



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

[REDACTED]
Eleni M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2020001903

Agency No. ARREDSTON17JUL02264

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”), pursuant to 29 C.F.R. § 1614.403, from a November 8, 2019 Final Agency Decision (“FAD”) concerning an 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Specialist (Labor Relations), GS-0201-13, for the Civilian Human Resources Activity, Management Labor Sustainment Division (“MLSD”), Redstone Arsenal in Huntsville, Alabama.

On September 12, 2017, Complainant filed a formal EEO complaint alleging that she was subjected to discrimination and a hostile work environment/harassment by the Agency on the basis of disability when:

- (a) On July 3, 2017, she received email notification of denial of her Family and Medical Leave Act (“FMLA”) request from her supervisor (“S1”),

¹ 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.

- (b) On October 20, 2016, S1 made insulting, intimidating, and ridiculing comments about her surgery,² and,
- (c) In October 2016 ("Request 1"), and in March 2017 ("Request 2"), Complainant requested a reasonable accommodation and did not receive a response from management.³

The Agency accepted Claim (a) for investigation, but dismissed Claims (b) and (c) on timeliness grounds, pursuant to 29 C.F.R. § 1614.107(a)(2). At the conclusion of its investigation of Claim (a), the Agency provided Complainant with a copy of the report of investigation ("ROI") and notice of her right to request a FAD or a hearing before an EEOC Administrative Judge ("AJ"). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b).

The FAD determined that the Agency erred in its initial dismissal of Claims (b) and (c).⁴ However, the FAD further determined that Claim (b) could still be dismissed without investigation on the alternate procedural grounds of failure to state a claim, citing 29 C.F.R. § 1614.107(a)(1). Finding the record sufficiently developed to do so, the FAD decided Claims (a) and (c) on the merits without remanding them for investigation.

Complainant's first level supervisor ("S1"), the Division Chief and Supervisory Human Resources Specialist, GS-0201-14, was the deciding official for her reasonable accommodation and FMLA requests, and her second level supervisor ("S2"), a Supervisory Human Resources Specialist, GS- 0201-15, was the concurring official.

² Complainant's formal complaint and ROI reveal that Complainant alleged that S1 subjected her to ongoing harassment throughout the relevant time frame, not limited to October 20, 2016.

³ While Complainant takes the position that Requests 1 and 2 constitute one ongoing request for an accommodation, for continuity and organizational purposes, this decision will continue to refer to Complainant's accommodation requests as Requests 1 and 2.

⁴ The EEOC's Compliance Manual, Section 2, "Threshold Issues," p. 2-73, EEOC Notice 915.003 (July 21, 2005), provides that "because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it." Further, the Commission has specifically held that the denial of reasonable accommodation constitutes a recurring violation that repeats each time the accommodation is needed. See Harmon v. Office of Personnel Management, EEOC Request No. 05930365 (Nov. 4, 1999); Peacock v. U.S. Postal Service, EEOC Appeal No. 0120032372 (July 31, 2003). Therefore, Claim (c) was properly determined to be timely, making the harassment allegation in Claim (b) timely as well. See Nat'l R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061 (Jun. 10, 2002) (a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period).

Complainant was one of the three MLSD Labor Relations Specialists who represented the Agency in all labor matters at Redstone Arsenal. The essential functions of her position included, but not limited to, negotiating and administering labor agreements, responding to labor organizations on behalf of management, and providing guidance and drafting briefs on labor matters. To perform these functions, Complainant spent prolonged periods of time typing documents, entering data, or writing notes by hand.

Complainant had a history of pain in her right (dominant) wrist and hand due to repetitive motion and arthritis. In late September 2016, Complainant's condition significantly worsened when a tendon in her right hand ruptured, causing one of her fingers to "simply dangle uselessly." On October 19, 2016, Complainant was at work, lifting a pile of papers and a binder when she heard a "pop" followed by severe pain and an inability to raise her fourth finger on her right hand. On or about October 21, 2016, Complainant injured a third finger while attempting to work using her injured hand. Even simple actions, such as opening and closing car doors, buttoning clothes, personal grooming, carrying items, and essentially any other action that involved grasping, manipulating, reaching, lifting, carrying, typing, leafing through documents, writing, or other actions involving her dominant hand, became extremely difficult and painful. Both S1 and S2 testify that they became aware of Complainant's injuries shortly after they occurred.

On or about October 20, 2016, Complainant showed her injury to S1 and explained how it impacted her ability to perform her job duties. According to Complainant, S1's response was insensitive and dismissive, and she allegedly made an offensive comment that Complainant's injury caused her to look like she was perpetually "shooting the bird." Ultimately, Complainant was diagnosed with carpal tunnel syndrome, arthritis, malformed ulna bone and torn tendons. The condition was permanent and would require surgery. Complainant could no longer type or write without experiencing pain.

On or about October 20, 2016, Complainant became aware of the Agency's Computer/Electronic Accommodations Program ("CAP"), located at its Washington, D.C. Headquarters. CAP offered assistive technology, such as Dragon speech recognition software, which would allow her to type efficiently without using her hands. Complainant orally asked S1 for assistive technology through CAP as a reasonable accommodation for her disability.

On November 18, 2016, S1 provided Complainant with the relevant portions of Army Regulation 690-12 Civilian Personnel, Equal Employment and Diversity ("AR 690-12"), which contained the Agency's EEO policies and forms to request a reasonable accommodation.

Reasonable Accommodations & FMLA Leave

On November 21, 2016, Complainant submitted a fully completed AR 690-12, Appendix B "Confirmation of Request for Reasonable Accommodation" form to S1 (Request 1). The form explained that Complainant was scheduled for surgery on December 2, 2016, that would involve tendon transfers to repair her injured fingers, and removal of part of her wrist bone.

Complainant attached a narrative statement explaining the nature of her impairment and how her request would be an effective accommodation. To date, Complainant had already provided S1 with an October 20, 2016 note from an Occupational Nurse Practitioner at Redstone Arsenal Post, advising against typing with her injured hand, an October 24, 2016 note from her physician directing her to avoid using her right hand, work restriction forms dated November 7 and 18, 2016 advising that Complainant avoid using her right hand, a November 16, 2016 prescription from an orthopedic physician for a “voice assistant program,” and a November 18, 2016 doctor’s note describing how Complainant’s injury restricted her daily life activities and predicting a four-week recovery period following surgery scheduled for December 2, 2016.

Complainant also explained that following surgery, her recovery would involve extensive occupational therapy to help her “relearn to use fingers on [her] dominant hand,” with an earliest return date of December 19, 2016. Complainant requested the following CAP assistive technology so she could telework while she recovered, and upon her return:

[L]aptop that can be secure from my home; OR allow working from home until I am cleared to use my right hand, voice activated software (Dragon) compatible headset and microphone that can connect to my computer (whether issued laptop or my home PC), to enable full email use, [and] voice recorder (to allow telephonic conversations to be recorded and then put into Word).

Where the Appendix B form asked whether the request was time sensitive, Complainant responded that she sought the accommodation “ASAP” because while she was absent her job would be “compromised,” due the specialized nature of her responsibilities, and lack of temporary support scheduled for her absence.

S1 granted Complainant’s request for a laptop, but told Complainant that she would process her reasonable accommodation request after Thanksgiving. In the meantime, S1 assigned an intern to type for Complainant. Complainant testified that intern assisted her on two occasions, and it was an ineffective accommodation. On November 29, 2016, Complainant went on leave one day earlier than planned, having not heard back from S1 about her assistive technology request.

On November 30, 2016, S1 formally acknowledged Complainant’s November 21, 2016 accommodation request. However, S1 also told Complainant, “[o]n November 28, 2016, you informed me your doctor was faxing *an excuse to take you out of work* beginning the following day. Therefore, you did not wish to proceed with the reasonable accommodation request.” (Emphasis added). S1 asked Complainant to confirm in writing that she withdrew her request, recalling that Complainant said that she wanted to withdraw her request when they spoke on November 28, 2016. Then, S1 unilaterally halted the reasonable accommodation process, stating it would resume once Complainant provided additional medical documentation and returned to work. Complainant responded on December 6, 2016, by reiterating her November 21, 2016 request for assistive technology, without stating that she withdrew her complaint.

On December 7, 2016, Complainant notified S1 that her surgery was rescheduled to December 19, 2016 and provided an “estimated timeline of treatment” from her physician. Complainant would be under medical care from her surgery through approximately February 19, 2017. Her new estimated return date was January 17, 2017 (or until released to return to work), and upon her return, she would be subject to medical restrictions until March 31, 2017. As a reasonable accommodation, the physician stated that Complainant, “would benefit from a speak-to-text software and/or audio recorder. In addition, [Complainant] may benefit from working from home to ensure less stress being placed on the hand, wrist and arm.”

On December 19, 2016, S1 appeared to temporarily reverse her November 30, 2016 stance, as she notified Complainant that she inquired about obtaining assistive technology on her behalf. However, the next day, S1 informed Complainant that she and the individual she spoke with felt it would be best to wait for Complainant to return to work with additional medical documentation before issuing assistive technology, as they could better assess her needs.

On February 23, 2017, in preparation for her return to work, Complainant submitted documentation from her physician. On March 20, 2017, Complainant returned to work and provided S1 with a March 20, 2017 DA Form 4700 (Certification of Medical Fitness) completed by a health care provider at the Health Center at Redstone Arsenal. Both the February 23, 2017 and March 20, 2017 documents state that Complainant cleared for “full duty with no restrictions” as of March 20, 2017. However, both specify that Complainant will continue to experience flare ups of her condition, and in those instances, she requires rest and 24 hours without using her hand, or telework (driving hurt her wrist and hand during flare ups, as it involved opening doors and grasping a steering wheel). Both documents clarify under “restrictions” that Complainant should use Dragon Software at work.

On March 27, 2017, although she believed her November 21, 2016 request for assistive technology as a reasonable accommodation was still pending, Complainant contacted S1 with a new request for assistive technology (Request 2). Complainant testifies that she also contacted CAP directly to request assistive technology.

On March 30, 2017, for purposes of an FMLA request, Complainant’s treating orthopedist completed a Form WH-380-E, which answered detailed questions about Complainant’s disability. Among other things, the orthopedist specified, “when [Complainant] returns to work on March 20, 2017, *please allow for the use of dictation software such as Dragon.*” (Emphasis added). He also stated that Complainant may work from home if she experienced a flare up, but to allow for 24 hours of rest, further establishing the chronic nature of Complainant’s disability.

In April 2017, Complainant submitted two FMLA requests, which S1 and S2 approved for a total of up to 480 hours (12 weeks), the maximum amount allowed per year. The first request, dated April 2, 2017, was for FMLA leave related to Complainant’s disability, and the second request, dated April 24, 2017, was for FMLA leave to allow Complainant to care for her mother.

On April 3, 2017, an EEO Specialist emailed Complainant to follow up about her reasonable accommodation request, providing details about what to include in a request, explaining the reasonable accommodation process, and providing Appendix C of AR 690-12. In an April 5, 2017, email response to S1 about her reasonable accommodation request, Complainant stated that she already sent a request on a PDF form, and asked if S1 is requesting that she send it again, noting that this new request should not have been necessary for a reasonable accommodation. Complainant still cooperates, stating, "I have asked the surgeon for another note to contain information to comport with the suggested form EEO sent to us." On April 11, 2017, Complainant's physician completed another Form WH-380-E, which also stated that Complainant was cleared to work with "no restrictions" as of March 20, 2017. Among other things, he reiterated that Complainant would require 24 hours of rest to recover when she experienced flare ups.

On April 24, 2017, S1 and Complainant met to discuss her reasonable accommodation request again, and again, S1 explained which form Complainant needed to provide to obtain a reasonable accommodation. On May 9 and 10, 2017, S1 sent a follow up email asking whether Complainant had completed a "reasonable accommodation and/or telework request," and reminding Complainant that her request must comport with Appendix C of AR 690-12. Complainant responded, "Thank you for asking, I have a draft which I will complete today for you." S1 testifies that Complainant "never properly completed any new reasonable accommodation request along with clear and supporting documentation."

On June 7, 2017, Complainant, who had been using her FMLA leave intermittently to care for her mother and for chronic pain in her right hand and wrist, learned that she would be eligible for retirement in September 2017, when she turned 62. She submitted an application to retire effective September 30, 2017. Complainant states in the record and told S1 that she intended to keep her options open, in case she received her reasonable accommodation, and was no longer in pain while working.

On June 29, 2017, Complainant, emailed a new FMLA leave request to S1. Complainant notes that she applied for retirement, and that she was approved for two FMLA requests, stating that she needed to care for her mother, and, "[i]t's time I rest my hand and wrist for now." Complainant elaborates, "typing and handwriting wear out my hand after only a very short while, so I go home in pain." She concludes, "I would like to take a block of FMLA time ASAP and then *return to work* until retirement." (Emphasis added.)

In or about late June 2017, CAP notified Complainant that the request she submitted directly to their office had been processed and her assistive technology had been shipped to her office.

On July 3, 2017, S1 denied Complainant's request for a "block of FMLA time" because she did not specify the amount of hours requested, dates and duration of the leave, or which of Complainant's two FMLA requests it applied to. S1 admonished Complainant for not tracking her leave, notified her that she had nearly 200 negative leave hours and already used 89 hours of leave without pay ("LWOP").

S1 also conveyed frustration, referencing a June 28, 2017 conversation she had with Complainant, “I clearly communicated that since you applied for regular retirement [as opposed to disability retirement]... you were expected to work until that time.” S1 also referenced an office-wide email Complainant sent, which, in S1’s opinion, indicated that Complainant intended July 7, 2017 to be her last day of work. Significantly, S1 told Complainant about an apparent communication she had with Complainant’s doctor’s office, implying that she did not believe Complainant required leave related to her disability. S1 makes no reference to Complainant’s reasonable accommodation request. However, S1 specified, “feel free to provide all necessary information for further consideration/approval.”

On July 5, 6, and 7, 2017, Complainant resubmitted her FMLA requests, this time using the proper form and including the specified information. She said she felt distraught and blindsided by S1’s July 3, 2017 denial, however, S1 approved each FMLA request the same day, and did not request any additional medical documents as a condition of approval.

On July 7, 2017, Complainant emailed S1, S2, and her co-workers, “after today, I will be out on FMLA leave until September.” She provided two contacts within the CPAC Labor as well as S1’s contact information. The email concluded, “I wish you all the best, and know that I leave you in good hands.” The email did not explicitly reference retirement.

On or about July 14, 2017, CAP notified Complainant that her assistive technology had been ordered. The package arrived the following week under her name, yet nobody notified her of its arrival. Part of Complainant’s stated reason for taking such extensive leave was that she needed to rest her wrist and hand, as continuing to work without assistive technology caused flareups and she experienced pain at the end of each day of typing at work. Complainant testified that had she known that her requested accommodation was available, she would have canceled her disability-related FMLA leave and returned to work.

An August 2, 2017 report from Complainant’s surgeon discusses the condition of her hand and wrist and states that typing makes her pain worse. As of that date, Complainant states that she was not aware of receipt of her reasonable accommodation request and she was anticipating returning to work after September 5, 2017. Ultimately, Complainant did not return to work prior to her retirement.

On two occasions in August 2017, Complainant attempted to return from FMLA leave, but was told by one of her colleagues that S1 said there was no need for Complainant to return to work. Complainant said she felt devastated, as she interpreted this to be tantamount to getting fired. She also asserted that S1’s failure to disclose the arrival of her assistive technology constituted denial of reasonable accommodation. We note that Complainant, who was aware that the software and equipment already shipped from CAP, does not specify whether she inquired about her accommodation when she called the office in August 2017.

Harassment/Hostile Work Environment

From her October 19, 2016 injury through her surgery on December 19, 2016, Complainant describes herself as “an emotional wreck” in part because she was in physical pain, but also due to S1’s alleged “hostile attitude.” On or about October 20, 2016, Complainant informed S1 that she would have to get surgery on her hand, and, S1 “immediately started drilling [Complainant] with questions regarding how long [she] would be out.” She explained that she could not provide a specific length of time, and that she was considering all of her leave options, including FMLA. According to Complainant, at the mention of FMLA, S1 “jumped out of her chair and said, “that tells me as a supervisor that you just don’t want to work.” S1 also allegedly demeaned Complainant by threatening to reassign her to her former position.

Soon afterward, S1 allegedly began making “excessive work demands,” and hovered by Complainant’s cubicle, directing her to “hurry up” and finish data entry before she went on leave. Complainant began experiencing anxiety attacks due to the pressure S1 allegedly placed on her. Coworkers testified that during this time they witnessed Complainant leave S1’s office crying more than once, and that she exhibited pain as she attempted to continue working. Complainant further alleges that on an unspecified date in November 2016, S1 humiliated her by asking Complainant’s coworker (“C1”), why Complainant was in his office so often in a manner that both Complainant and C1 interpreted to imply “something distasteful.” The record reflects that S1 knew C1 was the point of contact for Office of Workers’ Compensation Program (“OWCP”) matters and Complainant had a pending OWCP claim related to her disability.

On November 30, 2016, after Complainant went on leave for her surgery, S1 referred to Complainant’s medical leave documentation as obtaining an “excuse” to get out of work. On or about December 19, 2016, S1 allegedly threatened Complainant with AWOL when Complainant changed the date of her surgery after switching providers. Following the change in surgery dates, resulting in an additional month before Complainant anticipated returning to work, S1 allegedly ramped up the harassment. By Complainant’s account, S1 allegedly bombarded her with emails about her leave hours and asked invasive questions about her treatment plan. Complainant further alleges that S1 continued requesting supporting medical documents. The record reflects that despite all the previous medical documents Complainant provided, S1 continued to request more documentation.

Upon Complainant’s return to work on March 20, 2017, through her final day on July 7, 2017, S1 allegedly continued the harassment by making unnecessary requests for medical documentation, and prolonging Complainant’s efforts to obtain assistive technology as a reasonable accommodation. On two dates in August, while Complainant was on FMLA leave, she called to come into the office and was told by a coworker that S1 said she did not need to come in to work. Complainant said she felt as though she had been fired.

Based on this evidence, the Agency’s FAD concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

ANALYSIS AND FINDINGS

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”).

Dissatisfaction with EEO Investigation

The regulation set forth under 29 C.F.R. § 1614.108(b) requires the Agency to create an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An “appropriate factual record” is “one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.” § 1614.108(b). Upon receipt of the ROI, complainants are provided an opportunity to cure defects in the record by either notifying the agency (in writing) of any perceived deficiencies in the investigation, or by requesting a hearing before an AJ. See EEO MD-110, at Ch. 6, § XI and Ch. 7, § I.

Here, the record could have been developed further, had the Agency properly identified and investigated Claims (a) and (b). However, Complainant chose not to take advantage of the above-mentioned opportunities to cure these defects. If Complainant wanted an opportunity to further develop the record through discovery and cross examination of witnesses, she could have requested a hearing before an AJ. See Tommy O. v. United States Postal Serv., EEOC Appeal No. 0120152090 (Jun. 8, 2017).

The ROI contains an impartial and appropriate factual record, including sworn affidavit testimony from Complainant, S1, S2, and multiple coworkers who worked in close proximity with Complainant during the relevant time frame. We note the lack of documented communication originating from CAP and the Agency’s Disability Program Manager, however, there is ample medical documentation of Complainant’s disability dating to October 2016.

The ROI referenced an appellate decision issued by the Merit Systems Protection Board (“MSPB”) about a related matter raised by Complainant.⁵

⁵ MSPB Appeal No. AT0752180064I2 (Nov. 19, 2018) (finding that the MSPB lacked jurisdiction where Complainant alleged involuntary retirement due lack of a reasonable accommodation, it appears Complainant declined to exercise her right to appeal to the Commission for further review of the matter).

With respect to areas where the ROI could benefit from additional context, the MSPB decision provided a factual account of Complainant's reasonable accommodation requests consistent with the testimony in the ROI and based on sworn hearing testimony and evidence that was reviewed and accepted by an AJ. The ROI, in conjunction with the factual findings in the MSPB decision, allow for impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. The MSPB AJ's legal findings were not considered for our analysis.

As the information before us is sufficient to allow a reasonable fact finder to draw conclusions as to whether discrimination occurred, Complainant's request that we remand her complaint to the Agency for further investigation is denied.

Disparate Treatment (FMLA Request)

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she 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. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder 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).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a *prima facie* case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Typically, challenges to decisions pertaining to the FMLA, which is regulated by the Department of Labor, are considered impermissible collateral attacks on another proceeding, and therefore outside EEOC jurisdiction. See Stensgard v. United States Postal Serv., EEOC Appeal No. 0120122478 (Sept. 26, 2012), other citations omitted.

However, we have previously upheld discrimination allegations such as the one before us, where the Complainant challenges the acts of an Agency manager rather than the decision of an adjudicatory body. See Ramsey v. United States Postal Serv., EEOC Appeal No. 07A10080 (July 18, 2003) (discrimination found regarding the Agency's denial of an FMLA leave request).

Applying a disparate treatment analysis, the Agency offered a legitimate nondiscriminatory reason for the July 3, 2017 denial of Complainant's FMLA request. Namely, Complainant, who had extensive prior experience requesting FMLA leave, did not provide S1 with necessary information, including the amount of leave requested and specific dates of the leave. The Agency's legitimate nondiscriminatory reason is supported in the record, as S1 approved Complainant's leave request within the day once Complainant submitted the necessary information via the Agency's online application. On appeal, Complainant has not offered any evidence to indicate that the Agency's explanation was pretext for discriminatory intent.

However, in the July 3, 2017 email denying Complainant's FMLA request, S1 warns, "be advised your doctor's office has informed me you are not scheduled for any follow up visits and you have been cleared for duty without any restrictions. If your prognosis has changed, you must provide me with updated medical information." Based on this statement, S1 committed a *per se* violation of the Rehabilitation Act by communicating with Complainant's health provider about Complainant's confidential medical information without Complainant's knowledge or permission.⁶ The record does not reveal any scenario where it would be appropriate or permissible for S1 to communicate directly with Complainant's health provider.

Harassment/Hostile Work Environment

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 her disability. Only if Complainant establishes both hostility and motive, will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice 915.002 (June 18, 1999).

It is well established that routine work assignments, instructions, and admonishments, which are all "common workplace occurrences" do not rise to the level of hostility necessary to establish harassment. See Gray v. United States Postal Serv., EEOC Appeal No. 0120091101 (May 13, 2010) citations omitted.

⁶ Complainant also alleges that S1 violated the Health Insurance Portability and Accountability Act ("HIPPA") we note that HIPPA is enforced by the Department of Health and Human Services' Office of Civil Rights, making the EEO complaint process the improper forum to raise a HIPAA violation, and such allegations beyond EEOC jurisdiction. See Agustin L. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120161494 (Jun. 21, 2016) citations omitted.

Also, we have repeatedly found that allegations of a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See, e.g., Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996) (allegations that supervisor "verbally attacked" the complainant on one occasion, attempted to charge him with AWOL, and disagreed with the time the complainant entered into a sign-in log, were insufficient to state a harassment claim), see also Banks v. Dep't of Health and Human Servs., EEOC Request No. 05940481 (Feb. 16, 1995).

In the instant case, Complainant's allegations about S1 making "excessive work demands" involve a common workplace occurrence that is not sufficiently severe or pervasive to constitute harassment. Likewise, S1's comment about Complainant "shooting her the bird" may have been offensive, but it appears to be an isolated incident, as does S1's alleged comment in November, which implied "something distasteful" about Complainant and a coworker. Complainant's other harassment allegations are better characterized as improper medical inquiries in connection with Complainant's reasonable accommodation claim and will be discussed later in this decision. In sum, we affirm the Agency's conclusion that Complainant has not established discriminatory harassment as alleged.

Reasonable Accommodation

Under the Rehabilitation Act and the Commission's regulations, an agency is required to make reasonable accommodation of 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. 29 C.F.R. §§ 1630.2(o), 1630.2(p). Complainant contends that she was unable to perform the duties of a CDT because of the limitations stemming from her carpal tunnel syndrome, which was exacerbated due to the delay in providing a reasonable accommodation.

A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, Question 1 (Oct. 17, 2002). When an individual's disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. *Id.* at Question 6. The employer is entitled to know that the individual has a covered disability for which she needs a reasonable accommodation *Id.* Reasonable documentation means that the employer may require only the documentation that is needed to establish that a person has a disability within the meaning of the Rehabilitation Act and that the disability necessitates a reasonable accommodation. *Id.* If an individual's disability or need for accommodation is not obvious, and she refuses to provide the reasonable documentation requested by the employer, then she is not entitled to reasonable accommodation. *Id.*

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the disabled individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See EEOC Enforcement Guidance No. 915.002, see also, Abeijon v. Dep't of Homeland Sec., EEOC Appeal No. 0120080156 (Aug. 8, 2012).

Protected individuals are entitled to reasonable accommodation, but they are not necessarily entitled to their accommodation of choice. Castaneda v. United States Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994). Improper termination of the interactive process constitutes an improper denial of a reasonable accommodation. See Harvey G. v. Dep't of the Interior, EEOC Appeal Nos. 0120132052 & 0120150844 (Feb. 4, 2016).

The complainant has the initial responsibility of showing that a suggested accommodation is “reasonable” (i.e., that is generally plausible in the job being performed by the individual). See U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002), EEOC Enforcement Guidance No. 915.002. While this is not a high burden for the complainant, it is an initial plausibility threshold that the complainant must meet. Once the complainant shows that the requested accommodation is plausible, the burden then shifts to the agency to show whether the accommodation, even if plausible, would nonetheless impose an undue hardship (i.e., a significant difficulty or expense) on the operations of the agency. See Harge v. Dep't of Veteran's Affairs, EEOC Appeal No. 0120111521 (Dec. 4, 2014).

Complainant has established that assistive technology, including Dragon software, was a plausible reasonable accommodation because of the nature of her disability and the availability of the software and equipment through CAP. According to S1's December 19, 2016 email to Complainant, management approved assistive technology as a reasonable accommodation. Also, when Complainant independently contacted CAP, she was deemed eligible to receive the requested assistive technology. The physician's notes Complainant provided that explicitly requested Dragon software clearly also supports that the assistive technology would have been effective as a reasonable accommodation.

The Agency did not address undue hardship since it failed to analyze Complainant's reasonable accommodation claim on the merits. However, CAP is formally defined as a “centrally-funded reasonable accommodations program that provides assistive technology and services to people with disabilities,” under AR 690-12 Appendix C. One of the stated purposes of CAP, is “to remove barriers to employment opportunities by eliminating the costs of assistive technology and accommodation solutions.” *Id.* Thus, the Agency would not have faced an undue financial hardship by granting Complainant's request and granting Complainant's request would have comported with the Agency's policies.

Request 1

Based on the ROI, “Request 1” includes three explicit requests for assistive technology as a reasonable accommodation: on October 20, 2016, Complainant, verbally asked S1 for assistive technology as a reasonable accommodation, initiating the interactive process. On November 21, 2016, Complainant provided S1 with a written request for a reasonable accommodation identifying specific software and assistive technology she sought from CAP. As Complainant's disability was obvious, this request on its own was sufficient to obligate the Agency to act. Regardless, Complainant also attached sufficient documentary support of her disability.

On December 6, 2016, Complainant responded to S1's November 30, 2016 email asking her to confirm that she withdrew her accommodation request, by reiterating that she sought assistive technology as a reasonable accommodation during her recovery and upon her return to work.

The Agency takes the position that Complainant withdrew her November 21, 2016 request based on S1's November 30, 2016 email, as well as Complainant's December 6, 2016 response, where Complainant states: "I did not get to clarify my Reasonable Accommodation Request, however for now it is OBE [overcome by events] for my request to work from home. I may ask again if circumstances change. I will request the Dragon Software when I return to work." We agree that standing alone, in response to a request for written confirmation of withdrawal, this statement could be interpreted as a confirmation. Yet, the very next sentence contradicts an assumption of withdrawal: "I *still* am requesting the Dragon software and voice recorder for use *even* once I return to work....It is foreseeable that when I return I will *still* need the accommodation of technology. I have the intent to finish the CAP application soon." (Emphasis added).

At a minimum, Complainant's December 6, 2016 response email placed S1 on notice to ensure Complainant had a reasonable accommodation of assistive technology available upon her return to work. However, the next day, Complainant provides medical documentation establishing that she still seeks her November 21, 2016 requested accommodation. The ROI contains a December 7, 2016 note from Complainant's orthopedic surgeon, providing, in relevant part, that after her surgery on December 19, 2016, Complainant would be under post-operative care for three months with an estimated return date of January 17, 2016. The note then states: "Accommodation Request: During recovery [Complainant] would benefit from a speak-to-text software and/or audio recorder." In other words, Complainant would require an accommodation prior to her return to work so that she could telework.

We conclude that S1 denied Complainant's first request for a reasonable accommodation by improperly terminating the interactive process. Specifically, S1's November 30, 2016 email stated: "I will take no further action with regard to this request at this time. You may re-engage if accommodation is needed upon your return to duty with supporting documentation from your physician." Then, in response to Complainant's December 6, 2016 reiteration of her request, S1 stated the same day: "[in] reference your accommodation request, we will move out when you provide current substantiating medical documentation from your physician. Focus on getting well, we'll deal with everything else when you return."

Even assuming, *arguendo*, that the evidence supported the Agency's position that Complainant withdrew her November 21, 2016 request, the December 7, 2016 medical document should have re-opened the interactive process. A December 16, 2016 email from Complainant to S1 confirms that she is still working on obtaining more (unnecessary) medical documentation for S1. However, on or about December 20, 2016, S1 improperly terminated the interactive process again by informing Complainant that no further action would be taken until Complainant returned to work and provided updated medical documentation. S1 also effectively denied Complainant's request to telework while she recovered, prior to returning to work.

The Agency improperly denied Complainants multiple requests for a reasonable accommodation between October 20, 2016 and on and about December 20, 2016.

Request 2

The Agency explains that it did not provide Complainant with a reasonable accommodation upon her return to work and additional requests because, despite S1 following up multiple times, Complainant never provided her with a completed AR 690-12 Appendix C. Entitled “Reasonable Accommodation Request Resource,” Appendix C contained a list of questions facilitate the interactive process or “clarify the employee’s need for an accommodation or to explore potential accommodations.” S1 also stated that Complainant never submitted a DD Form 2946, which is required (along with other documentation) to obtain telework, yet she still allowed Complainant to check out a laptop to use while she was on leave.

When Complainant returned to work on March 20, 2017, S1 instructed her to complete Appendix C of AR 690-12 and provide updated medical documentation before she would provide the accommodation. We note that S1 had just received the February 23 and March 20, 2017 medical documentation confirming that Complainant’s condition, post-surgery was chronic, as it involved flare ups and ongoing treatment. The documentation also expressly supported Complainant’s November 21 and December 6 and 7, 2016 requests for assistive technology, specifically Dragon Software, as a reasonable accommodation. S1 also acknowledges that Complainant made another verbal request for telework and Dragon Software, a headset and voice recorder in April 2017.

When Complainant did not provide S1 with the Appendix C of AR 690-12, S1 contacted the Agency’s Reasonable Accommodation Program Manager (“RA Manager”) for assistance and she held a counseling session with the RA Manager and Complainant on or about April 25, 2017. During the meeting, Complainant was once again provided with instructions and Appendix C of AR 690-12. S1 testified that she and the RA Manager “explained that [Complainant] was a vital part of the [reasonable accommodation] process, 'that the process was interactive, and she was responsible for completing and submitting the paperwork. We explained after she submitted the paperwork, the RA Manager would hold a RA Team meeting to review her request and take action.’” When Complainant did not provide S1 with the completed form, S1 informed the RA Manager, and the RA Manager said that they would not take further action.

By the time S1 and the RA Manager held the meeting with Complainant, Appendix C of AR 690-12 appears superfluous. Complainant’s need for an accommodation was both obvious and supported by medical documentation, an effective reasonable accommodation had already been identified that would not cause the Agency undue hardship, and it appears that the accommodation was available, as CAP already approved Complainant for the accommodation when she contacted them independently. More importantly, Complainant already completed Appendix B, “Confirmation of a Request for Reasonable Accommodation” on November 21, 2-16. S1 and the RA Manager appear to conflate Appendix C of AR 690-12 with the interactive process itself.

Given S1's insistence on obtaining Appendix C, it is unclear why she and Complainant could not have completed it together during one of their meetings back in October 2016, or while they were meeting with the RA Manager, who could have clarified any confusion over what more was required.

It is well documented throughout the record that using her right hand to type and write aggravate Complainant's disability, and the software she requested would allow her to type without using her right hand. Before and after surgery, and through her recovery, Complainant told S1 and others about pain she was experiencing due to lack of reasonable accommodation. Most notably, Complainant's June 29, 2017 email to S1 requesting FMLA leave states:

My hand is still giving me problems. My pinkie finger is starting to droop down again, so that tells me some sort of tendon issue is going on. I went to see my surgeon, who had discouraging things to say. I am steeling myself for the prospect that my hand and wrist may never improve and now even my arm is starting to be affected. Typing and hand-writing wear out my hand after only a very short while, so I go home with pain. It's time I rest my hand and wrist for now.

Complainant states that flare-ups prevented her from going to work for a 24-hour period because to enable the flare up to subside, she could not use her right hand at all. However, she states "if the accommodation of telework had been offered, I was allowed per medical instructions to work with the dragon software (if I had it) and make calls for my job. I could also have worked from home with the dragon software, but I was denied it upon its arrival into the office in July 2017."

Alternately, the Agency argues that the post-surgery medical documentation Complainant submitted all state that Complainant had "no restrictions," so it was not obvious that a reasonable accommodation was necessary. Despite containing the phrase, "no restrictions," the referenced documents are a testament to the fact that Complainant's impairment has not gone away, but rather, is a chronic condition. All of the referenced documents advise that Complainant continues to experience flare ups where she needs at least a day to recover. The Agency does not address the fact that three of the referenced documents, dated February 23, March 20, and 27, 2017, explicitly recommend that Complainant be provided with Dragon Software as a reasonable accommodation. Complainant completed a request for the same accommodation and same impairment on November 21, 2016. Since the medical documentation confirms the continued existence of Complainant's impairment, we fail to see why the Agency required additional forms or medical documents to provide Complainant with a reasonable accommodation.

In reaching this conclusion, we note the Commission has stated that there are situations when an employer cannot ask for documentation in response to a request for reasonable accommodation. It is when: (1) both the disability and the need for the reasonable accommodation are obvious; or (2) the individual has already provided the employer sufficient information to substantiate that she has a disability and needs the reasonable accommodation requested. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 8, (Oct. 17, 2002) ("Reasonable Accommodation

Enforcement Guidance”), see also, e.g., Dixie B. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120170175 (Mar. 26, 2019) (agency’s requests for supporting medical documentation each time a complainant took leave to be improper disability-related inquiries, because the complainant had a chronic disability and already provided sufficient information to substantiate her need for leave as a reasonable accommodation for disability-related flare ups).

When Complainant initially requested a reasonable accommodation on or about October 20, 2016, both her disability and the need for assistive technology so that she would not have to use her right hand and wrist to type, were obvious. S1, S2, and Complainant’s coworkers all testified that they were aware that Complainant had a wrist impairment that hindered her ability to type and write. Assuming, *arguendo*, that Complainant’s disability and need for an accommodation were not obvious, her November 21, 2016 written request for a reasonable accommodation, accompanied by medical documentation substantiating her disability was sufficient to establish that Complainant’s condition was chronic, and, that, she would require assistive technology as a reasonable accommodation “ASAP” through her return to work.

The documents Complainant provided to S1 on February 23, 2017, in preparation for her return to work, substantiated the chronic nature of Complainant’s disability and specifically requested that Complainant be provided with Dragon Software as a reasonable accommodation. Complainant already completed the November 21, 2016 reasonable accommodation request for the same accommodation and same chronic disability, so she did not need to do so again when she returned to work on March 20, 2017. Moreover, the accommodation should have been provided already so that Complainant could have teleworked effectively during her recovery.

S1 never explains to Complainant in her many requests, why she believes the documentation Complainant already provided is not sufficient, particularly in light of the November 21, 2016 request, December 7, 2016 medical document, the February 23, 2017 clearance to go back to work, and obvious nature of Complainant’s disability. S1’s requests for additional medical information following Complainant’s November 21, 2016 formal request for a reasonable accommodation and accompanying documents, and the February 23, 2016 post-surgery update were improper disability-related inquiries.

In sum, we conclude that the Agency failed in its responsibility to provide Complainant reasonable accommodation for her disability as required by the Rehabilitation Act.

Entitlement to Compensatory Damages for Denied Reasonable Accommodation

In situations where an agency, as the employer, fails to provide a reasonable accommodation and undue hardship would not be a valid defense, the agency is not obligated to award a complainant compensatory damages if it can show that it made a “good faith” effort to provide them with a reasonable accommodation. See EEOC Enforcement Guidance No. 915.002, at 13 n.24, Teshima v. United States Postal Serv., EEOC Appeal No. 01961997 (May 5, 1998).

An Agency can demonstrate that it made a “good faith” effort by proving that it engaged in the interactive process. Id. For instance, documentation that a manager consulted with the individual with a disability and attempted to identify and make a reasonable accommodation evinces a “good faith” effort. Schauer v. Soc. Sec. Admin., EEOC Appeal No. 01970854 (Jul. 13, 2001), Luellen v. United States Postal Serv., EEOC Appeal No. 01951340 (Dec. 23, 1996) (the agency demonstrated good faith effort where it consulted with the complainant and her physicians in attempting to identify a reasonable accommodation, despite the fact that they were ultimately unsuccessful).

Even if an agency can show that it engaged in the interactive process, it cannot be deemed to have acted in good faith if it has not at least attempted to secure an accommodation for an employee, particularly where the employee has demonstrated cooperation with the process. See Ferguson v. Dep’t of Agriculture, EEOC Appeal No. 01A33341 (July 22, 2004) (although it engaged in the interactive process, the agency was found not to have made a “good faith” effort where it did not take any steps to secure an effective accommodation, even though “the record indicates that complainant always provided medical documentation as requested”), Mees v. United States Postal Serv., EEOC Appeal No. 01971964 (Sept. 11, 2000) (agency did not make a “good faith” effort where it lacked evidence that it searched for an accommodation for the complainant), Morris v. Dep’t of Def., EEOC Appeal No. 01962984 (Oct. 1, 1998) (agency did not make a “good faith” effort where it did not attempt to find an available office position for complainant in spite of his repeated requests).

The Commission previously found that an agency lacked good faith when responding to a reasonable accommodation request where the agency used the complainant’s leave status as an excuse to halt the interactive process. See Denese G. v. Dep’t of the Treas., EEOC Appeal No. 0120141118 (Dec. 29, 2016). Another indication of a lack of “good faith” effort occurs where an Agency’s inaction in response to a request for a reasonable accommodation, forces a complainant to take leave for a significant period time, which they would not have had to do if the Agency made a reasonable accommodation available to them. Id.

Here, the record does not reflect that the Agency acted in good faith when responding to Complainant’s requests for assistive technology as a reasonable accommodation. S1 made efforts to engage in the interactive process for both of Complainant’s reasonable accommodation requests, including following up and arranging a meeting with the RA Manager. She also partially granted Complainant’s November 21, 2016 request by providing him with a laptop in order to telework as a reasonable accommodation. Yet, there is no evidence that S1 made any meaningful attempt to secure a reasonable accommodation for Complainant.

Lack of good faith is evinced by S1’s improper disability-related inquiries including her *per se* violation of the Rehabilitation Act, and, in particular, S1’s refusal to proceed with Complainant’s second request unless Complainant provided her with a completed AR 690-12 Appendix C. Under the circumstances, it was not necessary for Complainant to submit this particular document, and it should not have been a barrier to Complainant obtaining a reasonable accommodation.

Complainant already submitted a reasonable accommodation request and provided S1 with ample up to date supporting medical documentation confirming her need for assistive technology as a reasonable accommodation, specifically, Dragon Software upon her return to work. The AR 690-12 Appendix C is a list of questions to be used as a tool for engaging in the interactive process.

While the Agency explains that it requires this document in accordance with its internal policies, failure to complete a form is not necessarily a valid reason to delay providing a reasonable accommodation. In her testimony, S1 appears to conflate the AR 690-12 Appendix C with the interactive process itself. Similarly, a December 2016 email to S1, around the time of her surgery, Complainant indicates that she had not completed her CAP form. Complainant's November 21, 2016 request and accompanying documentation identified all of the necessary information, including the specific assistive technology Complainant sought. The form is also not required under Agency policy. AR 690-12, Appendix D states that in order to obtain an assistive technology through CAP, an employee must "confirm request in writing, *preferably* by completing the CAP Request Form." (Emphasis added).

Complainant has not shown the Agency to be liable for failure to provide a reasonable accommodation to the extent that she alleges that on or about July 14, 2018, S1 failed to notify her that her assistive technology arrived from CAP. Complainant reasons that S1 knew that she took FMLA leave because typing without an accommodation harmed her fingers and wrist. S1 was also aware that with assistive technology, Complainant and could have worked with minimal use of her right hand and wrist had she been allowed to return from FMLA. Complainant argues that her August requests to come into work were denied for similar reasons. However, Complainant was on notice that her assistive technology was scheduled to be delivered from CAP around this time, she received emails informing her when it was shipped and when it was delivered, and she did not notify S1. Regardless, Complainant has not shown that S1 would have known to contact her while she was on leave because it was not clear whether Complainant still needed to stay on FMLA leave to care for her mother, whose condition worsened in recent months. Further, Complainant did not call or email her office to inquire whether the assistive technology arrived or ask about it when she contacted the Agency in August 2017.

It is well established that an unnecessary delay in providing an effective reasonable accommodation can indicate bad faith and result in a violation of the Rehabilitation Act. EEOC Guidance No. 915.002 at Q. 10, Yessenia H. v. Dep't of Veterans Affairs, EEOC Appeal No. 0720070027 (Oct. 13, 2015). In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay; (2) the length of the delay; (3) how much the individual with a disability and the agency each contributed to the delay; (4) what the agency was doing during the delay; and (5) whether the required accommodation was simple or complex to provide. *Id.* at n.38.

The Agency created several months-long unnecessary delays, beginning on November 30, 2016, when S1 first notified Complainant that she would not act on his accommodation request until Complainant returned to work with updated medical information.

The delay was unnecessary because Complainant already provided sufficient documentation to support her request. Regardless, Complainant submitted the December 7, 2016 medical documentation and demonstrated a continued effort to obtain more (unnecessary) documentation for S1. The unnecessary delay prevented Complainant from efficiently teleworking, despite S1 promptly providing her with a laptop. See, e.g. Patricia W. v. Dep't of Homeland Sec., EEOC Appeal No. 0120172637 (Mar. 26, 2019) (agency caused an unnecessary delay where the complainant was provided a reasonable accommodation of full time telework, but it took four months to provide the necessary technical equipment, software, and training). With the exception of December 19 and 20, 2016, S1, after consulting the RA Manager decided to take no further action until Complainant returned to work, with updated medical documents.

S1 reasoned that that after surgery and intensive occupational therapy, Complainant may no longer need a reasonable accommodation when she returned. See Clayton C. v. Dep't of Transp., EEOC Appeal No. 0120120350 (Nov. 17, 2015) (finding that the agency failed to engage in the interactive process, and rejecting agency's explanation that the complainant's initial request for a reasonable accommodation "expired," given that the complainant's disability was obvious and there was no evidence that the need for the accommodation had been eliminated). S1's reasoning ignores that Complainant's requests for an accommodation were also intended so that she could telework during her recovery (i.e. prior to returning to work). S1 does not acknowledge that the December 7, 2016 physician's note Complainant provided addresses this uncertainty by providing a timeline of her recovery that indicated Complainant would require assistive technology through March 31, 2017. As previously discussed, the record contradicts S1's alternate reason that Complainant withdrew her complaint.

S1 prolonged the unnecessary delay, even when Complainant's February 23, 2017 documentation confirmed that she still had the same limitation, her condition was chronic (so her initial accommodation request from November 21, 2016 was still valid), and she required Dragon Software as a reasonable accommodation. without a reasonable accommodation. By this point, it was definitely foreseeable that the unnecessary delay in obtaining assistive technology would result in Complainant missing work due to flareups of her condition arising from efforts to work without an accommodation. S1 continued not to act despite receiving Complainant's March 20, and 27, 2016 medical documents and upon Complainant's March 20, 2016 return to the office with an obvious disability. S1 attributed her delay in providing Complainant with a reasonable accommodation to Complainant's failure to fully respond to (improper) disability-related inquiries, and insisting that no further action could be taken until Complainant engaged in the interactive process by completing an AR 690-12 Appendix C.

Complainant and the Agency both contributed to the delay in providing reasonable accommodations, however the Agency did so to a much greater extent and to the detriment of its obligations under the Rehabilitation Act. See Ruben T. v. Dep't of Justice, EEOC Appeal No. 0120171405 (Mar. 22, 2019) (in determining that the agency was responsible for the unnecessary delay in providing the complainant a reasonable accommodation, the Commission considered that complainant was proactive, and the agency ceased its efforts to provide an accommodation when he was temporarily placed on another assignment, and there was "nothing in the record

showing that he withdrew or paused his request for the additional software”). Complainant could have been clearer in her December 6, 2016 response email to S1, who interpreted it as a withdrawal of her complaint. However, as previously discussed, S1 should not have ceased her efforts to obtain a reasonable accommodation for Complainant before or after Complainant’s email, given the December 7, 2016 medical documents. The record supports that S1 reached out to Complainant multiple times in March, April and May 2017 to obtain the completed AR 690-12 Appendix C. While it is not clear why Complainant failed to provide this document, it is not a sufficient reason to withhold a reasonable accommodation, given that she already provided a reasonable accommodation request and supporting medical documents. S1 also had opportunities to complete the document together with Complainant when they met to discuss accommodations. CAP appears to have been responsive when Complainant contacted them independently.

The assistive technology Complainant requested as a reasonable accommodation was simple to provide because it was available through CAP. According to Section 1.3 of the Agency’s “Procedures for Providing Reasonable Accommodation for Individuals with Disabilities” the Agency’s purpose in establishing CAP was to make assistive technology available to employees that needed it, and not cost individual offices or departments (contrary to S1’s assertion). In both verbal and written communications to S1, including the November 21, 2016 reasonable accommodation request, Complainant provided the specific items of assistive technology she believed would make an effective reasonable accommodation. S1 needed only to submit a request through CAP. Appendix D-2 of AR 690-12 provides clear information about how to request assistive technology through CAP, and CAP is identified as a resource in other portions of AR-690-12. That Complainant could obtain the assistive technology independently underscores how obtaining her reasonable accommodation was not a complex process.

In sum, we conclude the Agency’s excessive delay in responding to Complainant’s request for reasonable accommodation was in bad faith, entitling her to consideration of an award for compensatory damages.

CONCLUSION

Having thoroughly reviewed the record and the Parties’ contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s dismissal of Claim (a), and, on alternate grounds, Claim (b), and we REVERSE the Agency’s finding that Complainant failed to prove discrimination as alleged for Claim (c). Claim (c) is hereby REMANDED for further processing in accordance with the order below.

ORDER (D0617)

The Agency is ordered to take the following remedial action:

1. Back Pay. Complainant is entitled to a backpay award for days she was unable to work due to the Agency’s unnecessary delay and/or denial of reasonable accommodation. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R.

§ 1614.501, no later than **sixty (60) calendar days** after the date this decision was issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within **sixty (60) calendar days** of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Compensatory Damages. Within **thirty (30) calendar days** of the date of this Decision, the Agency shall notify Complainant that she has a right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages within **forty-five (45) calendar days** of receiving the Agency's notice. Within **thirty (30) calendar days** of receipt of Complainant's evidence (or when the 45-day limitation period has passed), the Agency shall complete the investigation on the claim for compensatory damages and issue a decision on the claim, with appeal rights to this Commission, in accordance with 29 C.F.R. § 1614.110.⁷
3. Attorney's Fees and Costs. Complainant is entitled to attorney's fees as provided in the statement below this Order, entitled "Attorney's Fees."
4. Provide Training to S2. Within **thirty (30) calendar days** of the date of this Decision, S2 shall complete a minimum of **2 hours of live one-on-one training**. This single session training may be prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) explain *this decision* and what, if anything, S2 should do differently if she or another one of her subordinates is presented with a similar scenario in the future, (2) discuss the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations.

⁷ **Information on determining Compensatory Damages:** EEOC MD-110, Ch. 11 § VII (Aug. 5, 2015) available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm, and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

5. Provide the following training to S1.
 - a. Within **thirty (30) calendar days** of the date of this Decision, S1 shall complete a minimum of **4 hours of live one-on-one training**. This can be presented in one or two sessions, and prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) explain *this decision* and what, if anything, S1 should do differently if presented with a similar scenario; and (2) explain the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations.
 - b. Within **sixty (60) calendar days** of the date of this Decision, S1 shall **give a 1-hour presentation** to the Agency's MER, Labor and Sustainment Division ("MSLD") at Redstone Arsenal addressing disability rights and the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations,
6. Consider appropriate Disciplinary Action for S1. Within **sixty (60) calendar days** of the date of this Decision, the Agency shall consider taking appropriate disciplinary action against S1. The Agency shall report its decision to the EEOC 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. Training is not considered a disciplinary action.
7. Posting Order. As provided in the statement below, the Agency must post the Notice **within thirty (30) days** of the date this decision is issued, and the Notice shall remain posted for **sixty (60) consecutive days**.
8. Report of Compliance. The Agency is directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented. If S1 or S2 left the Agency prior to the implementation of this Decision, the Agency shall furnish documentation.

POSTING ORDER (G0617)

The Agency is ordered to post at its Civilian Human Resources Activity 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).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

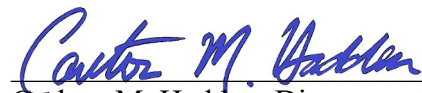
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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 7, 2021
Date