



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

[REDACTED]  
Damon Q.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020003388

Hearing No. 480-2020-00105X

Agency No. DLAN-19-0065

**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 his 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 order.

**ISSUES PRESETED**

The issues presented are: 1) whether the EEOC Administrative Judge (AJ) properly issued summary judgment in favor of the Agency; and 2) whether Complainant established that the Agency subjected him to harassment based on his disability, as alleged.

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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.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supply Technician, GS-05, at the Agency's Warehouse in Yermo, California. Report of Investigation (ROI) at 8. Complainant also worked as a Representative with the Union and is a left-hand amputee. ROI at 10. The Warehouse Supervisor served as Complainant's first-level supervisor (S1), and Complainant was also managed by the Director as well as the Deputy Director.

According to Complainant, during a December 19, 2018, safety re-enactment in building 405, which was watched by an audience of employees, the Director commented that he (Complainant) was working in an unsafe manner and then mimicked a crate inspection as though he had no left hand. Id. at 305. Complainant found the Director's mimicking of him and his disability to be offensive and he felt humiliated by the Director's actions. Id.

Complainant explained that after the re-enactment meeting, he approached the Director and asked him not to mimic his impairment as he had. Id. However, according to Complainant, the Director then became irate saying he was the one who brought up his impairment first and "got in his face" wherein Complainant felt the Director violated his personal space. Id. at 305-307. Complainant then apparently felt intimidated and threatened by the Director's comments and demeanor towards him and attempted to walk away from the Director. Id. Complainant averred, however, that as he attempted to walk away, the Director followed close behind him continuing to aggressively comment about the matter. Id.

In response, the Director did not dispute that he demonstrated the crate inspection as if he had no left hand to show that Complainant was not properly performing the task. The Director specifically averred that he reiterated that Complainant performed the safety inspection in an unsafe manner and he "put his arm up with his elbow bent," demonstrating the way Complainant performed the task. Id. at 337.

The Supervisory Facilities Specialist, who was present for the safety re-enactment on December 19, 2018, attested that the Director mimicked how Complainant may have performed the task by acting as though he did not have a left hand. Id. at 352. The Supervisory Facilities Specialist also observed Complainant and the Director talking after the re-enactment and thought it looked like an intense conversation. Id. The Supervisory Facilities Specialist did overhear the Director saying to Complainant that he was disappointed Complainant would espouse unsafe acts in front of other employees as he expected better from a Union Vice President. Id. The Distribution Process Worker, who also was present for the reenactment, attested that the Director made an off handed comment about Complainant's impairment and that he saw the Director mimicking Complainant's impairment as well. Id. at 369-370.

A Material Handler, who attended the re-enactment as well, similarly saw that the Director demonstrated how Complainant unsafely performed a task while acting as though he had no left hand. Id. at 373-374.

The Material Handler further explained that he observed Complainant and the Director talking after the safety re-enactment and he observed the Director getting closer and closer to Complainant to the point of Complainant putting his arm up between the two of them. Id. The Material Handler did not overhear what was being said between them, but he did see the Director walking behind the Complainant. Id. A second Material Handler also recalled the Director showing that Complainant was performing in an unsafe manner by acting as though he had no left hand.

Also, according to Complainant, on December 28, 2019, he met with the Supervisory Facilities Specialist to talk about the December 19, 2018, incident. Complainant then asked the Supervisory Facilities Specialist if he could meet with the Deputy Director that day who was in his office. Complainant explained that when he went to the Deputy Director's office, the Deputy Director asked him, "you don't have a gun on you, do you?" Id. at 307. Complainant felt that this comment from the Deputy Director was insinuating and embarrassing. Complainant averred that he then explained to the Deputy Director about how he felt about the re-enactment and that he did not wish to attend anymore meetings with the Director.

However, according to the Deputy Director, when Complainant initially asked to meet with him, he jokingly commented something to the affect "as long as you don't have a gun on ya." Id. at 342. He attested that he was just joking around and it appeared Complainant understood this as he also laughed at the comment. Id. During their discussion, Complainant mentioned that the Employee Assistance Program (EAP) Counselor had recommended he not be present in meetings with the Director and he was just there to let him know this. Id. at 342-343. The Deputy Director averred that he stated it would not be a problem and he hoped the matter would be resolved in the future. Id.

Thereafter, on January 31, 2019, the Safety Representative sent an email to Complainant, carbon copying the Director and Deputy Director, writing that she was told that Complainant did not attend the Command Awards Committee (CAC) meeting due to a conflict of interest with Management. Id. at 17. The Safety Representative further wrote that if Complainant was unwilling to participate for whatever reason, he should send an alternative Union Representative in his place. Id. The Safety Representative also generated meeting minutes from the CAC meeting, wherein it was noted that Complainant was not in attendance, and therefore there was no Union Representative present.

Complainant received another email on February 13, 2019, from the Safety Representative with additional CAC meeting minutes attached. Page four of the meeting minutes noted there was no Union Representative present at the meeting because Complainant chose not to attend as he did not want to participate in management meetings. Id. at 126.

Complainant believed that the emails from the Safety Representative and the meeting minutes made it appear as though he had an issue with all of management, which was not the case. ROI at 308-309. Complainant maintained that he never had a conflict of interest with management and did not state he did not wish to participate in management meetings. Id.

Complainant explained that he had only mentioned not wanting to be in meetings with the Director due to the December 19, 2018, incident. Id. He maintains that the emails and the meeting minutes reflect that the Safety Representative was obviously informed of his issues with the Director. Id. Complainant thought that the email and the meeting minutes cast him in a negative light. Id.

Months later, on April 12, 2019, an appointment of an Investigation Officer was issued to conduct an Army Regulation (AR) 15-6 investigation into Complainant's allegations. Sworn statements were taken by several employees who witnessed the re-enactment of December 19, 2018. Id. at 166. The findings of the AR 15-6 investigation determined there was nothing to support Complainant's allegations.

Meanwhile, on January 7, 2019, Complainant contacted an EEO Counselor and filed a formal EEO complaint on April 10, 2019, alleging that the Agency discriminated against him and subjected him to harassment on the bases of disability (amputee) and reprisal for prior protected EEO activity when:

1. On December 19, 2018, the Director mimicked his physical disability during the safety re-enactment meeting.
2. On December 19, 2018, he approached the Director to talk to him about his conduct during the safety re-enactment meeting, the Director in turn responded to him in an intimidating manner.
3. On December 19, 2018, while walking away from the Director because of his intimidating response and mannerisms, the Director walked behind Complainant talking aggressively about his physical disability.
4. On December 28, 2018, during a meeting with the Deputy Director, Complainant was asked by the Deputy Director, "Do you have a gun on you?" He perceived his comment as retaliation because he voiced dissatisfaction with the Director's mimicking his missing limb.
5. On January 7, 2019, while in his car, on his work break, and talking on the phone with the EEO office, the Deputy Director noticed he was on his cell phone. The Deputy Director walked past Complainant and inquired of his supervisor about him being on the phone.
6. On January 31, 2019, he received an email from the Safety Representative that was courtesy copied to the Director and Deputy Director reminding him if Complainant was not attending meetings to send an alternate person. He perceived the email as further reprisal creating a hostile work environment.

7. On February 13, 2019, he received an email from the Safety Representative stating he chose not to come to the regularly scheduled meeting because he did not want to participate in management meetings.

Following its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The AJ notified the parties *sua sponte* of an intent to issue a decision without a hearing and both parties responded. The AJ subsequently issued a decision by summary judgment in favor of the Agency.

The AJ found that assuming the incidents occurred as alleged regarding claims 1-3, the Agency's conduct was not severe or pervasive enough to rise to the level of a hostile work environment. In so finding, the AJ noted that, although Complainant felt the Director's safety re-enactment was offensive towards him, the evidence of the record showed that the Director's comments and actions were not actually objectively degrading or humiliating. The AJ observed that the Director was motivated by safety concerns to ensure that all employees were on notice for how to properly perform crate inspections and he was frustrated that Complainant had unsafely performed the crate inspection in front of employees given his respected position as a representative with the union. In addressing claims 4-5, the AJ also found that, assuming these matters occurred as alleged, they were also not severe or pervasive enough to meet the threshold necessary to establish a hostile work environment. The AJ also determined, regarding claims 6-7, that Complainant was the union representative for the unit and did not send an alternate to the meetings at issue. The AJ found that the Safety Representative was not motivated by discriminatory or retaliatory animus by her actions and was instead motivated by the lack of union leadership at the meeting and a desire to ensure attendance by the union at future meetings.

### CONTENTIONS ON APPEAL

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

On appeal, Complainant, through his attorney, contends that the Director was not required to demonstrate the crate inspection as if he did not have an arm. Complainant contends that the AJ erred in finding that the Director's actions were intended to address safety concerns, as an employee attested that the "[Director] quickly followed up [Complainant's] statements with an offhand comment toward his disability." Complainant maintains that another employee, who witnessed the re-enactment attested that "it was not the words [the Director] used but how he used them, referring to his missing arm. It was an uncomfortable moment for me." Complainant also notes that the Supervisory Facilities Specialist recalled that the Director was in his face following the re-enactment and Complainant was putting his arm up to keep the Director away. Complainant asserts that the Supervisory Facilities Specialist saw that both he and the Director were in a close, intense conversation after the re-enactment and that he (Complainant) put his arm up near his chest area.

Complainant additionally maintains that there is evidence in the record showing that the January 31, 2019, email he received was motivated by retaliatory animus. Complainant contends that he was cited for not being in attendance to the CAC meeting even though he put management on notice that he felt he was being harassed because of his disability by the Director. Complainant states management received an email from him stating that he would not be in attendance because his EAP Counselor recommended that he not attend any meeting with the Director. Complainant notes that his email identified an individual as a person who would take his place as the union representative for the meeting. Complainant also contends that the Agency did not take prompt measures to correct and address the harassment towards him as the Agency's AR-15-6 investigation was not conducted until April 12, 2019, months after he notified the Agency of the harassment towards him.

#### *Agency's Response*

In response, the Agency asserts that the AJ properly found that the Director did not mimic Complainant's impairment in an inappropriate fashion. The Agency contends that the Director's demonstration simply showed how to perform a crate inspection safely, as Complainant demonstrated how to perform the crate inspection in an unsafe manner. The Agency maintains that the Director needed to consider Complainant's disability to show how to safely perform a crate inspection. The Agency maintains that Complainant has not established that it was motivated by discriminatory or retaliatory animus.

#### STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See *id.* at Chapter 9, § VI.A. (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").

## ANALYSIS AND FINDINGS

### *Summary Judgment*

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

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." Pedersen v. Dep't of Justice, EEOC Request No. 05940339 (Feb. 24, 1995).

After a careful review of the record, we find that summary judgment was appropriate because no genuine dispute of material fact exists. However, we find that the AJ erred in finding in favor of the Agency, as the record reflects that Complainant was subjected to a hostile work environment, and liability can be imputed to the Agency as discussed below.

### *Hostile Work Environment*

In order to establish a claim of hostile environment harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he 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 environment, 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).

In this case, we first find that Complainant is a member of a statutorily protected class because there is no dispute that Complainant is an individual with a disability, as he is a left-hand amputee. Regarding prongs 2 and 3, there is also no dispute that during the December 19, 2018, safety re-enactment, which was watched by an audience of employees, the Director commented that Complainant was working in an unsafe manner and then mimicked a crate inspection as though he had no left hand. As the Director said himself, he reiterated that Complainant performed the safety inspection in an unsafe manner and he “put his arm up with his elbow bent,” demonstrating the way Complainant performed the task. ROI, at 337. We note that an audience of employees witnessed the Director’s mimicking of Complainant’s disability, and Complainant understandably felt humiliated and embarrassed by the Director’s actions. We note, moreover, that after the re-enactment meeting, Complainant approached the Director and asked him not to mimic his impairment as he had. But employees witnessed that the Director responded to Complainant in an intimidating and an abrasive manner after the re-enactment. Therefore, the Directors actions and comments were clearly unwelcome, and were made in reference to Complainant’s disability.

Regarding prong 4, we note that in evaluating whether the conduct is severe or pervasive enough to create a hostile work environment, the harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994). In this case, we note that Complainant attested that he felt threatened, embarrassed, and humiliated by the Director’s impersonation of him with his impairment during the safety reenactment. Complainant maintained, moreover, that the Director was also aggressive towards him after he complained to the Director that the mimicking of his disability was offensive towards him. We note that employees observed that Complainant and the Director engaged in a “heated” conversation after the reenactment, and a Material Handler attested that he observed the Director getting closer and closer to Complainant to the point of Complainant putting his arm up between the two of them. As noted above, the Director did not dispute that he demonstrated the crate inspection as if he had no left hand to show that Complainant was not properly performing the task.



Moreover, several employees also attested that they observed the Director mimicking Complainant's disability, pretending he had no left hand in showing that Complainant was unsafely perform crate inspections. We note that an employee specifically attested:

We had a safety meeting about how to open crates with various tools. When a tool was mentioned by Complainant [the Director] said 'Oh your [sic] going to open it?' It was not the words he used but how he used them, referring to Complainant's missing arm. It was an uncomfortable moment for me. After we were dismissed from the meeting a few of us were away from the crate in a little group and I looked and heard loud voices by the crate. [The Director and Complainant] were having discussions in loud voices.

ROI at 259.

According to Complainant, he was so humiliated by the Director's mimicking of his disability in criticizing his performance in front of employees that he communicated to the Deputy Director, among others, that he no longer wished to attend meetings wherein the Director would be present. Rather than immediately addressing Complainant's request and concerns of a hostile work environment, the Agency generated CAC meeting minutes noting that Complainant did not want to attend the meeting because he did not want to meet with management. Complainant further received emails wherein he was accused of having a conflict with management. Complainant believed that the meeting minutes and the emails cast him in a negative light, as he only wanted to be away from the Director and did not have a conflict with management as a whole.

Upon review, we determine that a reasonable person in Complainant's circumstances would find that management's actions were severe enough to create a hostile work environment based on disability regarding claims 1-3, 6, and 7.<sup>2</sup>

### *Liability*

The record shows that the Director was responsible for the supervision of Complainant. An employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee; See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998).

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<sup>2</sup> We find that Complainant did not show that he was subjected to a hostile work environment regarding the Deputy Director's actions with respect to claims 4 and 5. We find, regarding claim 4, that the Deputy Director's comment, while inappropriate, was made in jest and was not severe enough to rise to the level of a hostile work environment. In addition, there is no evidence that the Deputy Director's actions concerning claim 5 were motivated by retaliatory or discriminatory animus.

When, as here, the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 s. Ct. 2257, 2270 (1998); and Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).

In the instant case, there is no dispute that Complainant complained to the Director, the Deputy Director, and the Supervisory Facilities Specialist on or before December 28, 2018, about the December 19, 2018, re-enactment wherein his disability was mimicked. As noted above, Complainant specifically told the Deputy Director he no longer wished to attend meetings wherein the Director would be present. Rather than immediately addressing Complainant's request and concerns of a hostile work environment, the Agency generated CAC meeting minutes noting that Complainant did not want to attend the meeting because he did not want to meet with management. We note, moreover, that the Agency's AR-15-6 investigation into the matter was not conducted until April 12, 2019, long after Complainant notified the Agency of the harassment towards him.

Based on the totality of the evidence presented before us, we conclude that the Agency, once made aware of the Director's conduct on December 19, 2018, failed to take immediate and corrective appropriate action to properly address and correct the harassment towards Complainant. Instead, the harassment towards Complainant continued with respect to claims 6 and 7. Thus, the Agency is liable for the Director's harassing conduct in this case and any compensatory damages associated with the harassment towards Complainant.

### CONCLUSION

Accordingly, we MODIFY the Agency's final order finding no discrimination and we REMAND this matter to the Agency to take the following corrective action as set forth in the Order below.<sup>3</sup>

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<sup>3</sup> Given our conclusion that Complainant established that he was subjected to a hostile work environment based on his disability, we need not address reprisal as basis herein, as under the circumstances of this case, a finding on the additional basis of reprisal would not entitle him to any greater relief.

ORDER

Unless otherwise indicated, the Agency is ordered to take the following remedial action within one hundred and twenty (120) days of the date this decision is issued:

1. The Agency shall take all necessary steps to ensure that Complainant has no contact with the Director and provide Complainant with a designated management official to inform if subsequent acts of alleged harassment occur by the Director or by other individuals on his behalf.
2. The Agency shall complete a supplemental investigation to determine Complainant's entitlement to compensatory damages. The Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan 5, 1993) and request objective evidence from Complainant in support of his request for compensatory damages. No later than ninety (90) calendar days from the date this decision is issued, the Agency shall issue a final decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission. The Agency shall then pay Complainant the amount of compensatory damages within thirty (30) days from its determination/final decision.
3. The Agency shall conduct eight (8) hours of in-person or interactive training for the Director and Deputy Director regarding recognizing a hostile work environment and addressing management's responsibilities with respect to eliminating harassment in the workplace. The Agency shall conduct the training within ninety (90) days from the date the decision is issued.
4. Within sixty (60) days from the date this decision is issued, the Agency shall consider taking disciplinary action against the Director found to have subjected Complainant to harassment. The Commission does not consider training to constitute disciplinary actions. The Agency shall report its decision. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.
5. Within thirty (30) days from the date this decision is issued, the Agency shall post a notice in accordance with the paragraph below entitled "Posting Order."

POSTING ORDER (G0617)

The Agency is ordered to post at its Warehouse in Yermo, California 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:



Carlton M. Hadden, Director  
Office of Federal Operations

August 9, 2021

Date