



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

[REDACTED]  
Shanti N.,<sup>1</sup>  
Complainant,

v.

Xavier Becerra,  
Secretary,  
Department of Health and Human Services  
(Indian Health Service),  
Agency.

Appeal No. 2019004882

Agency No. HHS-IHS-0095-2017

**DECISION**

On July 9, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 24, 2019 final decision 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Staff Analyst, GS-0301-09, at the Agency's Office of Information Technology (OIT), Division of Program Management and Budget (DPMB) facility in Rockville, Maryland.

On March 6, 2017, Complainant filed an EEO complaint alleging that the Agency subjected to her to discrimination and harassment on the bases of race (multiracial), national origin (Caribbean American), sex (female), religion (Christian), color (fair yellow), disability, age, and reprisal for prior protected EEO activity, noting 17 claims that will be discussed below as claims

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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.

(1) through (17). The Agency dismissed Complainant's alleged basis of age, finding she was younger than 40 years old but accepted the remaining issues and claims raised in the complaint.

The Agency conducted an investigation which produced the following pertinent facts:

*Alleged Bases*

Regarding her alleged basis of disability, Complainant alleged that she suffered from traumatic brain injury (TBI), post-traumatic stress disorder (PTSD), cranial 7<sup>th</sup> nerve paralysis, migraines, visual depth perception problems, blurred vision, and tinnitus. She attested that she was hired as a veteran with service-connected disabilities. She also indicated she had been pregnant and miscarried in March 2016, and became pregnant again in March 2017, with a full-term delivery in January 2018.

Regarding her alleged basis of age, the record shows Complainant's date of birth as being March 19, 1980.

*Claim (1)*

Complainant alleged that, prior to being hired in March 2016, the screening of her credit report as part of her background investigation related to her being hired was excessive and illegal. She attested that, after she was hired, a Personnel Security Officer (Officer1) accessed her credit report and demanded that Complainant pay the delinquent accounts on her report. She attested that Officer1 indicated that, if Complainant did not arrange payment plans for the past due bills, her security clearance would not be adjudicated, and she could be terminated. Complainant alleged the Agency did not obtain proper consent prior to accessing her credit report and failed to inform her that her employment was contingent upon her resolving these debts. She alleged the Agency violated various federal and state laws and disputed the legality of the Agency's clearance process. She alleged that she was harmed because she was required to pay bills that were on her credit report but were not her responsibility. She alleged that she received stressful communications and was forced to pay the bills. She alleged the Agency treated employees with Indian Preference more favorably.

Officer1 attested that Complainant received a Public Trust Adjudication and not a Security Clearance. She explained that a Public Trust Investigation was started prior to Complainant's being hired and, upon verification of her meeting minimum security requirements, she was hired while additional checks occurred. Officer1 attested that, as part of the pre-employment process, Complainant was asked to complete a Public Trust Questionnaire and for permission to access her credit. She attested that the Questionnaire asked if Complainant had any debts or financial obligations that were more than 180 days or more delinquent and Complainant acknowledged that she did. She attested that Complainant was advised to address the payments in arrears and demonstrate a good faith effort to show she was working on improving her financial standing. She attested that Complainant was advised of her debt and that it needed to be addressed prior to adjudication.

She attested that Complainant was advised similarly to all other Agency employees and her Public Trust Adjudication was not processed any differently from that of any other employee.

*Claim (2)*

Complainant alleged that, beginning on her first day of work in March 2016 in OIT, she had problems with a coworker (CW2) who does not talk to her, refuses to do her own work assignments, bullies Complainant and other coworkers, and has told contractors, who are of the same Latino descent as a coworker, not to speak to Complainant or their other coworker. Complainant alleged that she informed her supervisor (Supervisor1) about this but nothing was been done in response. Complainant alleged that CW2 was rude, spread gossip and made false statements about her to coworkers. She described examples, such as when CW2 would not eat lunch with them and asked management to move her away from Complainant. Complainant alleged that Supervisor1 did not pursue that matter because Complainant was not a Native American with Indian Preference.

Supervisor1 denied these allegations, but stated he recalled an incident when he was made aware of an argument between Complainant and CW2. He attested that he investigated the incident and informed the parties that, while they did not have to be friends, they needed to work together, act professionally, and treat each other with respect.

CW2 acknowledged that she did not talk to Complainant much and did not get along with her, but she denied Complainant's allegations. She alleged that she was mistreated and asked Supervisor1 to be moved. She also attested that Supervisor1 had yelled at her on many occasions and she described the work environment as intimidating and frightening. She attested that Complainant was mistreated by Supervisor1 similar to the way he mistreated and harassed all the other employees.

CW1 attested that, in July 2016, the work environment became hostile, noting an incident when CW2 made verbal threats to her. She attested that Supervisor1 did not discipline CW2 for her hostile behavior and unprofessionalism.

*Claim (3)*

Complainant alleged that, in August 2016, she met with Supervisor1 for a mid-year performance review for her Performance Management Appraisal Program evaluation (PMAP). She alleged that she pointed out that her position was listed as a Staff Assistant instead of the correct title of Staff Analyst. Supervisor1 said he would not change it but would do so on her 2017 PMAP. She alleged that, during this meeting, there was no discussion of her performance or a mid-year rating. She attested that she refused to sign the PMAP because it contained inaccurate information about her performance and work contributions, and her title was incorrect.

Supervisor1 attested that he did not conduct a mid-year review with Complainant because she was a new hire. He attested that he met with her in August 2016 to explain the performance management process. He acknowledged Complainant's correct title was Staff Analyst and explained that he made the error because he used a Staff Assistant's PMAP to draft Complainant's PMAP. He attested that this was an inconsequential error. He attested that all employees were evaluated based upon performance and denied Complainant's allegations.

CW2 attested that she received a negative mid-year PMAP from Supervisor1, including an unsatisfactory rating. She alleged that Supervisor1 had unreasonable expectations and used intimidation tactics. She attested that Complainant was not treated differently from any other employee, as they all received hostility and mistreatment from Supervisor1.

CW1 attested that, when she met with Supervisor1 for her mid-year PMAP, her Staff Analyst title was also incorrect, and her performance narrative contained negative remarks.

*Claim (4)*

Complainant alleged that, beginning in August 2016, the duties being assigned to her and her two co-workers were being increased with the more difficult assignments being given to Complainant. She alleged that she had to do the work of one coworker who either refused to perform the work or could not do the work for reasons including failing an initial exam to perform one task, noting that one such assignment occurred when Complainant was assigned to revise and edit notes from a meeting taken by this co-worker. She alleged that she was expected to respond to e-mails within five minutes and to go to other offices to process paperwork despite her disability.

Complainant alleged that she was assigned to process controlled correspondence through the Action Tracking System (ATS). She alleged that, although she attended training on the ATS computer system, she was not provided official training on preparing controlled correspondence folders for formatting letters/memos, routing, and getting signatures, and her supervisor told her to "do more" to process correspondence which had been pending "for years." Complainant alleged that, since she had not been provided formal training, she "contacted upper level people to find out what needed to be done and how to process outstanding pending documents." She alleged that she was reprimanded by her supervisor for "contacting upper level IHS Directors" and he told OIT leadership that Complainant "didn't know what she was doing." She alleged that she was also blamed for actions that were overdue since 2012, about four years prior to her arrival at HIS.

Complainant alleged that she was told she had not calculated or reported voucher actual costs for travel matters even though she could not perform this task because the organization codes were incorrect from the time she started at IHS until June 6, 2017, when she was finally given full access to the report in Concur Government Edition Travel System (CGE) which she had requested since July 5, 2016. She alleged that, on or about February 22, 2017, she had receptionist duties added to her assigned duties.

Complainant attested that Supervisor1 increased the duties of all Staff Analysts and she was assigned duties outside of her position description, including kitchen cleaning, receptionist, managing senior leaders' calendars, responding to inbox email requests within 5 minutes, and some of CW2's duties.

Complainant alleged that CW2 was continually AWOL, which caused her duties to be reassigned to other Staff Analysts. Complainant also alleged CW2 had a language barrier which limited her ability to complete her duties. Complainant alleged Supervisor1 unfairly delegated CW2's duties to others.

Supervisor1 attested that he assigned all job responsibilities in a fair and consistent manner based on the needs of the division and staffing requirements. He attested that work assignments were distributed evenly among staff, based on his understanding of the business processes involved and the employee's perceived skill sets. He noted that Complainant was a GS-9 level employee and CW1 and CW2 were GS-7 level employees, which is why Complainant had the more difficult assignments, which were within the scope of her position description. Supervisor1 attested that supervisory discretion and workload balance were factors he considered in making assignments and Complainant was not aware of his supervisory actions or thought processes and was, therefore, not qualified to assess his activities.

Supervisor1 also attested that he directed all Staff Analysts to respond to emails and Skype messages within 5 minutes to ensure proper customer service. CW1 and CW2 confirmed this policy.

Regarding Complainant's allegations about going to other offices, Supervisor1 attested that he expected Complainant to travel to other floors and interact with other employees to process Agency documentation as this was part of her duties. CW1 and CW2 confirmed that this was part of the established process. Supervisor1 attested that he first learned of Complainant's disability when she submitted a request for a reasonable accommodation on December 27, 2016.

Supervisor1 denied making the alleged statement regarding Complainant's ATS duties. He attested that Complainant was provided training on ATS that did not include formatting documents, but Complainant was trained by the Executive Secretary staff on this and was instructed to seek guidance from them as needed. He attested that Complainant contacted a Presidentially-appointed Director for assistance with document formatting and he did state that Complainant needed to think about who she talked to and asked for assistance.

CW2 attested that she was also assigned reception duties and alleged Complainant and CW1 were hostile towards her. CW2 attested that Staff Analysts covered for each other as needed and stated that Complainant was treated as harshly as was everyone else.

CW1 attested that management assigned Staff Analysts additional duties outside their PD and noted that she was also assigned CW2's duties.

*Claim (5)*

Complainant alleged that her office required annual leave to be approved two weeks in advance. She alleged that, if she needed to use annual leave for a medical appointment related to her disability, this created a problem since she often was not able to have an appointment scheduled two weeks in advance. She alleged that she also could not use leave for medical emergencies without worrying about the work being done because there had not been any cross-training between her and her coworkers. She attested that this policy was problematic for her when she wanted to use her annual leave for medical appointments and found this unreasonable. She also attested that, because she had such significant work responsibilities, she was concerned about taking leave and found this to be unfair.

Supervisor1 attested that there was a Leave Request Directive requiring all employees to provide two weeks advance notice for all annual leave requests, to ensure adequate personnel coverage at all times. He attested that there were exceptions under certain circumstances and Complainant could request sick leave for her medical appointments, as opposed to annual.

The Chief Information Officer (CIO) attested that Supervisor1's policy was compliant with Agency leave policies.

*Claim (6)*

Complainant alleged that, on December 9, 2016, she was notified she was not selected for a position at the Department of Agriculture. She alleged that she had been informed they only needed to make one final reference check and she would be offered the position. She alleged that her second-level supervisor (Supervisor2) provided the reference. She alleged that the Department of Agriculture informed Complainant that they decided not to offer her the position based on the reference check results. Complainant alleged that, on December 23, 2016, Supervisor2 asked Complainant what happened with that position and said to her: "I would give you a bad job reference just to keep you because you're so good." Complainant asserted that Supervisor2 intentionally gave her a bad reference to prevent her from getting a better job and promotional opportunities and to keep her at the Agency.

Supervisor2 attested that she recalled Complainant asking her to provide a job reference and she agreed to do so. She attested that, during the call with the Department of Agriculture, she was asked about Complainant's work contributions and completion of work assignments. Supervisor2 attested that she answered the questions truthfully, based on her supervisory observations. She attested that she did not make any derogatory or negative comments about Complainant.

A member of the USDA interviewing/hiring panel attested that Complainant was interviewed for the position and, after the interview, there were five reference checks on Complainant.

She attested that they decided not to move forward with Complainant due to the feedback from several of her references, as there were indications that Complainant had difficulty with analytics, progressing beyond routine work, and developing beyond her current skill level.

*Claim (7)*

Complainant alleged that, on December 23, 2016, she was accused of receiving her government purchase card at her home which was signed for even though she was on leave and no one was at her home to have signed for the card. She attested that she was married in the Caribbean and on her honeymoon at the time when this happened, and management was aware that she was on leave and out of the country.

The Coordinator for the Purchase Card Program attested that Supervisor1 gave her Purchase Card applications for Complainant and a few other staff members. She processed the applications according Agency processes and received notice that the cards were signed for and delivered to Complainant's home address. She attested that she attempted to verify receipt with Complainant and Complainant indicated she did not receive the cards. Coordinator explained that lost or misaddressed Purchase Cards were not uncommon, and, in such instances, the cards are canceled, and replacements are ordered to avoid any fraudulent activity. She attested that Complainant was issued a new card.

*Claim (8)*

Complainant alleged that Supervisor1 instructed her to change nine hours of leave for one of her co-workers to eight hours for January 20, 2017, when Federal employees in the Washington, DC, area were placed on administrative leave for the Presidential Inauguration, even though it had been correctly approved for nine hours by the Human Resources Specialist responsible for leave matters since the coworker was on an alternative work schedule. Complainant attested that Supervisor1 accused her of incorrectly entering leave for CW1, when he misinterpreted Agency leave policies for employees working on an alternative work schedule (AWS), and accused her of falsifying timekeeping records.

Supervisor1 denied Complainant's allegations. He attested that Human Resources emailed notice on properly recording time for employees on AWS and he asked Complainant to verify CW1's time was properly recorded in accordance with that guidance.

CW1 attested that she worked an AWS and her hours were changed because Supervisor1 had incorrectly indicated that she had to use an hour of leave for Inauguration Day and Human Resources clarified to Supervisor1 that an AWS did not affect the leave and her hours were corrected.

*Claim (9)*

Complainant alleged that, on February 1, 2017, her request for a reasonable accommodation to allow her to telecommute (telework) was denied. She alleged that she was told the reason was no one in her position could telework. She alleged that, during the interview for her position, she informed Supervisor1 that she was interested in teleworking, but she was not informed it was not an option.

Complainant attested that, on December 27, 2016, she requested telework as a reasonable accommodation for her medical impairments (TBI, PTSD, and pregnancy) and Supervisor1 denied her request, stating that it was an undue hardship to allow her to telework since her position required her to perform her duties. She attested that when she started working, she was told the telework policy had changed for Staff Analysts and she could not telework; she asserted that she was misled. She attested that CW2's poor performance created a situation where she was indispensable and when she needed an accommodation, her request was denied under the pretense that her absence would be a hardship.

Complainant attested that, on February 23, 2017, she requested reassignment to a position that would allow her to telework as a reasonable accommodation and, in the interim, Supervisor1 offered her AWS. She attested that she rejected that option because the demanding schedule and longer hours would have increased her stress level and worsened her disability.

Supervisor1 attested that he denied Complainant's request to telework because all three Staff Analysts were in customer service positions and needed to be onsite to provide the service. He attested that when Complainant asked about telework during her job interview, she was told that telework requests were evaluated on a case-by-case basis. He attested that Complainant did not indicate during the interview that she had a disability or a preference for telework.

Supervisor1 attested that he engaged in the interactive reasonable accommodation process and offered Complainant the option of a compressed work schedule, which she declined. Supervisor1 attested that he followed the reasonable accommodation process and coordinated his activities with the Reasonable Accommodation Coordinator.

Supervisor2 attested that Staff Analysts worked in customer service positions and Supervisor1 designated all of these positions as onsite, non-telework positions.

A Senior EEO Specialist (EEO1) attested that he processed multiple reasonable accommodation requests from Complainant, the first of which was made on December 27, 2016 and requested two to three days of telework per week and a parking space. He attested that Supervisor1 denied this request on February 2, 2017 and was provided the proper documentation to document the decision. EEO1 attested that the request was denied because it would be an undue hardship to provide the requested accommodation. He attested that Supervisor1 explained that Complainant's position of Staff Analyst had a primary responsibility to provide customer service to all Agency employees and was required to be onsite for employees that walked in for service.

He attested that Complainant was not granted a parking space at that time, but Complainant's position was eligible for a compressed work schedule.

EEO1 attested that Complainant's second request was made on February 23, 2017, for reassignment to a position that allowed two to three telework days per week and a parking space. He attested that Supervisor1 approved the reassignment request on April 12, 2017, but Indian Health Service (IHS) Human Resources (HR) experienced difficulties in completing the reassignment process because IHS had a policy of giving absolute hiring preference to Native Americans and Alaskan Natives and Complainant was neither. He explained that it would be difficult to reassign her to a position in IHS because she would have to compete for a vacant position and would be discounted by a candidate with "Indian Preference."

EEO1 noted that there were two competing laws in the matter—that relating to Indian Preference and that relating to Reasonable Accommodation. He attested that he brought the matter to the Agency's Office of General Counsel and was advised that the Agency Reasonable Accommodation policy would probably take precedence over the Indian Preference policy. However, when he took the matter to IHS HR, their position was that the Indian Preference policy should prevail.

EEO1 attested that many managers were involved in Complainant's reasonable accommodation request for a reassignment. He attested that Complainant was provided a parking space and subsequently received a state handicapped parking permit to allow her to park in designated spaces.

EEO1 attested that Complainant filed an additional request on October 10, 2017, with weight limitations due to pregnancy. He attested that Supervisor1 approved her request on October 30, 2017, and she was restricted from lifting more than 10 pounds and was allowed to use an exercise ball at work for comfort while pregnant. He recalled on December 6, 2017, Complainant informed him that, due to her pregnancy, her task of escorting visitors was difficult. He attested that he advised her to inform Supervisor1, and when she did, Supervisor1 removed the duty. EEO1 stated he was unable to identify any other Staff Analyst who had been allowed to telework as an accommodation because he could not check every Staff Analyst at the Agency.

A November 2, 2017 letter from a Department of Veterans Affairs Medical Center indicates that Complainant had several medical conditions, including TBI, migraine headaches, paralysis of the 7<sup>th</sup> cranial nerve, and PTSD. It indicates that Complainant's commute was aggravating her pain and contributing loss of productivity and the neurological issues caused by her TBI were worsened by prolonged walking and time spent outdoors. It indicates that teleworking two to three days per week would increase her productivity and she would be aided by a parking space close to her job.

*Claim (10)*

Complainant alleged that, on February 7, 2017, she received her PMAP which was “Partially Achieved Expected Results” with a numerical rating of 2.33. She disputed the overall rating as well as the rating for each of her critical elements, including the following:

- a. Complainant allowed herself to be kicked out of the Unified Financial Management System (UFMS). However, she had not been assigned to work in UFMS so she used other systems to perform her job. Since she had not been using UFMS, it kicked her out of the system.
- b. Complainant allowed actions in the Action Tracking System (ATS) to go overdue. However, she had closed all outstanding ATS actions going back to 2014 despite having received insufficient training.
- c. Complainant needed to do better with travel vouchers, which was raised again on March 21, 2017. This was despite the Standard Administrative Codes (SAC) for travel for OIT employees being incorrect when Complainant began working there. She pointed out to her supervisor that she could not properly perform the travel voucher process correctly because of the problems with the SAC codes. He contacted the travel staff about this and told Complainant that he would inform her when the information was fixed, but never told Complainant this was done. Complainant continued to perform her travel duties, but with difficulty because of the SAC code problem. She was not provided with access to the correct software needed for this until June 12, 2017.
- d. Complainant was criticized about her performance of some of her timekeeping duties even though her supervisor had listed her as the alternate timekeeper for one of her coworkers, but not the other.

Complainant alleged that, on February 9, 2017, Supervisor1 said if she disagreed with her rating, she could send him a written response which would be attached to her PMAP, but he would not change the rating.

Complainant attested that she met with Supervisor1 for her performance review and refused to sign the evaluation because she disagreed with his assessment of her performance. She attested that, her score of 2.33/5.0 was an inaccurate representation of her work performance and asserted that Supervisor1 was overly critical and harsh, had impossible or unreasonable expectations, etc.

Supervisor1 attested that he was Complainant’s Rating Official, and he rated her as Partially Achieved Expected Results with a rating of 2.33. He attested that he evaluated her based on the criteria in the PMAP. He attested that he frequently discussed tasks and duties with Complainant throughout the rating period to help her understand the performance expectations and to provide clarity when she was confused about a task.

Supervisor2 attested that she was the Reviewing Official and she believed the performance rating was an accurate reflection of Complainant’s performance.

Regarding Complainant's specific disagreements above, Supervisor1 attested that all Staff Analysts were directed to take the UFMS training course and submit an access request. He attested that the training instructed the Staff Analysts to access the system at least once every 30 days or their access would be disabled. He attested that Complainant failed to keep her account active and, when she was instructed to enter a requisition, she was unable to do so. He attested that he deducted points from her performance rating for this.

Regarding Complainant's allegations that Supervisor1 made false statements about her ATS work products and complaints about her from senior managers and her allegations regarding insufficient training, Supervisor1 attested that Complainant was sufficiently trained to work the system and was provided points of contact in the Executive Secretary office for assistance, but she contacted a Presidentially-appointed Director to ask questions about how to perform executive communication functions.

Regarding the travel vouchers, Supervisor1 explained that a SAC code was entered for each employee when their profile was created, and he denied the codes were ever incorrect. He attested that Complainant was responsible for communicating with other employees to ensure any such issues were resolved so that she could run reports, but she failed to do so and he had to follow up to determine if the accesses were corrected and run the reports. He attested that Complainant typically failed to follow up on issues and demonstrated negligent behavior.

A Management Specialist attested that, when Supervisor1 gave him a staff report, there were errors regarding his subordinates being assigned to the wrong organization. He attested Supervisor1 requested changes and he timely made them. He attested that Complainant was a Travel Preparer for OIT and had completed the training on preparing staff travel. He attested that he was not aware of any issues with the SAC codes.

Supervisor1 denied the allegations in claim (10)(d).

*Claim (11)*

Complainant alleged that, beginning on or around February 10, 2017, Supervisor1 yelled at, bullied, insulted, degraded, defamed, gossiped about, and harassed her, as well as he made up lies about her work when he sent her a meeting request to discuss an Inter-Agency Agreement (IAA) which she had already completed. She alleged that, when she explained herself, her supervisor began to yell at her making threats and stating: "Stop talking." She alleged that he also yelled at her saying: "You're digging yourself into a hole." She alleged that he also told her that she was not allowed to ask a GS-15 employee (Senior1), to change the name on the IAA. She alleged that she did not have authority to change the name on the IAA so she was requesting it be done by someone with that authority. She alleged that she subsequently had to ask Supervisor1 for additional guidance on processing IAAs. She alleged that other managers and co-workers liked about her work product, bullied, insulted, degraded, and gossiped about her as well.

Supervisor1 stated the allegations were mostly fictions, but he agreed that Complainant was called to a meeting around February 10, 2017 to discuss her emails with Senior1 and indicated this meeting was called because Complainant was not doing her job, which was to help senior staff with forms completion, and had asked senior level employees to complete forms. He attested that he informed Complainant of the concerns and she became defensive and irate and “flipped a switch,” interrupting him and would not allow him to finish his sentences. He stated that he said, “stop talking, you’re digging yourself into a hole” because her voice became louder and he was about to expel her from his office.

Senior1 attested that, when Complainant sent her the IAA document, she returned it to her because it was incorrect. She attested that Complainant reissued the document and asked Senior1 to make the revisions. Senior1 attested that Complainant had the authority to make the changes in the IAA system and it was her responsibility to reconcile the documents. Senior1 attested that, while she did not witness the alleged exchange, she believed Supervisor1 communicated in a demeaning and patronizing manner, noting that he had degraded her in front of staff.

### *Claim (13)*

Complainant alleged that, on February 23, 2017, she requested a reasonable accommodation consisting of a reassignment to another position where she could be allowed to telecommute and to be assigned a parking space, but the request for reassignment has not been approved or denied. She alleged that on June 19, 2017, June 21, 2017, and July 11, 2017, she identified possible positions into which she could be reassigned. She alleged that she was not assigned a parking spot until August 24, 2017.

Supervisor1 confirmed Complainant’s request for a reasonable accommodation. He attested that he agreed to her request to release her to another position of her choosing, with the stipulation that her position would remain staffed and budgeted. He noted that the request did not include telework and that he had previously denied that request as an undue hardship.

The Director, Division of Administrative Services attested that employees were not arbitrarily provided parking passes and all parking permits were assigned according to Agency policies and procedures. He stated that Complainant was issued a parking pass in August 2017, in accordance with Agency policies and procedures.

EEO1 reiterated his testimony provided above. He also attested that, following Complainant’s February 23, 2017 request, he communicated with IHS HR to have her reassignment request processed by that Office and pointed out that the Agency Reasonable Accommodation Policies stated that if no other reasonable accommodation could be provided, a reassignment should be considered. EEO1 attested that IHS HR responded it would be a problem identifying a position for Complainant’s reassignment within IHS, because Complainant did not have Indian Preference, and Indian Preference laws gave hiring preference for IHS positions to Native Americans and Alaska Natives.

EEO1 attested that Complainant identified several positions for reassignment and most of them were with the Food and Drug Administration. He reiterated that IHS HR raised the issue that there was not a mechanism in the reasonable accommodation policy that provided guidance on how to reassign an employee from one operating division of Health and Human Services (HHS) to another, as an accommodation to a medical impairment. He attested that IHS HR made suggestions for Complainant to contact the hiring manager for the various positions, to coordinate a non-competitive hiring reassignment at her grade. He attested that IHS HR said that if the reassignment was approved by the other operating division, Complainant could then contact IHS HR for assistance concerning the reassignment. He attested that IHS HR stated they were not permitted to contact another Agency or advocate on Complainant's behalf regarding this matter.

EEO1 attested that, on May 9, 2017, IHS HR also stated their position was "not to agree to be reassigned to other positions at Headquarters as part of an employee's reasonable accommodation requests." He attested that IHS HR clarified that stance due to not having control over hiring decisions at other operating divisions, not having a mechanism to identify available positions for reassignment as an accommodation, a hiring freeze on federal positions, and not reassigning employees because they did not get along with their supervisors. EEO1 attested that he pointed out twice to IHS HR that Complainant raised her need to telecommute at her job interview with Supervisor1, and again at the time she arrived at IHS, and therefore she asked for an accommodation before she worked for Supervisor1. He claimed because Complainant's request to telework predated Supervisor1's supervision, it was unfair to say she requested the reassignment to no longer be supervised by Supervisor1. He attested that HR management suggested a 32-hour work week, but Supervisor1 rejected that and, instead offered Complainant a compressed work schedule, which she rejected. EEO1 attested that Complainant received a parking spot in the building on August 24, 2017.

EEO1 attested that EEO and HR management determined that some changes were needed to the IHS Reasonable Accommodation Policy, relating to the portions of reassignment. He attested that the Agency's intent is to have a policy to deal with how HIS would check to determine if there were other positions suitable to reassign IHS employees to other operating divisions. He attested that, as of his testimony, no policy changes had been made.

#### *Claim (14)*

Complainant alleged that, on March 27, 2017, she was notified she was being denied a within-grade increase. She attested that she was wrongly denied this increase due to her low performance rating, which she maintained was incorrect and based on misinformation and unrealistic expectations.

Supervisor1 attested that he issued Complainant a notice that she was being denied the increase and that included ways she could improve her performance.

He explained that Agency policy did not allow employees with a PMAP below “Meets Expectations, 3.0” to receive a within-grade increase and Complainant had received a 2.33 rating. He also attested that CW1 and CW2 were also denied within-grade increases.

CW2 attested that she had not received a within-grade increase in the previous two years. CW1 attested that she did not receive a within-grade increase due to her low PMAP.

*Claim (15)*

Complainant alleged that she was consistently given instructions concerning her work assignments which were confusing and did not recognize she was not authorized to perform certain tasks which she has been assigned. Some situations where this occurred included:

- a. On February 10, 2017, Supervisor1 sent an e-mail to his staff about the use of Skype for internal communications which conflicted with how Complainant handled Skype communications;
- b. On or about March 16, 2017, Complainant was improperly criticized by Supervisor1 for the way she was performing the monthly OIT Travel Approval Process which he had established. This was partly due to the late submission of travel information performed by OIT staff;
- c. Complainant was told to take Level 1 COR training by Supervisor1, but he directed her to take the wrong course;
- d. On or about June 16, 2017, Supervisor1 accused her of not posting items to the Purchase Card request (PCard) log even though she had;
- e. On June 2, 2017, when a question arose about the processing of a PCard request, Complainant was listed as possibly being responsible even though she had properly processed the request and it was later acknowledged that one of her coworkers was responsible for the error;
- f. On August 29, 2017, after Complainant requested a key for the cabinets in her work area, Supervisor1 told her that she was not authorized to give out the office CAN number even though she was not aware of the process for doing this and was following instructions from the official responsible for getting her the keys. Supervisor1 also notified the official who asked for the CAN number that requests to commit funds from his staff had to be approved by him or one of his two supervisors;
- g. On July 19, 2017, Supervisor1 issued an e-mail that Complainant and her coworkers were not properly maintaining their Outlook calendars;
- h. On August 8, 2017, Complainant was criticized for not changing her mailing list when a new Division Director started working for IHS, and for not removing the Division Director who had departed;
- i. On August 28, 2017, Complainant was questioned about whether she had responded to a request in ATS, but the case had been incorrectly assigned to OIT and was subsequently reassigned to another office;

- j. On or about September 1, 2017, Complainant was performing an additional duty assigned to her by Supervisor2 of asking the Division Directors to submit reports which she was to collect, print and send to CIO every two weeks. However, several Division Directors were confused by what information Supervisor2 wanted; and
- k. On March 29, 2017, Complainant was criticized about who she listed as her alternate Point of Contact (POC) for OIT Travel Activities, even though she had reasons for listing that person as the Alternate POC instead of one of her coworkers.

Supervisor1 attested that he assigned Complainant duties that were well within her position description and Supervisor2 and CIO gave her reasonable assignments as well. He attested that Complainant was expected to be flexible and capable of learning new tasks, as defined in OPM guidelines for the GS-0301-09 occupation series and grade.

Regarding Complainant's specific alleged instances, Supervisor1 generally did not recall the alleged events or indicated that Complainant's allegations were false, and she was treated fairly.

*Claim (16)*

Complainant alleged that, on April 25, 2017, she received her Performance Plan for 4/24/2017 through 12/31/2017. She alleged that duties were included for which she does not have access to what she needs to perform those duties since her laptop computer has not been properly formatted. She alleged that, in addition, several duties had numerical criteria listed without an explanation of how her final PMAP would be affected if she had the number of errors listed. She alleged that additional duties were added. She alleged that subjective standards were imposed such as all communications were to be "respectful, courteous and positive at all times."

Supervisor1 attested that, as Complainant's supervisor, and in accordance with the PMAP policy, he was required to create and issue her a PMAP each year. He stated that, when he wrote her PMAP, it was his supervisory right, to include whatever duties he saw fit within the scope of her PD. He attested that many of her PMAP sub-elements had error maximums per quarter and he conveyed to Complainant that if she exceeded the limits, she would fail that item/element. He attested that Complainant was informed of all PMAP changes and how scoring would be performed.

*Claim (17)*

Complainant alleged that, on September 5, 2017, she received her mid-year performance review with a rating of 3.0. She asserted that this new rating was an indication that she had been previously rated unfairly.

Supervisor1 attested that Complainant was rated as “Achieved Expected Results, 3.0.” He attested that her score was issued in accordance with PMAP policies and processes and was based on his assessment of her performance.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed. On appeal, Complainant asserts that she is now employed at the U.S. Department of the Navy and has been rated as performing at a “Fully Successful” level; has received an Individual Cash Award; and was scheduled to be promoted from a GS-9 to GS-11. The Agency has not submitted a brief or statement in response.

### ANALYSIS AND FINDINGS

#### *Standard of Review*

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

#### *Dismissed Basis*

Under the ADEA, all personnel actions taken by a federal agency with regard to an employee, who is “at least forty years of age . . . shall be made free from any discrimination based on age.” 29 U.S.C. § 633a. See also 29 C.F.R. 1614.103(a) (processing of discrimination complaints from aggrieved individuals “at least 40 years of age”).

Here, the record shows that Complainant’s date of birth is March 19, 1980, which means that her 40<sup>th</sup> birthday was March 19, 2020. The events at issue took place prior to her being hired at the Agency in March 2016 through September 5, 2017, which was prior to her 40<sup>th</sup> birthday. Therefore, we find Complainant's allegation of age discrimination under the ADEA was properly dismissed because she was under the age of 40 when the alleged discrimination took place. See, e.g. Nunn v. United States Postal Serv., EEOC Appeal No. 0120093722 (Mar. 2, 2010) (allegation of age discrimination failed to state a claim because the complainant was under age 40).

*Harassment Claim*

Complainant has alleged the Agency subjected her to harassment, noting several alleged instances. To establish a claim of hostile environment harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis -- in this case, her race, sex, or age. Only if Complainant establishes both of those elements -- hostility and motive -- will the question of Agency liability present itself.

Most of Complainant's harassment allegations can generally be described as reflecting her disagreement with her supervisors' managerial decisions, including disagreements over how work should be done and how employees should be supervised, as well as decisions regarding matters such as procedures for determining fitness for employment, performance evaluation, assignments, policies for leave approval, providing references, and reasonable accommodation approvals. Complainant's other allegations appear to reflect personality conflicts, trivial slights, and other petty annoyances between Complainant and her co-workers and/or supervisors. Without evidence of an unlawful motive, we have found that similar disputes do not amount to unlawful harassment. See Complainant v. Dep't of Def., EEOC Appeal No. 0120122676 (Dec. 18, 2014) (The record established that the issues between the complainant and the supervisor were because of personality conflicts and fundamental disagreements over how work should be done and how employees should be supervised, and there is no indication that the supervisor was motivated by discriminatory animus towards the complainant's race, sex, or age); Lassiter v. Army, EEOC Appeal No. 0120122332 (Oct. 10, 2012) (personality conflicts, general workplace disputes, trivial slights and petty annoyances between a supervisor and a complainant do not rise to the level of harassment). We also recognize Complainant's allegations of having been spoken to harshly, in a manner that she described as bullying, yelling, etc. We have consistently stated that EEO regulations are not to be used as a “general civility code.” Lowe v. United States Postal Service, EEOC Appeal No. 0120121684 (March 7, 2013).

Although Complainant has alleged that the Agency acted discriminately and/or in reprisal, we have reviewed the record and, while it suggests Supervisor1 may have demonstrated poor communication and managerial skills, it does not establish that the incidents at issue were based on Complainant's race, color, religion, national origin, sex, disability, and/or prior EEO activity. Therefore, we find Complainant's allegations are insufficient to support her claim of discriminatory harassment.

### *Disparate Treatment Claims*

Complainant's allegations regarding her duty assignments, reference check, performance evaluations, and denial of a within-grade increase give rise to claims of disparate treatment. For Complainant to prevail on a claim of disparate treatment, she must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14.

To establish a prima facie case of disability discrimination under a disparate treatment theory, Complainant must demonstrate that: (1) she is an "individual with a disability" (2) she is "qualified" for the position held or desired; (3) she was subjected to an adverse personnel action under circumstances giving rise to an inference of disability discrimination and/or denied a reasonable accommodation. See Josiah M. v. U.S. Postal Serv., EEOC Appeal No. 2019003865 (Feb. 14, 2020).

To establish a prima facie case of disparate treatment on the basis of reprisal, Complainant must show that: (1) she engaged in a protected activity; (2) the Agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse treatment. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120132503 (Aug. 28, 2014), citing Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Complainant must ultimately prove, by a preponderance of the evidence, that the agency's explanation is pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Burdine, 450 U.S. at 256.

Assuming arguendo that Complainant established a prima facie case of discrimination based on disability and reprisal, we find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions, as discussed above.

We note that Supervisor1 explained that job responsibilities were distributed evenly based on management's understanding of the business processes involved and the employee's skill set. Supervisor1 further explained that, insofar as Complainant compared the level of difficulty of her assignment to that of the other two Staff Analysts, this reflected the fact that she was a GS-9 level employee and they were GS-7 level employees.

Regarding the matter of the reference check, Supervisor2 explained that she answered the USDA hiring official's questions truthfully, based on her observations, and she did not make any derogatory or negative comments about Complainant. We note that the USDA hiring official indicated that they decided not to move forward with Complainant because of feedback from *several* of Complainant's references.

Regarding the matter of Complainant's evaluations and denial of a within-grade increase, Supervisor1 explained that Complainant received a rating of 2.33 or "Partially Achieved Expected Results" in February 2017 because this rating reflected Complainant's performance. The record establishes that Supervisor1 also gave both of the other Staff Analysts, CW1 and CW2, low ratings and, consequently, none of them received within-grade increases. The Agency explained that Agency policy required employees to receive a minimum rating of 3.0 in order to receive a within-grade increase. The Agency explained that Complainant's subsequent rating of 3.0 reflected her improved performance.

Although Complainant has alleged that the Agency acted disparately or in reprisal, we have reviewed the record and find that the preponderance of the evidence does not establish that Agency's actions were motivated by Complainant's race, color, religion, national origin, sex, disability, and/or prior EEO activity. In so doing, we note that, we have long held that agencies have broad discretion to set policies and carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See, e.g., Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (January 16, 1997). For these reasons, we find that Complainant has failed to establish a claim of disparate treatment.

#### *Reasonable Accommodation Claim*

Complainant alleged that the Agency denied her a reasonable accommodation, in spite of her multiple requests. Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). The agency may choose among reasonable accommodations as long as the chosen accommodation is effective. An "effective" accommodation either removes a workplace barrier, thereby providing an individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment. 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 on Reasonable Accommodation).

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See Enforcement Guidance on Reasonable Accommodation. An individual with a disability is “qualified” if she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the 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). “Essential functions” are the fundamental job duties of the employment position that the individual holds or desires. 29 C.F.R. § 1630.2(n).

A request for a modification or change at work because of a medical condition is a request for reasonable accommodation. Enforcement Guidance on Reasonable Accommodation at Q. 1. After receiving a request for reasonable accommodation, an agency “must make a reasonable effort to determine the appropriate accommodation.” 29 C.F.R. pt. 1614. app. § 1630.9. Thus, “it may be necessary for the [agency] to initiate an informal, interactive process with the individual with a disability . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3); see also 29 C.F.R. pt. 1630 app. § 1630.9: Enforcement Guidance on Reasonable Accommodation at Q. 5.

Reasonable accommodation includes such modifications or adjustments as job restructuring, the acquisition or modification of equipment or devices, or reassignment to a vacant position. 29 C.F.R. § 1630.2(o)(2)(ii). In general, reassignment is the reasonable accommodation of last resort and should be considered only when: (1) there are no effective accommodations that would enable an employee to perform the essential functions of his or her current position; or (2) accommodating the employee in the current position would cause an undue hardship. 29 C.F.R. pt. 1630 app. § 1630.2(n); Enforcement Guidance on Reasonable Accommodation, “Reassignment.” An agency should reassign the employee to a vacant position that is equivalent in terms of pay, status, and other related factors. If there are no vacant equivalent positions, then the agency should reassign the employee to a lower-level position that is closest to the current position. Id.

An agency is in the best position to know which jobs are vacant or will become vacant within a reasonable time and, as part of the interactive process, should ask the employee about her qualifications and interests. Bill A. v. Dep’t of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016). Because it possesses the relevant information, an agency is obligated to inform an employee about vacant positions for which the employee may be eligible as a reassignment. Woodman v. Runyon, 132 F.3d 1330, 1344 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions); see also Enforcement Guidance on Reasonable Accommodation at Q. 28.

The employee should assist the agency in identifying vacancies to the extent that the employee has information about them. Further, if the agency is unsure whether the employee is qualified for a particular position, the agency can discuss with the employee his or her qualifications Mengine v. Runyon, 114 F.3d 415, 419-20 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing)); see also Enforcement Guidance on Reasonable Accommodation at Q. 28.

We emphasize that a federal agency's obligation under the Rehabilitation Act to offer reassignment is not limited to vacancies within a particular department, facility, or geographical area. Instead, the extent of the agency's search for a vacant position is an issue of undue hardship. Enforcement Guidance on Reasonable Accommodation at Q. 27. Accordingly, absent undue hardship, the agency must conduct an agency-wide search for vacant, funded positions that the employee can perform with or without reasonable accommodation. See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017).

Here, the Agency does not contest that Complainant is an individual with a disability and therefore covered under the Rehabilitation Act. In response to Complainant's initial request for telework as a reasonable accommodation, the Agency argued that accommodating Complainant in her current position with telework would cause an undue hardship as her Staff Analyst position required her to regularly perform on-site customer service. The weight of the evidence supports the Agency's assertion that no other Staff Analyst similarly situated to Complainant was allowed to telework. However, the record is also clear that Complainant subsequently asked for reassignment to a position that would allow her to telework and Supervisor1 indicated he would allow the reassignment if a position could be located. By requesting the reassignment, Complainant, in essence, acknowledged that without telework there was no other effective means to accommodate her in her position. However, it appears no search was conducted by the Agency for a reassignment for Complainant because Agency officials believed Complainant was unlikely to be able to compete for vacancies at IHS because of the operation of its Indian Preference policies.<sup>2</sup>

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<sup>2</sup> In this case, it appears the Agency has incorporated the statutory preferences of the Indian Preference Act into its administrative policies. The Indian Preference Act, 25 U.S.C. 472, et seq., provides preference to qualified Native Americans to appointment to vacancies in the Bureau of Indian Affairs and the Indian Health Service. The purposes of the Indian preference laws are to give Native Americans a greater participation in their own self-government, to further the government's trust obligation towards the Native American tribes, and to reduce the negative effects of having non-Native Americans administer matters that affect tribal life. Morton v. Mancari, 417 U.S. 535, 542 (1974); Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707 (8th Cir. 1979). There is no doubt that Indian preference laws may result in employment disadvantages within the Indian Health Service for non-Native Americans. However, Congress apparently decided that in this particular employment situation the good to be gained by the preference outweighed that harm caused by it to non-Native Americans. The Supreme Court has directly ruled that the Indian Preference Act was not repealed or affected by the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964

Most significantly in this case, beyond management's speculation that its Indian Preference policies would block efforts to reassign Complainant to another position, there is no evidence that there was any attempt to actually identify vacant positions to which Complainant might be reassigned and see if Indian Preference issues actually arose. It appears in certain instances that the preference can be waived by the Agency, especially in the case of reassignment of a current employee to an already existing position. Moreover, the validity of management's expressed concerns is called into question by the very fact that Complainant, despite not qualifying for the preference, was hired by the Agency into her position with IHS in the first place.

We also note that Complainant identified several positions for reassignment in the Food and Drug Administration (FDA), another operating subcomponent of the Agency. However, the Agency indicated it had not developed the policies and procedures necessary to effectuate a reassignment from one operating component, such as IHS to another, such as FDA. Agency officials suggested that Complainant apply for these vacant positions via USAJobs or contact the hiring manager at FDA to discuss the possibility of a noncompetitive assignment. Agency officials were clear that IHS HR would not contact FDA or advocate on Complainant's behalf. The Agency's position was that it was Complainant's responsibility to obtain and secure her own reassignment to another operating subcomponent. However, the Commission has previously concluded that the obligation under the Rehabilitation Act to conduct a search for possible reassignment positions was not limited to vacancies within a particular subcomponent of the parent agency, department, facility, or geographical area. See, e.g., Tyler v. Department of Justice, EEOC Petition No. 0320070017 (June 1, 2007).

Instead, the extent of the Agency's search for a vacant position is an issue of undue hardship. The Agency was obligated to provide case-specific evidence proving that providing reasonable accommodation would cause an undue hardship in the particular circumstances. A determination of undue hardship should be based on several factors, including: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility making the reasonable accommodation: the number of persons employed at this facility; the effect on expenses and resources of the facility; (3) the overall financial resources, size, number of employees, and type and location of facilities of the employer; (4) the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and (5) the impact of the accommodation on the operation of the facility. See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017); Enforcement Guidance on Reasonable Accommodation. Here, we find the Agency has not shown that reassigning Complainant posed any undue hardship. Therefore, we find that Complainant has established that she was denied a reasonable accommodation in violation of the Rehabilitation Act. See Kristofer E. v. U.S. Postal Serv., EEOC Appeal No. 0120170557 (Jan. 25, 2018).

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to proscribe discrimination in most areas of federal employment. Morton v. Mancari, 417 U.S. at 546-551.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's findings of against harassment and disparate treatment and REVERSE the Agency's finding regarding the denial of a reasonable accommodation. We are REMANDING the matter for further processing in accordance with this decision and the below ORDER.

### ORDER

Unless otherwise indicated, the Agency is ORDERED to complete the following remedial actions **within one hundred and twenty (120) calendar days** of the date this decision is issued:

- I. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. Thereafter, **within ninety (90) calendar days** of the date this decision is issued, the Agency shall determine the amount of compensatory damages to be awarded. **Within thirty (30) days** of determining the amount of compensatory damages, the Agency shall pay Complainant the compensatory damages.
- II. **Within ninety (90) calendar days** of the date this decision is issued, the Agency shall provide four (4) hours of in-person or interactive training to the identified responsible management officials regarding their responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations under Section 501 of the Rehabilitation Act, particularly its duties regarding reasonable accommodation.
- III. The Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
- IV. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a compliance report to the Compliance Officer in accordance with the paragraph entitled, "Implementation of the Commission's Decision."

POSTING ORDER (G0617)

The Agency is ordered to post at its Rockville, Maryland facility 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).

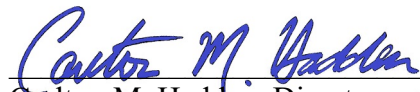
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 14, 2021

Date