



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Lonny C.,<sup>1</sup>  
Complainant,

v.

Debra A. Haaland,  
Secretary,  
Department of the Interior  
(Bureau of Reclamation),  
Agency.

Appeal No. 2020004093

Hearing No. 550-2018-00313X

Agency No. DOI-BOR-16-0530

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 4, 2020, final order concerning his 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. and 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 PRESENTED**

The issues are whether the Administrative Judge properly issued a decision without a hearing finding that Complainant did not establish that the Agency failed to provide a reasonable accommodation; or subjected him to discrimination or harassment based on disability or sex, or in reprisal for protected EEO activity.

---

<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 File Clerk at the Agency's Management Services Office, Finance and Accounting Division, Fiscal Services and Account Receivable Group in Lakewood, Colorado. Complainant has been deaf since birth, and when he started his position on December 14, 2015, he had sign language interpreters/job coaches provided by the Department of Vocational Rehabilitation (DVR). Report of Investigation (ROI) at 129, 147. Complainant stated that he discussed additional accommodations with his first-line supervisor (S1) (no disability), such as an iPad and a video relay service (VRS). ROI at 131. S1 noted that the iPad and VRS would enable them to have a sign language interpreter for impromptu situations. ROI at 719.

Complainant stated that he was not provided with effective training from a coworker (CW1) because she was not cooperative, which hindered his training. ROI at 135-6. On June 24, 2016, S1 issued Complainant a notice of Termination During Probationary Period. ROI at 1327-9.

On October 28, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (sexual orientation),<sup>2</sup> and disability (deafness/perceived disability of tumor), and in reprisal for protected EEO activity (instant EEO complaint), when:

1. from December 14, 2015, through June 24, 2016, Complainant was denied reasonable accommodations;
2. on or about June 24, 2016, Complainant was terminated; and
3. from December 14, 2015, through June 24, 2016, Complainant was subjected to a hostile work environment when, in addition to the above incidents, management officials:
  - a. denied Complainant proper training;
  - b. were hostile and uncooperative in training;
  - c. refused to communicate in an appropriate manner and their communication was harsh and aggressive;
  - d. scrutinized Complainant's work;
  - e. made threatening remarks regarding Complainant's sexual orientation; and
  - f. failed to provide notice of performance deficiencies.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ).

---

<sup>2</sup> In Bostock v. Clayton Cty., the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. \_\_\_, 140 S. Ct. 1731 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's August 27, 2019 motion for a decision without a hearing and issued a decision without a hearing on January 27, 2020. The AJ found that the Agency demonstrated that there were no genuine disputes as to any material fact, and he adopted the Agency's motion and reply in their entirety to award summary judgment in favor of the Agency on all claims.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant filed the instant appeal and submitted a statement in support of his appeal. The Agency opposed Complainant's appeal.

### CONTENTIONS ON APPEAL

Through his non-attorney representative, Complainant argues that there was a lack of clarification of the legal procedure. For example, while the AJ's order provided a deadline date for discovery, it was not explained that any request must be completed within 30 days of the request, and that a request cannot be made less than 30 days prior to the discovery deadline. Complainant states that he was unable to get all the information he sought, while the Agency was able to obtain information to present its case. Complainant argues that he had evidence that S1 refused to provide an interpreter for a meeting. Complainant states that he is not fluent in English, and he requests a hearing with an accommodation to present his case in sign language.

The Agency counters that the AJ properly entered a finding of no discrimination. The Agency argues that Complainant did not establish a prima facie case of discrimination, and that S1 determined that, because of repeated performance issues, Complainant was not going to work out, and that S1 acted appropriately and in the best interests of the Agency by terminating Complainant's employment. The Agency asserts that Complainant's own actions showed a lack of focus on the job, demonstrated by the hundreds of personal emails sent on the job in the two-week period before he was terminated.

The Agency also argues that Complainant did not establish a prima facie case of failing to provide a reasonable accommodation, or a prima facie case of retaliation for prior EEO activity. Regarding Complainant's harassment claim, the Agency asserts that Complainant does not identify unwelcome conduct related to his membership in a protected class that unreasonably interfered with his work. The Agency requests that the Commission affirm the AJ's decision.

### 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 the 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 Chap. 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

#### *Decision without a hearing*

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.

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). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant did not identify any material facts in dispute, and the Agency asserted that there were no material facts in dispute. As such, we find that the AJ properly issued a decision without a hearing.

*Reasonable Accommodation*

In order 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). An agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o), (p).

It is undisputed that Complainant is an individual with a disability due to his deafness. We find that Complainant is a qualified individual because S1 stated that he was able to perform the essential functions of his position without accommodations because the majority of his work was done through email and fax. ROI at 723. Complainant stated that at the start of his employment, he discussed accommodations to “enhance communication,” such as an iPad and VRS, which he never received. ROI at 131. However, we find that Complainant was accommodated with sign language interpreters until May 31, 2016. A sign language interpreter (SLI1) stated that she was hired by DVR and worked with Complainant through May 31, 2016. ROI at 147.<sup>3</sup>

Complainant stated that on June 20, 2016, he requested a sign language interpreter from S1 during a discussion about SharePoint, and S1 replied that she did not understand what he was saying and that he could lip read. ROI at 132, 703. S1 corroborated that on June 20, 2016, Complainant came to her to discuss his challenges, and when he did not understand S1, he requested an interpreter. S1 stated that she felt that they resolved the matter and that Complainant seemed fine. ROI at 756.

Complainant stated that on June 21, 2016, S1 called him into her office for a one-on-one meeting, and that when he did not understand S1 and asked that she repeat herself, S1 became angry and dismissed him. Complainant stated that on June 22, 2016, he attended a meeting with S1 and CW1, and that he had difficulty understanding them because there was no interpreter present. ROI at 45-6.

While the Agency ordered an iPad to provide VRS as an accommodation, S1 stated that the bandwidth was not large enough in the first iPad, and that they ordered another iPad, which was not received.

---

<sup>3</sup> Complainant provided notarized statements from DVR sign language interpreters.

ROI at 719-20. We find that the Agency violated the Rehabilitation Act when it failed to provide Complainant with an effective accommodation on June 20-22, 2016, because he was not provided with a sign language interpreter, either in-person or through VRS on an iPad.

It is undisputed that Complainant requested a sign language interpreter on June 20, 2016, and that S1 did not make any attempts to arrange for an interpreter and continued their conversation because she expected Complainant to read her lips. However, Complainant stated that he cannot lip read full, detailed conversations, and that he needs assistance. ROI at 703. In addition, while it is not clear if Complainant specifically requested an interpreter on June 21<sup>st</sup> or 22<sup>nd</sup>, the need was obvious given the communication challenges between Complainant and S1. Accordingly, we REVERSE the Agency's determination to adopt the AJ's decision finding that the Agency did not fail to accommodate Complainant.

Where a discriminatory practice involves the provision of a reasonable accommodation, damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. See 42 U.S.C. § 1981a(a)(3); and Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). As noted above, S1 made no attempts to obtain a sign language interpreter for meetings with Complainant on June 20-22, 2016, and we find that Complainant is entitled to damages.

Pursuant to section 102(a) of the Civil Rights Act of 1991, a complainant who establishes unlawful intentional discrimination under either Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., or Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. may receive compensatory damages for past and future pecuniary losses (i.e., out-of-pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish) as part of this "make whole" relief. 42 U.S.C. § 1981a(b)(3). As such, the Agency is ORDERED to conduct a supplemental investigation regarding any compensatory damages, attorney's fees, and costs for its failure to reasonably accommodate Complainant on June 20-22, 2016.

### *Disparate Treatment*

Generally, claims of disparate treatment are examined under the analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). For Complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas, 411 U.S. at 802 n.13. Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination.

At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

We find that Complainant did not establish a prima facie case of discrimination based on disability or sex, but he established a prima facie case of reprisal when the Agency terminated his employment during his probationary period. A complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

While Complainant initiated the instant EEO complaint on June 22, 2016, we find that there is no evidence that S1 was aware of his EEO contact prior to Complainant's removal. However, we find that Complainant engaged in protected EEO activity when he requested an accommodation of a sign language interpreter from S1 on June 20, 2016, and he was subsequently subjected to adverse action when he was informed that his employment was terminated on June 24, 2016.

When establishing a prima facie case of retaliation under Title VII, close temporal proximity is sufficient to infer a causal nexus between an employee's protected activity and an adverse action on the part of an employer. See Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (noting that "cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'"). Here, we find a close temporal proximity because Complainant's removal occurred a few days after he requested a reasonable accommodation. Accordingly, we find that Complainant established a prima facie case of reprisal.

In her affidavit, S1 stated that she decided to terminate Complainant's employment because he continued to have challenges, despite having had over 200 hours of training. S1 stated that Complainant had a "bit of an attitude" and would not follow her instructions. For example, S1 stated that she asked Complainant several times not to go to another coworker (CW2), but that he chose to go to her, and Complainant would not communicate with S1 when he needed help. S1 also stated that Complainant did not want to engage and appeared to not understand the importance of his role and the impact of his role on the division and organization. S1 added that Complainant took 132.5 hours of leave. ROI at 726-7, 732-3.

We find that Complainant has shown that the proffered reasons were pretext for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.

See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

We find that S1's proffered reasons are inconsistent with other evidence in the record. Regarding Complainant's "attitude," S1 noted in Complainant's 90-day evaluation that strived to work well with others, and that he had "a very positive attitude and personality". ROI at 1298. S1 also sent an email on February 25, 2016, in which she stated that Complainant was doing a great job of learning and understanding his new role, which contradicts her assertion that Complainant appeared not to understand the importance of his role. ROI at 151.

In addition, while S1 stated that she asked Complainant several times not to go to CW2, we note that S1 instructed Complainant in his 90-day evaluation to contact CW2 if CW1 was out of the office. ROI at 1298-9. In addition, in the removal notice, S1 stated that Complainant was "told to seek assistance from [CW2]."<sup>4</sup> ROI at 1327-8. While we note that S1 did not specify when she instructed Complainant not to go to CW2 for assistance, we find that the lack of details surrounding Complainant's alleged failure to follow instructions when he continued to go to CW2 makes the assertion not worthy of belief, especially in light of S1's instructions for Complainant to contact CW2.

S1 stated that Complainant did not communicate with her when he needed assistance; however, she also stated in her affidavit that on June 20, and 21, 2016, Complainant came to her because he needed assistance. Specifically, S1 stated that on June 20, 2016, Complainant came to her office because he had issues with SharePoint, and on June 21, 2016, Complainant came to her office, but someone was in her office at the time. ROI at 755-6. We find that S1's statements that Complainant came to her office twice directly contradicts her claim that Complainant did not approach her with any issues.

In response to Complainant's usage of leave, S1 confirmed that this was approved leave, but when asked why the leave was approved if there was a concern about Complainant's leave, S1 responded that the government did not allow for a lot of leave without pay, and that there was a concern with a new employee who had not been able to accrue a lot of leave, which could become a problem down the line. ROI at 733-4. We find that S1's response for why she approved Complainant's leave is confusing, and it is not clear why S1 included leave that she approved as a factor in Complainant's removal. We note that part of Complainant's approved leave was from April 26, 2016, through May 11, 2016, when he underwent surgery. ROI at 44.

On appeal, the Agency argued that Complainant's own actions showed a lack of focus on the job, which was demonstrated by the hundreds of personal emails sent on the job in the two-week period before he was terminated.

---

<sup>4</sup> While S1 wrote that Complainant went to "another co-worker" in the termination notice, she clarified that this was CW2 in her affidavit. ROI at 727.



However, S1 did not reference a lack of focus, as evidenced by personal emails, as a factor in Complainant's termination notice. In addition, to the extent that S1 asserted that Complainant demonstrated performance issues, despite receiving hundreds of hours of training, we note that she did not address Complainant's complaints that CW1's training was not effective. Complainant stated that S1 "made excuses" for CW1's behavior, and S1 only responded "no" to the question if CW1 was hostile or uncooperative toward Complainant. ROI at 136, 740.

Evidence in the record supports Complainant's concerns with his training. SLI1 stated that Complainant's initial training was delayed due to CW1's absence and the training was "very inconsistent" to accommodate CW1's schedule. SLI1 stated that the training was "difficult to follow and often unclear." SLI1 stated that many attempts were made to clarify Complainant's job duties and obtain feedback, but that CW1 was often unavailable or seemed "short or upset" by Complainant's questions. Another sign language interpreter (SLI2) stated that CW1's training was "very hard to follow" and CW1 "struggled to explain things clearly." SLI2 stated that when Complainant asked questions, CW1 showed "clear frustration and impatience." ROI at 147-8.

Based on a review of the record, we find that the evidence shows that S1's reasons for terminating Complainant's employment during his probationary period are not worthy of belief, and that Complainant established that the Agency's proffered reasons were pretexts for discrimination. Accordingly, we AFFIRM the Agency's decision to adopt the AJ's finding that Complainant did not establish that the Agency discriminated against him based on disability or sex, but REVERSE the Agency's decision to adopt the AJ's finding that Complainant did not establish that the Agency retaliated against him when it terminated his employment during his probationary period on June 24, 2016. As noted above, Complainant is entitled to compensatory damages for the Agency's retaliation in violation of the Rehabilitation Act.

### *Harassment*

Harassment is actionable if it is sufficiently severe or pervasive that it results in an alteration of the conditions of a complainant's employment. See Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002, at 3 (Mar. 8, 1994). To establish a claim of harassment, Complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998).

We find that Complainant belongs to statutorily protected classes based on his disability, sexual orientation, and protected EEO activity, and that he was subjected to unwelcome verbal conduct. However, for incident 3e, there is no evidence that Complainant was subjected to "threatening" comments about his sexual orientation. When asked to specify the threatening remarks, Complainant responded "inappropriate to question me." ROI at 141.

Complainant later stated in his rebuttal that S1 asked if anyone had harassed him because he is gay. ROI at 699. S1 denied asking Complainant about his sexual orientation, but she stated that CW1 reported overhearing others talking about Complainant, and S1 informed Complainant that if he was uncomfortable, to let her know. ROI at 744. We find that S1 asking Complainant if he felt harassed based on his sexual orientation was not threatening, nor harassing.

Even assuming that the remaining incidents were based on Complainant's protected classes, we find that they do not rise to the level of unlawful harassment. The Commission has held that routine work assignments, instructions, and admonishments do not rise to the level of harassment because they are common workplace occurrences. See Gray v. U.S. Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of a protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. See Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130465 (Sept. 12, 2014). In addition, we note that Title VII is not a civility code. Rather, it forbids "only behavior so objectively offensive as to alter the conditions of the victim's employment." Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). In this case, there is no evidence that the complained of incidents were abusive or offensive, or taken to harass Complainant. As such, we AFFIRM the Agency's decision to adopt the AJ's finding that Complainant did not establish that the Agency subjected him to harassment based on disability or sex, or in reprisal for protected EEO activity.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's final order adopting the AJ's decision without a hearing. We AFFIRM the Agency's decision that Complainant did not establish that he was subjected to disparate treatment based on disability or sex, or that he was subjected to harassment based on disability or sex, or in reprisal for protected EEO activity. We REVERSE the Agency's decision regarding the failure to accommodate claim and the reprisal claim when the Agency terminated Complainant's employment during his probationary period, and we ORDER the Agency to take further action, in accordance with the Order below.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days from the date this decision is issued, the Agency shall offer Complainant reinstatement to his former File Clerk position, or a substantially equivalent and agreeable position, and ensure that Complainant is reasonably accommodated with ready access to sign language interpreting services, retroactive to June 24, 2016. Complainant must respond to the Agency's offer in writing within 15 days of receipt of the offer. Should Complainant reject the offer of reinstatement, entitlement to any additional backpay attributed to the reinstatement shall terminate as of that date of refusal.
2. Within 60 days from the date this decision is issued, the Agency shall determine the appropriate amount of additional backpay, with interest, and other benefits (such as Thrift Savings Plan and FERS pension) due Complainant (if any), pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of backpay and benefits due, and he shall provide all relevant information requested by the Agency. The Agency shall pay the amount within 60 days from the date of that determination of the appropriate amount. If there is a dispute regarding the exact amount of backpay and/or benefits, the Agency shall pay Complainant the undisputed amount within 60 days of the date the Agency determines the amount it believes to be due. 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."
3. Within 30 days from the date the backpay amount is paid to Complainant, the Agency shall request that Complainant submit his claim for compensation for all additional income-tax liability associated with lump sum payments. The Agency shall afford Complainant 60 days to submit his claim and supporting documents. The burden of proof to establish the amount of additional tax liability, if any, is on Complainant. The calculation of additional tax liability must be based on the taxes Complainant would have paid had he received the backpay in the form of regular salary during the backpay period, versus the additional taxes he paid due to receiving the back-pay in a lump-sum award. Thereafter, the Agency shall issue a decision regarding claimed additional tax liability within 60 days after the time period expires for Complainant to submit his claim for additional tax liability.
4. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorney's fees, and costs for its failure to accommodate Complainant on June 20-22, 2016, and for its retaliatory termination of his employment on June 24, 2016. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard.

5. The Agency shall issue a final decision addressing the issues of compensatory damages, attorney's fees, and costs no later than 30 days after the completion of the investigation.
6. Within 90 days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to S1, with an emphasis on the Agency's obligation to accommodate, and not terminate, qualified individuals with disabilities.
7. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management official has left the Agency's employment, then the Agency shall furnish documentation of her departure date.
8. The Agency shall immediately post a notice in accordance with the paragraph below.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Management Services Office, Finance and Accounting Division, Fiscal Services and Account Receivable Group in Lakewood, Colorado 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).

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0920)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507.

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

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

#### RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.**

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



---

Carlton M. Hadden, Director  
Office of Federal Operations

August 5, 2021  
Date