



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

[REDACTED]  
Sandra A.,<sup>1</sup>  
Complainant,

v.

Carlos Del Toro,  
Secretary,  
Department of the Navy,  
Agency.

Appeal Nos. 2020001588, 2021002131

Agency Nos. 18-00259-00130, 20-00259-01008

**DECISION**

Complainant filed two appeals with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 2, 2019 and January 19, 2021, final decisions concerning her equal employment opportunity (EEO) complaints alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. In the interest of administrative efficiency, we exercise our discretion and consolidate the above-referenced appeals. 29 C.F.R. § 1614.606. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decisions.

**BACKGROUND**

At the time of events giving rise to these complaints, Complainant worked as a Technical Editor, GS-1083-12, in the Agency's Clinical Investigations Department (CID), Naval Medical Center, San Diego, California.

On October 24, 2018, Complainant filed an EEO complaint (Agency No. 18-00259-00130 (Complaint 1)) alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (Irritable Bowel Syndrome (IBS)) and in reprisal for prior protected EEO activity when:

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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. Complainant's first-line supervisor (S1) failed to provide timely and effective reasonable accommodation for her disability when:
  - a. On May 17, 2018, Complainant submitted a reasonable accommodation request to reinstate her work schedule of 100 percent telework to S1, but did not receive a timely response for approximately two months;
  - b. On July 17, 2018, Complainant received a response from S1 on her reasonable accommodation request where she approved "frequent and prolonged bathroom access as needed" rather than her requested accommodation for 100 percent telework;
  - c. On or about August 2, 2018, Complainant submitted a second reasonable accommodation request to S1 to adjust her Maxiflex work schedule to permit work outside of core hours and on the weekends in order to catch up on work and make up some time lost when she is sick during the week; and
  - d. On August 15, 2018, S1 responded to her second request approving one day of telework as needed for flare-ups. Also, Complainant was required to maintain core hours of 9:00 a.m. to 2:00 p.m. while on telework or on duty and complete any required forms and training before beginning telework.
2. Complainant was subjected to discrimination based on her disability and in reprisal when:
  - a. On May 22, 2018, S1 established a performance critical element requiring that Complainant maintain core work hours that is supportive to the CID mission and vision for customer service; and
  - b. On July 25, 2018, S1 issued Complainant a Letter of Requirement notifying her of her unsatisfactory attendance and restricting her leave usage with additional requirements for approval that were to remain in effect for one year.
3. Complainant was subjected to harassment, in addition to the events set forth in Claims (1) and (2), when:
  - a. On September 10, 2018, S1 contacted Complainant with the Captain present about her inappropriate and unprofessional conduct at a recent staff meeting where she discussed her telework package, requested help from others with the Quality Improvement/Evidence Based Project (QI/EBP) process, and complained about the realignment of her duties and responsibilities. S1 cautioned Complainant that if it happened again, she would have HR issue her a Letter of Reprimand for insubordination and disrespect. S1 also ordered Complainant not to format and submit manuscripts to journals and instead spend eight hours a week reviewing QI/EBP projects; and
  - b. From May 16, 2018, to November 26, 2018, S1 continually questioned Complainant about timekeeping matters, including her work schedule, working outside of core hours, family, and childcare issues, and use of approved sick leave or the reason for requesting sick leave during various counseling sessions with a third party present, but not her union representative.

On January 21, 2020, Complainant filed a second EEO complaint (Agency No. 20-00259-01008) (Complaint 2). Complainant referenced the allegations in Complaint 1 and further alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of race (Hispanic), national origin (Mexican), color (Brown), disability, and in reprisal for prior protected EEO activity, when:

4. on January 28, 2019, S1 threatened to contact the Human Resources and Legal offices when Complainant refused to move to the office associated with her approved accommodation; and
5. she was subjected to a hostile work environment which culminated in her resignation on February 15, 2019 (constructive discharge).<sup>2</sup>

The Agency processed Claim (5) as a mixed-case complaint, and provided Complainant appeal rights to the Merit Systems Protection Board (MSPB). After MSPB determined they lacked jurisdiction over the matter, the case was returned to the EEO complaint process.

*Denial of Reasonable Accommodation – Claim (1)*

Complainant experiences complications from Irritable Bowel Syndrome (IBS). This condition results in alternating periods of diarrhea and constipation. Complainant asserted that her condition is permanent, and that medication alleviates her symptoms.

According to the position description in the record, 60 percent of Complainant's major duties consist of preparing manuscripts developed from clinical research for publication. To do so, Complainant must ensure that the manuscripts are clear, logical, and adequately supported by evidence. Ten percent of Complainant's job consists of administrative oversight of the Medical Editing Division, twenty percent is devoted to administering and overseeing the CID-sponsored Academic Research Competition and the CID web page, and the remaining 10 percent is dedicated to coordinating and overseeing Cooperative Research and Development Agreements, and other collaborative agreements within the Agency.

When Complainant took over Technical Editor duties in 2012, she informed her supervisor at the time that she had IBS. The supervisor allowed her to telework with a flexible schedule. Complainant first teleworked three times a week, then teleworked 100 percent of the time for roughly two years. Under her flexible work schedule, Complainant was simply required to work 80 hours in a two-week pay period. Complainant asserted that working at home allowed her to "have a low-stress environment with a consistent, regular schedule where [she] could have greater control over [her] IBS symptoms."

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<sup>2</sup> In Complaint 2, the Agency dismissed two additional claims as untimely raised with an EEO Counselor and previously raised in Complaint 1. Because we have consolidated the complaints and those claims are addressed herein, we need not address the Agency's procedural dismissal.

In March 2018, Complainant's first-line supervisor (S1) assumed supervision of Complainant's department. The record indicates that S1 canceled all telework arrangements for the department effective April 29, 2018. In May 2018, Complainant notified S1 that she had a medical condition and contended that S1's revocation of her telework schedule aggravated her condition and Complainant needed to take leave.

The record contains an email exchange between Complainant and S1 on May 9, 2018. Therein, S1 hesitated in granting advanced sick leave, to which Complainant responded that she has a history of intestinal issues, and that her prior supervisor was aware. Complainant offered to provide medical documentation. S1 acknowledged the email but insisted she did not become fully aware Complainant had a medical condition until she submitted a reasonable accommodation request on May 17, 2018.

In the May 17, 2018 request Complainant sought to telework three days a week, alternating her days in the office. In support of her request, Complainant provided documentation from her physician dated June 14, 2018, in which the physician requested that Complainant have "frequent and prolonged bathroom access or work from home." In June 2018, Complainant asserted that S1 said she was willing to be flexible with leave requests and Complainant's work schedule. Complainant insisted that she needed to be able to telework, and that she had been able to fully perform the duties of her job while teleworking. During this meeting, Complainant rejected the idea that a private restroom would be an effective reasonable accommodation.

S1 denied taking an unreasonable amount of time to process Complainant's reasonable accommodation request. S1 explained that she went on emergency medical leave from May 24, 2018, until June 11, 2018. Other employees responsible for processing Complainant's request were also out of the office, which caused additional delay. S1 believed that Complainant's physician allowed that working in the office with frequent access to the restroom was an appropriate accommodation.

The record contains notes from a corrective interview on July 11, 2018, between Complainant, S1, and the Major. While it is unclear who maintained these notes, a primary subject of discussion during the interview was that Complainant used 201 hours of sick leave since April 29, 2018, an "average of 20 hours a week." According to the notes, Complainant needed "to have a large sick leave balance to ensure loss during prolonged illness or disability." Another issue was that Complainant was "possibly coming in late due to childcare." The notes indicated that the problem arose because Complainant said she may be coming in late the week of July 11, 2018, because her husband is working, and that Complainant had previously said that she would not be able to come in by core hours the week of June 12, 2018, because her husband was out of town.

On July 17, 2018, Complainant received a written response to her reasonable accommodation request dated July 13, 2018. Therein, the Agency refused to grant Complainant telework, but allowed Complainant "frequent and prolonged bathroom access as needed."

Complainant sought clarification and S1 asserted that, if she exceeded her break time, then she would need to use leave. Complainant explained that, based on the Agency's decision, she would only be able to work 20 to 30 hours a week onsite. If she were allowed to telework, however, she would be able to work a full 40-hour week.

In a July 19, 2018 email, S1 instructed Complainant that she did not need to submit a leave request to use the restroom. Rather, if Complainant exceeded her allotted break time, she needed to either "work longer or make up [her] time."

Complainant attempted to submit a new reasonable accommodation request in August 2018. After S1 initially said Complainant could not submit a second request, the Agency accepted the request. Complainant provided a form completed by her physician, dated August 6, 2018, which said that due to Complainant's condition, she required frequent access to a bathroom, and "would have less flares and function better if able to work from home 3 days per week." He added that, "during flares she needs access to bathroom and stress in office tends to trigger flares."

On August 15, 2018, S1 agreed to allow Complainant to telework one day a week as needed. However, due to paperwork Complainant was required to complete, she did not begin teleworking until October 2018. The record contains an email from a Management Analyst on October 30, 2018, saying that Complainant's position has been coded as eligible for "situational telework."

S1 responded that she was given advice that Complainant could not submit a second reasonable accommodation request. After receiving further advice, S1 reversed herself and permitted the second request. During the processing of the second request, according to S1, "it was suggested that we could offer her situational, light duty telework until the [reasonable accommodation request] was resolved. She was initially granted one day of telework and then a new interim accommodation of light duty telework, up to three days a week for flare-ups."

The record contains a memorandum dated November 13, 2018, from a physician employed by the Agency's Occupational Medical Department. The physician noted that Complainant's condition results in unpredictable, sudden restroom needs. According to the physician, Complainant's "functional limitations have resulted in situations that are easy to take care of if working from home but can be difficult and misunderstood in a professional environment." The physician acknowledged that Complainant could work on site but would need a restroom attached to her office or a restroom close to her office with a stall reserved for her use.

On January 23, 2019, Complainant received a memorandum from the Agency addressing her request for reasonable accommodation. In response, the Agency moved Complainant to a different office ostensibly with a private bathroom. The Agency's proposed accommodation did not include any telework days and explicitly denied Complainant's request for telework three days per week. Complainant objected that the office was shared by three other employees who all denied knowledge that she was to have exclusive use of the bathroom. As a result, on January 28, 2019, Complainant informed the Agency she would not accept the move to the new office.

In her email, Complainant informed the Agency that the bathroom was not a private bathroom, but rather shared with her colleagues. Complainant noted that she was allowed to telework as an interim accommodation.

In an email response to Complainant's decision not to accept the move, S1 told Complainant that she would consult with the Agency's human resources and legal offices on the next steps. Complainant stated that she has not returned to work since February 14, 2019.

*Hostile Work Environment – Claims (3) and (4)*

Complainant generally alleges that, from May 16, 2018, to November 26, 2018, S1 repeatedly questioned her about timekeeping, her work schedule, working outside of core hours, family and childcare issues, and Complainant's use of approved sick leave. Complainant protested that S1 would require her to submit sick leave requests in advance and argued that it was not feasible because she did not know when her condition would flare up. Additionally, S1 imposed a new requirement in November 2018, that Complainant needed to ensure coverage if she was out for more than three days. Complainant argued that other coworkers were not subjected to the same requirements.

On May 16, 2018, Complainant met with S1. According to Complainant, S1 asked about Complainant's teleworking while having children in the house and asked if Complainant knew when core hours were. Complainant claimed that, until this point, she did not know that there were core hours. Complainant then met with S1 on May 22, 2018, to discuss her performance. At that time, Complainant learned that S1 had added, as an element of her performance plan, that she needed to maintain core work hours. Complainant noted that two of her coworkers did not have the core hours as part of their performance plans.

S1 admitted that she added core hours to Complainant's performance plan and not to any other employees, but reasons that she had issues with Complainant's absenteeism and working outside core hours. S1 asserted that Complainant initially requested telework in order to provide childcare. Because this was against Agency policy, S1 reviewed Complainant's timecards and realized Complainant frequently worked weekends in order to meet the 40-hour workweek requirement. S1 "needed to get her back to working normal business hours so she could be available for customers." S1 further asserted that all employees were required to work core hours even if it was not in their performance plans. S1 then testified that core hours were from 9:00 a.m. to 2:00 p.m.

S1 denied that Complainant used her leave in connection with her condition. Rather, S1 asserted once Complainant was back in the office after S1 revoked telework privileges, Complainant "was in maybe 50 percent of the time." S1 asserted that her leave usage was "related to vacation, her children/spouse, and possible childcare issues." S1 further stated that the Agency "later found out [Complainant's] position was not telework eligible" despite Complainant having been authorized to telework for years.

On August 3, 2018, S1 issued Complainant a Letter of Requirement. In the Letter, dated July 25, 2018, S1 articulated her suspicion that Complainant was abusing leave. As a result, if Complainant wished to use sick leave, Complainant was required to contact S1 or the Major, and for any sick leave used, Complainant needed to submit medical documentation.

S1 asserted that Complainant had a lot of time and attendance issues, including using leave and working outside of core hours. S1 said Complainant tended to call coworkers instead of her supervisor when she was taking leave and was using leave faster than it accrued. According to Complainant, the Letter required her to get a doctor's note any time she was sick or had to take a family member to the doctor. Complainant objected that the leave she used included 90 hours of bereavement leave, which S1 had approved. In further rebuttal, Complainant argued that S1 would frequently forget that Complainant had submitted a leave request, and then would question where Complainant was. Moreover, Complainant argued she had to use leave more frequently, some of which was protected by the Family and Medical Leave Act (FMLA) because the Agency failed to reasonably accommodate her.

On September 10, 2018, Complainant met with S1 who counseled Complainant on asking inappropriate questions during staff meetings. Complainant denied S1's accusation. Rather, she had asked about her telework package in one meeting, and then asked for assistance in completing QI packages. In response, S1 suggested the two take that discussion "offline." During this meeting, S1 and Complainant discussed Complainant's review of QI and Evidence Based Projects (EBP). Complainant asserted that QI/EBP reviews are not within her job description, and that she agreed to review QI/EBP packages temporarily in March 2018, until a new research facilitator came on board, supported by an email dated February 21, 2018, from her previous supervisor. However, the facilitator never started. S1, however, insisted that Complainant continue performing QI/EBP reviews. Complainant protested S1's decision, arguing that to do so would prioritize an ancillary duty over her primary responsibility of formatting and submitting manuscripts.

S1 responded that it was inappropriate that Complainant would "challenge" her in front of others. S1 believed Complainant's requests for coverage on QI/EBP packages and regarding personnel matters were not appropriate for staff meetings. S1 also objected to emails Complainant sent to department staff saying she would no longer cover QI/EBP packages. S1 further testified that she is "a back-up medical editor and know[s] Complainant's] job." Therefore, S1 concluded – contrary to Complainant's position description – that formatting and editing manuscripts was not part of Complainant's position description. S1 also believed that QI/EBP packages were more important and had a higher value to the Agency, so she instructed Complainant to focus on QI/EBP packages.

### *Constructive Discharge*

Complainant claimed that due to the ongoing harassment and her declining health, she was forced to resign. Complainant stated she felt it necessary to resign because paperwork she received from S1 following their final reasonable accommodation meeting reflected she qualified for a disability retirement based upon her condition. In addition, Complainant asserted that S1 mentioned if she could not perform the essential functions of her job, she would need to consider her options, which she interpreted as a threat.

The record contains a copy of Complainant's resignation letter, dated February 14, 2019. Therein, Complainant said that she has been subjected to discrimination and harassment since S1's arrival at CID. Complainant asserted that she spoke to a Captain after submitting her resignation and told him that she was resigning because of S1's treatment of her.

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 or reprisal 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").

### *Denial of Reasonable Accommodation*

An Agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9; Barney G. v. Dep't. of Agric., EEOC Appeal No. 0120120400 (Dec. 3, 2015). In order 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 a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship



under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (“Enforcement Guidance”). It is undisputed that Complainant is a qualified individual with a disability.

In this case, we first note that when S1 canceled all telework agreements on April 9, 2018, the notification to staff did not contemplate that any telework agreement may have been instituted as a reasonable accommodation. Following the suspension, Complainant made both informal and formal requests for accommodation. Complainant notified S1 as early as May 2018, that she had a history of intestinal issues and offered to provide medical documentation.

The Commission notes that under the Rehabilitation Act, an employee is not required to use the magic words “reasonable accommodation” when making a request. See Enforcement Guidance on Reasonable Accommodation, Question 1. Instead, the employee or the employee’s representative need only inform the agency that he or she needs an adjustment or change at work for a reason related to a medical condition. See Triplett-Graham v. U.S. Postal Serv., EEOC Appeal No. 01A44720 (Feb. 24, 2006), req. for reconsid. den’d, EEOC Request No. 05A60859 (Sep. 19, 2006); see also Geraldine B. v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120090181 (Oct. 13, 2015). Accordingly, Complainant’s May 9, 2018 email to S1 triggered the Agency’s obligation to begin the reasonable accommodation process. Complainant’s email should have made S1 aware that she has a condition, that her prior supervisor was aware of the issue, and that Complainant was using leave to treat the condition. Yet, S1 testifies that the Agency did not begin to take action until Complainant formally requested a reasonable accommodation on May 17, 2018.

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 on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), EEOC Notice No. 915.002 (Oct. 17, 2002); 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. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994).

We note that the Agency, on appeal, argues that Complainant did not request telework until her second formal request for reasonable accommodation in August 2018. However, the Agency’s argument is not supported by the evidence. Rather, Complainant’s physician, in a form completed in June 2018, asserted that Complainant would benefit from teleworking. Moreover, Complainant asked S1 to reinstate her telework schedule in May 2018, shortly after it was revoked. However, the Agency did not consider teleworking until S1 instituted it as an interim accommodation on August 15, 2018, but ultimately rescinded telework as a reasonable accommodation in its January 2019 decision.

Rather than grant telework, the Agency chose to grant Complainant a shared office with a bathroom in the office.

The Agency correctly notes that Complainant is not entitled to the accommodation of her choice. However, the Commission has long held that, while individuals protected under the Rehabilitation Act are not necessarily entitled to the accommodation of their choice, they are entitled to an effective accommodation. See Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994); U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002). Based on the evidence in the record, the Agency's decision did not grant Complainant an effective accommodation. When Complainant learned of the Agency's decision, she informed S1 that she did not believe the bathroom was an effective accommodation because other employees share the bathroom. Further, the Agency's own physician wrote that Complainant's condition is easily taken care of by working from home, "but can be difficult and misunderstood in a professional environment." The Agency's physician also suggested that Complainant have a restroom attached to her office or close to her office and reserved for her use. The physician did not recommend a shared bathroom. Therefore, we cannot conclude that the Agency's preferred accommodation was, in fact, effective.

On the other hand, Complainant testifies that she was diagnosed with IBS in 2011 and was teleworking full time for several years under her old supervisor before S1 came onboard. Complainant's testimony that teleworking fully accommodated her disability is supported by both the Agency's own medical documentation and S1's testimony. Notably, S1 said, in a January 30, 2019, email that Complainant's attendance was satisfactory *until* she returned to the office full-time. The evidence directly shows that Complainant could have been effectively accommodated by allowing her to telework three times a week.

The Agency's arguments against telework also do not pass muster. The Agency suggested that Complainant's position was not telework eligible. That a position is nominally ineligible for telework is insufficient to exclude it from a reasonable accommodation analysis. To refuse telework as a reasonable accommodation on this basis, the Agency must demonstrate that the ineligibility results from the position's essential functions. The Agency has not done so here and is largely undercut from doing so by Complainant's frequent, prolonged, and successful use of telework. Complainant testifies that when she is able to telework, she is able to successfully work 40-hour weeks. When she is not, she functionally becomes a part-time worker. Complainant's payroll records bear this out and is not controverted by the Agency. Similarly, S1 asserts that Complainant needed to be in the office to service her customers. But S1 does not identify these customers or otherwise articulate why Complainant's virtual presence rendered her incapable of providing service. Accordingly, we find the Agency failed to effectively accommodate Complainant when it refused to consider telework as a reasonable accommodation.

In addition, in Complainant's August 2018 reasonable accommodation request, Complainant requested an adjustment to her Maxiflex schedule that would allow her to work outside of core hours and on weekends. Complainant's request for schedule flexibility as an accommodation is grounded in S1's insistence that Complainant adhere to core hours, identified as 9:00 a.m. to 2:00 p.m. Complainant sought flexibility because her disability results in unpredictable and uncontrolled flare-ups. Accordingly, Complainant has difficulty adhering to specific work times.

S1 asserted that she added core hours to Complainant's performance plan because Complainant had issues with absenteeism. S1's explanation is undermined by three pieces of evidence. First, S1 acknowledged Complainant had no issues with attendance or absenteeism until her telework agreement was revoked. Second, the record includes the Agency's policy as to core hours, which may be required except if an employee is on a Maxiflex schedule. Complainant was on a Maxiflex schedule. Third, S1 admitted she revoked the core hour requirement for the department, ostensibly because other employees did not like it. Complainant asserted the core hour requirement was revoked because of an internal investigation. There is no evidence in the record supporting either reason, but the fact that core hours were revoked as quickly as they were instituted is evidence that the requirement was discretionary in the first place and not an essential requirement of Complainant's position. Given these pieces of evidence, S1's decision to hold Complainant to core hours despite Complainant's request for flexibility, constitutes a failure to accommodate Complainant's condition.

### *Disparate Treatment – Claim (2)*

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant 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. Corp. 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. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

As discussed above, there is no dispute that Complainant is a qualified individual with a disability. We find that Complainant has established a prima facie case of discrimination as she was subjected to a Letter of Requirement and the requirement to work core hours while other employees outside of her protected class were treated more favorably. S1 argues that she instituted core hours for Complainant and issued the Letter of Requirement because Complainant was not regular in attendance. Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

As we have already discussed, S1's articulated reasons for instituting core hours do not pass muster. Moreover, S1 readily admits that she instituted core hours as part of Complainant's performance plan but not for any other employee and permitted other employees to disregard core hours. Thus, S1 has not articulated a legitimate, non-discriminatory reason and admits she held Complainant to a different standard than the remainder of the department.

Further, the Letter of Requirement is contradictory to the Agency's obligation to accommodate Complainant's disability, and not supported by the evidence. S1 suggested that Complainant was abusing leave in order to care for her children. However, the record provides no evidence to support that Complainant was abusing her leave rather than using leave following the Agency's denial of her requested reasonable accommodation of telework and/or flexible work hours. Moreover, S1 provides shifting explanations for her actions between Complaint 1 and Complaint 2.

Therefore, in the absence of a legitimate, non-discriminatory reason, we find the Agency subjected Complainant to discrimination on the basis of her disability.

### *Hostile Work Environment*

To establish a claim of hostile work environment, 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; and (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. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

In short, 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, because of her disability or for engaging in prior protected EEO activity. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself.

Here, although we find the Agency failed to accommodate Complainant and subjected her to disparate treatment, we do not find the Agency subjected Complainant to a hostile work environment. The record reveals that although QI/EBP packages were not part of Complainant's job description, Complainant assumed responsibility for them and, according to S1, they needed to be completed. S1's communications with Complainant appear to be ordinary business interactions. Thus, we do not find the Agency's actions to be sufficiently severe or pervasive to establish a hostile work environment. Accordingly, the Commission finds that Complainant was not subjected to a hostile work environment.

*Constructive Discharge – Claim (5)*

Constructive discharge occurs when an employee resigns from his or her employment because he or she is being subjected to unlawful employment practices. If the resignation is directly related to the Agency's unlawful employment practices, it is a foreseeable consequence of those practices and constitutes a constructive discharge. The Agency is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a complainant. In order to establish that she was constructively discharged from her position, complainant must show: (1) that a reasonable person in her situation would have found the agency's actions intolerable; (2) that the agency's actions were discriminatory; and (3) that her resignation resulted from the agency's actions. See Malpass v. Dep't of Veterans Affairs, EEOC Request No. 05920527 (July 20, 1992).

We note that the Agency analyzed Complainant's constructive discharge allegation based only on the claim of a hostile work environment raised in Complaint 2. This is reversible error. Constructive discharge claims are not limited to hostile work environments. See Manuel R. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120152197 (Mar. 30, 2016) (deeming viable a claim that constructive discharge resulted from a denial of reasonable accommodations). Complainant filed two complaints concerning a common set of facts; the second complaint raised constructive discharge. Further, the facts surrounding complainant's resignation clearly demonstrates that she resigned because of the Agency's decision on her request for reasonable accommodation. Therefore, Complainant's claim of constructive discharge must be analyzed in the context of her request for reasonable accommodation.

In this case, a reasonable person in Complainant's situation would have found the Agency's actions intolerable. Across two complaints, the Agency does not dispute that Complainant was adequately performing the duties of her job prior to S1's revocation of her telework privileges, and that, aside from an interim once-per-week telework arrangement, the Agency refused to permit Complainant to telework again or work under a more flexible schedule. Because of her condition and the Agency's failure to accommodate that condition, she was reduced to a part-time worker. Further, as evidenced above, the Agency did not fully address Complainant's request for reasonable accommodation for more than half a year, until its January 2019 decision, which as we have determined, failed to effectively accommodate Complainant's disability. As such, the Agency's actions were both intolerable and discriminatory.

Complainant also demonstrates that her resignation resulted because of the Agency's discriminatory actions. Complainant received the Agency's letter on January 23, 2019, informed S1 that she would not be accepting the Agency's offer of accommodation as it was ineffective, and submitted resignation paperwork three weeks later, on February 15, 2019. Complainant's actions clearly demonstrated that she resigned her employment because of the Agency's conduct regarding her request for reasonable accommodation. Accordingly, Complainant has proven her claim of constructive discharge.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE in part and AFFIRM in part the Agency's final decisions and REMAND the matter to the Agency for further action in accordance with the ORDER below.

### ORDER

The Agency is ordered to:

1. Within 60 days of the date this decision is issued, the Agency shall offer Complainant reinstatement to her former Technical Editor, GS-1083-12 position, or a substantially equivalent position, at the grade and step where she would have been absent the discrimination, retroactive to the effective date of Complainant's resignation, February 15, 2019, with all the rights, benefits, and privileges of that position. The Agency's job offer of reinstatement shall include a notice that, if Complainant either does not respond or declines the job offer within 15 days of receipt, her right to receive further back pay and other benefits based on the job offer shall terminate as of that date. If the offer is accepted, the Agency shall place Complainant into the position no later than 30 days from that date of acceptance.
2. Upon reinstating Complainant to her position, the Agency shall immediately initiate the reasonable accommodation process with Complainant to assist her in identifying an accommodation she may need and effectively accommodate her accordingly.
3. Within 60 calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant pursuant to 29 C.F.R. § 1614.501. 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 Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."
4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.

5. Within 60 days of the date this decision is issued, the Agency shall expunge from all official Agency records the Letter of Requirement.
6. Within 60 days of the date this decision is issued, the Agency shall restore or compensate Complainant for any leave that she has been forced to use due to the Agency's failure to provide her with a reasonable accommodation since May 17, 2018.
7. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the 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)) and request objective evidence from Complainant in support of her request for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. No later than sixty (60) calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.
8. Within 90 calendar days from the date this decision is issued, the Agency shall provide eight hours of interactive or in-person training to the management official identified as S1 (Complainant's supervisor) regarding management's responsibilities under the Rehabilitation Act, with special emphasis on management's duties regarding the interactive process. The Agency shall provide proof of S1's attendance, as well as the contents of the in-person training provided.
9. The Agency shall consider taking disciplinary action against the management official identified as S1. The Commission does not consider training to be disciplinary action. 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 S1 has left the Agency's employ, the Agency shall furnish documentation of their departure date.

#### POSTING ORDER (G0617)

The Agency is ordered to post at the Clinical Investigations Department at the Naval Medical Center in San Diego, California copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

#### 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).

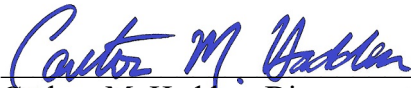
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

September 16, 2021

Date