



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

[REDACTED]  
Goldie G.,<sup>1</sup>  
Complainant,

v.

Andrew M. Saul,  
Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2019004032

Agency No. HQ-18-0828-SSA

**DECISION**

On June 10, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 13, 2019 final order 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. Our review is de novo. For the following reasons, the Commission MODIFIES the Agency's final order.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Information Technology Specialist, GS-2210-13, in the Agency's Deputy Commissioner for Systems, Office of Information Security in Baltimore, Maryland. On October 17, 2018, Complainant filed an EEO complaint wherein she claimed that the Agency discriminated against her when:

1. Beginning in 2017 and ongoing, the Agency failed to provide Complainant with a reasonable accommodation based on her disability (respiratory disorder).

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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.

Complainant claimed that the Agency subjected her to discrimination based on her disability and in reprisal for prior protected EEO activity when:

2. From November 22, 2017 and ongoing, the Agency subjected Complainant to harassment;
3. On June 8, 2018, the Agency subjected Complainant to disparate treatment when her request to be transferred to another manager was denied;
4. On March 13, 2018, a laptop was closed on her fingers;
5. On May 7, 2018, she was charged with being absent without leave (AWOL) for teleworking, allegedly without permission;
6. On May 15, 2018, she was admonished for changing desks without permission; and
7. On May 23, 2018, she was accused of falsifying information and making things up to put in her reasonable accommodation request and was asked to withdraw her request.

In a partial dismissal dated November 1, 2018, the Agency dismissed claims (4) – (7) as discrete acts pursuant to 29 C.F.R. § 1614.107(a)(2) on the grounds that Complainant failed to initiate contact with an EEO Counselor in a timely manner. The Agency stated that Complainant's EEO Counselor contact on July 13, 2018, was more than 45 days after the relevant incidents occurred. The Agency indicated that the dismissed claims would be considered as part of the overall hostile work environment claim. Claims (1-3) were accepted for investigation.

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). 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 pursuant to 29 C.F.R. § 1614.110(b).

The record reveals that Complainant has had a respiratory condition since 2013 when she was exposed to mold in her apartment. Complainant provided medical documentation that stated exposure to certain fumes and odors causes her to experience respiratory distress resembling an asthma attack. Complainant indicated that when she is in respiratory distress, her ability to learn, think, and concentrate are impacted. Complainant indicated that she attempts to avoid exposure to threatening fumes and odors by not taking elevators, staying away from the cleaning crew, and asking management not to use markers with odors.

Complainant stated that on February 28, 2014, she requested a reasonable accommodation to telework two days a week in order to reduce her exposure to workplace fumes that trigger her disability. The Agency stated that the reasonable accommodation request was approved as Complainant was permitted to work from home two days a week and anytime there was potential exposure.

According to Complainant, her prior Supervisor allowed her to move her desk as needed to prevent exposure to noxious chemicals and permitted her to call into meetings from her workstation. Complainant claimed that since October 2017, she contacted her then Supervisor<sup>2</sup> for help with the odor exposure, but no proactive actions were taken. Complainant stated that her Supervisor asked her to submit a new reasonable accommodation request in April 2018 because he could not locate her original request.

On May 3, 2018, Complainant submitted an identical copy of her 2014 reasonable accommodation request. Complainant stated she did not receive a response, and that she submitted another reasonable accommodation request on June 28, 2018. In that request, Complainant sought to work from home two days a week, move her desk as needed, change her job duties, and receive a reassignment. Complainant maintained that management did not understand her condition as the Division Director (Director) told her she did not believe that she is an individual with a disability. Complainant stated that she asked to have a new cubicle assignment because she sat at the mouth of a corridor which was a high traffic area. Complainant asserted that this was a continuing issue because her area was cleaned daily and coworkers wear cologne. According to Complainant, there were no notifications from management to help her avoid triggers and rearrange her schedule to account for cleaning and employee meetings.

The Director asserted that she did not approve the reasonable accommodation request because it lacked specificity for action. The Director stated that Complainant was currently teleworking two days a week based on her 2014 reasonable accommodation request. The Director maintained that Complainant would not be able to perform the essential functions of her job by moving workstations. The Director asserted that engaging in the reasonable accommodation interactive process with Complainant proved unsuccessful. The Director stated that her actions have not been discriminatory, but rather based on Agency policy and procedure.

With regard to her harassment claim, Complainant described the alleged harassment as follows: On an unspecified date, management refused to allow her to relocate her workstation; in March 2018, a coworker slammed her laptop on her fingers while she was typing; in April 2018, her reasonable accommodation request was denied; in April 2018, management asked her to resubmit a reasonable accommodation request; in May 2018, management admonished her for changing desks without permission; in June 2018, Complainant's request to be moved away from the coworker who injured her fingers was denied; on an unspecified date, management accused her of trying to take advantage of the reasonable accommodation system; and in July 2018, management told her to withdraw her reasonable accommodation requests.

Complainant stated that she notified her Supervisor on numerous occasions that he was creating a hostile work environment for her. Complainant asserted that she also informed the Director of the Supervisor's harassment. Complainant stated in a May 23, 2018 meeting, the Director said to her "Oh we suppose to jump up and move you every time you smell a chemical?"

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<sup>2</sup> The Supervisor has retired and the EEO Investigator was unable to obtain an affidavit from him.

The Director stated that some of the allegations of harassment were not true and others she was not involved in or had no recollection. According to the Director, when Complainant informed her of the incident with the coworker and her laptop, she referred the matter to the harassment prevention officer for investigation. The Director stated that Complainant was already separated from that coworker and that she spoke to the coworker and informed him his conduct was inappropriate. With respect to Complainant being admonished for changing her workstation, the Director stated that Complainant went to another employee's cubicle rather than a designated crash cubicle. The Director noted that she did not have evidence that the Supervisor admonished Complainant, but rather the Supervisor sent Complainant an email giving guidance on workstations. As for Complainant's belief that she did not think Complainant had a disability, the Director maintained that she was empathizing with Complainant when she said she does not know what it feels like to experience Complainant's respiratory disorder. The Director maintained that Complainant did not indicate to her that she found her conduct offensive. The Director stated that she was unaware of Complainant's prior EEO activity.

In terms of claim (3), Complainant stated that she requested to be reassigned on March 13, 2018, June 8, 2018 and July 3, 2018, but her requests were denied. According to Complainant, management responses included "Just because you submitted a reasonable accommodation request does not mean that I have to approve it." Complainant asserted that two individuals without a disability were permitted to transfer to another division in the past two years after informing management they could not travel for work due to their relatives' illnesses.

The Director asserted that Complainant sought a transfer due to childcare needs. The Director maintained that she denied Complainant's transfer requests because Complainant, as an Information Technology Specialist, was not qualified for the positions in other locations, specifically the Security Assessments and Authorizations Branch and the Risk Management Branch. The Director stated that she met with each of the Branch Chiefs in those components, but neither was willing to employ Complainant. According to the Director, given that Complainant's transfer request was based on childcare needs, the Agency allowed Complainant to change her work process. The Director stated that Complainant was not required to travel as she was permitted to complete her work responsibilities remotely. With respect to the comparators cited by Complainant, the Director asserted that she transferred one of the employees to a different component because his skillset matched the required skillset for the position and there would not be an employee loss. The Director stated that an employee loss could potentially result in an understaffed unit as the employee/supervisor ratio would be off which could lead to a loss in supervisors. The Director stated there have been instances where she has refused to transfer employees because, like Complainant, there was no place for them to go. The Director noted that she was not involved in the other comparators transfer.

On December 7, 2017, Complainant requested to be moved to the Meadows East building because she believed there were empty cubicles there. An Agency official informed Complainant there would be no moves to the Meadows East building due to renovations.

That same day, Complainant emailed Agency officials informing them that she needed to be relocated to another area that is not at the mouth of a corridor and near areas where the cleaning crews come to mix chemicals, shampoo carpets and set up and break down equipment to buff floors. On January 4, 2018, an Agency official responded to Complainant that she had contacted the Facilities/Housekeeping manager about the issue.

Complainant informed her Supervisor on April 13, 2018, that she had to leave the building on April 9, 2018, when she got sick due to cleaning chemicals behind her desk. Complainant stated that she had headaches, nausea, dizziness, nose dripping and chest pains, which are her physical reactions every time she is exposed to such chemicals. Complainant stated that her request to be removed from the main corridor was never honored. On April 13, 2018, the Executive Officer contacted Complainant and informed her that she should contact a supervisor if cleaning crews start using chemicals during work hours. He stated that he would send another email to ask that chemicals not be mixed in Complainant's general area. The Executive Officer noted that although space in the annex area was very limited, if an immediate move was necessary, he has cubicles available at the Meadows East building on the first or fourth floors.

On April 13, 2018, Complainant's Supervisor informed her that she should begin the reasonable accommodation process as he had been told that reasonable accommodation must be annually renewed, updated, and justified. On May 14, 2018, Complainant notified her Supervisor that she was sick from May 9-11, 2018, due to chemicals that were used in her assigned cubicle area. Complainant stated that since 2017, she has requested on numerous occasions to be moved to a safe working environment due to her health condition. Complainant noted that in the Executive Officer's April 13, 2018 email he stated that he has immediate cubicle availability in the Meadows East building. According to Complainant, she has not received any communications concerning moving to a safe environment despite sending an email to the Executive Officer agreeing to the move.

On May 15, 2018, Complainant's Supervisor admonished Complainant for working from an absent employee's desk without prior approval from him and the front office. The Supervisor stated that Complainant was missing from her duty station and made no attempt to contact him until she learned of his attempts to contact her.

Complainant informed her Supervisor by email dated May 16, 2018, that she reported back to work on May 14, 2018, but there was a strong chemical smell in her area, and thus she had to immediately relocate to a safer work space. Complainant reminded her Supervisor that her physician said she cannot be in the building when the cleaning crew is there. Complainant reiterated that it is very important that she be relocated to a safer work environment. In an email dated May 16, 2018, Complainant's Supervisor told Complainant that he would like to get all these situations resolved and properly documented as soon as possible, but they needed to sit down and work out the details before he would put anything in writing. On May 21, 2018, Complainant was assigned a cubicle in the Meadows East building.

In an email dated May 29, 2018, Complainant told the Director that effective immediately she was not able to travel because she no longer has childcare when she travels, and she had persistent fear for her personal safety and health. In terms of her personal safety, Complainant referenced the incident where her coworker slammed her fingers inside her laptop. Complainant stated that she informed her Supervisor of the incident and that she was afraid to be in close proximity to the coworker. According to Complainant, the Supervisor nevertheless continued to assign the same team member to travel with her to two additional states. Complainant complained that it was not until she went to the Employee Assistance Program and her union office that she received a new workspace assignment. Complainant accused the Agency of a blatant disregard for her health noting that what she had been attempting to accomplish for seven to eight months was accomplished within an hour once the union got involved. Complainant requested a reassignment to another team and mentioned various skills that she claimed would enable her to easily transition to many different teams.

In an email dated June 11, 2018, the Director presented to Complainant her summary of the meeting they had on June 8, 2018. The Director noted that she found a new work location for her in Meadows East. The Director stated that the Supervisor had directed Complainant to redo her reasonable accommodation request. According to the Director, she informed Complainant she would be denying the reasonable accommodation request because Complainant already has two telework days a week as part of the Agency's telework program. The Director mentioned that episodic telework is also available pending submission of the request form and approval. The Director observed that Complainant stated she would require more accommodations than that and would be resubmitting her reasonable accommodation request. The Director stated that she would talk to the other Branch Chiefs to find a suitable place for her to work.

In her response to the Director dated June 11, 2018, Complainant reiterated that the seven to eight months delay in responding to her health needs was unnecessary. Complainant noted that after her initial reasonable accommodation request in 2013 and 2014, prior management allowed her to call into meetings in addition to telework. Complainant stated that they did this to prevent her from being exposed to perfumes and colognes from other employees and fumes from markers used on white boards. Complainant noted that the Director stated during the meeting that this was never documented. Complainant acknowledged that it was not written but that the reasonable accommodation policy states that reasonable accommodation can also be verbal. Complainant stated that she cited examples of her physical desk assignments being changed by prior management multiple times based on activity in the building that was damaging to her health. According to Complainant, although this was not specifically written, management made this accommodation because they understood that not moving her out of harm's way would have an adverse impact on her health. Complainant denied saying that she would need more accommodations. Rather, Complainant asserted that she would update her reasonable accommodation request and specifically state the items the Director said were not in writing such as relocating her desk if there is a health need and calling into meetings. Complainant stated that the Director accused her of making things up to put on her reasonable accommodation request.

In a July 5, 2018 email to the Director, Complainant presented her summary of a meeting they had on July 3, 2018. According to Complainant, the Director stated that she wants carte blanche to do whatever she wants and that she is using reasonable accommodation under that pretense. Complainant noted that the Director stated that she does not understand her disability and will not pretend that she does. Complainant asserted that the Director stated that she wanted her to remove telework from her reasonable accommodation form since it is already in place for all employees in the Agency and episodic telework is available. Complainant stated that the Director asked her if she went down the checkbox on the reasonable accommodation form and checked everything. Complainant stated that she responded no and checked the ones appropriate for her disability. Complainant claimed that the Director said that she should be lumped in with everyone else and do regular telework. Complainant stated that she responded that her disability requires that she be handled differently. With regard to episodic telework, Complainant noted that she should not have to provide 24 hours advance notice because she does not know when she will experience triggers related to her disability. Complainant further noted that the telework policy states that if one comes into the building on a regularly scheduled telework day, an employee will lose that day and cannot receive another makeup day that week. Complainant asserted that her physician required that she be away from the building at least two days a week to reduce exposure. Complainant maintained that if she has to come into the building on her regular telework day, then that day needs to be replaced with another day that week.

As for her need to avoid travel, Complainant stated that in light of her condition frequent travel presents a significant risk to her health. Complainant noted that two former team members requested to leave the team and be reassigned to other teams specifically because they were no longer able to travel. Complainant observed that neither of these employees had a disability, yet they were assigned to other teams and job duties that did not require travel. Complainant noted that the Director told her she would not reassign her to another team. Complainant pointed out that she was in an unsafe work environment for seven months and that just because she is currently in a safe place, that does not mean matters will not change as various repairs and modifications could require the use of noxious chemicals. Complainant indicated that instead of addressing matters as the need arises as her Director prefers, there should instead be documentation of what she needs. Complainant expressed disagreement with the Director's statement that the only valid item on her reasonable accommodation request is address fragrance/chemical sensitivities.

In the decision, with respect to claim (1), the Agency determined that Complainant is a qualified individual with a disability. The Agency further determined that when triggered, Complainant's disability limits her ability to think, learn and concentrate, thus precluding her from performing her position's functions. The Director acknowledged that she was aware of Complainant's disability. The Agency determined that it took reasonable measures to accommodate Complainant's disability. The Agency pointed to the fact that Complainant has since 2014 received a reasonable accommodation that permitted her to telework twice a week. The Agency noted the additional accommodations Complainant requested in June 2018, but concluded that Complainant has not established, or even alleged, that the reasonable accommodation she already received was ineffective.

With regard to the alleged harassment at issue in claim (2), the Agency determined that Complainant did not establish the alleged incidents were sufficiently severe or pervasive or that the conduct at issue was based on her protected classes.

As for claim (3), the Director stated that she denied Complainant's transfer requests because Complainant was not qualified for the positions in other locations, and neither Branch Chief in the two components was willing to hire her. The Agency asserted that Complainant was allowed to change her work process, not travel, and to work remotely since her transfer requests were based on childcare issues. The Agency determined that Complainant failed to establish that its reasons for the denial of her transfer requests were pretextual. As a result, the Agency found that Complainant was not subjected to discrimination as alleged. The instant appeal followed.

### ANALYSIS AND FINDINGS

Initially, we observe that in its partial dismissal the Agency dismissed claims (4-7) on the grounds that Complainant failed to initiate contact with an EEO Counselor in a timely manner. The record reflects that Complainant initiated contact with an EEO Counselor on July 13, 2018, which was more than 45 days after the incidents at issue in claims (4-7). Thus, the claims were appropriately dismissed as discrete acts. However, they are considered below as part of the analysis of the hostile work environment claim.

#### *Denial of Reasonable Accommodation*

The Commission notes that an agency is required to reasonably accommodate the known limitations of a qualified individual with a disability, unless it can show that doing so would cause an undue hardship to its operations. See 29 C.F.R. §§ 1630.2 (o) and (p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002); Barney G. v. Dep't of Agric., EEOC Appeal No. 0120120400 (Dec. 3, 2015). It is undisputed that Complainant is a qualified individual with a disability.

The record reflects that Complainant initially received reasonable accommodation for her respiratory disorder/chemical sensitivity disability in 2014, after Complainant requested a reasonable accommodation to telework two days a week in order to reduce her exposure to workplace fumes that trigger her disability. Complainant explained that she also attempted to avoid exposure to threatening fumes and odors by not taking elevators, staying away from the cleaning crew and asking management not to use markers with odors.

The Agency stated that Complainant was permitted to work from home two days a week and anytime there was potential exposure. According to Complainant, she was previously allowed to move her desk as needed to prevent exposure to noxious chemicals and permitted her to call into meetings from her workstation. Complainant contends that her Supervisor was dismissive and largely non-responsive from November 2017- April 2018 when she requested assistance with odor exposure situations.



On April 13, 2018, Complainant's Supervisor informed her that she should begin the reasonable accommodation process as he had been told that reasonable accommodation must be annually renewed, updated and justified. On May 14, 2018, Complainant notified her Supervisor that she was sick from May 9-11, 2018, due to chemicals that were used in her assigned cubicle area. Complainant stated that since 2017, she requested on numerous occasions to be moved to a safe working environment due to her health condition. Complainant noted that in the Executive Officer's April 13, 2018 email, he stated that he has immediate cubicle availability in the Meadows East building. According to Complainant, she had not received any communications concerning moving to a safe environment despite sending an email to the Executive Officer agreeing to the move.

Complainant informed her Supervisor by email dated May 16, 2018, that she reported back to work on May 14, 2018, but there was a strong chemical smell in her area, and thus she had to immediately relocate to a safer work space. Complainant reminded her Supervisor that she cannot be in the building when the cleaning crew is there. Complainant reiterated that it is very important that she be relocated to a safer work environment. On May 21, 2018, Complainant was assigned a cubicle in the Meadows East building.

The Commission notes that although an employee's preferred accommodation should be considered, the Agency may ultimately choose among effective accommodations. Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994). We find that the Agency did not act expeditiously to accommodate Complainant's disability. Complainant informed the Agency in December 2017 and again in April 2018, that she needed to be relocated from her work location due to her proximity to the cleaning crews that mix chemicals, shampoo carpets, and set up and break down equipment to buff floors. On April 13, 2018, Complainant informed her Supervisor that she had to leave the building on April 9, 2018, when she got sick due to cleaning chemicals behind her desk. Despite Complainant clearly putting the Agency on notice again of her vulnerability at her work station, the Agency did not act promptly to find her another work location. Although the Agency indicated in December 2017 that renovations were taking place at the Meadows East building, the Agency has not presented evidence as to why Complainant could not be moved then to another safer workstation. The Executive Officer did contact Complainant on April 13, 2018 and informed her that she should contact a supervisor if cleaning crews start using chemicals during work hours. The Executive Officer noted that although space in the annex area was very limited, if an immediate move was necessary, he had cubicles available at the Meadows East building on the first or fourth floors. The Executive Officer stated that he would send another email to ask that chemicals not be mixed in Complainant's general area. Nonetheless, Complainant stated that she detected a strong chemical odor in her work area on May 14, 2018, which was after she returned from a three-day absence that had been caused by the use of cleaning chemicals in her work area.

The Agency was remiss in December 2017-January 2018 and April - May 2018 when it did not undertake sufficient measures to reasonably accommodate Complainant in light of the ongoing threat to her health.

Complainant states that in January 2018, her Supervisor informed her that cubicle assignment requests needed to originate from management, and that he would submit a request on her behalf if she provided documentation. Complainant asserts there is no indication the Supervisor made that request despite her well-documented disability since 2014 and her resubmission of her medical documentation. Complainant states that in May 2018, she informed her Supervisor that she needed to move her desk due to heavy chemical odors near her normal workstation. While we note that Complainant was relocated to the Meadows East building on May 21, 2018, the Agency took too long before acting responsibly in this situation. Accordingly, the Commission finds that Complainant was denied reasonable accommodation in violation of the Rehabilitation Act for the period of December 7, 2017 – May 20, 2018.

With respect to Complainant's request for reasonable accommodation in terms of a change in job duties, outstationing, and reassignment to a different position, Complainant argues these were valid requests given that her position required regular travel, and that meant exposing her to new and potentially dangerous environments on a regular basis. Complainant contends that the Agency's universal telework policy of allowing employing two days of telework per week does not mean that her May/June 2018 reasonable accommodation telework requests should have been disregarded. According to Complainant, she should have received consideration for additional telework days so that she could minimize her exposure to workplace chemicals, without having an undue burden on Agency operations.

Upon review of the record, we discern little support for the other accommodations Complainant sought. The Director took reasonable steps to ascertain if Complainant could be reassigned to another team, but she lacked the skills and the Branch Chiefs were unwilling to take her on. Complainant acknowledged that her requests for a change in work duties and outstationing were associated with her request to be assigned to another team. In light of Complainant's relocation to the Meadows East building, we find that the Agency has adequately addressed Complainant's workstation accommodation needs as of May 21, 2018. However, the Agency is reminded that reasonably accommodating Complainant includes giving her prior notice of when cleaning crews will be working in her work area. In terms of Complainant's desire to telework more than two days per week, the Agency offered Complainant episodic telework and leave as needed. With respect to Complainant's request to avoid travel, we observe that this issue appears to have arisen from Complainant's lack of childcare and also the aforementioned difficult incident with a coworker. We do not consider those issues to be connected to Complainant's condition and we do not observe sufficient grounds for such an accommodation based on Complainant's medical documentation. Further, the Agency allowed Complainant to change her work process so that she did not have to travel and frequently could work remotely. While Complainant is entitled to an effective reasonable accommodation, she is not entitled to the accommodation of her choice. Lynette B. v. Dep't of Justice, EEOC Appeal No. 0720140010 (Dec. 3, 2015). As a result, we find that Complainant failed to establish that she was denied a reasonable accommodation with regard to these specific requested accommodations.

*Hostile Work Environment*

To establish a claim of harassment 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 to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Therefore, to prove her harassment 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 the alleged basis. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

Complainant identified numerous incidents as comprising her hostile work environment claim. For example, Complainant states that from November 2017 until April 2018, management did not acquiesce to her request to have her workstation moved to a safer location. Complainant claims that in March 2018, a coworker slammed her laptop on her fingers while she was typing; in April 2018, her reasonable accommodation request was denied; in April 2018, management asked her to resubmit a reasonable accommodation request; in May 2018, management admonished her for changing desks without permission; in June 2018, Complainant’s request to be moved away from the coworker who injured her fingers was denied; on an unspecified date, management accused her of trying to take advantage of the reasonable accommodation system; and in July 2018, management told her to withdraw her reasonable accommodation requests. Complainant stated that she informed the Director and notified her Supervisor on numerous occasions that he was creating a hostile work environment for her.

The Director asserted that when Complainant informed her of the incident involving her coworker and the laptop, she referred the matter to the harassment prevention officer for investigation. The Director stated that Complainant was already separated from that coworker and that she spoke to the coworker and informed him his conduct was inappropriate. Thus, the Agency took appropriate steps to address the situation concerning Complainant’s coworker. As for Complainant being admonished for changing her workstation, the Director stated in her affidavit that Complainant went to another employee’s cubicle rather than a designated crash cubicle. The Supervisor sent Complainant an email giving guidance on workstations. It is evident that the Agency could have been more empathetic toward Complainant but an admonition about relocating to the wrong cubicle can hardly be considered an act of harassment. As we have discussed, the Agency failed at several points to reasonably accommodate Complainant’s disability.

However, we do not discern sufficient evidence that the actions or lack of action taken by Agency officials regarding Complainant's reasonable accommodation requests were harassment.

### *Disparate Treatment*

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n. 13. To establish a prima facie case of reprisal, Complainant must show that: (1) she engaged in protected EEO activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between her protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The prima facie inquiry may be dispensed with where the Agency articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, *supra*; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

With regard to Complainant's request for a reassignment, we shall assume *arguendo* that Complainant set forth a prima facie case of disparate treatment disability discrimination and reprisal. The Director asserted that she denied Complainant's request because Complainant as an Information Technology Specialist, was not qualified for the positions in other locations, specifically the Security Assessments and Authorizations Branch and the Risk Management Branch. The Director stated that she met with each of the Branch Chiefs in those components, but neither was willing to employ Complainant. We find that the Agency articulated legitimate, nondiscriminatory reasons for the denial of Complainant's reassignment request.

Complainant attempts to establish pretext by arguing there is no documentation in the report of investigation as to why she was not qualified for transfer to the other components, nor why the other Branch Chiefs did not want to take her on. Complainant argues that in light of the Director's hostile and dismissive attitude toward her disability and reasonable accommodation requests, it is likely that her conversations with the other Branch Chiefs would have been tinged with comments about her disability and need for accommodations, which could have affected the other Branch leaders' outlook on taking her on as an employee. Complainant contends that two non-disabled employees on the Director's team were transferred based on their inability to engage in a grueling travel schedule. According to the Director, given that Complainant's transfer request was based on childcare needs, the Agency allowed Complainant to change her work process.

The Director stated that Complainant was not required to travel as she was permitted to complete her work responsibilities remotely. With respect to the comparators cited by Complainant, the Director asserted that she transferred one of the employees to a different component because his skillset matched the required skillset for the position and there would not be an employee loss. The Director stated that an employee loss could potentially result in an understaffed unit as the employee/supervisor ratio would be off which could lead to a loss in supervisors. The Director stated there have been instances where she has refused to transfer employees because, like Complainant, there was no place for them to go. The Director noted that she was not involved in the other comparator's transfer. We find that Complainant has not established that the Agency's explanation for denying her a reassignment was pretext intended to hide discriminatory or retaliatory motivation.

### CONCLUSION

The Agency's determination of no discrimination with regard to claim (1) is REVERSED. The Agency's determination of no discrimination with respect to claims (2-3) is AFFIRMED.

### ORDER (C0618)

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency shall restore or compensate Complainant for any leave that Complainant has been forced to use due to the Agency's failure to reasonable accommodate her between December 7, 2017 and May 20, 2018.
2. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's entitlement to compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at [eeoc.gov](http://eeoc.gov)). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issue of compensatory damages no later than 30 days after the completion of the investigation.
3. Within 90 days of the date this decision is issued, the Agency shall provide a minimum of eight hours of training to the Director regarding her responsibilities under the Rehabilitation Act, placing a special emphasis on the Agency's obligation to provide reasonable accommodation for employees' disabilities.
4. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the Director. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the

compliance officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S1 has left the Agency's employ, the Agency shall furnish documentation of her departure date.

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 all of the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Deputy Commissioner for Systems, Office of Information Security in Baltimore, Maryland facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

#### ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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 the date this decision was issued. 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 (M0620)**

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that tend to establish that:

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

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

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


#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.



Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

October 5, 2020  
Date