



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Chanelle B.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020004887

Agency No. DON 19-39872-01074

**DECISION**

On August 31, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's July 21, 2020, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

**BACKGROUND**

During the relevant time, Complainant worked as an Information Technology Specialist, GS-11 at the Agency's U.S. Pacific Fleet, Littoral Combat Ship Squadron One in San Diego, California. Complainant was appointed to this position on January 9, 2017, subject to a two-year probationary period. See Report of Investigation (ROI) at 179. Complainant's supervisor (S1) assumed his position in September 2017. See ROI at 468-70.

Complainant suffers from post-traumatic stress disorder (PTSD), for which she verbally requested a reasonable accommodation for on January 13, 2017. See ROI at 444. It is unclear from the record what the informal accommodation consisted of, but it appears to have related to Complainant's desk location.

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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.

Complainant stated that she was not informed about the reasonable accommodation process and when she notified her supervisor (S1) that she intended to request an accommodation, S1 became hostile and started to scrutinize her leave. See ROI at 445. Complainant filed an informal grievance, dated October 16, 2018, after S1 reduced her duties and told her she had to submit her work projects to a military employee, which she asserted put her performance appraisal at risk. See ROI at 156, 447-48. S1 stated that Complainant's position description (PD) was updated because there was a reorganized command, in which certain programs were reassigned. See ROI at 473.

Complainant explained that she was previously located at a desk, at the back of the office, with a wall behind it. But S1 moved her to a desk at the front of the office, which allowed customers and co-workers to stand behind her when the area was congested. See ROI at 449. Complainant submitted a reasonable accommodation request for her PTSD on October 11, 2018, requesting a desk that would not require her to face away from personnel entering the office space. See ROI at 306-307. When asked for additional documentation, Complainant submitted a note from her physician explaining that a workspace which allowed Complainant to be fully aware of those around her and the environment, i.e. no one behind her, would reduce her anxiety and improve her concentration. See ROI at 251. In a November 27, 2018 email, S1 informed Complainant that her accommodation request had been approved; specifically, that her desk would have additional privacy screens. See ROI at 410. According to Complainant, she informed the Agency that the accommodation provided was not effective and also noted that her desk was not ergonomically correct. In response, an ergonomic assessment was conducted on her workstation. See ROI at 277, 289, 451-52. The Agency, however, did not make any other modification to the accommodation.

On November 21, 2018, Complainant sent S1 an email requesting to move back to her original desk location until her symptoms improved. However, she did not receive a response. See ROI at 161. On November 28, 2018, she again asked S1 if she could work from her previously assigned desk until her symptoms subsided. See ROI at 160-61. S1 told Complainant that he expected her to be at her modified desk the next day, on November 29, 2018. See ROI at 159. According to Complainant, she was out sick on November 29, 2018. When she returned to the office, on November 30, 2018, S1 required her to return to her assigned workspace and told her "this is a direct order." See ROI at 183, 455. Complainant explained she could not do so because of her PTSD, but S1 responded that he did not care about her condition. See ROI at 455. Complainant stated that she became very upset and had a panic attack. See id. S1 recalled that Complainant cried, "Can't you see I am having a f\*\*\*\* panic attack?" See ROI at 183. Complainant stated that she went to the Chief Staff Officer (CSO), her third-line supervisor, and asked him to intercede, but he did not. See ROI at 456. The CSO recalled that Complainant came to him in tears, asking for assistance, and he explained that her accommodation was approved and if she was not satisfied, she would need to restart the reasonable accommodation process. See ROI at 502.

On December 3, 2018, Complainant was issued a new PD, which she stated was unnecessary and issued to “cover up” the fact that her duties had been removed. See ROI at 457. S1 stated that the previous PD was too general and needed to be revised to better fit the organization. See ROI at 483. On the same day, Complainant was also marked Absent Without Leave (AWOL) although she had an approved Fitness and Wellness agreement in place. See ROI at 458. The agreement permitted Complainant to exercise for one hour from 3:00 to 4:00 p.m. on Mondays, Wednesdays, and Fridays, and was signed by S1 on September 27, 2018. See ROI at 423. Complainant stated that she was not told she had been marked AWOL. See ROI at 458.

Complainant was again marked AWOL, on December 6, 2018, when she left for a doctor’s appointment. See ROI at 459. However, according to Complainant, she had informed S1 and her time-keeper of her appointment. See Id. The next day, upon being informed of her AWOL status, Complainant explained that she made a mistake in the timekeeping system for which she apologized and corrected. See ROI at 187. S1 asked for additional documentation of her doctor’s appointment and, in response, Complainant provided a copy of an appointment card confirming a doctor’s appointment at 2:15 p.m. on December 6, 2018. See ROI at 192. Complainant stated that after she corrected her error in the time-keeping system, S1 approved the leave request, but still marked her as being AWOL. See ROI at 459.

On December 10, 2018, Complainant received a Management Directed Reassignment. See ROI at 236. Oddly, on the same day, Complainant also received a termination letter, notifying her of her termination during her probationary period. The letter informed Complainant she was being terminated for relocating her work desk without permission, unprofessional conduct to her supervisor on November 30, 2018, and leaving work without permission on December 3 and December 6, 2018. See ROI at 87-88.

On March 4, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (mental) and reprisal for protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:

- a. From January 13, 2017 to October 10, 2018, the Agency failed to inform Complainant of the proper reasonable accommodation procedures;
- b. On August 20, 2018, S1 removed Complainant’s duties required for “successful” completion of critical elements in her performance appraisal;
- c. On August 31, 2018, Complainant was required to move workstations despite an informal reasonable accommodation which was previously approved;
- d. On September 14, 2018, S1 did not respond to Complainant’s verbal administrative grievance (from 15 days prior on August 30, 2018);

- e. In October 2018 and November 2018, S1 did not engage Complainant in an interactive discussion, which led to an approved yet ineffective accommodation;
- f. On October 31, 2018, the CSO did not respond to Complainant's written administrative grievance [dated October 16, 2018] within 15 days;<sup>2</sup>
- g. On November 8, 2018, S1 informed Complainant she had to submit a sick leave request for his approval instead of annotating the hours in the timekeeping system;
- h. On November 30, 2018, S1 directed Complainant to return to her original workstation;
- i. On December 3, 2018, Complainant was told she was being reassigned to a new position description;
- j. On December 3, 2018, Complainant was marked AWOL despite having an approved Fitness and Wellness agreement;
- k. On December 6, 2018, Complainant was marked AWOL despite having informed S1 of a medical appointment on December 3, 2018;
- l. On December 10, 2018, Complainant received a Management Directed Reassignment; and
- m. On December 10, 2018, Complainant was terminated during her probationary period.

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).

In its decision, the Agency found that claims (e), (j), (k), (l), and (m) constituted discrete adverse employment actions, but determined that Complainant did not establish a prima facie case of disparate treatment with regard to those claims because she did not identify any similarly-situated employees who were treated differently. The Agency further found that Complainant did not establish she was denied a reasonable accommodation. Although Complainant was found to have established a prima facie case of reprisal for claims (e) through (m), the Agency found that that management presented legitimate, nondiscriminatory reasons.

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<sup>2</sup> We note that the record indicates that the CSO responded to Complainant's administrative grievance on November 15, 2018. See ROI at 157-58.

Moreover, reasoned the Agency, Complainant did not establish that the proffered reasons were a pretext for discrimination. The decision further found that Complainant did not establish a hostile work environment. According to the Agency decision, Complainant failed to prove that she was subjected to discrimination as alleged.

### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the record was sufficient to establish both a prima facie case of disparate treatment and reprisal based on S1's statements and actions. For example, his expressed a desire to discipline Complainant for the "administrative issues" he had to deal with regarding her accommodation request. Also, the fact that Complainant, alone, was required to provide additional documentation of her sick leave requests. Complainant also asserts that the investigation failed to adequately examine any similarly situated employees. Finally, Complainant argues that the evidence establishes that she was denied a reasonable accommodation and the Agency's stated reasons are not worthy of credence.

In response, the Agency asserts that Complainant has not established either a hostile work environment or the denial of a reasonable accommodation. Moreover, it contends that Complainant's disability does not excuse her misconduct.

### 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").

#### *Reasonable Accommodation*

Agencies are required to reasonably accommodate the known limitations of qualified individuals with disabilities unless they can show that doing so would result in undue hardship upon their operations. See 29 C.F.R. §§ 1630.2(o), (p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002); Barney G. v. Dep't of Agric., EEOC Appeal No. 0120120400 (Dec. 3, 2015). Inherent in this duty is an obligation to break down artificial barriers which preclude individuals with disabilities from participating on an equal footing in the work force. Accordingly, the Rehabilitation Act requires federal agencies to make various types of "reasonable accommodation" for federal employees who have disabilities.

This requirement helps ensure that federal employees with disabilities will be able to perform the essential functions of their positions and enjoy all the benefits and privileges of employment enjoyed by non-disabled employees. See Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act (Appendix to Part 1630), at § 1630.2(o): Reasonable Accommodation.

After receiving a request for reasonable accommodation, an agency “must make a reasonable effort to determine the appropriate accommodation.” 29 C.F.R. Part 1630, app. § 1630.9. Thus, “it may be necessary for the [agency] to initiate an informal, interactive process with the individual with a disability . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.” 29 C.F.R. § 1630.2(o)(3); see also 29 C.F.R. pt. 1630 app. § 1630.9, Enforcement Guidance at Q. 5. The term “reasonable accommodation” means, in pertinent part, modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position in question. See 29 C.F.R. § 1630.2(o)(1)(ii). Reasonable accommodations may include but are not limited to: job restructuring; part-time or modified work schedules; reassignment to a vacant position; or acquisition or modifications of equipment or devices. 29 C.F.R. § 1630.2(o)(2)(ii).

As an initial matter, we find, and the Agency does not dispute, that Complainant is a qualified individual with a disability within the meaning of the applicable regulations. Here, the record demonstrates that Complainant was capable of performing the essential functions of her job with an effective and reasonable accommodation. Complainant had performed the duties of her position for more than a year at her previous desk in the rear of the office. See ROI at 444, 449.

We find that the Agency did not provide Complainant with an effective and reasonable accommodation, due to its failure to engage in the interactive process (claim (e)). We note that an agency’s failure to properly engage in the interactive process does not itself establish a denial of reasonable accommodation, unless the failure to engage in the interactive process resulted in the agency’s failure to provide a reasonable accommodation. See Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002). While a complainant is not entitled to the accommodation of her choice, she is entitled to an effective accommodation. See Lathum v. U.S. Postal Serv., EEOC Appeal No. 01A53430 (Aug. 22, 2006). If more than one accommodation is effective, the preference of the individual with a disability should be given primary consideration. See Polen v. Dep’t of Defense, EEOC Appeal No. 01970984 (Jan. 16, 2001). Here, Complainant explained that her previous desk location was at the back of the office, with a wall behind it. This location allowed Complainant to see people approach her and also did not permit anyone to stand behind her, allowing her to be fully aware of her surroundings, minimizing the hypervigilance that is one of the symptoms of her PTSD. After she was relocated to the front of the office, in a location which permitted people to congregate behind her, she requested a desk location that would not require her to face away from entrances or permit people to stand behind her. See ROI at 306-307, 449.

When asked for additional documentation, Complainant provided a form from her physician stating that a workspace which allowed Complainant to be fully aware of people and her environment, i.e. no one behind her, would reduce her anxiety and help her to concentrate. See ROI at 251.

Rather than providing the requested accommodation, S1 approved an accommodation which consisted of “additional cubicle wall partitions for privacy.” See ROI at 410. This was not an effective accommodation, however, because it did not address Complainant’s concerns regarding the ability to see those around her and limit the possibility of people approaching from behind. In addition, when Complainant explained to S1 that the privacy screens did not effectively accommodate her PTSD, S1 told her that he did not care about her condition. See ROI at 455. Further, when Complainant spoke to the CSO, he simply told her that if she was not satisfied with the accommodation, she should restart the reasonable accommodation process. See ROI at 502. We note that the record indicates, and the CSO acknowledges, that Complainant expressed a willingness to work from her designated desk at some future time, when the symptoms of her condition improved sufficiently to permit her to do so. See ROI at 502. However, neither S1 nor the CSO were willing to consider such a compromise. See id. The record is devoid of any explanation from management as to why Complainant’s request could not be granted, permitting her to work at a desk location with her back to a wall. The Agency has not asserted that its failure to accommodate Complainant was due to undue hardship. This is particularly troubling since the record reflects that Complainant had previously performed her job functions, effectively, while at her desired desk location, indicating that it would not have been an undue hardship to grant Complainant’s requested accommodation. See ROI at 455. We conclude that the Agency did not make a good faith effort engage in the interactive process and accommodate Complainant. Therefore, Complainant proved by a preponderance of the evidence that she was denied a reasonable accommodation in violation of the Rehabilitation Act.

### *Disparate Treatment*

Complainant also asserts that she was subjected to disparate treatment on the basis of disability and in reprisal for protected EEO activity in a number of instances, including the reassignment of duties and extra scrutiny of sick leave requests, and culminating in her termination on December 10, 2018.

Complainant must satisfy a three-part evidentiary scheme to prevail on a claim of disparate treatment reprisal discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, Complainant must 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. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Second, the burden is on 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).

Third, should the Agency carry its burden, Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). Reprisal claims are afforded a broad view of coverage and are "not limited to discriminatory actions that affect the terms and conditions of employment." Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 64 (2006). Rather, a complainant "must show that a reasonable employee would have found the challenged action materially adverse," that is, one that "might have 'dissuaded a reasonable worker'" from engaging in protected activity. Id. at 68.

"A request for reasonable accommodation is a form of protected activity." Walters v. Pension Benefit Guarantee Corp., EEOC Appeal No. 0220080001 (Nov. 18, 2010); Keller v. U.S. Postal Serv., EEOC Appeal No. 01A03119 (Apr. 25, 2003). Federal employees are protected from "retaliation" in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the Rehabilitation Act. 29 U.S.C § 791; see also, Americans with Disabilities Act of 1990 (ADA), as amended, Section 503, 42 U.S.C.A. § 12203.

In this case, the record reflects that S1 and the CSO became aware of Complainant's disability in August 2018, when Complainant first protested the change in her designated workstation. Complainant engaged in protected activity when she filed her reasonable accommodation request on October 11, 2018, and then filed a grievance challenging the reassignment of her duties and the end of her informal accommodation of a workstation located at the back of the office. We find that Complainant established a nexus between her protected bases and claims (g) through (n), culminating in her termination (claim (m)), given the close temporal proximity between her accommodation request on October 11, 2018 and the challenged actions beginning on November 8, 2018. Evidence of the nexus is also shown by S1's comments doubting the veracity of Complainant's condition in spite of the medical documentation and expressing his desire to discipline Complainant for the "administrative issues" related to her accommodation request. See, e.g., Morris v. U.S. Postal Serv., EEOC Appeal No. 01A51604 (June 14, 2005) (finding that temporal proximity of approximately one month between adverse action and protected conduct was sufficient to raise an inference of retaliation). We also note that the record indicates that there were no issues with Complainant's performance or her conduct from the time of her hiring, in January 2017, until August 2018, when she made her new supervisors, S1 and the CSO, aware of her condition and intention to file a reasonable accommodation request.



The termination letter described the Agency's legitimate, nondiscriminatory reasons for Complainant's termination as follows: (1) On November 28, 2018, she relocated her workspace without her supervisor's approval; (2) Failure to follow a direct order, when her supervisor told her to return to her designated work desk on November 30, 2018, she did not comply until December 3, 2018; (3) Unprofessional conduct by raising her voice and using profanity to her supervisor on November 30, 2018; (4) Failure to follow established leave procedures by leaving her work desk without permission on December 3, 2018 and December 6, 2018; and (5) being charged with 2.67 hours of AWOL on December 6, 2018. See ROI at 87-88.

Complainant can establish pretext in two ways: "(1) indirectly, by showing that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the employer." Chuang v. Univ. of Cal. Davis Bd. of Trs., 225 F.3d 1115, 1127 (9th Cir. 2000) (internal quotation marks omitted); see also McDonnell Douglas, 411 U.S. at 804-05. Indicators of pretext can include discriminatory statements or past personal treatment attributable to the one or more of the officials involved in the selection process, unequal application of Agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015). In this case, we find that Complainant has established that the Agency's reasons for its conduct were a pretext for discrimination based on a combination of both direct and indirect evidence which cumulatively indicate that unlawful discrimination more likely than not motivated the Agency.

The evidence in the record does not support the Agency's stated reasons for Complainant's termination, indicating that it is not worthy of credence. To begin with, the relocation of Complainant's assigned workstation is a direct consequence of the Agency's failure to engage in the interactive process and provide an effective accommodation for Complainant's disability. In addition, the record reflects that on November 21, 2018, Complainant sent S1 an email seeking permission to return to her previous workstation until the symptoms of her condition improved. See ROI at 160-61. When S1 did not respond, Complainant sent another email on November 28, 2018, reiterating her request to work from her previous workstation. S1 responded, by simply ordering Complainant to work from her assigned desk. See ROI at 159-60. Complainant explained that she was out sick on November 29, 2018, and, upon her return on November 30, 2018, she explained to S1 that she could not return to her assigned desk because of her condition. S1 purportedly told her that he did not care about her condition and she should talk to her doctors.<sup>3</sup> See ROI at 183, 455. Moreover, contrary to the implication created by the termination letter, Complainant in fact obeyed S1's direct order and returned to her assigned desk on the next business day, i.e. December 3, 2018.

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<sup>3</sup> S1 denied telling Complainant that he did not care about her condition; however, he acknowledged that he "often times told all [his] employees '[he is] not a doctor.'" See ROI at 475.

With respect to claim (j), leaving her workstation without permission on December 3, 2018, the evidence does not support the Agency's version of the event. According to Complainant, she only left her workstation to go to the track for the previously approved one hour. See ROI at 458. Notably, there is no evidence in the record to support S1's bare assertion that Complainant's departure did not correlate with the time of her pre-approved Fitness and Wellness Leave.

With respect to claim (k), Complainant's AWOL status on December 6, 2018, the evidence in the record casts doubt on the severity of the offense professed by the Agency. The record indicates that Complainant made an inadvertent error, submitting her leave request for an incorrect date, an error for which she apologized and immediately corrected the next day. See ROI at 187-89, 459. Complainant further stated that, although S1 approved the corrected leave request, he still marked her as AWOL. See ROI at 459. In addition, the record provides some support for Complainant's assertion that S1 subjected her leave requests to extra scrutiny, which was not directed to other employees. S1 sent Complainant an email stating the Agency required "administratively acceptable evidence" for sick leave of less than three days "when determined necessary by the agency." See ROI at 189-91. However, S1's statement to Complainant is not supported by the Agency's Policy on Time and Attendance, which provides only that an employee is required to provide supporting documentation for sick leave lasting longer than three days. See ROI at 388-89. There is no evidence in the record supporting S1's insistence that Complainant was required to provide evidence to support her sick leave requests of less than three days, nor has the Agency provided an explanation for this deviation from the its established procedures.

We further emphasize that there is additional evidence in the record which indicates that the Agency's stated reasons for Complainant's termination were a pretext for discrimination. In October 2018, in response to Complainant's administrative grievance, an HR official sent the CSO an email expressing her concerns with S1's decision to rearrange Complainant's duties and amend her PD (claims (b) and (i)). See ROI at 529-30. In particular, the HR official noted that, based on her understanding, Complainant was not the only person with that specific PD. It is unclear from the record if any other employee was also assigned a new PD.<sup>4</sup> See id. The HR official also stated that it was a "red flag[]" that S1 made these changes given that S1 had inquired about terminating Complainant during her probationary period. See ROI at 530. Furthermore, while S1 denied any retaliatory motive, and stated that dealing with Complainant's reasonable accommodation request "didn't take up that much time," he emailed an HR staff person on November 27, 2018, stating that Complainant was not satisfied with her accommodation and was going to submit additional medical documentation. In the email S1 proceeded to complain that he "[had] to spend an extraordinary amount of time dealing with administrative issue [sic] concerning this employee." See ROI at 302, 472.

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<sup>4</sup> S1 stated that he could not recall if any other employees had their duties reassigned at the time. See ROI at 474.

Additionally, he stated that he thought Complainant had an issue with honesty and expressed his desire to reassign or discipline Complainant for the “continuous cycle” of administrative issues. See id. at 302-303.

With regard to the final reason given for Complainant’s termination, while we acknowledge that her unprofessional conduct and use of profanity toward her supervisor is a valid reason for termination, we find that, under the circumstances of this case, Complainant’s misconduct was only a pretext for discrimination. See Hamilton v. General Elec. Co., 556 F.3d 428 (6th Cir. 2009) (“[W]hen an employer waits for a legal, legitimate reason to fortuitously materialize, and then uses it to cover up his true, longstanding motivations for firing the employee, the employer’s actions constitute the very definition of pretext.”) (internal quotations omitted). While an agency does not have a duty to excuse an employee’s misconduct as a form of reasonable accommodation where such misconduct would result in discipline or discharge if committed by another employee, Complainant’s misconduct in this situation was a direct result, not only of Complainant’s disability, but of the Agency’s failure to provide her with an effective, reasonable accommodation. Moreover, we emphasize that the circumstances of this case support an inference that S1 had already decided to terminate Complainant because he had made inquiries, in October 2018, about possibly terminating her during her probationary period and again expressed his desire to reassign or discipline Complainant on November 27, 2018, less than a week before the incidents on which Complainant’s termination was based. We also note that the CSO, who ultimately approved the termination, did not provide any additional, independent reason for Complainant’s termination. Instead, the CSO stated only that he believed S1’s explanation that Complainant was terminated for the reasons given in the termination letter. See ROI at 507-507.

We find that the Agency failed to provide sufficient legitimate, nondiscriminatory reasons to support its actions, i.e. requiring Complainant to provide supporting documentation for her sick leave requests, changing her position description, requiring Complainant to return to her previous workstation, marking Complainant AWOL on December 3 and 6, 2018, and terminating her on December 10, 2018. We conclude that Complainant successfully established by a preponderance of the evidence that the Agency’s reasons were a pretext for discrimination. Therefore, Complainant has established that she was discriminated against as alleged.

#### *Hostile Work Environment Based on Disability and Reprisal*

We also find that Complainant has shown that she was subjected to a hostile work environment based on reprisal and disability, and that the Agency is vicariously liable for the harassment. To establish a claim of harassment a complainant must show that: (1) she belongs to a statutorily protected class; (2) she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on her statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser’s conduct should be evaluated from the objective viewpoint of a reasonable person in the victim’s circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

With respect to element (5), an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). This defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) being taken against the employee.

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). On the one hand, petty slights and trivial annoyances are not actionable. On the other, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B) (Aug. 25, 2016).

As previously noted, in a November 27, 2018 email, S1 complained about the “continuous cycle” of “administrative issues” he had to handle regarding Complainant’s reasonable accommodation request. While this email was not directed to Complainant, other evidence in the record supports Complainant’s assertion that S1 became hostile and started treating her differently after she submitted her reasonable accommodation request. In particular, we note S1 subjected Complainant’s leave requests to additional scrutiny by requiring her to submit documentation in support her sick leave, a requirement which is not reflected in the Agency’s Policy on Time and Attendance. See ROI at 189-91; 388-89. The record also reveals that, more than once, S1 demonstrated an indifference to Complainant’s disability. For example, when Complainant explained why she could not return to her assigned desk, S1 simply ordered her back to her designated workstation and purportedly advised Complaint to speak with her doctors.<sup>5</sup> See ROI at 455.

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<sup>5</sup> S1 denies telling Complainant that he did not care about her condition, as alleged by Complainant. There were no witnesses to the exchange.

We find that considered as a whole, the instant record establishes that Complainant was subjected to harassment based on disability and reprisal. The alleged harassment also clearly affected the terms and conditions of her employment as she was held to different standards than her coworkers when it came to requesting sick leave, unfairly marked AWOL, and ultimately terminated without any warning, counseling, or investigation. We further find that these incidents of harassment are sufficiently severe to constitute a hostile work environment.

S1 was responsible for the disability and reprisal-based harassment, and as Complainant's supervisor, the Agency is vicariously liable. The Agency has not established an affirmative defense, as the preponderance of the evidence does not establish that it exercised reasonable care to prevent and promptly correct any harassing behavior. We note that the CSO acknowledged that Complainant reached out to him in October 2018, about feeling belittled by S1, and he explained that he spoke with S1 about his demeanor and tone. See ROI at 515. However, the record reflects that the CSO did not take any further action. See id. In addition, after Complainant filed her administrative grievance, an HR official emailed the CSO expressing her concerns about the "red flags" raised by S1's treatment of Complainant at the time, but the CSO not only failed to take any action, he accepted S1's later explanation for Complainant's termination without question. See ROI at 507-508; 530. Therefore, Complainant has established that she was subjected to a hostile work environment based on reprisal and disability.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that Complainant has established that the Agency subjected her to discrimination and a hostile work environment based on disability and reprisal, and denied her a reasonable accommodation.

Therefore, we REVERSE the Agency's final decision finding no discrimination and REMAND the matter to the Agency for further processing in accordance with this decision and the Order below.

### ORDER (C0618)

The Agency is ordered to take the following remedial actions:

- I. Within thirty (30) days of the date this decision is issued, the Agency shall offer to reinstate Complainant in the position of IT Specialist, or a substantially equivalent position. Complainant shall have fifteen (15) days from the date of the offer to accept or decline the position. If Complainant should decline the Agency's offer, the date of her rejection shall be the end date for any back pay due Complainant. The offer shall state that reinstatement will be effective retroactively to the date of the termination giving rise to the instant appeal, and shall include all benefits, including backpay, that she would have received, but for the termination. Should Complainant not wish to be reinstated, she shall receive backpay and benefits, as noted below, from the date of her termination to the date of her response to the agency.

- II. 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 the Complainant, pursuant to 29 C.F.R. § 1614.501. The amount of backpay shall be equal to the pay Complainant would have earned had she not been terminated in December 2018. The amount of backpay may be reduced by the amount of interim earnings, not to include unemployment compensation or similar excludable income, acquired during the period between the date of termination and the date of either reinstatement or rejection of the offer of reinstatement. The 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 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." 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.
- III. If Complainant accepts reinstatement to her position and to the extent that Complainant still requires it, the Agency shall immediately engage in the interactive process with Complainant and provide her with a reasonable accommodation for her disability.
- IV. Within sixty (60) days of the date this decision is issued, the agency shall expunge the termination letter and all references to complainant's termination from all agency records and files.
- V. Within ninety (90) calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages, determine the amount of compensatory damages due Complainant, and issue a final decision on compensatory damages with appeal rights to the Commission. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages no later than 30 calendar days after the completion of the investigation. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
- VI. Within sixty (60) calendar days of the date this decision is issued, the Agency shall restore to Complainant any leave used as the result of the unlawful harassment or the Agency's failure to accommodate Complainant. Complainant shall cooperate with the

Agency and provide it with information concerning what leave she took as a result of the harassment and the failure to accommodate.

- VII. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide a minimum of four hours of in-person or interactive EEO training to the responsible management officials, including S1 and the CSO. The training shall have a special emphasis on reprisal, disability discrimination, the reasonable accommodation process, and harassment.
- VIII. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider discipline against the responsible officials, including S1 and the CSO. The Agency shall report its decision to the Compliance Officer. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision. If S1 or the CSO is no longer employed by the Agency, as either an employee or a contractor, the Agency shall provide evidence of their departure date(s).
- IX. Within thirty (30) calendar days of the date this decision is issued the Agency shall post a notice in accordance with the statement entitled "Posting Order."

The Agency is further 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, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its San Diego, California Littoral Combat Ship Squadron One 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

February 24, 2022

Date