



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Larraine D.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Citizenship and Immigration Services),
Agency.

Appeal No. 2021001090

Hearing Nos. 560-2017-00285X
560-2016-00235X

Agency Nos. HS-CIS-25241-2016
HS-CIS-27038-2016

DECISION

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 October 21, 2020, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision finding no discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Immigration Services Officer at the Agency's National Benefits Center facility in Overland Park, Kansas.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

On February 4, 2016, Complainant filed EEO complaints (consolidated by the Agency) alleging that the Agency harassed and discriminated against her on the bases of race (African American), sex (female), age (born in 1965)², and in reprisal for protected EEO activity when:

- a. Complainant's coworkers talked about her, spread lies and rumors to new officers on her team and to her supervisor, and posted comments on Facebook.
- b. On November 10, 2015, management made racially charged and retaliatory comments by "stating she was playing all of the trump cards like race and sex and trying to see which one would stick to the wall."
- c. After reporting the harassment, she was ostracized, and others changed their communication style with her which included copying the section chief on all emails.
- d. In or around October 2015, she was told not to submit a telework application because the due date had passed while she was out on medical leave.
- e. Management scrutinized her work and questioned her telework usage.
- f. On November 24, 2015, management pressured her to find out if she was going to pursue a formal EEO complaint.
- g. Management gave her negative feedback on her 2014 performance plan and appraisal (PPA).
- h. Management questioned her time and attendance.
- i. Management allowed her coworkers to make disparaging comments towards her and ostracize her.
- j. Management checked on her to see if she was talking.
- k. Management accused her of being unapproachable.
- l. Management did not allow her to work overtime related to her position.
- m. Management excluded her from lunches and a social function.

² Complainant's first complaint included claims (a) – (h) and alleged discrimination and harassment based on race, sex, age, and reprisal. In a second complaint, Complainant alleged that the remaining claims were reprisal for her first complaint. Thus, claims (i) – (r) are only based on reprisal.

- n. Management asked her colleagues about her absence from work.
- o. Management falsely accused her of not completing mandatory training.
- p. Management refused to give her new supervisor WebTA access in advance as she believes is customary.
- q. On October 18, 2016, she was issued a lower rating than she feels is warranted for her fiscal year 2016 Performance Plan and Appraisal (PPA).
- r. In June or July of 2016, she was not selected for an Immigration Services Officer position.³

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). Complainant requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

Complainant filed the instant appeal.

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”).

Generally, claims of disparate treatment are examined under the tripartite analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F. Supp. 318, 324 (D. Mass.), *aff’d*, 545 F.2d 222 (1st Cir. 1976).

³ The Agency dismissed claim (r) for untimely EEO Counselor contact. Complainant has not disputed the dismissal on appeal and therefore we shall not address this claim in this decision.

For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978).

Once a complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Com. Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715-16 (1983).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Complainant v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990).

Title VII also prohibits employers from “discriminat[ing] against any of [its] employees ... because [such employees have] opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge . . . or participated in any manner in an investigation, proceeding or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a). As a general matter, 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). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004. (Aug. 25, 2016).

In order 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).

In order to meet the requirements of prong 4, 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 claim (f), we find that Complainant has established that the Agency subjected her to reprisal. However, with respect to all other claims, Complainant has failed to rebut the Agency's legitimate, nondiscriminatory reasons for its actions and has failed to show she was subjected to a discriminatory hostile work environment.

Regarding claim (a), Complainant asserts that in May 2015, her workers told her first line supervisor (S1) that she broke the database they utilize for their assignments. She stated that she decided to limit her social interactions with them and stopped going to lunch with them. As a result, they allegedly began sharing her personal information with each other. She further alleges they posted comments on Facebook referring to her. S1 asserted he had no knowledge of any harassment by employees. S1 noted that Complainant's coworkers informed him that she could be difficult to communicate with; one day she appears to get along well with coworkers and on other days she refuses to speak to anyone. S1 disputes that Complainant was ever in trouble or blamed for the database breaking as it is a common occurrence. The evidence shows a coworker made a Facebook post venting about a team member that “[only] comes to work once a week,” Complainant was not mentioned by name.

Regarding claim (b), Complainant asserts she overheard S1 stating that Complainant was, “playing all of the trump cards like race and sex and trying to see which one would stick to the wall.” S1 denies making any such comment and Complainant has not provided any evidence to support the allegation.

Regarding claim (c), Complainant asserts that after she reported S1 and her coworkers' harassment of her to her second line supervisor (S2), S1 began copying S2 on all emails between them. She asserted that her team members refused to talk to her and made jokes about her. She asserted they spread rumors that she was attempting to have her coworkers fired. The record indicates that S2 instructed S1 to copy him on email correspondence between S1 and Complainant in response to the allegations. S2 stated he wanted to monitor the situation and be aware of communications between them. Both S1 and S2 denied any knowledge of rumors that she was attempting to have coworkers fired. S2 noted that Complainant did not propose S1's firing when they met to discuss her harassment allegations.

Regarding claim (d), Complainant asserts that employees were required to submit new telework applications in October 2015. When she submitted her application, S1 informed her that the window to apply for telework had closed and her submission was untimely. When she submitted a new telework application in April 2016, she was told her previous application had been approved in December 2015.

Complainant alleges S1 was not straight forward about the status of her telework application. S1 indicated that although Complainant had missed the submission window, he advocated for her application to be accepted and never told her anything to the contrary.

Regarding claim (e), Complainant asserts that after she complained to her second line supervisor (S2), S1 began questioning her telework. She started teleworking in September 2015, and prior to her complaint to S2, S1 never inquired about her telework usage. Complainant believes the conduct is reprisal for reporting his harassment to S2 and alleges that S1 did not question other employees regarding telework usage. S1 stated that Complainant had been doing an hour or two of telework at home every afternoon and evening when the policy had been no more than 8 hours of telework per week. S1 discussed this with Complainant who discussed the issue with S2. S2 told her telework on overtime was unlimited. S1 had not realized the policy on the subject had changed. However, employees were still required to request overtime from S1. S1 indicated that he asked all employees what they were working on at home. S1 stated that Complainant's actions gave the appearance to other team members that Complainant was abusing the telework system, but she was not given greater scrutiny than any other employee.

Regarding claim (f), Complainant asserts that during a meeting with S2, he inquired as to whether she would file an EEO Complaint. When she first reported her harassment allegations, S2 offered to move her to a new team and allegedly told her it would be difficult to prove discrimination against S1. Complainant further alleges that S2 stated that his offer to move her to a new team would be unavailable if she filed an EEO complaint. Complainant stated she felt pressured and harassed.

S2 acknowledged that during the meeting, he asked if Complainant planned to file a formal complaint. He noted that after their initial meeting when she reported the alleged harassment, she requested 24 hours to let management know her decision regarding a transfer but never informed them of her decision. S2 stated he also encouraged Complainant to talk things out with S1, but she declined. He offered her a transfer again, but she declined. S2 stated that Complainant stated she wanted S1 to be punished for what he had done and that she was seeking compensation for her suffering. S2 stated that since it was clear she planned to file a complaint, he told her that she would continue working for S1 and everyone should remain professional. S2 stated, "I don't recall saying the transfer is off the table although that would have been the effect since I could no longer transfer her once she filed a formal complaint."

Regarding claim (g), Complainant alleges that S1 gave her a low performance evaluation based on feedback he received from Coworker 1 (C1) and Coworker 2 (C2). She received a 3.3 or "achieved expectations," which was not high enough to qualify her for a bonus. She asserts that she was the only person on the team that did not get a bonus. Complainant stated that S1 said C1 and C2 told him she was being difficult and giving them pushback during her training. They also indicated that she would wear her headphones while they were trying to train her. She stated that S1 told her she needed to ask more questions. S1 stated that in Complainant's first weeks with the team both her trainers reported that she was not listening or asking questions while they were trying to train her.

S1 stated that he shared the information with Complainant in an effort to encourage her to pay better attention and ask questions, but her overall appraisal was based on S1's own notes regarding her performance for the year.

Regarding claim (h), Complainant stated that in January 2016, management initiated unscheduled leave due to bad weather. S1 emailed her asking if she was working. Complainant asserts that management had access to all the databases that she worked from and could see the work in her queue; thus, from her perspective, the inquiry made no sense. Complainant asserts that she was the only employee to whom S1 made this inquiry. S1 stated right before the unscheduled leave, Complainant had been out of the office for several days. Since the bad weather leave was unplanned, S1 felt it was unlikely she had enough work to do on telework. No other employee had been out for that length of time prior to the week telework was authorized due to bad weather. S1 asserts he did not accuse her but asked if she had enough work to do.

Regarding claim (i), Complainant alleges that C2 commented to another coworker that she should have urinated on clothing she had previously given Complainant under the guise of friendship. She asserts Coworker 4 (C4) made comments that they were tired of walking eggshells around Complainant. Other coworkers told her that members of her team would congregate outside of work and talk about her and encourage other coworkers to not listen to her. Coworker 5 (C5) told Complainant that S1 stated "there are disgruntled and negative members on the team who are trying to recruit others to bring down the team." Complainant stated she did not report these issues to management. S1 stated that Complainant caused the team to feel divided and frustrated with each other after Complainant's first complaint because she made disparaging remarks about almost everyone on the team. S1 stated he heard some rumors but did not address them specifically because they did not occur as part of the work environment. He further stated that he encouraged everyone to act professionally and focus on the growing workload.

Regarding claim (j), S1 told the team that there should be no talking in the vault room at all. Complainant alleges S1 came into the room and reminded her that there was absolutely no talking allowed. Complainant alleges S1 would check to see if there was talking when she was in there but did not do the same when other workers were in there. S1 stated that the no talking policy had been implemented because the officers working on the classified computers in the vault room complained they could not concentrate. S1 stated that he reminded Complainant of the policy and also reminded other coworkers of the no talking policy.

Regarding claim (k), Complainant asserts that S1 suggested she was unapproachable in an email. S1 stated he did not use the word "unapproachable," but has informed her since the beginning of her employment that she did not listen well to her assigned trainers and as a result people were refusing to work with her because she did not listen.

Regarding claim (l), Complainant states that she noticed C1 working in her virtual files, which she believed was with the approval of S1.

She noted that the practice is that a team member is supposed to ask permission to go into someone's queue and take their work. S1 never communicated that he was assigning some of her work to another coworker. C1 told her she was helping with her backlog. S1 stated he had no knowledge of another employee going in Complainant's queue for work. Complainant had upwards of 200 cases in her queue while other officers are usually carrying 80 cases. S1 stated he has told the members on his team to inform other officers when removing work from someone's queue. He further asserted that the team members generally did not like to talk to Complainant because she was confrontational and that could be why C1 did not tell her. S1 informed C1 that Complainant had a lot of work, but Complainant's overtime status was not affected.

Regarding claim (m), although Complainant initially alleged that management excluded her from lunches and a social function, she stated in her affidavit that only her coworkers were responsible. She stated that she organized birthday lunches for members of the team and her coworkers would attend but not bring food. She asserted her coworkers also excluded her from after-work outings. S1 denied any knowledge of these events.

Regarding claim (n), Complainant stated that S1 emailed her colleagues asking why she was not at work. Complainant noted that he emailed the team about it but did not call her. S1 asserted that he typically does not call employees and it was easier to have an acquaintance touch base with her.

Regarding claim (o), Complainant asserts that S1 sent an email to Complainant's new first line supervisor (New Supervisor) to inform her that Complainant had not completed a training even though she had indeed completed it. She noted that she felt it was retaliatory because at that point she was assigned to New Supervisor and it was up to her to ensure that the training was done. Complainant completed the training on December 27, 2016. On December 28, 2016, New Supervisor emailed her asking her to complete it based on S1's email. S1 stated that Complainant had just transferred to a new team before Christmas and S1 could still see her Performance and Learning Management Systems (PALMS) account, which stated she had not completed the December training. S1 asserts he only informed New Supervisor because in the system Complainant was identified as still needing to complete the training based on a list that was generated and sent to supervisors by management and Complainant's PALMS information was not yet available to New Supervisor.

Regarding claim (p), Complainant alleges that S1 did not give New Supervisor the designation to view and approve her time in WebTA, which she asserts is the common practice. Complainant stated she had to go to the timekeepers to have her leave approved when S1 could have New Supervisor access. S1 stated that he did not have the ability to switch supervisor assignments in WebTA. S1 asserted that the timekeepers explained that changes could not be made until the week after closing pay period. He further stated he had no control over when the change to give New Supervisor access to Complainant's time was to take place.

Regarding claim (q), Complainant asserts that for fiscal year 2016, S1 rated her a 3.9 or “exceeded expectations,” which is lower than she feels she deserved (the highest rating was the next highest rating, “achieved excellence”). Complainant received the same rating in the prior year. S1 recommended she complete a self-assessment for fiscal year 2016. Complainant submitted a four-page self-assessment that included accolades and accomplishments and still received the same score. Complainant asserts S1 gave his preferred employees more favorable evaluations even though she works harder than them. Complainant further asserts she deserved a higher rating because S1 had her make presentations when one of his favorite employees was unavailable. Complainant asserts that S1 knew Complainant had strong writing and oral communication skills and would ask Complainant to look over presentations or memos for corrections. Complainant further notes that S1 sent an email to S2 regarding Complainant’s EEO activity stating, “A new complaint? Issuing a PPA tomorrow should be entertaining.”

Complainant’s appraisal indicates she was evaluated on performance goals including national security/fraud detection, quality & customer service, and contribution to the USCIS mission and was rated “exceeded expectations” for each. She was also evaluated on core competencies of communication, customer service, representing the Agency, teamwork and cooperation, and technical proficiency. She was rated “exceeded expectations” for all core competencies with the exception of communication, for which she was rated “achieved expectations.”

S1 reported that he evaluated Complainant based on his observation of her work habits and work ethic. S1 asserts that her evaluation was not influenced by her EEO activity. Notably, the evidence shows that for fiscal year 2016, eight employees including Complainant received evaluations of “exceeded expectations” while five employees received evaluations of “achieved excellence.”

Based on the foregoing we find that with respect to all claims, Complainant has failed to establish that the Agency subjected her to discrimination based on race, sex, or age.

Complainant asserts the harassment is related to race, sex, age, and reprisal because her coworkers had no other reason to harass her. She reported it started when she unfriended them on Facebook. She alleges her coworkers became emboldened when they witnessed S1’s treatment of her. She asserts S1 had no reason to treat her differently compared to other employees unless her race, sex, and age were factors. Complainant further asserts race was a factor because S1 gives preference to C1 and C2 and they are both White. She asserts that sex was a factor because Coworker 3 (C3) is a Black male that S1 trusted and respected because he was the only male on the team. Complainant asserts that age was a factor because S1 treated a younger coworker better than her.

We find that Complainant failed to show that the Agency’s actions were pretext for discrimination. She has not provided any evidence to suggest that the alleged Agency actions were related to Complainant’s race, age, or sex. Complainant has also not shown that there were similarly situated employees not in her protected groups that were treated more favorably regarding any of the claims.

Pretext requires more than a belief, assertion, or suspicion that the Agency was motivated by discrimination. See Kathy D. v. Environmental Protection Agency, EEOC Appeal No. 0120171318 (Aug. 14, 2019).

Regarding her claims of reprisal, Complainant asserts that once she reported her claims of harassment to S2, S1 and her coworkers retaliated against her. Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a *per se* violation of the law. Charlie K. v. Equal Emp't Opportunity Comm'n, EEOC Appeal No. 0120142315 (Jan. 24, 2017), request for recon. denied, EEOC Request No. 0520170235 (Dec. 19, 2017) (citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (complainant told that filing an EEO suit was “wrong way to go about getting a promotion”)). Agencies have a continuing duty to promote the full realization of equal employment opportunity in its policies and practices. 29 C.F.R. §1614.101. This duty extends to every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Agencies are obligated to insure that managers and supervisors perform “in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal employment opportunity.” 29 C.F.R. §1614.102(a)(5); see Mike T. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020004555 (Nov. 10, 2021); Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), request for recon. denied, EEOC Request No. 0520090654 (Dec. 16, 2010) (*per se* violation found where supervisor mentioned EEO complaints had been filed and said, “What goes around, comes around”); Woolf v. Dep't of Energy, EEOC Appeal No. 0120083727 (June 4, 2009) (*per se* violation found when a labor management specialist told complainant, “as a friend,” that her EEO claim would polarize the office). When a supervisor’s behavior has a potentially chilling effect on the use of the EEO complaint process -- the ultimate tool that employees can utilize to enforce equal employment opportunity -- the behavior is a *per se* violation. Mike T., EEOC Appeal No. 2020004555.

We find that S2’s inquiries into Complainant’s intentions regarding her harassment claims were reasonably likely to deter Complainant from engaging in the EEO process. The discussions Complainant had with S2 were not in the nature of official settlement discussions. We conclude that S2’s statements about the transfers, even if well intentioned and not meant to pressure Complainant (we make no finding about the intent), coupled with his inquiry as to whether Complainant would file a formal complaint are sufficient to reasonably likely deter a person from engaging in the EEO process. Thus, Complainant has established reprisal by a preponderance of the evidence as to claim (f).

However, with respect to the remaining claims, Complainant provides no evidence other than her own opinion to support these contentions. The evidence shows that Complainant’s relationship with her coworkers was strained prior to her reporting her allegations of harassment to S2 reportedly because she unfriended them on Facebook. With respect to the actions attributed to S1, Complainant has not rebutted his articulated legitimate reasons for his actions.

With respect to the petty slights and mistreatment she alleges from her coworkers, there is no evidence to suggest that management encouraged such behavior, and Complainant stated that after she filed her first EEO complaint she did not report any of the incidents to management.

Complainant has also failed to provide any evidence other than her own opinion to suggest that S1 gave her a lower performance appraisal than deserved out of retaliation. The email he sent to S2 stating that issuing a PPA should be entertaining does not persuasively suggest that S1's evaluation was motivated by retaliation. Furthermore, Complainant's assertion that S1's preferred employees all received higher ratings is unpersuasive since the majority of the team received an "exceeded expectations" appraisal rating as Complainant did.

Lastly, the Commission finds that the harassment allegations, taken as a whole, were insufficiently severe or pervasive to constitute a hostile work environment.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is REVERSED in part and AFFIRMED in part. We REMAND the matter to the Agency to comply with the Order herein.

ORDER

The Agency shall take the following actions:

1. Within 90 days from the date this decision is issued, the Agency shall provide at least eight hours of EEO training to S2. The training shall place special emphasis on the Agency's obligation to prevent retaliation and interference with the EEO process. The Commission does not consider training to be a disciplinary action.
2. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against S2 for the retaliation found to have occurred in this complaint. If the Agency decides to take disciplinary action, then it shall identify the actions taken. If the Agency decides not to take disciplinary action, then it shall set forth the reason(s) with specificity for its decision not to impose discipline. If S2 has left the Agency's employment, then the Agency shall furnish documentation of his departure date.
3. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under Title VII. The Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in Complainant 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 45 days of the date Complainant receives the Agency's notice. No later than 90 days after the date that this decision is issued,

the Agency shall issue a decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission.

4. The Agency and its management shall cease and desist from discouraging employees from engaging in the EEO process.

POSTING ORDER (G0617)

The Agency is ordered to post at its National Benefits Center facility in Overland Park, Kansas, copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a).

The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

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

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

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

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

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

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

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

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

RIGHT TO REQUEST COUNSEL (Z0815)

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

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

May 5, 2022
Date