



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]

Alice S.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin, III,  
Secretary,  
Department of Defense  
(Defense Logistics Agency),  
Agency.

Appeal No. 2020000391

Agency No. DLAN-19-0003

**DECISION**

On October 18, 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 September 20, 2019 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

**BACKGROUND**

Complainant worked as a Management & Program Assistant, GS-0344-07, at the Agency's Distribution Center in Oklahoma City, Oklahoma. At the time of the events giving rise to this complaint, she held the position of Training Coordinator. On November 15, 2018, Complainant filed an EEO complaint in which she alleged that the Agency discriminated against her and subjected her to a hostile work environment on the basis of disability (Anxiety/Depression) and in reprisal for prior protected EEO activity (requesting a reasonable accommodation in March 2017) when:

1. On September 28, 2018, her second-line supervisor (S2) determined that Complainant's position was ineligible for regular and recurring telework although

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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.

she alleged she had been successfully teleworking in her current position for the previous two years; and

2. On October 4, 2018, Complainant became aware that S2 had disclosed information about her medical condition and reasonable accommodation request to a union official who was not representing her in any capacity. Complainant alleged that in this same meeting, S2 used disparaging language and comments in describing her and her situation.

At the conclusion of the ensuing investigation, the Agency provided Complainant with a copy of the investigative report (IR) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). On June 3, 2019, Complainant requested a final agency decision on the merits of the complaint. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination or reprisal as alleged.

Incident (1):

In a reasonable accommodation request dated March 23, 2017, Complainant indicated that she had been diagnosed with major depression and that she was asking for one day of scheduled telework per week with an option of one additional day. She also asked for a permanent reassignment to the Training Coordinator position, which was vacant at the time. IR 222, 225, 269, 274-76. Her requests were granted, and under its terms, the telework agreement between Complainant and the Agency would be in effect from July 6, 2017 through July 6, 2019. IR 348, 375-76, 378, 411-12.

In an email dated September 26, 2018 and addressed to the Distribution Deputy Commander (DDC), who was S2's immediate supervisor, Complainant reported that the Supervisory Management Analyst who served as her first-line supervisor (S1) informed her that S2 was going to terminate her telework privilege. Complainant opined that the reason for S2's actions was that S2 had personal issues with her and that S2 did not care for telework. IR 210-12, 296-97. The day before, September 25, 2018, the DDC had informed Complainant and several other employees that an audit had been conducted that had uncovered outdated telework agreements and inappropriate coding within EAGLE, the Agency's time and attendance system. In particular, the audit had revealed that Complainant's Training Coordinator position had never been designated for telework and consequently, that EAGLE should not have included a telework code corresponding to that position. IR 286-94, 377-78, 380. S1, S2 and the DDC averred the Training Coordinator Position was never designated for telework because the duties of the position required that the incumbent be in the office in order to interface, with management, students, and visiting instructors. IR 351-53, 378-79, 413-14, 432.

The Safety and Occupational Health Manager, a colleague of Complainant's who worked directly under S2 stated that S2 was very vocal in his dislike of the Agency's telework program, and that S2 had expressed an opinion that teleworkers did not do any work. IR 434-35.

A Safety Management Analyst who was also a colleague of Complainant's affirmed that Complainant was upset over S2's relentless "trolling" of her, that he, S2, talked about Complainant behind her back and went out of his way to be unaccommodating, and that she, Complainant, and several other employees had lost their telework privileges. She also maintained that S2 disliked the telework programs. IR 440, 442. In her rebuttal affidavit, Complainant stated that the only time she needed to be in the office was when training classes were actually in session, and that if necessary, she could come into the office on such days even if training classes fell on her telework day. IR 450-451.

#### Incident (2):

Complainant claimed that a Union Official (UO1) informed her that during a meeting that took place in S2's office among himself, another Union Official (UO2) and the Administrative Branch Chief (ABC), S2 disclosed to the group that Complainant had filed a reasonable accommodation request and had openly discussed her medical condition. At least one official also noted that S2 made disparaging and rude comments about Complainant and what he thought were her "frivolous attempts to circumvent his supervision." UO1 reported that the ABC had left the room before the discussion about Complainant had begun, and that S2 had started discussing Complainant's medical conditions in an unprofessional and unethical manner. IR 341-42, 390-91. UO2 also reported that he heard S2 discussing Complainant's medical condition in the presence of UO1, himself, and the ABC. IR 398-400. The ABC averred that although he had attended that meeting, he did not hear anyone's medical condition being discussed. IR 406-07. However, both he and a Division Chief stated that they had heard S2 disparage Complainant on other occasions. IR 238, 344, 424-27. S2 denied that he had raised Complainant's medical condition in the meeting that had taken place in his office, and that the only information discussed during that meeting was the result of the audit regarding telework. He also averred that Complainant had made it known to other employees that she disliked him personally. IR 355-57.

### ANALYSIS AND FINDINGS

#### *Standard of Review*

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

*Disparate Treatment (Ineligibility for Telework)*

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, 802 (1973). Her first step would generally be to 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 Const. Corp. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since S2 articulated legitimate and nondiscriminatory reasons for his actions vis-à-vis Complainant. See U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983). S2 stated that Complainant's telework privilege was not revoked. Rather, the Training Coordinator position had been designated as telework-ineligible due to the need for the incumbent to interact with customers of the training program, namely students and instructors.

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the explanation provided by S2 is a pretext for discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Hon. Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007), req. for reconsid. den'd EEOC Request No. 0520080211 (May 30, 2008).

When asked why she believed that her medical condition and prior reasonable accommodation request were factors in S2 taking her telework privilege away, Complainant replied that S2 had been extremely vindictive toward her and that he changed the telework eligibility status of her position merely because he could. IR 212. There are indications in the record that S2 disliked the telework program and had expressed his contempt for it on more than one occasion. However, merely disfavoring the telework program, by itself, is not sufficient evidence to support a finding that S2 actually harbored unlawful considerations of Complainant's medical condition or the fact that she had asked for and had been granted a reasonable accommodation. While Complainant has submitted affidavits from several witnesses, none of them had contradicted or undercut S2's sworn statements or cause us to question S2's veracity on the issue of the results of the telework audit. Further, we note affidavit testimony from the DDC that S1 and not S2 was the manager with whom Complainant should have discussed telework issues, and that she believed that this was what S2 had intended. IR 299. As Complainant chose not to request a hearing, the Commission does not have the benefit of an Administrative Judge's credibility determinations after a hearing. Therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. In this case, the evidence does not establish the existence of a discriminatory or retaliatory motive on the part of S2 in connection with Complainant's ability to telework.

### *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.

The Commission finds that the alleged incidents were not sufficiently severe or pervasive to establish a hostile work environment. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, the Commission finds that Complainant failed to show that the Agency's actions were based on discriminatory or retaliatory animus. While there is evidence that S2 made disparaging and disrespectful comments about Complainant during the above-discussed meeting with other officials and at other times, there is no evidence that the remarks were based on animus toward Complainant's protected classes. The Commission notes that the anti-discrimination statutes are not a civility code. Rather, they forbid “only behavior so objectively offensive as to alter the conditions of the victim's employment.” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). As a result, the Commission finds that Complainant was not subjected to discrimination or a hostile work environment as alleged.

### *Unauthorized Disclosure of Medical Information:*

The Rehabilitation Act prohibits disclosure of confidential medical information except in certain limited situations, including when managers need to be informed regarding necessary accommodations. 29 C.F.R. § 1630.14(c). Consequently, where unauthorized disclosure of medical information is at issue, it is not necessary to prove the existence of a discriminatory motivation in order to establish a violation of the Rehabilitation Act; mere disclosure of such information without justification is enough. See e.g. Velva B., et al. v. U.S. Postal Serv., EEOC Appeal Nos. 0720160006 & 0720160007 (Sept. 25, 2017); req. for reconsid. den'd EEOC Request Nos. 0520180094 & 0520180095 (Mar. 9, 2018).

In this case, two of the witnesses who were present at the meeting in S2's office, UO1 and UO2 stated under oath that S2 had talked about Complainant's medical condition and reasonable accommodation without prompting. The third witness, the ABC, stated that Complainant's medical information was not discussed, but UO1 had stated under oath and without contradiction, that the ABC had left the meeting before S2 had started talking about Complainant. We therefore find that Complainant's allegation that S2 had disclosed her personal medical information without justification to individuals without a need to know to be supported by evidence of record. Accordingly, we will enter an order directing the Agency to take appropriate corrective measures, including posting of notice that a violation of the Rehabilitation Act had occurred, providing training to S2, and consideration of disciplinary action against S2. We will also direct the Agency to conduct a supplemental investigation on the issue of entitlement to compensatory damages.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we MODIFY the Agency's final decision.

### ORDER

1. Within 120 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of harm caused by divulging her medical information. The Agency shall afford Complainant an opportunity to establish a causal relationship between the disclosure and pecuniary and/or non-pecuniary losses. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages she is entitled to and shall provide relevant information requested by the Agency. The Agency shall issue a new Agency decision awarding compensatory damages to Complainant within 60 calendar days after the date this decision is issued. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.
2. Within sixty (60) calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive EEO training to the management official identified as S2 if that individual is still employed by the Agency. The training shall focus on the laws, regulations, and policies governing confidentiality of medical information, and shall include a discussion of the circumstances under which such information shall and shall not be disclosed.
3. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider disciplining the management official identified as S2. The Commission does not consider training to be a 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.

4. If the responsible management official identified as S2 has left the Agency's employ, the Agency shall furnish documentation of his departure date within sixty (60) calendar days of the date this decision is issued.

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.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Distribution Center in Oklahoma City, Oklahoma 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 (M0920)

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

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

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

Complainant should submit 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, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files 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)

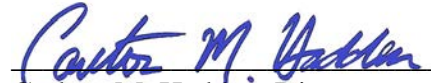
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

February 11, 2021  
Date