



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

[REDACTED]
Will K.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Western Area),
Agency.

Appeal No. 2020000109

Hearing No. 551201600003X

Agency No. 1E982000815

DECISION

Complainant timely appealed, pursuant to 29 C.F.R. § 1614.403, from the Agency's April 11, 2019 Final Order concerning an 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., Section 501 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an Operations Industrial Engineer, EAS-21, at its Seattle Network Distribution Center ("NDC"), located in Federal Way, Washington.

On March 17, 2015, Complainant filed an EEO complaint raising the following two issues:

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

- I. Discrimination and harassment/ hostile work environment on the bases of race (Middle Eastern, Persian), national origin (Iranian), religion (Islam), and reprisal (prior protected EEO activity) when:
- a. On December 18, 2014, his supervisor told him, "Playing politics is what I want you for,"
 - b. On October 20, 2014, Management advised him during mediation to file a CA-2 Workers' Compensation claim and then later disputed such claim,
 - c. Beginning October 20, 2014, Management followed him at work, interrogated him, prevented him from speaking on teleconferences, listened to his conversations, ignored his reported safety concerns, and failed to implement his proposals,
 - d. On December 9, 2014, Management issued him a Performance Improvement Plan ("PIP"),
 - e. On December 9, 2014, Management punished him by instructing him to take online communication courses and write down what he learned,
 - f. On December 18, 2014, Management issued him a Letter of Concern,
 - g. On January 30, 2015, Management had a discussion with him regarding his progress on the PIP, and,
 - h. On an unspecified date, Management prohibited him from communicating via e-mail after reporting a safety violation to all managers.
- II. Discrimination on the bases of age (mid-50's), disability/perceived disability (adjustment disorder, depression, and anxiety) and reprisal (prior protected EEO activity) when, in March 2015, the Agency denied his request for reasonable accommodation.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission ("EEOC" or "Commission") Administrative Judge ("AJ"). Complainant timely requested a hearing. The parties engaged in discovery, then the Agency submitted a motion for a decision without a hearing. The parties agreed to participate in mediation, and when it was unsuccessful, the matter was reassigned to another AJ. Over Complainant's objections, the newly assigned AJ found the record sufficiently developed, and issued a decision by summary judgment in favor of the Agency on March 29, 2019.

The record developed during the investigation and discovery includes the following evidence:

Complainant's position as an Operations Industrial Engineer entailed collaboration on projects within the NDC and at the national level, requiring strong communication skills to convey technical information and to work collaboratively across different functional and hierarchical groups. Complainant reported to an In-Plant Support Manager, EAS-25 ("M1" Indian, Sikh, India), and the Plant Manager, PCES-01, ("M2" Caucasian, Protestant, American) throughout the relevant time frame for this complaint. In or about January 2015, he reported to an Acting In-Plant Support Manager, EAS-25 ("M3" Caucasian, Christian, American, 48).

On October 20, 2014, Complainant and M1 engaged in mediation and entered into a binding settlement agreement to resolve an EEO complaint where Complainant had named M1 as the responding management official.² Term 1 of the Agreement provided that the Agency would withdraw a September 11, 2014 Letter of Warning ("LOW") it issued to Complainant regarding his communications during a national teleconference. Term 3 of the Settlement Agreement states: "Management will provide coaching for [Complainant] to enhance communication within the organization and management will evaluate changes suggested by [Complainant.]"

Issue I

During the October 20, 2014 mediation, Complainant revealed that he was experiencing work-related stress. M1 responded that the proper venue to file a claim for work-related injuries was the Department of Labor ("DOL") Office of Workers Compensation Programs ("OWCP"), and that Complainant could do so by submitting a Form "CA-2." A few days later, Complainant submitted a CA-2 to the Agency's Office of Health and Resource Management ("HRM"). He included a narrative statement explaining that he was experiencing neck pain caused by anxiety and stress from work. He also referenced the October 20, 2014 settlement agreement, specifying that "the mutual agreement was for me to file a CA-2 for medical compensations." Complainant did not include any supporting medical documentation.

In an October 24, 2014 letter, HRM advised Complainant that if the neck injury and anxiety detailed in CA-2 rendered him unable to work, Complainant would have to provide medical documentation to his supervisor. HRM further advised Complainant to complete and submit an enclosed Form "CA-35A." Among other things, the CA-35A provided a check list of specific evidence that the OWCP would accept in support of a Workers Compensation Claim, including, "attach or forward a medical report from your physician," followed by a bulleted list of specific information to include in the report. When Complainant failed to respond, the HRM Manager challenged Complainant's OWCP claim on November 5, 2014.

² Complainant's assertion that M1 and M2 were required under the October 20, 2014 settlement agreement to provide him compensation by approving his OWCP claim requires an interpretation of the settlement agreement itself, and was properly raised in a breach of settlement claim, outside the scope of the instant complaint.

On December 9, 2014, M1 issued a Performance Improvement Plan (“PIP”) for the stated reason of complying with October 20, 2014 settlement agreement, as “a coaching opportunity... to improve the communication related issues to an acceptable level.” The PIP identified two “Unacceptable Performance Deficiencies” and directed Complainant to improve performance in these areas to “good or acceptable” rating by April 30, 2015. Under the PIP, Complainant was required to attend a training on communication/coaching, and a seminar on communication behavior by December 23, 2014. In addition, M1 would provide Complainant with “ongoing coaching opportunities/training opportunities” through March 20, 2016.

On December 18, 2014, OWCP denied Complainant’s claim, citing the lack of medical evidence. The next day, a Postal Health and Human Resource Specialist notified Complainant, M1, and M2 that Complainant’s claim had been denied, and referenced Complainant’s option to appeal. Complainant states that he felt humiliated by the denial, having entered the settlement agreement, but does not dispute that he took no further action.

Also on December 18, 2014, M1 discussed Complainant’s performance with him and issued a Letter of Concern (“LOC”) reiterating the discussion. In the LOC, M1 included a timeline provided a timeline of incidents pre-dating the instant complaint, including matters that were raised in the October 20, 2014 settlement agreement that the Agency agreed to remove from Complainant’s record.

On January 30, 2015, M3, who had been on the job in an acting capacity for two weeks, conducted a PIP progress meeting with Complainant. M3 informed Complainant that he was under performing and Complainant provided status updates.

By Complainant’s account, throughout this time frame, he experienced harassment and a hostile work environment under M1, M2 and M3.

Issue II

In February 2015, Complainant submitted multiple medical notes to the Agency. M3 interpreted the documents (and Complainant’s act of submitting medical documents), as a request for reasonable accommodation, so he referred the medical documents to the District Reasonable Accommodation Committee (“DRAC”) on February 11, 2015. M3 did not consult Complainant before doing so, and Complainant later contended that this was not his intention to request a reasonable accommodation.

On March 25, 2015, Complainant contacted DRAC officials, explaining that he did not require an accommodation. However, he also stated: “I still believe I would be able to perform my job functions when I return to duty as long as I feel safe and secure at work which is impossible at my current work location and under current management.” The supporting medical documentation provided Complainant’s anxiety diagnosis and indicated that Complainant could not work for M1.

On March 27, 2015, DRAC issued a determination that due to Complainant's diagnoses, and his statements, there was no available reasonable accommodation that could allow him to return to work, much less perform the essential functions of his position. Complainant contacted the HR Manager for clarification, explaining that he did not request a reasonable accommodation.

Based on this evidence, the AJ issued a decision by summary judgment in favor of the Agency. The Agency's Final Order adopted the AJ's finding that Complainant had not been subjected to discrimination or retaliation as alleged. The instant appeal followed.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). 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. In rendering this appellate decision we must scrutinize the AJ's legal and factual conclusions, and the Agency's Final Order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence, and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus.

AJ Abuse of Discretion

The AJ shall have the power to regulate the conduct of a hearing. 29 C.F.R. § 1614.109(e). The AJ has full responsibility for the adjudication of the complaint. EEO Management Directive 110 ("MD-110") (Aug. 5, 2015), Ch. 7 § III(D). This responsibility gives the AJ wide latitude in directing the terms, conduct, or course of EEOC Administrative hearings. Douglas F. v. Equal Employment Opportunity Commission, EEOC Appeal No. 0120122183 (Dec. 4, 2015) citations omitted.

Complainant argues abuse of discretion by the AJ when his two motions to compel the Agency to respond to his discovery requests were denied. Where, as here, the information requested is already contained in the ROI, or outside the scope of the claims at issue, we have found an AJ's decision not to compel further discovery to be proper. See Robinson v. United States Postal Serv., EEOC Appeal No. 0120101782 (Aug. 27, 2010).

As for Complainant's frustration that not all of his arguments were addressed by the AJ, we note that a significant portion of Complainant's arguments concern allegations outside the scope of the subject matter and time frame of his complaint. We find no error or abuse of discretion by the AJ has been established.

Disparate Treatment

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a *prima facie* case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for 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. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

An employer has the discretion to determine how best to manage its operations and may make decisions on any basis except a basis that is unlawful under the discrimination statutes. Furnco, Nix v. WLCY Radio/Rayhall Communications, 738 F.2d 1181 (11th Cir. 1984). The reasonableness of the employer's decision may, of course, be probative of whether it is pretext. The trier of fact must understand that the focus is to be on the employer's motivation, not its business judgment. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). Moreover, it bears noting that an agency is not required to refrain from non-discriminatory personnel actions it would otherwise take simply because the employee has engaged in EEO activity. See Sotomayer v. Dep't of the Army, EEOC Appeal No. 01A43440 (May 17, 2006).

The Agency offers the same legitimate non-discriminatory reasons for its actions in Claim I.d, the December 9, 2014 PIP, Claim I.f, the December 18, 2014 LOC, Claim I.e, online coursework, and Claim I.g, where M3 completed Complainant's PIP progress review on January 30, 2015: to improve Complainant's performance, and to comply with the October 20, 2014 settlement agreement.

Complainant expresses his disagreement with the Agency's business judgment, such as coursework assignments, conduct during teleconferences, and decisions not to adopt his forklift proposal and other safety recommendations. However, Complainant has not shown that the Agency's actions were unreasonable to indicate pretext for retaliation and discrimination. For instance, he argues that the training courses M1 assigned him were unreasonable, as the content was not engineering-specific, yet the record reflects that the coursework related to communication skills, consistent with the PIP and the October 20, 2014 settlement agreement. Likewise, we do not find M1's requirement that Complainant provide a written summary of the training to be "unreasonable," evincing pretext, simply because Complainant would have preferred to print out a certificate of completion instead.

Another example Complainant provides occurred when M3 evaluated his performance for his PIP on January 30, 2015, and erroneously accused him of making an unauthorized purchase of easels. At the time it was frustrating for Complainant, however, we do not find M3's actions unreasonable. Complainant acknowledges that at the time of their PIP progress meeting, M3 did not know Complainant was asked by Management to request the purchase, and that upon finding out, M3 corrected the error. Complainant felt it was unreasonable for M3, a new "acting" manager to discuss his PIP with him, but the record reflects that M3, as Complainant's manager at the time, acted within the scope of his supervisory authority. The PIP itself directs Complainant to participate in monthly progress meetings with his supervisor.

Complainant theorizes that the timing of the LOC, which was issued the same day his OWCP claim was denied, indicates retaliation. Other than Complainant's assertion, we find no evidence that these actions were connected, and if they were, how this would state a claim of discrimination or retaliation. An allegation of retaliation for filing a claim for workers compensation must be raised with OWCP, as it is outside EEOC jurisdiction.³

The remainder of Complainant's evidence, primarily excerpts from emails, does not address his work performance. Also, Complainant has not established that the PIP and LOC were unreasonable in terms of business judgment. Thus, without more, Complainant's argument that the Agency's articulated reasons for its actions were a pretext for discrimination are insufficient to create a question of material fact warranting a hearing or result in a finding of discrimination.

³ Complaints involving other administrative proceedings, including those involving OWCP and its related processes, do not state a claim within the meaning of the Commission's regulations. Bell v. Dep't of Transportation, EEOC Appeal No. 01991806 (Jan. 11, 2001) (agency's alleged failure to ensure that records related to an OWCP claim were accurate and complete, and that it allegedly falsified OWCP documents, does not state a claim), Hogan v. Dep't of the Army, EEOC Request No. 05940407 (Sept. 29, 1994). The proper venue for Complainant to appeal his denied OWCP claim is with the OWCP. Therefore we will not address Complainant's arguments related to the processing of his CA-2, and we will limit our analysis to the fact that M1 informed Complainant that he could file a claim with OWCP.

Reasonable Accommodation

The Commission's regulations require agencies to make reasonable accommodations for the known physical and mental limitations of a qualified individual with a disability unless it can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), 1630.2(p). A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. See Bryan R. v. United States Postal Serv., EEOC Appeal No. 0120130020 (Mar. 20, 2015), citing EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002, Question 1 (Oct. 17, 2002).

An employee is not required to use the "magic" words "reasonable accommodation" when making a request. Instead, the employee or the employee's representative need only inform the Agency that he or she needs an adjustment or change at work for a reason related to a medical condition. See Triplett-Graham v. United States Postal Serv., EEOC Appeal No. 01A44720 (Feb. 24, 2006). Agencies are required to engage in an interactive process with employees regarding reasonable accommodations, and employees who refuse to cooperate in that process are not entitled to an accommodation. See Carleen L. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120151465 (May 12, 2017), EEOC Notice No. 915.002 at Q. 6.

Although Complainant did not articulate that he was an individual with a disability requesting a reasonable accommodation, we find that M3 appropriately interpreted Complainant's submission of medical documentation, indicating that Complainant was prevented from working due to a medical condition, as a request for a reasonable accommodation. M3's actions in this respect are not evidence of discrimination or retaliation, as alleged by Complainant.

Complainant's statements in the record are inconsistent with his claim that he was denied a reasonable accommodation. Assuming, *arguendo*, that Complainant is a qualified individual with a disability who requested a reasonable accommodation, there is no evidence that he engaged in the interactive process which is central to the whole accommodation process. Moreover, the DRAC properly determined that Complainant's medical documentation, which stated that he could not perform the essential functions of his position at his current worksite or under his current supervisors, indicated that there was no viable reasonable accommodation available to him. When he received the DRAC's decision, Complainant did not submit any updated documents indicating he was medically able to perform the essential functions of his position, nor did he exhibit an interest in participating in the interactive process.

To the extent that Complainant was attempting to use the reasonable accommodation process to obtain a reassignment, we have long held that reassignment is an "accommodation of last resort" that should only be utilized after a determination has been made that there are no other accommodations that would enable him or her to perform the essential function of his current position without imposing an undue hardship upon the Agency. Zachary K. v. Dept. of Veterans Affairs, EEOC Appeal No. 0120130795 (Nov. 19, 2015). As Complainant did not engage in the interactive process, the Agency was not obligated to provide him with this accommodation. See Oda H. v. United States Postal Serv., EEOC Appeal No. 0120151451 (Jul. 26, 2017).

Harassment

To prove his harassment claim, Complainant must establish that he 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 his membership in a protected class and/or his prior EEO activity. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (June 18, 1999).

We have long held that routine work assignments, instructions, and admonishments constitute “common workplace occurrences” that do not rise to the level of harassment. See Gray v. United States Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010) citations omitted. To the extent Complainant alleges that he was subject to stricter communication requirements and excessively monitored by management, we have previously found similar claims, while unpleasant, are also “common workplace occurrences.” See Gormley v. Dep’t of the Interior, EEOC Complaint No. 01973328 (Feb. 18, 2000), Carver v. United States Postal Serv., EEOC Appeal No. 01980522 (Feb. 18, 2000) (A supervisor questioning an employee with respect to their duties, even if done in a confrontational manner, is a “common workplace occurrence.”)

Claims I.d, I.e, I.f, I.g, and Issue II will not be considered in the harassment analysis, as we already determined that Complainant did not establish that the Agency acted with discriminatory or retaliatory motive. The record does not support that Claim I.8 occurred as alleged. Complainant’s remaining claims, assuming, *arguendo*, that the actions occurred as alleged and during the time frame for the instant complaint, are common workplace occurrences that do not constitute harassment, even when considered together.

To support his allegation in Claim I.h, Complainant provides an email from M1 to Complainant after Complainant sent out a group email about a safety repair issue. In it, M1 stated: “I think a phone call or one on one would have been sufficient to resolve this issue? As I’ve discussed, this [could have been] easily resolved by giving him a call versus this email tag team approach that not getting any result.” We find that Complainant’s proffered evidence, rather than demonstrate that M1 prohibited Complainant was from communicating by email as alleged, reveals an instance where M1 provided feedback on the most effective way for Complainant to communicate in a specific situation. Advice from a supervisor is a “common workplace occurrence” that does not constitute harassment. Likewise, the email evidence Complainant provided in support of the allegations in Claim I.c, such as Management allegedly “interrogating” him about his whereabouts during work hours, only establishes instances where Management acted within the scope of its authority, issuing routine work assignments, instructions, and admonishments. With respect to Claim I.b, where M1 informed Complainant that he could file a workers’ compensation claim with OWCP if he experienced a workplace injury, information that Management is required to provide to injured employees, also describes a common workplace occurrence, not harassment.

Even if the alleged actions could be considered harassment, Complainant repeatedly raises arguments indicating that his harassment claims are not EEO matters. He attributes the Agency's alleged harassment in Claims I.a, I.c, and I.h to retaliation for his refusal to "play the game," i.e. participate in the Agency's alleged "corruption." Complainant describes how he stood up to Management when they allegedly asked him to falsify documents to conceal safety violations and to submit fictitious reports, and as a result, he was punished for it with the alleged harassment raised in the instant complaint. The activity Complainant describes as underlying his harassment allegations is not protected under EEO Statutes, and would not state a viable claim of discrimination.⁴

Retaliation

When a supervisor's behavior has a potentially chilling effect on use of the EEO complaint process – the ultimate tool that employees have to enforce equal employment opportunity - the behavior can be a violation of the anti-retaliation provisions of the employment discrimination statutes. Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998). For instance, comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and can establish what is sometimes referred to as a "*per se*" violation of the law. See Leisa C. v. Dep't of Defense, EEOC Appeal No. 0120132212 (Nov. 8, 2013) citing Binseel, see, e.g. Ashby v. Dep't of the Treasury, EEOC Appeal No. 0120090364 (Feb. 27, 2012), recon. den., EEOC Request No. 0520120435 (July 12, 2012) (*per se* violation found where Complainant's supervisor mentioned Complainant's prior EEO activity to another colleague and made inappropriate comments about Complainant's EEO complaints). In the instant complaint, Complainant appropriately points out that the LOC included reference to his protected EEO activity.⁵

In the LOC, M1 provides a timeline of "events" to support his assertion that Complainant's "job performance has been unsatisfactory, and informal efforts to correct these deficiencies have not caused [Complainant] to change his behavior."

⁴ Safety violations, or concerns about reporting alleged workplace safety violations, may be raised with the DOL Occupational Health and Safety Administration ("OSHA"). See Complainant v. United States Postal Serv., Appeal No. 0120151653 (Aug. 14, 2015). If Complainant is alleging retaliation for whistleblower activity, such claims must be raised under the Whistleblower Protection Act because the Commission does not have jurisdiction over Whistleblower Protection Act claims. See Reavill v. Dep't of the Navy, EEOC Appeal No. 05950174 (July 19, 1996). Alternately, Complainant could contact the appropriate Postal Inspector General within the Agency.

⁵ Complainant's observation that the LOC's inclusion of the September 11, 2014 LOW and its underlying events violated Term 1 of the October 20, 2014 settlement agreement, is a breach of settlement claim outside the scope of this complaint. Also outside the scope of this complaint, as it is an OWCP issue, we note that the LOC also inappropriately lists that on October 23, 2014 Complainant "claimed work related illness/injury for stress" essentially equating filing an OWCP claim, which is Complainant's right, with poor performance.

On this list were the October 20, 2014 EEO settlement agreement, and that on December 11, 2014 (one week earlier), Complainant “claimed discrimination and harassment at work, currently being investigated.” The list is immediately followed by the stated intent of the LOC, which was for M1 to “discuss [his] concerns and to make sure [Complainant] clearly understood how serious this matter is.”

We find the reference to Complainant’s protected activity in this context was reasonably likely to either deter Complainant or others from engaging in the EEO process. Therefore, although Complainant ultimately has not demonstrated that the LOC itself was unwarranted, the Agency is still liable for *per se* retaliation with regard to some of the language used in the LOC.

We remind the Agency that that it has a continuing duty to promote the full realization of equal employment opportunity in its policies and practices. 29 C.F.R. §1614.101 This duty extends to every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Agencies are obligated to "insure that managers and supervisors perform in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal employment opportunity. 29 C.F.R. §1614.102(5).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency’s final order accepting the AJ’s finding on the merits of his claims. We REMAND the complaint to the Agency to address matter of *per se* retaliation, in accordance with the Order provided below.

ORDER

Within **thirty (30) calendar days** of the date this decision was issued, the Agency is ordered to ensure that **M1, M2, and M3** each meet separately with an EEO Officer, HR Specialist, or other Agency official with professional expertise on EEO procedure and EEO rights, for **one hour of individualized in-person training and discussion** of retaliation under EEO statutes in relation to their role as management officials. The training/discussion must address how the LOC in the instant complaint constituted retaliation *per se*, in violation of Title VII, as well as a plan to avoid retaliation *per se* going forward.

If the Agency is unable to comply because M1, M2, and/or M3 have since left the Agency, it can establish compliance by providing the supporting personnel documentation of their departure.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

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:



Carlton M. Hadden, Director
Office of Federal Operations

October 26, 2020

Date