



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

[REDACTED]  
Tyson A.,<sup>1</sup>  
Complainant,

v.

Thomas J. Vilsack,  
Secretary,  
Department of Agriculture  
(Food Safety and Inspection Service),  
Agency.

Appeal No. 2020000972

Agency No. FSIS-2019-00177

**DECISION**

On October 31, 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 October 1, 2019, final decision concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

**BACKGROUND**

The Agency strives to protect public health by assuring meat, poultry, and egg products are wholesome through inspection of establishments<sup>2</sup> and products. Since 2012, Complainant worked as Food Inspector, Slaughterhouse, in furtherance of this mission. During the relevant time, he was assigned to the West Liberty Foods Meat Processing Plant in West Liberty, Iowa.

In mid-2018, Complainant began experiencing breathing difficulties. Complainant observed that his symptoms were greater immediately after working and eased when he was away from work.

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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.

<sup>2</sup> According to the Agency, it does not own nor control the establishments where Agency personnel perform their job duties.

Complainant was diagnosed with airway disease related to occupational irritant exposure. Immediately following this diagnosis, on August 23, 2018, Complainant submitted a doctor's note to the Agency and filed a worker's compensation claim. According to Complainant, the Agency responded by telling him that it had no work for him, failed to engage in the interactive process, and escorted him out of the plant. On November 27, 2018 and February 7, 2019, Complainant requested reasonable accommodations which would enable him to return to work. The Agency denied the requests.

Believing that the Agency's actions were discriminatory, Complainant filed a formal EEO complaint based on disability (breathing issues and Airway Inflammatory Disorder) and reprisal (requested a reasonable accommodation) on February 28, 2019.

The Agency framed the claims as follows:

1. beginning on August 23, 2018, and continuing to present, management has not authorized Complainant's return to work; and
2. on November 27, 2018, and February 7, 2019, management denied his requests for a reasonable accommodation, to include his use of a physician recommended and approved respirator while in the workplace, or a job reassignment in an area without airway irritants.

After an 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). When Complainant failed to timely request a hearing or an Agency decision, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its October 1, 2019 decision, the Agency found that Complainant was not discriminated as alleged. As an initial matter, the Agency reasoned that Complainant's August 23, 2018 doctor's note was not a request for a reasonable accommodation, but rather a statement informing management that Complainant could not work on the slaughter floor where certain chemicals were used. The sprays used to wash animal carcasses contained chemicals that caused Complainant respiratory distress. Consequently, Complainant was removed from the facility. Thereafter, in November 2018, Complainant requested the use of a respirator approved by his doctor (hereinafter "Respirator-1"). The Agency rejected Respirator-1, without describing the reason for the rejection, in its decision, but simply noted that "detailed reasons" were shared with Complainant in its February 2019 denial. When the Agency provided Complainant with a respirator (hereinafter "Respirator-2"), in early November 2018, Complainant allegedly refused to use it, without explanation. Complainant submitted a second request for an accommodation, on February 7, 2019, seeking a reassignment. After searching for a position within Complainant's parameters, the Agency notified him on April 2, 2019 that its efforts were unsuccessful. In the Agency's view, it had fulfilled its obligations to Complainant under the Rehabilitation Act.

As for his claim of reprisal, the Agency concluded that Complainant was not retaliated against when his reasonable accommodation request was denied and he was not permitted to return to work. Complainant was not prevented from returning, but rather he “refused to use the safety devices he needed to work in the Plant.” As noted above, the Agency’s failure to provide Complainant with a reassignment, was not discriminatory, but due to the fact that an appropriate position could not be located.

Complainant filed the instant appeal.

### 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”).

#### *Reasonable Accommodation*

Under the Commission's regulations, an agency is required to reasonably accommodate the known limitations of a qualified individual with a disability, unless the agency can show that the accommodation would cause an undue hardship. See 29 C.F.R. 1630.2(p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (October 17, 2002). Moreover, once an employer becomes aware of the need for an accommodation, the employer has an obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3).

To establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability; (2) he is a qualified individual with a disability; and (3) the Agency failed to provide 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). “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 or desires and, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m).

We find that Complainant is an individual with a disability. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii). The instant record reflects that Complainant, due to workplace exposure to respiratory irritants, has developed asthma with acute exacerbation. The condition substantially limits his ability to breathe.

After a complainant has shown that he is an individual with a disability, the complainant must then establish that he is a “qualified individual with a disability,” an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). Here, the record reflects that Complainant has worked as a Food Inspector since 2012. Agency management confirmed that Complainant is capable of performing the essential functions of his position. Therefore, we find that Complainant is a qualified individual.

The term “reasonable accommodation” means, in pertinent part, modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position in question. See 29 C.F.R. § 1630.2(o)(1)(ii). Reasonable accommodations may include but are not limited to the following: job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. Id.

Complainant asserts that he first requested a reasonable accommodation for his breathing problems on August 23, 2018, when he submitted his workers’ compensation claim and a doctor’s note to his manager. While the instant record does not include a copy of the August 23, 2018 note, Complainant attested that it stated that he could not be exposed to the chemicals used to wash animal carcasses because the chemicals caused him respiratory distress. Similarly, the Agency described the note as explaining Complainant could not work on the slaughter floor where certain chemicals were used and sprayed. However, instead of treating the note as a reasonable accommodation request, the Agency considered the note to be a prohibition on working the slaughter floor and sent Complainant home. Based on the limited evidence before us, we find the Agency’s failure to view the August 23, 2018 information as a request for an accommodation to be rational.

In the immediate weeks that followed, Complainant remained at home and again communicated a need for an accommodation.

On September 25, 2018, the Agency confirmed receipt of Complainant's request to use a "mask/respirator while working to inhibit/limit exposure to peracetic acid and lactic acid washes used on animal carcasses" as well as a medical release for Complainant's pulmonologist (hereinafter "Dr. H"). In an October 15, 2018 email, Complainant followed up with the Agency, plainly stating "I am formally requesting, again, a work accommodation." Attached to the email was a note from Dr. H stating: "It is reasonable to try the respirator in the work setting, to see if you would tolerate working in that setting without an exacerbation of your airway disease while working...." Complainant's doctor also advised that the respirator should be fit-tested to ensure inhaled air only flowed through the filter. It was not until October 22, 2018, that the Agency issued a response to Complainant's repeated requests for a respirator. In the email from the Human Resources Specialist/Reasonable Accommodation Advisor (hereinafter "RA-Advisor"), Complainant was informed that his request for a respirator was denied because an Agency review concluded "there is no evidence that demonstrates significant inhalation exposure to the employees at the establishment."

Complainant's attorney then made efforts to obtain an accommodation for him, writing to RA-Advisor on October 25, 2018, clarifying any early confusion over the August 23, 2018 note from Dr. H by stating that Complainant was not prohibited from working on the slaughter floor, but instead needed to mitigate his inhalation exposure. Additionally, the email noted that Complainant was eager to return to work and could provide his own respirator, but asked what other options the Agency was considering.

In a brief email, sent on November 2, 2018, Complainant's manager (hereafter "Manager-Y") notified Complainant that the Agency would be able to provide Complainant with a respirator. The record reflects that when Complainant returned to work on November 9, 2018, he was given Respirator-2 which Complainant rejected as ineffective. While the Agency contends that Complainant failed to provide any reason, the record shows otherwise. Quite simply, Respirator-2 only filtered particulate matter, and it did not filter chemical gases and vapors. Respirator-2 would not provide Complainant with the necessary protection against irritant chemicals. Further, the Agency made no effort to ensure the respirator fit properly. In contrast, a "Safety Half Facepiece Disposable Respirator Assembly" was specifically labeled for use with organic vapor and acid gas and endorsed by Complainant's pulmonologist.

Correspondence from Complainant's attorney reiterated the failings of Respirator-2 and sought an explanation for the Agency's rejection of Respirator-1. The efforts to obtain a solution that would return Complainant to work were met with a brief November 16, 2018 email, from Manager-Y, stating that he was "in the process of researching a few questions" and would be "in touch".

On November 27, 2018, Complainant received an email from Manager Y, as well as a "Denial of Reasonable Accommodation Request" form. In the email, Manager reasoned that providing Respirator-1 "would be an undue burden because it is a safety hazard while performing his animal slaughter duties as well as concerns with complying with OSHA's regulatory requirements."

The denial form provided further details for the denial. For example, the Agency cited FOH's finding that Respirator-1 was "problematic" due to Complainant's other heart and lung conditions. Additionally, the use of Respirator-1 "has the potential to interfere with his ability to look down and completely visualize his work area when using his knife." According to the denial, the size and shape of Respirator-1 "has the potential to interfere with Complainant's head movement and mobility" which is a "potential hazard to himself and co-workers" since the workplace included machinery with moving parts, moving vehicles, and slippery surfaces. Finally, the Agency stated that, based on pictures and the description of Respirator-1, it would significantly interfere with Complainant's ability to orally communicate.

As noted above, once the Agency became aware that Complainant was requesting a reasonable accommodation it was required to engage in the interactive process. This informal, interactive process should be a problem-solving approach that includes: an analysis of the job to determine its essential functions; consultations with the complainant; an assessment of the effectiveness of potential accommodations; and consideration of the complainant's preferences. 29 C.F.R. pt.1630, app. § 1630.9. The exact nature of this dialogue will vary according to the particular circumstances. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915-002 (March 1, 1999), pg. 13. In the instant case, the Agency failed to participate in this necessary exchange of information, which resulted in the improper denial of a reasonable accommodation.

The Agency's own internal Reasonable Accommodation Procedures, which it has submitted on appeal, state that the interactive process is "extremely important" as is timeliness in processing requests. Yet, the Agency's actions in this case fail to abide by its own policies. More than one month after Complainant's first requests, the Agency simply denied the presence of harmful irritants and the need for any protective equipment. Its determination illustrates the absence of any individualized assessment, and ignored the information repeatedly put forth by Complainant, including medical documentation, regarding the ineffectiveness of Respirator-2 and the benefits of Respirator-1. Moreover, when the Agency finally issued a formal denial of Respirator-1, its reasons were woefully inadequate.

With respect to FOH's concerns that the use of Respirator-1 was "problematic" due to Complainant's other medical conditions, we find these reasons are unsubstantiated. Dr. H repeatedly stated that it was "reasonable" and "worthwhile" for Complainant to try Respirator-1 in the work setting, believing that Complainant could tolerate the use without any adverse health effects. Quite plainly, Dr. H's notes reflect that he informed Agency officials that Complainant's "underlying cardiac and pulmonary conditions alone or in combination did not preclude use of a respirator." Using a possible accommodation for a limited trial period is often part of the ongoing interactive process and can be a path towards identifying an effective accommodation. Here, the Agency ignored such recommendations to test Complainant's use of Respirator-1 on the slaughter floor and instead put forward theoretical and speculative concerns.

Fears that Respirator-1 would compromise Complainant's field of vision or ability to orally communicate with colleagues, putting himself and others in harm's way, could have easily been addressed by simply testing out the device.<sup>3</sup>

The Agency's November 27, 2018 denial also indicates that evaluating Respirator-1 during a trial period would require compliance with OSHA standards and thus result in an "undue burden" for the Agency. According to the Agency, in order to permit Complainant even trial use of Respirator-1 it would have to "establish and implement a written respiratory protection program, including the medical evaluation component, training, cleaning/storage/maintenance of the respirator" since it presently did not have such a program. We find troubling the Agency's reasoning that the lack of a current written respiratory policy rises to the level of an undue hardship, thereby excusing the Agency's failure to provide a reasonable accommodation.

An "undue hardship" is a significant difficulty or expense in light of the agency's circumstances and resources. See 29 C.F.R. § 1630.2(p). The agency bears the burden of establishing, through case-specific evidence, that a reasonable accommodation would cause an undue hardship. U.S. Airways, Inc. v. Barnett, 535 U.S. at 402. "Generalized conclusions will not suffice to support a claim of undue hardship." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (October 17, 2002), "Undue Hardship Issues." The Agency has not shown that use of Respirator-1 would create an undue hardship.

In addition to not establishing that Respirator-1 was ineffective, the Agency failed to properly consider possible alternative reasonable accommodations.

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<sup>3</sup> To the extent that the Agency expands this argument on appeal to assert that use of Respirator-1 would pose a "direct threat", we find the its application of such legal theory to be misplaced. A person is a "direct threat" if he or she poses a significant risk of substantial harm to the health or safety of him or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). A finding of "direct threat" must be based on an individualized assessment of the individual that takes into account: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm, 29 C.F.R. § 1630.2(r). See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of RI, Dep't of Mental Health Retardation and Hosp., 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. In this case, the Agency argues that Complainant's *use of a particular accommodation* creates a direct threat. It asserts on appeal that FOH's evaluation of Respirator-1 concluded that its use would pose a direct threat. However, a review of the FOH communication reveals that it did not believe that Respirator-1 would benefit Complainant and it "might" induce harm – far short of posing a "direct threat".

For example, Complainant's preferred accommodation was containment of the irritant chemicals by spraying them within a fume hood or cabinet, rather than in the open where a fan blew the chemicals to Complainant's work area. While the Agency asserts on appeal that it does not control the facilities where Agency employees perform their inspection duties, correspondence between Complainant and the Agency's Occupational Safety and Health Specialist reflects that the Agency is still obligated to provide its employees with safe and healthy working conditions. There is no evidence that the Agency even raised the matter with the plant's management or owner.<sup>4</sup> Complainant also suggested he return to a facility he had previously worked, in Arcadia or Barron, Wisconsin, where the irritants were not used or were contained. The Agency counters, on appeal, that it could not detail Complainant to the alternative facilities because doing so would impact his pre-existing accommodations. Instead, the option should have been explored during the interactive process. As noted by Complainant, on appeal, implicit with his suggestion was that it was compatible with his other accommodations.<sup>5</sup> Again, if the Agency had made good faith efforts to engage in the interactive process these options would have been assessed.

Finally, by failing to prove that the reasonable accommodations proposed by Complainant and his doctor would be ineffective or create an undue hardship the Agency erred in considering reassignment. Generally, reassignment is the reasonable accommodation of last resort and should be considered only when (1) there are no effective accommodations that would enable an employee to perform the essential functions of his or her current position or (2) accommodating the employee in the current position would cause an undue hardship. 29 C.F.R. Part 1630. App. § 1630.2(n); Enforcement Guidance on Reasonable Accommodation, "Reassignment".

Based on our finding that the Agency failed to make good faith efforts to reasonably accommodate Complainant, we will remand the matter for a supplemental investigation into whether Complainant is entitled to compensatory damages. Under Section 102 of the Civil Rights Act of 1991, compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.<sup>6</sup>

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<sup>4</sup> While the instant EEO complaint is limited to consideration of Rehabilitation Act violations, medical documentation within the instant record indicates that workplace exposure to the chemical irritants *caused* Complainant's impairment.

<sup>5</sup> Complainant current assignment to the West Liberty facility allowed him to attend regular medical appointments. If moved to a Wisconsin facility, Complainant suggested he could use FMLA for such appointments.

<sup>6</sup> We need not address the additional basis of reprisal because it would not impact the remedy. See Williams v. U.S. Postal Serv., EEOC Appeal No. 01944389 (Apr. 11, 1996) (other bases of discrimination not addressed where disability discrimination found).



### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we **REVERSE** the Agency's final decision finding of no discrimination. The case is **REMANDED** to the Agency for further processing in accordance with this decision and the **ORDER** below.

### ORDER

The Agency is ORDERED to take the following action:

1. **Within 90 calendar days of the date this decision is issued**, conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages and if so, the amount of damages Complainant is entitled for this violation of the Rehabilitation Act.
  - a. Notify Complainant of his right to submit objective evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)<sup>7</sup> and request objective evidence from Complainant in support of compensatory damages (providing an option and instructions to request an extension in the case of extenuating circumstances).
  - b. Issue a written decision on the results of the investigation to Complainant with appeal rights to this Commission.
  - c. Pay Complainant the determined amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to the Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
2. **Within 90 calendar days from the date this decision is issued**, provide at least eight hours of in-person training to Manager-Y and RA-Advisor regarding their responsibilities under the Rehabilitation Act with special emphasis on the

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<sup>7</sup> For more information on determining compensatory damages: EEOC Management Directive 110, Ch. 11 § VII (August 5, 2015), available at [https://www.eeoc.gov/federal/directives/md-110\\_chapter\\_11.cfm](https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm) (provides the types of compensatory damages available under Title VII and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy, under the subsection "Proof of Damages").

Agency's obligation to provide reasonable accommodations and engage in the interactive process.

3. **Within 30 calendar days from the date this decision is issued**, the Agency shall post a notice in accordance with the paragraph below.

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 the West Liberty Foods Meat Processing Plant, West Liberty, Iowa, 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 (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:



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Carlton M. Hadden, Director  
Office of Federal Operations

August 16, 2021

Date