complainant was alleging disparate treatment based on her disability.

As a threshold matter, Complainant must establish that she is a "qualified individual with disability" within the meaning of the Rehabilitation Act. The Agency acknowledged that Complainant has restrictions on record, specifically from a form CA-17 dated April 3, 2013. The Agency also acknowledged receipt of a medical note on March 28, 2014 but found that it was insufficient to establish disability. The Agency challenged Complainant's disability claim, argued that she did not meet the standards for an individual with a disability, did not demonstrate that she currently suffered from a medical condition or impairment that substantially affected a major life activity, and as such, subsequently determined that she was not an individual with a disability.

The record demonstrates that the March 28, 2014 medical documentation referenced by the Agency stated that Complainant "currently has [a] very painful condition called patellar chondromalacia with tendinopathy, degenerative joint disease and patellar osteophytosis. The patient, despite her current conditions, is able to work under light duty." The notice is clear that Complainant's physical condition is degenerative, and not something that would heal with time. The medical documentation further listed the limitations that she had, which included the performance of manual tasks such as standing, walking, climbing, kneeling, twisting, and more.

Contrary to the Agency's determination, we find that Complainant is an individual with a disability within the meaning of the regulations. We further determine that Complainant is qualified as she was able to perform the duties and responsibilities of her position, as acknowledged by the Agency, despite her condition. Additionally, Complainant demonstrated that she was subjected to an adverse employment action in claims 1 and 2, that give inference to discrimination based on her disability. Since we have determined that Complainant established a prima facie case of disability discrimination, the burden shifted to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. at 253. The Supreme Court has described this burden as being met "if the [agency's] evidence raises a genuine issue of fact as to whether it discriminated against the [complainant]". Id. at 254-55.

Moreover, the agency must "frame the factual issue with sufficient clarity so that the [complainant] will have a full and fair opportunity to demonstrate pretext," with the adequacy of its evidence "evaluated by the extent to which it fulfill[ed] these functions." Id. at 255-56.

The burden incumbent upon the agency to respond to a complainant's prima facie case with a legitimate, nondiscriminatory reason for its actions is a burden of production, not persuasion. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000). While the agency's burden of production is not onerous, it must nevertheless provide a specific, clear, and individualized explanation for the treatment accorded a complainant. Lorenzo v. Dep't of Def., EEOC Request No. 05950931 (Nov. 6, 1997).

Upon review of the record, we find that the Agency has failed to meet its burden of articulating legitimate, nondiscriminatory reasons regarding its actions in claims 1 and 2. Specifically, Complainant asserted that the Agency subjected her to discrimination based on her disability when on July 14, 2016, Complainant's request for sick leave was charged as Leave Without Pay (LWOP); and, when from July 18, 2016 through July 22, 2016, Complainant's scheduled vacation (Annual Leave) was charged as LWOP. In claim 1, S1 asserted that Complainant requested sick leave upon being instructed to work an overtime shift and alluded to this as the reason for the change. However, S1 denied having any responsibility for changing Complainant's sick leave to LWOP and asserted that Postmaster2 made the ultimate decision. In claim 2, S2 acknowledged that Complainant had scheduled Annual Leave for the week of July 18 to 22, 2016, however, despite this knowledge S2 entered Complainant's leave as LWOP instead. In his affidavit, S2 could not provide an explanation for his action, simply stating that he was under a lot of work stress at the time. Regarding claim 2, S1 asserted that it was Postmaster2 who had changed the Annual Leave to LWOP. The EEO Investigator sent Postmaster2 an affidavit request, but Postmaster2 did not respond. Even though Postmaster2 was cited as the responsible management official in claims 1 and 2, the Agency made no efforts to explain why Postmaster2 did not respond to the affidavit request, attempt to reach Postmaster2 again, and/or attempt to provide any other explanations for the alleged actions of Postmaster2. There is no indication from the record that Postmaster2 was somehow inaccessible for this investigation. We find here that the explanations provided were vague, and not accompanied by supporting documentation.

Complainant, having the ultimate burden of proving discrimination, must demonstrate by a preponderance of the evidence that the Agency's actions were pretextual and motivated by discriminatory animus. The Commission finds that Complainant has met that burden. We have held that while disbelief of the agency's articulated reason does not compel a finding of discrimination as a matter of law, such disbelief, together with a prima facie case, permits a finding of discrimination. Jones v. Dep't of Veterans Affairs, EEOC Request No. 05940013 (November 2, 1995); see also Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct 2097 (2000). After a thorough review of all the evidence of record, the Commission finds that Complainant has met her burden of establishing, by a preponderance of the evidence, that the Agency's reasons for changing her sick and annual leave requests to LWOP in Claims 1 and 2 were pretext masking discriminatory animus.<sup>4</sup>

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<sup>4</sup> As we have found that Complainant has established disparate treatment with respect to claims 1 and 2, we need not address that these matters also constituted harassment because this would not alter our remedies.



We note that claims 1 and 2 specifically regard Postmaster2's treatment of Complainant, as such those claims are distinguishable from claims 3, 5, and 6, which involve different responsible management officials.

*Disparate Treatment - Claims 3, 5, and 6*

Regarding claims 3, 5 and 6, we determine that the Agency has articulated legitimate, nondiscriminatory reasons for its actions. Concerning claim 3, Complainant asserted that she was denied auxiliary assistance, that Postmaster1 and S3 would not sign her PS Form 1571, and that she was instructed to provide documentation from Postmaster1 for leaving work after her normal eight-hour shift. In this matter, the record demonstrated that Complainant was approved for auxiliary time mere minutes after her request and initial denial. Additionally, Complainant was only initially denied her auxiliary request because of mandatory overtime for every employee. Furthermore, Complainant asserted that management refused to sign her PS Form 1571. However, S3 had approved her auxiliary request and signed the PS Form 1571, but Complainant had simply left the facility before receiving the signed copy. Postmaster1 also acknowledged requesting documentation from Complainant explaining why she was leaving prior to completion of the mandatory overtime. While Complainant did not comply with the request, nothing more came from the request.

Concerning claim 5, management acknowledged that on December 9, 2016, December 13, 2016, and January 17, 2017, notifications of Pre-Disciplinary Interviews were placed at Complainant's case and she was given notices to her in front of co-workers. S3 provided that he wanted to ensure Complainant was receiving the notices. Concerning claim 6, Complainant asserted that on December 16, 2016, during a service talk, Complainant was called out by name for calling the 1-800 Leave System. S3 stated that Complainant was absent on December 16, 2016 and is unsure if she is referring to another day, but denied calling Complainant out, on that date or any other day. Although Complainant asserts that she was subjected to disability discrimination, she provides no credible evidence to support these assertions regarding claims 3, 5, and 6. We find nothing in the record from which to infer discriminatory animus.

We note that in these matters, pretext inquiry is not concerned with bad judgment, impeccability, dislike, or a mistake. Marvin W. v. Dep't of Homeland Sec., EEOC Appeal No. 0120170438 (Dec. 12, 2018). The question is not whether the agency made the best, or even a sound, business decision; it is whether the real reason is discrimination. Mere assertions or conjecture that an agency's explanation is a pretext for intentional discrimination is insufficient because subjective belief, however genuine, does not constitute evidence of pretext. The focus of pretext inquiry is whether an agency's actions were motivated by discriminatory animus. Further, at all times the ultimate burden of persuasion remains with Complainant to demonstrate by a preponderance of the evidence that the Agency was motivated by prohibited discrimination. Complainant has failed in this regard.

We note that in this matter, beyond the Reports of Investigation and Complainant's arguments, Complainant did not present further evidence to support her claims.

While Complainant initially requested a hearing before an EEOC AJ, she subsequently withdrew her request, and as a result we do not have the benefit of an AJ's credibility determinations regarding the witnesses. Complainant had to prove, by a preponderance of the evidence, that the alleged discriminatory acts occurred. We note that the EEO Investigator contacted Postmaster2, however, Postmaster2 failed to respond to the affidavit request. Here, the evidence is, at best, in equipoise. Accordingly, Complainant has failed to meet her burden of persuasion. 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).

### *Associational Disability – Claim 3*

We note that while not explicitly part of the accepted claims, Complainant did raise the issue of associational discrimination on the basis of her daughter's disability. As noted above, the Agency framed Complainant's complaint as a denial of a reasonable accommodation claim. As related to claim 3, the record does demonstrate that Complainant is essentially requesting a reasonable accommodation to care for her daughter when she requests to leave at the end of her eight-hour shift, and not be forced to take on overtime.

The Rehabilitation Act prohibits discrimination against qualified individuals because they have an association or relationship with an individual with a disability. 42 U.S.C. § 12112(b)(4); 29 C.F.R. § 1630.8. However, employees who are in a relationship or have an association with individuals who have disabilities are not themselves entitled to reasonable accommodations for those disabilities. Complainant v. Dep't of Def., EEOC Appeal No. 0120102815 (Aug. 14, 2014) citing EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act at n. 5 (Oct. 17, 2002). Consequently, to the extent that Complainant characterizes claim 3 as a denial of her request for reasonable accommodation, the Commission finds that the Agency did not violate the Rehabilitation Act by initially denying auxiliary time, refusing to initially sign the Form 1571, and/or requesting documentation for her departure that day. Davis v. Dep't of the Interior, EEOC Appeal No. 0120123517 (Feb. 12, 2013); Ascanio v. U.S. Postal Serv., EEOC Appeal No. 0120091035 (Nov. 9, 2010).

Lastly, to the extent that Complainant claims the Agency violated her FMLA rights associated with her medical needs or her daughter's care, we note that the FMLA falls under the regulatory ambit of the Department of Labor, not the Commission. Therefore, the Commission has no jurisdiction over this type of claim. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122478 (Sept. 26, 2012).

### *Harassment – Claims 3, 5, and 6*

With respect to claims 3, 5, and 6, we find that Complainant has not established her claim of harassment because there is no persuasive evidence that any of these alleged incidents were based on Complainant's membership in her protected class; and she failed to describe any severe or pervasive conduct that in any way altered her work environment or negatively impacted the terms

and conditions of her employment. Complainant bears the ultimate responsibility in demonstrating that the actions taken by the Agency were motivated by discriminatory animus. See Oakley v. U.S. Postal Service, EEOC Appeal No. 01982923 (Sept. 21, 2000). In this matter, Complainant has failed to provide sufficient evidence that the actions of the responsible management officials were connected and motivated by discriminatory animus.

We note that not every unpleasant or undesirable action which occurs in the workplace constitutes an EEO violation. See Shealey v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0120070356 (Apr. 18, 2011) (citing Epps v. Dep't of Transp., EEOC Appeal No. 0120093688 (Dec. 19, 2009)). We have consistently held that the discrimination statutes are not general civility codes. Lassiter v. Dep't of the Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between a supervisor and a complainant do not rise to the level of harassment). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." Harris, 510 U.S., at 21, citing Meritor, 477 U.S., at 67. Moreover, ordinary managerial duties include assuring compliance with agency policy and procedures, monitoring subordinates, scheduling the workload, scrutinizing and evaluating performance, providing job-related advice and counsel, taking action in the face of performance shortcomings and to otherwise manage the workplace. Erika v. Dep't of Transportation, EEOC Appeal No. 0120151781 (June 16, 2017).

Based on the record, we conclude that Complainant has not shown that she was subjected to events which, taken as a whole, created an intimidating, hostile, or offensive work environment based on her disability.

### CONCLUSION

We find that Complainant established that the Agency violated the Rehabilitation Act with respect to claims 1 and 2. However, she failed to show by a preponderance of the evidence that, more likely than not, the Agency subjected her to discrimination based on her disability in claims 3, 5 and 6, or an overall hostile work environment. Therefore, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final decision and REMAND the matter for further processing accordance with the ORDER below.

### ORDER

The Agency is ordered to take the following remedial action regarding claims 1 and 2:

1. Within **ninety (90) calendar days** of the date this decision is issued the Agency shall retroactively provide Complainant with lost leave or pay as associated with claims 1 and 2.

2. The Agency shall conduct a supplemental investigation on compensatory damages,<sup>5</sup> including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. Thereafter, within **ninety (90) calendar days** of the date this decision is issued, the Agency shall determine the amount of compensatory damages to be awarded. Within thirty (30) days of determining the amount of compensatory damages, the Agency shall pay Complainant the compensatory damages.
3. Within **ninety (90) calendar days** of the date this decision is issued the Agency shall provide eight hours of in-person or interactive training to Postmaster2, the identified responsible management official in claims 1 and 2, regarding her responsibilities with respect to eliminating discrimination in the federal workplace.
4. Within **thirty (30) calendar days** of the date this decision is issued the Agency shall consider taking appropriate disciplinary action against Postmaster2, the identified responsible management official in claims 1 and 2. The Commission does not consider training to be disciplinary. 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s)
5. 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, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Ponce, Puerto Rico Post Office 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.

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<sup>5</sup> As our finding of disability discrimination is based on disparate treatment rather than a failure to accommodate, compensatory damages are available to Complainant without a showing that the agency failed to engage in good faith efforts to accommodate her.

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).

#### 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

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

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court.

“Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director  
Office of Federal Operations

July 7, 2020

Date