



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

[REDACTED]  
Bennett W.,<sup>1</sup>  
Complainant,

v.

David Bernhardt,  
Secretary,  
Department of the Interior  
(Bureau of Land Management),  
Agency.

Appeal No. 2019005238

Hearing No. 570-2017-01090X

Agency No. BLM-16-0219

**DECISION**

On August 11, 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 June 6, 2019, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Human Resource Specialist at the Agency's Bureau of Land Management facility in Washington, D.C.

On June 1, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American), sex (male), disability (severe photo-sensitivity, anxiety, panic attacks), and reprisal for prior protected EEO activity when:

---

<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.

1. Since July 2015, Complainant was subjected to a pattern of harassment from management that created a hostile work environment.
2. On December 17, 2015, Complainant's telework privileges were revoked and his subsequent request for reinstatement of telework in March 2016, was denied.
3. In March 2016, Complainant received a "Fully Successful" Performance Appraisal Rating for Fiscal Year 2015.
4. On April 21, 2016, Complainant's request to attend Pathways Training was cancelled.
5. On January 20, 2016 and on several other dates, Complainant was denied the opportunity to participate in Staffing policy work.
6. Since February 16, 2016 to July 21, 2016, management has effectively denied Complainant's requests for a detail by not responding to such requests.
7. On July 14, 2016 and several other dates, Complainant was made aware that his medical documentation had been shared with persons without a need to know and his reasonable accommodation request was made public.
8. On August 3, 2016, Complainant's request for a reasonable accommodation was denied.
9. on December 29, 2016, Complainant received a fiscal year 2016 annual performance rating, which did not accurately reflect his performance.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

Over Complainant's objections, the AJ assigned to the case granted the Agency's April 1, 2019 motion for a decision without a hearing and issued a decision by summary judgment in favor of the Agency on May 31, 2019. Specifically, the AJ found that the Agency articulated legitimate, nondiscriminatory reasons for its actions and that Complainant failed to establish that such reasons were pretextual. The AJ further found that the Agency's actions were insufficiently severe and/or pervasive to constitute harassment and that Complainant failed to establish that Agency officials harbored any animus towards his protected bases. With regard to the alleged disclosure of Complainant's medical information, the AJ noted that Complainant conceded that it was within the duties of the Reasonable Accommodation Coordinator to view such information. With regard to the Agency's alleged denial of reasonable accommodation, the AJ found that Complainant failed to provide requested additional medical information, declined the accommodation offered by the Agency, and declined to participate in the interactive process.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The instant appeal followed.

### ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

Upon review of the record we find that the AJ properly found that the instant complaint was suitable for summary judgment. The record is adequately developed and there are no disputes of material fact. On appeal, Complainant argues that the AJ denied him the opportunity to conduct discovery, which hampered his ability to establish whether or not material issues of fact were present. In response, the Agency argues on appeal that Complainant sought an expansion of time from the AJ in order to conduct additional discovery but filed his request too late, and the AJ rejected it. We note that, on appeal, Complainant has only provided a single example of the type of evidence he believes he was prevented from obtaining, namely evidence to rebut Agency claims of plagiarism. However, given that the AJ found that the issue of plagiarism was not a material fact and our own decision does not address the issue of plagiarism, we find that Complainant has not shown how he was harmed by the AJ's action.

#### ***Disparate Treatment***

Where, as here, complainant does not have direct evidence of discrimination, a claim alleging disparate treatment is examined under the three-part test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this analysis, a complainant initially must 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. See St Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas 411 U.S. at 802. Next, in response, the agency must articulate a legitimate, nondiscriminatory reason for the challenged actions. See Burdine, 450 U.S. at 253-54; McDonnell Douglas, 411 U.S. at 802.

Finally, it is complainant's burden to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

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, non-discriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

#### Telework, Appraisals, Staffing Work, Detail Requests and Medical Information

Following a review of the record we find that responsible management officials articulated legitimate, non-discriminatory reasons for the disputed actions.

With regard to Complainant's telework privileges, Complainant's Supervisor (S1: Caucasian, female) averred that:

On October 5, 201 5, [S1's second-level supervisor (S3<sup>2</sup>)] asked that the Complainant's telework schedule be suspended through November due to the tight Executive performance schedule. Executives must be able to focus on the mission and the high demands of their positions, and the Complainant's position required that he handle many administrative matters related to their employment. As such the Complainant needed to be responsive and available. [S3] said that his position couldn't telework during that time because she wanted greater visibility and needed for him to be available during this critical time. The Complainant had a vacation already planned and paid for during this time and I did allow him to take leave for a week. After the Executive performance period winded down, the Complainant went back to his regular telework schedule in December. It came to my attention from my leaders that once again he wasn't responding to emails or voicemails. I received a phone call from [S1's first-level supervisor (S2)] that she and [S3] were trying to get a hold of the Complainant for hours and that he wasn't responding to phone calls or emails. He did not respond to [S2] until after I personally contacted him.

---

<sup>2</sup> The record indicates that S3 is no longer with the Agency.

On December 21, 2015 I sent the Complainant a letter that notified him that I was cancelling his telework because he was not only not responding to our leadership's calls, but he also wasn't going to the main Interior building regularly as required. I told him that he needed to show more responsiveness and visibility and that [S2] and [S3] needed to see him and know that he was present and available to provide direct HR service to the executives.

On February 1, 2016 he asked me about restarting his telework. During my weekly one-on-one meetings with my supervisors during this time period I would occasionally ask if they saw any improvements in these areas and they kept telling me that they did not and that they still needed to observe him being more responsive. The Complainant asked again on March 24, 2016, and made a reference to being on telework punishment. I clarified to him that telework was not an entitlement and that [S3] said that she hadn't seen an improvement in responsiveness and visibility so I wasn't going to approve reinstatement of his telework at that time. The Complainant was permitted to do situational telework in the event of snow, etc.

In July 2016 I did discuss with him allowing him to telework again regularly on a trial basis but shortly after that discussion I ended up cancelling all telework for all staff members for the remainder of the calendar year due to a shortage of staff and the impending change of administration and leadership that would greatly affect the needed work and responsiveness of our office. Telework was cancelled in September 2016. I cancelled regular telework for all staff members for the remainder of the calendar year due to a shortage of staff and the impending change of administration and leadership that would greatly affect the needed work and responsiveness of our office. It was not reinstated until about 2 weeks ago.

We further note that S1 provided copies of contemporaneous emails between herself and Complainant that support her version of events.

With regard to Complainant's FY 2015 evaluation of "Fully Successful", S1 averred that:

Fully successful is not a bad rating; it means that you are performing your duties successfully. I contemplated giving a lower rating level in some of the performance elements based on my observations of the Complainant's work and feedback from my supervisors during that period, but I felt that the Complainant did, in the end, perform the duties at least successfully during the July 2015 to September 2015 timeframe, even though I had several complaints or concerns from my leadership that things weren't being done in a timely fashion. At one point during discussions about his performance, I did inform the Complainant that I had concerns that he wasn't operating fully at the GS-14 level. For example, he submitted a vacancy announcement for an executive position that wasn't in final format, something that should be done at the GS-14 grade level.

In another instance, he had a conversation with our Director and he was quite rude and I felt that he lacked diplomacy. I had asked all staff to write up their accomplishments for the rating period and the accomplishments that he himself listed and provided to me were at the fully successful level, he did not list anything that was at an exceptional level. He didn't go above and beyond in any particular area. I provided a verbal review to the Complainant in December and then in March I gave him his formal review. During both I told him that I observed that he was struggling in certain areas and that his performance was fully at best. I told him that based on my observations I did not think that he was fully ready to handle the level of independence needed for a GS-14 position.

With regard to Complainant being denied staffing policy work, S1 averred that:

Complainant was assigned staffing policy work. In October or November 2015, I did discuss with him that he could work on some hiring reform assignments that I was considering. Subsequent to that, the Bureau took the idea of hiring reform to a much higher level than I was originally considering and decided that they wanted a full-time project lead to lead a multi-dimensional, Bureau-wide program. I was provided an additional position to hire someone to manage this bureau-wide project full time. The Complainant was assigned a role as one of the team leads on the HR Modernization project, an assignment that included numerous and ongoing staffing policy projects. The Complainant's own job was primarily serving as the Executive Resources HR Specialist and policy work was an additional duty, so I couldn't have him lead the HR Modernization project or do staffing policy work full time. Also, it was not an option to detail him to the role of HR Modernization program lead because his job required him to be immediately responsive and visible to the Executive Resources cadre. I would have never taken him off of that assignment as that is what he was hired to do. His job was never going to be staffing lead since there was already someone in the staffing lead position. We discussed this and I told him that he was hired to be in the Executive Resources HR Specialist role. I had given him plenty of other policy work as well, including drafting a policy on IPA Assignments and developing a data and metrics program. When I gave him assignments, he often failed to complete them accurately or timely. It would take him months to do some of these things.

With regard to management failing to respond to Complainant's detail requests in February and July, 2016, S1 averred that:

I do not remember July as I had recently been out of the office on vacation and then was out again for a week or more due to my own unexpected medical issue and I had a backlog of email to catch up on, but I do recall when he asked for the earlier request around February 2016. At that time, I told him that we were getting ready to kick off the HR Modernization project and that he was going to have a major role as a team lead so it was not a good time to be away from the office.

The HR Modernization project went through the end of August 2016. Also, the Complainant had several assignments that he had not turned in and were late, so I could not have approved the request to be on a detail even without the HR Modernization project.

With regard to Complainant's medical information being shared, S1 averred that, "I shared the documentation with . . . the Reasonable Accommodation Coordinator (RAC) for the office and . . . the HR Officer. RAC shared the documentation with the Medical Officer of the DOI's Office of Occupational Health and Safety."

With regard to Complainant's FY 2016 performance rating, S1 averred that:

The complainant received a rating of Fully Successful for 2016. Although his overall rating was the same as it was for FY 15, based on feedback that I received from some of his executive clients and based on my observations of his work, I was able to raise his rating from level 3 (fully successful) to level 4 (superior) for the element related to his management of the executive resources program. Although this did not raise his overall rating, it did increase his total score from 3.25 in FY 15 to 3.4 in FY 16.

The Agency having articulated legitimate non-discriminatory reasons for its actions, the burden shifts back to Complainant to establish, by a preponderance of the evidence, that the Agency's reasons were not its true reasons, but were pretexts for discrimination. See Hicks; Burdine; McDonnell Douglas. Following a review of the record we find that Complainant has failed to meet this burden.

With regard to Complainant's telework privileges, Complainant did not deny S1's contention that management officials had been unable to reach him while he was on telework. Instead Complainant argues that S1 has not provided any evidence that this occurred more than once. Complainant further maintained that S1 "had mentioned that [S2&3] mentioned they had difficulty reaching other employees but they were never placed on telework restriction, to my knowledge." Complainant, however, has not identified these other employees and hence is unable to establish that they were otherwise similarly situated with himself. Complainant argues that female employees did not have their telework restricted, but he makes no argument that any of them could not be reached by management while teleworking. With regard to S1's contention that she eventually stopped all telework, Complainant maintains that "it only affected the black employees . . . of HR Policy and Programs Division; the last white employee [name omitted] of the Washington Office retired around August 21, 2016. . . . [name omitted], the sole white employee, in Boise, ID, was allowed to continue teleworking." Since Complainant admits that the sole employee outside of his protected bases who was allowed to continue telework worked in a separate office more than halfway across the country we again find that Complainant has not shown he was similarly situated with that employee.

With regard to Complainant's FY 2015 and 2016 performance ratings, Complainant averred that he believed he should have been rated at the Superior level for both and that "the work products I produced met the criteria for the Superior levels for Performance Elements 1, 2, 3, and 4. I was rated Fully Successful in 3 of my 4 performance elements: Elements 1, 2, and 4." While Complainant may believe he was entitled to a higher rating, he has not met his burden of establishing that the Agency's articulated reasons for awarding him "Fully Successful" ratings are a pretext or that the actions were motivated by discriminatory animus against his protected bases.

With regard to Complainant being denied staffing policy work, and management failing to respond to Complainant's detail requests in February and July 2016, Complainant did not address S1's articulated reason for her actions. With regard to Complainant's medical information being shared, Complainant affidavit confirms S1's response that she shared the information with RAC. In addition, Complainant alleged that "it came to my attention one of the contractors for building maintenance was aware that I received a workplace modification because of a medical condition." As such we find that Complainant has not shown that S1 shared the information with people without a need to know or that his reasonable accommodation request was improperly made public.

In conclusion, we find, with regard to the above claims, Complainant has not shown, by a preponderance of the evidence, that the Agency's articulated reason for its actions were pretexts to mask discrimination or reprisal, or that such actions were motivated by discriminatory animus against his protected bases.

#### Cancellation of Pathways Training

With regard to the denial of Complainant's Pathways Training being cancelled, we note that S1 averred that the reason for the action was that:

The Complainant was scheduled to attend Pathways training approximately 2-3 weeks after I received his medical documentation [in support of his first reasonable accommodation request concerning his photosensitivity]. The Pathways training takes place in Phoenix, AZ and is attended by a large number of participants in a training facility with numerous big fluorescent lights. Because I could not control the lighting situation at the training facility and because I had just learned of the severity of his condition, it was necessary for me to cancel his participation in that session.

S1 admits that she cancelled Complainant's participation in the training because of his claimed disability. As such, S1 has not articulated a legitimate, non-discriminatory reason for her action. The record shows that S1 and Complainant discussed the option of wearing dark sunglasses indoors but S1 nevertheless cancelled the trip based on her own interpretation of Complainant's medical restrictions, not based on Complainant's description of what his needs were. The record shows S1 sent Complainant a memo dated April 15, 2016, in which S1 appears to be receptive to Complainant's medical needs, including the need to turn off overhead lights at his desk.

However, S1 further stated in the memo that the training trip needed to be cancelled due to the presence of overhead lights at the training center that S1 could not control, despite the fact that S1 further noted in the memo that it was, “OK [for Complainant] to wear sunglasses.” We note that the record includes an additional handwritten note by S1. The date is illegible, but in the note S1 wrote that Complainant:

Contradicted himself. Write up conv[ersation] with [Complainant] about Reasonable Accommodation. In morning he said natural sun not a problem and room darkening with window shades wouldn't matter, only fluorescent light flickering caused problem. Then in afternoon when I told him that he couldn't go to Phoenix because couldn't control environment, he said that he could sit through week of training with fluorescent lights cause [illegible] darkening shades for outside [illegible].

This handwritten note indicates that Complainant was willing to attend the training, perhaps with the aid of sunglasses, and that he believed that window shades at the facility would be sufficient. Despite this S1 decided to cancel the training due to Complainant's disability rather than incorporate Complainant's feedback into her decision.

Here, it is undisputed that S1 cancelled Complainant's training because of what she perceived were limitations caused by his disability, despite his own expressed desire to attend the training and belief that he could be accommodated at the training. We further note that there is no evidence proffered by the Agency that allowing Complainant to attend the Pathways training would have caused any problems for the Agency. Because S1 has not articulated a legitimate, non-discriminatory reason for her action, we find that Complainant has established his claim of disparate treatment based on disability when he was denied the opportunity to attend Pathways training.

### ***Denial of Reasonable Accommodation***

An agency is required to make a reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9. To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). The term “qualified,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds and, with or without reasonable accommodation, can perform the essential functions of the position. 29 C.F.R. § 1630.2(m).

A request for a modification or change at work because of a medical condition is a request for reasonable accommodation. Enforcement Guidance on Reasonable Accommodation at Question 1. After receiving a request for reasonable accommodation, an agency “must make a reasonable effort to determine the appropriate accommodation.” 29 C.F.R. pt. 1614. app. § 1630.9. Thus, “it may be necessary for the [agency] to initiate an Informal, interactive process with the individual with a disability . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3); see also 29 C.F.R. pt. 1630 app. § 1630.9; Enforcement Guidance on Reasonable Accommodation at Question 5.

Reasonable accommodation includes such modifications or adjustments as job restructuring, the acquisition or modification of equipment or devices, and reassignment to a vacant position. 29 C.F.R. § 1630.2(o)(2)(ii). A qualified individual with a disability is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position held or desired. 29 C.F.R. § 1630.2(m); see also Struthers v. Dep't of the Navy, EEOC Appeal No. 07A40043 (June 29, 2006) (complainant has the threshold burden of establishing that he is a qualified individual with a disability).

The record shows that Complainant has severe photosensitivity, anxiety, and panic attacks. With regard to severe photosensitivity we find that Complainant is an individual with a disability that limits his major life activities of seeing and working based on his physician's documentation that stated that the condition triggered “decapitating [sic]” migraines that impaired his ability to work. We further find that Complainant is a qualified individual with a disability as the record shows that Complainant could perform the essential functions of his position with reasonable accommodations such as dimming the lights in his work area or permitting him to wear dark sunglasses at work. With regard to anxiety and panic attacks, we need not address whether Complainant is an individual with a disability because, as we explain further below, we find that the Agency did not deny Complainant a reasonable accommodation.

In April 2016, Complainant requested an accommodation for extreme photosensitivity and generalized anxiety disorder. Complainant requested the removal of overhead lights, the approval to wear sunglasses indoors, moving his work location away from his leadership chain, and the opportunity to telework. The record further shows that, with regard to Complainant's normal work environment in the office, the Agency and S1 promptly responded to Complainant's extreme photosensitivity by ensuring that the overhead lighting around his work area was dimmed or turned off. In his affidavit, Complainant did not allege that his request was not complied with and so we find that Complainant was not denied a reasonable accommodation for photosensitivity with regard to his normal work environment in the office. As noted above, however, S1 did not provide a reasonable accommodation to Complainant with regard to his request to attend Pathways training, by, for example, allowing him to attend while wearing sunglasses, or providing the training in some other format that would not require Complainant to attend classes under bright fluorescent lighting. Instead, S1 cancelled Complainant's attendance at the training even though Complainant indicated he could attend.

With regard to Complainant's generalized anxiety disorder, the record shows that the Agency engaged in the interactive process with Complainant over a period of months seeking additional input and medical information from Complainant, until, on August 3, 2016, S1 issued Complainant a memorandum that stated that Complainant had requested:

[A] reasonable accommodation which you described as anxiety and panic attacks and noted that you were unable to focus on your work. You provided the medical documentation dated May 18, 2016 for your second condition. The medical care provider [Name omitted], noted that your impairment was anxiety and panic attacks which caused you to be unable to focus on work assignments. [Your physician] also noted that your impairment limits your ability to stay on task, complete your assignments in a timely manner, multitask, and analyze complex and abstract concepts. [Your physician] also noted that your position requires a high degree of analytical capability and confidence and your impairment severely limits your ability to perform these duties effectively due to your mind constantly wondering and going blank. [Your physician] recommended that you be allowed to telework twice a week stating that it would help you with your ability to stay focused and to analyze complex and abstract concepts and also recommended moving your work space to a location that is not high traffic.

Given that our workspace is mainly cubicles and your cubicle is not in a high traffic area, on July 5, 2016, I directed you to reposition your chair and computer to face the back right corner to lessen the distraction of people walking by your cubicle. However, to date you have ignored my directive and have kept your computer in its original position which allows you to see individuals walking by.

[Your physician] did not give an explanation of how working from home would stop your mind from going blank or wandering and enable you to stay on task, to multitask and to analyze complex and abstract concepts, and to complete your work in a timely manner. Your past telework demonstrated a lack of responsiveness to senior management which is why telework was rescinded. Your position does not allow for extended telework as an essential function of your position requires much face-to-face time with senior leadership. [The Agency Telework Handbook] states that "Employees are responsible for communicating well with the supervisor, co-workers, and customers, enabling a relatively seamless transition" and "Demonstrating self-motivation independence, and dependability in accomplishing work assignments." . . .

I cannot modify your position to remove any of your essential functions nor can I lower your production standards. However, I can offer that for the time being that you move your computer as previously directed, and once cubicle 3294 becomes vacant you may move to that cubicle as it is further from the hallway door. In addition, I am willing to purchase noise reduction headphones for you that should

assist in your staying focused as they filter out distracting sounds but still allow nearby conversations.

The memorandum concluded by requesting that Complainant respond within ten days or “it will be assumed you are no longer interested in the assistance offered and your case will be closed.” The record does not show that Complainant responded to the August 3, 2016 memorandum. As such we find that the Agency did not deny Complainant a reasonable accommodation with regard to his generalized anxiety disorder and panic attacks.

### ***Hostile Work Environment***

Finally, we note that, to the extent that Complainant is alleging that he was subjected to a hostile work environment, when his telework privileges were revoked, he received “Fully Successful” ratings for Fiscal Years 2015 and 2016, he was denied the opportunity to participate in staffing policy work, his detail requests were ignored, and his medical information was shared with persons without a need to know, we find that under the standards set forth in Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) that any claim of hostile work environment that includes such claims must fail. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (March 8, 1994). A *prima facie* case of hostile work environment that includes such claims is precluded based on our finding, discussed above, that Complainant failed to establish that any of the actions taken by the Agency were motivated by discriminatory animus or retaliatory motive. See Oakley v. United States Postal Service, EEOC Appeal No. 01982923 (September 21, 2000).

The sole remaining act of harassment consists of Complainant receiving a written warning on October 6, 2015. In considering whether such an action constitutes harassment, the Commission notes that in Harris, the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), that harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of the complainant’s employment. See EEOC Notice No. 915.002 (March 8, 1994), Enforcement Guidance on Harris v. Forklift Systems, Inc. at 3.

Following a review of the record we find that Complainant has not shown that the harassment either involved or was based on his protected bases. We further find that Complainant has not shown that the single action was sufficiently severe or pervasive so as to alter the conditions of Complainant’s employment.

### **CONCLUSION**

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find with regard to all of the claims except the cancellation of his Pathways Training, that Complainant has not shown that discrimination occurred. However, with regard to the denial of Pathways Training we find that Complainant has established that he was denied a reasonable accommodation and that he was subjected to disparate treatment based on disability. We therefore AFFIRM the final order in part and REVERSE in part, and we REMAND the claim for further processing in according with this decision and the Order below.

ORDER

1. If he has not already been provided with the Pathways Training at issue, Complainant shall receive permission to attend the next session of the training if he still wishes to go, with reasonable accommodation provided for his disabilities.
2. Within ninety (90) calendar days of the date this appellate decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)) and request objective evidence from Complainant in support of his request for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. No later than sixty (60) calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.
3. Within ninety (90) calendar days from the date this decision is issued, the Agency shall provide eight hours of interactive or in-person training to S1 (Complainant's supervisor at the Agency's Bureau of Land Management facility in Washington, DC), regarding management's responsibilities under the Rehabilitation Act, with special emphasis on management's duties regarding the interactive process. The Agency shall provide proof of S1's attendance, as well as the contents of the in-person training provided.
4. Within thirty (30) calendar days from the date this decision is issued, the Agency shall post a finding notice, as provided in the statement 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 Bureau of Land Management facility in Washington, DC, 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)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of 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 (K0618)

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.

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

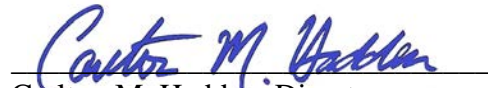
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency or filed your appeal with the

Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by 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. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:

  
Carlton M. Hadden, Director  
Office of Federal Operations

November 9, 2020  
Date