



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

[REDACTED]  
Jennifer K.,<sup>1</sup>  
Complainant,

v.

Thomas W. Harker,  
Acting Secretary,  
Department of the Navy,  
Agency.

Appeal No. 2020001035

Hearing No. 430-2017-00468X

Agency No. DON-14-62381-03536

**DECISION**

Complainant timely 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 final order concerning her 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. For the following reasons, the Commission REVERSES the Agency's final order.

**ISSUE PRESENTED**

The issue presented is whether the AJ properly issued a decision without a hearing, finding that the Agency did not subject Complainant to pregnancy-based disparate treatment.

**BACKGROUND**

At the time of the events at issue, Complainant was a Civil Service Mariner (CIVMAR), Second Officer, working from the Agency's Military Sealift Command (MSC) in San Diego, California. Report of Investigation (ROI) at 15.<sup>2</sup>

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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> The page numbers refer to the "bates stamp" numbers on the bottom right of each page.

Complainant's duties as a Second Officer entailed working on a Navy ship while at sea or in dock. Her duties while being assigned to a ship included, among other things, ensuring the operational readiness of all rig crews, and loading, replenishing, and discharging of all cargo and fuels. ROI at 270. In April 2014 or before, Complainant was given a cargo ship assignment to report to the USNS Alan Shepard, a vessel assigned to sail out to sea from San Diego harbor. Id. at 719.

Before she reported to her assigned ship, Complainant notified the Agency's Placement Specialist in an email on April 24, 2014, that she was pregnant and asked what options were available to her regarding work assignments. Id. at 40. Complainant was about three months pregnant at the time of her email to the Placement Specialist. According to Complainant, at the time of her email to the Placement Specialist, Complainant believed she was able to perform the essential functions of her position. Complainant thought she was qualified, physically fit, and ready for a shipboard assignment and did not need a reasonable accommodation. Id. at 884-885.

The next day, the Placement Specialist responded to Complainant's email, writing that Complainant obviously could not be assigned to the USNS Alan Shepard due to her pregnancy. Id. at 39. The Placement Specialist suggested that Complainant take leave and notify the medical department of her pregnancy, which would most likely determine that she would be Not-Fit-For-Duty (NFFD). Id. The Placement Specialist further wrote that once Complainant was declared NFFD, she could ask Employee Labor Relations for an assignment to a ship that was not scheduled to leave dock and sail out to sea. Id. Complainant then began to take leave and the Medical Department declared that she was NFFD on April 28, 2014. Id. at 635.

Meanwhile, in April 2014 the Captain apparently left a voicemail for Complainant, telling her that he was willing to help her obtain an accommodation and he had just helped a few other pregnant officers who got work shore side. Id. at 889-890. Thereafter, on May 12, 2014, Complainant submitted a request for reasonable accommodation form. In the form, Complainant wrote that "[T]he shipboard environment is not conducive to a healthy prenatal situation. I may not be able to climb ladders, enter confined spaces or tanks as once possible." Id. at 98-99. Complainant therefore specifically requested a shore side position, which would enable her to regularly attend prenatal doctor's appointments. Id.

On June 20, 2014, the Deputy Director of Manpower Personnel (DDMP) emailed the Director of the Placement Division about temporarily placing Complainant into a temporary shore side position as a Marine Placement Assistant (MPA). Id. at 71. But the Director of the Placement Division responded that Complainant could not be placed into the vacant position because she was not considered disabled and so the MPA position would need to be opened for competition nationwide. Id.

Complainant thereafter continued to contact several management officials in an effort to obtain an accommodation for her pregnancy. Meanwhile, Complainant accumulated days of sick and annual leave, including 112 hours of annual leave from May 6 through May 23, 2014, and 528 hours of leave without pay from May 27 through August 1, 2014. Id. at 4, 105-107.

During this time, Complainant emailed Labor Relations on July 24, 2014, in a further attempt to get her accommodation request granted. Id. at 47. Therein, Complainant specifically wrote:

I have not received any response from you yet and I'm not sure if you're in the office. I would like an answer regarding my reasonable accommodation case since I'm now out of leave and am accumulating an insurance debt. If you cannot answer me then please forward this to your boss so they can.

Id.

An employee with Labor Relations responded to Complainant's email, writing that management has been unable to accommodate her, but she would continue to look for other positions that Complainant could qualify for. Id. In July 2014, as Complainant was no longer assigned to any job duties, she moved to Eugene, Oregon, due to a job opportunity for her husband. Id. at 69, 896. The next month, in August, after Complainant moved, the DDMP offered Complainant training classes in Seattle, Washington, for a possible position. Complainant, however, did not accept the training offer because she had already taken the offered classes, and, therefore, she believed taking the classes would not help her find a position. Id. at 664.

Subsequently, on August 26, 2014, Complainant received a certified letter from the Director of the Placement Division dated July 25, 2014. Id. at 240-242. Therein, the Director wrote that Complainant's request for reasonable accommodation was denied because she did not meet the definition of an individual with a disability as the condition of pregnancy is not considered to be a disability. Id. After Complainant gave birth to her son on November 17, 2014, she formally resigned from the Agency.

### *Procedural Background*

On September 10, 2014, Complainant contacted an EEO Counselor and filed a formal EEO complaint on November 4, 2014, alleging she had been discriminated against on the bases of sex (female - pregnancy) when, upon management learning of her pregnancy, she was removed from all duties and forced to use leave and encumber insurance debt.

Following the investigation, the Agency provided Complainant with a report of the investigation and notification of her right to request a hearing before an EEOC Administrative Judge (AJ). The request for a hearing form provided by the Agency indicated that it should be filed with EEOC's Charlotte, North Carolina District Office.

On May 26, 2015, Complainant, through her attorney, timely filed a request for a hearing with the EEOC's Los Angeles District Office. The cover letter accompanying the hearing request explained the reason for filing the hearing request with the Los Angeles office rather than Charlotte as directed by the Agency:

My client's duty location with the Military Sealift Command (MSC) was (is) San Diego, California. My client, a Second Officer with the MSC, received all of her

assignments from its San Diego offices until she became pregnant at which time she was taken out of the assignment pool.

A copy of this letter was provided to Agency counsel. The Agency responded to Complainant's attorney by letter indicating that it did "not acquiesce in [Complainant's] request to have the case heard in California." Complainant expressed her objections to the Agency's position that the hearing should be held in Charlotte, indicating that her duty station was in California and she had filed her request with the EEOC office with jurisdiction over the geographic location in which the discrimination occurred. The Agency filed its objections to Complainant's position, indicating that although Complainant worked in California, her official duty station was in Norfolk, Virginia, and the "detailer and shore-side supervisor" responsible for her assignments, was located in Norfolk.

On February 11, 2015, EEOC's Los Angeles hearings unit issued a Notice of Transfer, transferring the case to the Charlotte hearings unit. Thereafter, on July 22, 2016, the Agency filed a motion for sanctions against Complainant for failure to file a timely hearing request with the proper office. The Agency requested dismissal of the hearing request and a remand of the complaint to the Agency for the issuance of a final decision.

On December 20, 2016, following issuance of an order to show cause, the AJ in Charlotte issued an "Order of Sanction and Dismissing Hearing Request" granting the Agency's motion. In the Order, the AJ dismissed Complainant's hearing request "as sanction for untimely filing and blatant disregard for proper jurisdictional filing." The complaint was remanded to the Agency for the issuance of a final decision.

Complainant subsequently appealed the AJ's dismissal of her hearing request to the Commission, which the Commission addressed in Jennifer K. v. Dep't of the Navy, EEOC Appeal No. 0120171630 (June 26, 2016). Therein, the Commission concluded that the AJ erred in imposing sanctions against Complainant. In so finding, the Commission noted that Complainant did not violate an order from an AJ; there was no evidence that the Agency was harmed by Complainant's actions; and any delay resulted in harm to Complainant, not the Agency. The Commission therefore reversed the AJ's December 20, 2016, order sanctioning Complainant and remanded the matter back to the Charlotte hearings unit.

The same AJ of the Charlotte hearings unit was then again assigned to Complainant's case who held an Initial Conference with the parties on January 25, 2018. The next day on January 26, 2018, the AJ issued an Order on Initial Conference, giving the parties a 90-day discovery period with the commencement date beginning on March 5, 2018. The Order noted that discovery must be initiated on or before March 5, 2018, at 5:00 p.m. or the parties would be deemed to have waived the right to conduct discovery.

On March 5, 2018, Complainant's Counsel, who resided in Portland, Oregon, initiated discovery by serving the Agency with interrogatories that afternoon before 5:00 p.m. Eastern Standard Time (EST). The Agency also, before 5:00 p.m. EST, served Complainant with interrogatories, document requests, admission requests, and a deposition notice.

However, at 4:56 p.m. EST, Complainant's Counsel emailed the AJ asking for clarification regarding the language of the AJ's January 26, 2018, Order on Initial Conference. Complainant's Counsel specifically wrote in the email to the AJ:

The parties appear to have some confusion. Pursuant to your order (re-attached for reference) which requires that discovery be "initiated" today, on behalf of Complainant, I served a full set of interrogatories. My understanding is that one can initiate discovery as such based on my extensive practice with EEOC (but not in the Charlotte office). I ask that you kindly confirm. The ninety-day discovery period was set to begin today. I intend to serve additional discovery. The agency has declined to take a position on this question at this time and has encouraged me to ask the tribunal for clarification.

If for some reason the tribunal actually requires a party to serve *all* discovery by today's date, I was not placed on adequate notice of such requirement and would need an extension to serve document requests, request for admissions, and deposition notices. I apologize for the confusion. Thank you in advance for clarifying the situation.

At 5:51 p.m. EST, the AJ responded to Complainant's Counsel's email writing that discovery requests were due at 5:00 p.m. Complainant's Counsel then replied via email to the AJ that she thought she only had to initiate discovery by 5:00 p.m., which she did by sending the Agency interrogatory requests before 5:00 p.m. EST. Complainant's Counsel explained to the AJ that she was unaware that she had to serve all discovery requests by 5:00 p.m., and therefore asked the AJ to grant her a short extension. After the AJ did not reply to Complainant's Counsel's request for an extension, she quickly served document requests, admission requests, and deposition notices to the Agency on March 5, 2018, at 7:50 p.m. EST (4:50 p.m. Pacific Standard Time (PST)). The AJ later emailed the parties writing that the proper time zone for the parties to submit discovery requests was 5:00 p.m. EST, and not PST where Complainant and her counsel resided.

After the Agency objected to Complainant's Counsel's document requests, admission requests, and deposition notices, Complainant's Counsel filed a Motion to Compel on April 12, 2018. Therein, Complainant's Counsel requested that the AJ issue an order finding all of Complainant's discovery timely and compelling the Agency to provide full responses to Complainant's Request for the Production of Documents and Request for Admissions. The AJ however denied Complainant's April 12, 2018, Motion to Compel, finding that Complainant's discovery requests were untimely filed.

#### *AJ's Decision*

The Agency subsequently submitted a Motion for Summary Judgment on June 19, 2018, and Complainant responded to the motion. On September 5, 2019, the AJ issued a decision by summary judgment in favor of the Agency. The AJ specifically noted that even though Complainant may have contested management's reason for removing her from ship assignments, she failed to present any evidence that disputed the fact that she was NFFD. The AJ found that

Complainant did not clearly demonstrate that the Agency was more likely than not motivated by some discriminatory animus. The AJ observed that the Agency's pregnancy policy is found in its Civilian Marine Personnel Instructions and Complainant did not provide a persuasive argument that this material was not available to her.

The AJ found that even with Complainant not qualifying as a person with a disability, the Agency attempted to provide an accommodation. The AJ noted that Complainant sought a shore side position close to her home in Oregon, so she could continue to see her midwife. The AJ noted that Complainant found the offered accommodations unacceptable and declined. The AJ specifically found that the Agency encouraged Complainant to pursue shore side training, which Complainant rejected. The AJ noted that the Agency was not required to provide Complainant with an accommodation of her choice, but rather an accommodation that allowed her to continue working within her restrictions.

The Agency thereafter issued the instant final order implementing the AJ's decision. The instant appeal followed.

### CONTENTIONS ON APPEAL

#### *Complainant's Brief on Appeal*

On appeal, Complainant, through her Counsel, maintains that she was forced to take unpaid maternity leave and ultimately resign due to the Agency's failure to provide her with an accommodation for her pregnancy. Complainant states that there is no dispute that she had a healthy pregnancy free of complications and the Agency knowingly deemed her as NFFD based only on her pregnancy status and used that status to remove her from all shipboard assignments.

Complainant notes that after having been removed from her shipboard assignment in April 2014, she returned to her home in Vermont. Complainant contends that she attempted to obtain a position through reasonable accommodation until mid-July 2014 and held herself ready to report anywhere. Complainant asserts that by July, she was five months pregnant, out of paid leave, and encumbering insurance debt. She maintains that she still had not received any news about a substitute assignment or reasonable accommodation. She states that she and her husband moved to Eugene, Oregon, where he had employment options. Complainant asserts that the Captain subsequently left her a voicemail, saying the Agency could potentially find a job for her at or near her home in the Pacific Northwest where she was moving to. But she called him back several times and never heard from him again.

Complainant contends, moreover, that numerous non-pregnant civilian mariners who have medical issues and limitations – some quite serious – are routinely found fit-for-duty and deployed on shipboard assignments. Complainant maintains that the Agency categorically treats those employees more preferentially than pregnant civilian mariners with respect to fitness-for-duty findings and assignments.

Complainant contends, furthermore, that the AJ did not fully afford her the opportunity to engage in discovery before issuing Summary Judgment in the Agency's favor. Complainant specifically notes that the AJ's Order on Initial Conference only required the parties to "initiate" discovery on March 5, 2018, by 5:00 p.m. Complainant maintains that the AJ's Order did not put her on notice that *all* discovery requests were to be served on the first day of discovery, nor did it state that all discovery had to be served by according to the AJ's time zone.

Complainant asserts that because she initiated discovery by filing her interrogatories earlier than 5 p.m. EST, she technically met the terms of the AJ's Order. She maintains that she should have been allowed to serve additionally discovery as long as it could be answered before the expiration of discovery, which was set for June 4, 2018. Complainant asserts, moreover, that her discovery requests were filed before 5:00 p.m. PST, and therefore were timely requested in accordance with the AJs order. Complainant maintains that she requested a reasonable extension of a mere three hours upon which to initiate discovery, which was denied by the AJ. Complainant believes that the AJ's refusal to enforce her additional discovery requests constitutes as an abuse of discretion and another improvident sanction, both of which show bias against Complainant.

#### *Agency's Response*

In response, the Agency argues, in pertinent part, that Complainant maintained that she could not perform the functions of her position as a Second Officer on a ship. The Agency asserts that it nevertheless made good faith efforts to look for training and a temporary shore-side job for Complainant. The Agency contends that it does not offer teleworking positions for CIVMARs, but it nevertheless still looked for any type of position that Complainant could perform from her home while she lived in Oregon.

The Agency also believes the AJ properly denied Complainant's Motion to Compel, as Complainant's Counsel submitted her requests for production and requests for admissions past the March 5, 2018, 5:00 p.m. EST deadline. The Agency notes that the AJ, on January 29, 2018, responded to Complainant's Counsel's email writing that the EST applied, and therefore, Complainant's Counsel had ample notice regarding the AJ's set deadline to initiate discovery. The Agency also states that the AJ provided Complainant's Counsel with a generous extension of time to respond to its Motion for Summary Judgment, and Complainant's Counsel clearly has not established that the AJ exhibited bias in this case.

#### STANDARD OF REVIEW

We determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56.

The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

### ANALYSIS AND FINDINGS

#### *Summary Judgment*

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Issuing a decision without holding a hearing is not appropriate for a case that can only be resolved by weighing conflicting evidence. If the non-moving party "has not had the opportunity to discover information that is essential to his opposition," then a decision without a hearing is inappropriate. Anderson, 477 U.S. at 250. The AJ must enable the non-moving party to engage in sufficient discovery to respond to a motion for a decision without a hearing. After receiving an opposition to a motion for a decision without a hearing, an AJ may order discovery as necessary. 29 C.F.R. § 1614.109(g)(2).

After a careful review of the record, we find that the AJ's issuance of a decision without a hearing was not appropriate as Complainant was not fully afforded the opportunity to engage in discovery, the record has not been adequately developed, and there are genuine issues of material fact in dispute. We further find that the AJ erred as a matter of law, as explained below.

#### *Discovery*

In the present case, Complainant argues on appeal that the AJ improperly did not fully afford her the opportunity to engage in discovery before issuing Summary Judgment in the Agency's favor. We note that AJs have broad discretion in the conduct of hearings, including discovery, and the determination of whether to admit evidence, issue sanctions or permit or compel the testimony of witnesses. See 29 C.F.R. § 1614.109. Notwithstanding, we note that the record reflects that both parties expressed confusion over the AJ's January 26, 2018, Order, which noted that discovery must be initiated on or before March 5, 2018, at 5:00 p.m. Both parties seem to have been unsure if the language used in the Order that discovery must be initiated on or before March 5, 2018, at 5:00 p.m. meant that all discovery requests were actually due at that time. Complainant asserts that because she initiated discovery by filing her interrogatories earlier than 5:00 p.m. EST, she technically met the terms of the AJ's Order to start discovery. Complainant therefore maintains that she should have been allowed to submit her additional discovery requests, as she initiated discovery by submitting interrogatories before 5:00 p.m. EST and the expiration of discovery was not actually set until June 4, 2018.

Due to the expressed confusion by the parties about the language contained in the AJ's January 26, 2018 Order, as well as the time zone difference, we find in the interest of fairness that the AJ should have granted Complainant's request for an extension to fully submit her discovery requests. There is no evidence that the Agency was unfairly prejudiced by Complainant's failure to submit her discovery requests by a mere three hours.

We note that as part of her discovery requests Complainant's Counsel requested Human Resources documentation related to Complainant beginning in April 2014 through September 2015, when Complainant was removed from her duties. Complainant's Counsel also requested documentation related to the Agency's finding that she was NFFD because of her pregnancy. Given the significance of Complainant's claim that she was removed from her duties after informing the Agency of her pregnancy, we find that this requested discovery could be relevant to the outcome of Complainant's case.

The AJ has a responsibility to ensure that the record has been adequately developed for a hearing and ensure that Complainant has had ample opportunity for appropriate discovery. Under the circumstances, we find that the AJ abused her discretion in denying Complainant's Motion to Compel with respect to her requests for production and requests for admissions.

*Sex (Pregnancy) Discrimination in violation of Title VII<sup>3</sup>*

We note that the Pregnancy Discrimination Act (PDA) requires that an agency treat women affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, as other persons not so affected but similar in their ability or inability to do work. 42 U.S.C. § 2000e(k) (1994). Thus, a complainant alleging that the denial of an accommodation for a pregnancy-related condition constituted disparate-treatment sex discrimination may state a prima facie case by showing that: (1) she belongs to the protected class; (2) she sought accommodation; (3) the agency did not accommodate her; and (4) that the agency did accommodate others "similar in their ability or inability to work." Young v. United Parcel Service, 575 U.S. 206, 229 (2015). Complainant may satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment and who was provided an accommodation that the pregnant employee sought.

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<sup>3</sup> EEOC guidance also provides that complainants may pursue a "disparate impact" theory of discrimination because "Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions and the employer cannot show that the policy is job related for the position in question and consistent with business necessity." See Enforcement Guidance: Pregnancy Discrimination and Related Issues, No. 915.003 (June 25, 2015).

Once Complainant has established a prima facie case, the Agency must articulate a legitimate, non-discriminatory reason for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. Id. (citing, McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)). “That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (‘similar in their ability or inability to work’) whom the employer accommodates.” Id. The complainant may then show that the agency's reasons are pretextual, which can be done “by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden, but rather--when considered along with the burden imposed--give rise to an inference of intentional discrimination.” Young, 575 U.S. at 229.

In the case at hand, we find there are genuine issues of material fact in dispute as to whether Complainant established a prima facie case of pregnancy-based disparate treatment. Specifically, with regard to prong (3), we find that there are material facts in dispute as to whether the Agency offered Complainant an accommodation. We note that the AJ found that the Agency offered Complainant training for a position while she lived in Eugene, Oregon, which she refused because she did not want to leave her midwife. However, the record reflects that Complainant was not offered training for a possible reassignment until August 2014, nearly four months after she first notified the Agency of her pregnancy. By this time, Complainant had already expended hours of sick and annual leave, including 528 hours of leave without pay from May 27 through August 1, 2014. ROI at 4, 105-107. Complainant also averred that the offered training would not have help her obtain a position, as she had already taken the training at issue. Id. at 664. Complainant maintained that she attempted to follow-up with the Agency but received no response. Id.

In addition, the record reflects that there was a vacant MPA shore side position available that the DDMP believed Complainant could have been temporary assigned. Id. at 71. But the Director of the Placement Division responded that Complainant could not be placed into the vacant position because she was not considered disabled and so the MPA position would be opened for competition for employees nationwide. Id. However, the Director of the Placement Division believed that a pregnant civilian employee could be temporary assigned to the medical ships USNS Comfort and USNS Mercy. Id. at 105. We note, moreover, that the DDMP maintained that Complainant was offered temporary assignments in San Diego and Norfolk, which Complainant rejected. Id. at 167, 824-825. Complainant stated, however, that she was not offered any such positions, and we note that the record does not support that any such accommodation offers were made to Complainant. Id. at 664. We, therefore, find that the DDMP’s credibility, along with other management officials, must be assessed through a live hearing.

We further find that the AJ erred as a matter of law in failing to specifically address prong (4) of the prima facie case and whether the Agency articulated a legitimate, non-discriminatory reason for treating the pregnant worker (Complainant) differently than a non-pregnant worker similar in his/her ability or inability to work.

The AJ only notes that the Agency's reason for its actions was that Complainant was declared NFFD. However, this cited reason by the AJ does not specifically address a legitimate reason for treating Complainant differently than a non-pregnant worker similar in his/her ability or inability to work, in accordance with Young.

The Agency must therefore articulate a justification for not having to accommodate Complainant, a pregnant worker, while accommodating other categories of workers. The record needs to be developed as to whether the Agency accommodates other employees for medical conditions that require reassignment to a shore side position. We note that Complainant did not have any pregnancy related complications and she felt like she was coerced by management into being placed in NFFD status.

Moreover, on August 26, 2014, Complainant received a certified letter from the Director of the Placement Division dated July 25, 2014. ROI at 240-242. Therein, the Director wrote that Complainant's request for reasonable accommodation was denied because Complainant did not meet the definition of an individual with a disability because the condition of pregnancy is not considered to be a disability. Id. As such, we find that there are genuine issues of material fact in dispute as to whether the Agency has a policy or practice in place of not having to accommodate pregnant workers while accommodating other categories of workers.

We note that the Young inquiry is satisfied if the employer has a practice or policy that indicates some class of workers are entitled to accommodations when pregnant workers are not provided such a benefit and are similar in their ability or inability to work. The AJ should facilitate developing the record to determine whether such practice or policy existed and whether Complainant can show pretext by demonstrating that such a practice or policy imposes a significant burden on pregnant workers. We note that Complainant can show pretext by establishing that the Agency's legitimate, nondiscriminatory reason is not sufficiently strong to justify the burden imposed. See Elease S. v. U.S. Postal Serv., EEOC Appeal No. 0120140731 (Dec. 27, 2017) (genuine issues of material fact existed as to whether the Agency provided more favorable treatment to non-pregnant employees, and the Commission instructed the agency to further articulate a justification for its stated policy of not having to accommodate pregnant workers while accommodating other categories of workers).

In sum, we find that there are too many unresolved issues and genuine issues of material fact that require an assessment as to the credibility of the various management officials as well as Complainant herself. We further find that the record is not adequately developed, and Complainant was not adequately afforded the opportunity to engage in discovery, as noted above.<sup>4</sup>

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<sup>4</sup> There is no dispute that Complainant did not have any complications related to her pregnancy, and, therefore, she was not an individual with a disability. However, we are not reaching a finding as to whether or not Complainant was regarded as an individual with a disability and subject to discrimination under the Rehabilitation Act in this case.

### CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission REVERSES the Agency's final order and REMANDS the matter to the Agency in accordance with this decision and the Order below.

### ORDER

The complaint is remanded to the Hearings Unit of the EEOC's Charlotte District Office for the scheduling of a hearing. The Agency shall submit a copy of the complaint file to the Hearings Unit of the EEOC's Charlotte District Office within fifteen (15) calendar days of the date this decision becomes final. The Agency should request that a different AJ than the AJ who issued the September 5, 2019, decision in this case handle the hearing. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

### 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

May 20, 2021

Date