



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

[REDACTED]  
Vickie P.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021000751

Hearing No. 430-2017-00391X

Agency No. ARUSAR16MAY01964

**DECISION**

On October 29, 2020, Complainant, via counsel, filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), per 29 C.F.R. § 1614.403(a), from a September 30, 2020 final Agency decision (FAD) on 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.

**BACKGROUND**

During the period at issue, Complainant was employed by the Agency as a dual status Military Technician, meaning she held both civilian and military status. As a civilian, Complainant was a Safety and Occupational Specialist, GS-0018-11. As an Army Reserve soldier she was a Staff Sergeant (non-commissioned officer). Complainant worked at the Agency's Headquarters, 80th Training Command (The Army School System (TASS)) in North Chesterfield, Virginia.

On June 16, 2016, Complainant filed an EEO complaint. In that complaint, as later amended, Complainant claimed:

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

1. The Agency subjected her to a hostile work environment based on her disability (epilepsy, traumatic brain injury, ulnar palsy, and hearing processing problems, which separately or together cause various symptoms) when:
  - (a) On April 25, 2016, after seeing the tail of her service dog, a [Distance Learning Operator] contractor screamed and complained to coworkers that the dog cannot be in the building. Later, soldiers barked at her dog.
  - (b) On April 25, 2016, the company Supply Sergeant, E-7, said her service dog was not allowed in the supply room and to remove him from the building.
  - (c) On April 25, 2016,<sup>2</sup> Supply Sergeant and another soldier, an identified Master Sergeant, asked her personal questions about her service dog and disability. Supply Sergeant said that her dog was not allowed in the building, feigned a cough, and claimed he had an allergy.
  - (d) On or around May 3, 2016, management officials contacted the Staff Judge Advocate's Office to discuss and research her personal medical issues.
  - (e) On May 4, 2016, the Command Legal Attorney and the Commander shared this medical information by forwarding the above email to personnel without a need to know.
  - (f) On May 4, 2016, the Command Legal Attorney by email to the Commander (military side only) of the 80th Training Command stated that "psychological dogs are not authorized", presumed she had a mental illness. The Commander replied by email that she had a neurological disability and her service dog is a "seizure dog".
  - (g) On May 10, 2016, the Commander again forwarded the above email to personnel without a need to know.
  - (h) On June 19, 2016,<sup>3</sup> during a mandatory town hall meeting, Supply Sergeant made threatening fist gestures toward her service dog and expressed negativity about it being in the meeting and building. As a result, others in the room said Complainant should be more considerate of

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<sup>2</sup> While the Agency defined incidents "a" and "b" as occurring on May 2, 2016, and incident "c" on May 3, 2016, the record reflects that all three took place on April 25, 2016.

<sup>3</sup> The Agency identified the date of occurrence as June 16, 2016, but the record reveals that the incident occurred on June 19, 2016.

others and their feelings, and she should just call into meetings and not come, especially if she is so sick.

2. Complainant alleged that she was subjected to unlawful retaliation for engaging in EEO activity when:
  - (a) On June 27, 2016, in an email response to Complainant, the Commander again forwarded the above email with her medical information to personnel without a need to know and wrote negatively of her.
  - (b) On June 29, 2016, the Commander told her to avoid contact with Supply Sergeant and any place he might be, to leave a meeting that he might be in, and to walk a different path, so that everyone's rights were considered.
3. Based on disability and in reprisal for protected EEO activity, the [civilian] Chief Executive Officer, GS-0301-14, of the Headquarters 80th Training Command<sup>4</sup>, and management, failed to take corrective action to address her concerns.
4. She was subjected to discrimination and a hostile work environment based on disability and reprisal when on October 14, 2017, she was issued a Letter of Reprimand.

Following an EEO investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). She later withdrew the request, and the AJ ordered the Agency to issue a FAD. The Agency dismissed some claims for failure to state a claim finding they were “personnel actions that relate solely to the Complainant’s military service” and reasoning that they are outside of the jurisdiction of the civilian EEO process. The Agency also determined that claim 3 was not an independent claim, but an element of proof of a harassment claim.<sup>5</sup> It found no discrimination was established on the remaining claims.

The evidence developed during the EEO investigation shows that on February 18, 2016, in her civilian role, Complainant requested, as a reasonable accommodation, permission to have a fully trained service dog accompany her at work throughout the day, including in her office, meeting rooms, bathroom, dining facilities, and during travel. The request was approved the same day by Chief Executive Officer (hereinafter “CEO”), the highest level civilian in the workplace, Complainant did not include medical documentation with her request, but CEO knew she had a seizure disorder.

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<sup>4</sup> Was her first line supervisor till March 2016, then her second line supervisor.

<sup>5</sup> On appeal, Complainant agrees with the dismissal of issue 3. Accordingly, we shall not consider issue 3 in this decision.

Complainant first arrived to work in her civilian role with her service dog, a German Shepard, in late April 2016. The Commander stated that, at an April 2016 conference, Complainant explained to her that the dog was trained to sense when a seizure was going to come on. According to Complainant, her service dog: guides her around obstacles she cannot focus on immediately; alerts her to things she cannot hear; retrieves items and carries a back pack for items she drops or cannot carry due to her ulnar palsy; and, for her extreme fatigue and weakness, is trained to provide her a mobility brace and some momentum with slight pulls.

#### Incidents 1.a, 1.b, 1.c, 1., and 2.b - Interactions with service dog and Complainant

In incident 1.b., Complainant alleged that when she entered the supply office with her service dog, Supply Sergeant said he did not like dogs, asked why she had him and what was wrong with her. However, Supply Sergeant attested that when he saw the service dog, he asked Complainant to stop at the office door, but she did not. Instead, she came in with the dog, walked behind his desk, and came within two feet of him, laughing.

Regarding incident 1.c, Complainant alleged that, as she was passing an office, Supply Sergeant asked what the service dog was for, faked a cough, said he was allergic to it and that the dog could not remain in the building. According to Supply Sergeant, while he was visiting inside another office, Complainant came in with the dog, despite his request for her not to because he feared that breed of dog. He then said the dog was not supposed to be in the building. Since the Command did not explain the dog's presence, Supply Sergeant stated that he asked what the dog was for and denies asking about Complainant's medical condition. He admitted saying he had an allergy.

As for incident 1.a, Complainant coordinated with the Distance Learning Operator (hereinafter "Contractor") to use the Distance Learning Center, located in a different building, to attend and conduct trainings. Additionally, when the network Complainant used was down, she worked with Supply Sergeant to secure a large conference table in Contractor's building for her and her soldiers to use. Complainant asserted, as noted in the Agency's decision, that Contractor screamed hysterically even though her dog was over 100 feet away.

In its decision, the Agency recounted Supply Sergeant's explanation, regarding incident 1.h.: that he jumped up after the dog touched him and denied making comments about Complainant. Rather, people teased Supply Sergeant about his fear of the dog.

The Agency, referring to coworkers reactions while in the presence of Complainant's service dog, found that, at most, these were the reactions of surprised coworkers who were afraid of her dog. Further, the Agency noted that coworkers who told Complainant that dogs were not allowed in the building were not in her supervisory chain of command, had no authority to deny her use of a service dog. They were correct that pet dogs are not permitted in the building, stated the Agency, but wrong since this was a service dog. It found that coworkers' questions to Complainant, as to why her dog was present and/or what it did, were not medical inquiries.

Instead, the Agency reasoned that questions could be fairly be interpreted as asking what tasks the dog performed and did not rise to the level of severe or pervasive conduct.

The Agency found that the Commander asking Complainant to avoid contact with Supply Sergeant when she was with her service dog, incident 2.b, was consistent with the Job Accommodation Network's written advice in this situation; namely, establish different paths of travel for each employee, and develop a plan between the employees so they are not using common areas, such as the break room and restroom, at the same time. The Agency determined that Supply Sergeant, who worked in a different building than Complainant, was given essentially the same advice by the Lieutenant Colonel (i.e. to leave the building when the service dog was there).

In its decision, the Agency considered issue 2.b. to also include Complainant's allegation that, in the above conversation, the Commander also told her that due to Supply Sergeants far of her dog, he could kill it and not be found liable. However, the Agency credited the Commander's account of the incident: that she instructed Complainant not to go into Supply Sergeant's office with her dog and, that when Complainant objected, the Commander advised that if Supply Sergeant felt threatened and hurt the dog defending himself, there may be nothing she could do.

Incidents 1.d, 1.e, 1.f, 1.g, and 2.a - Seeking legal advice regarding a service dog as a reasonable accommodation and disclosure of medical information

On April 26, 2016, Supply Sergeant emailed the above Lieutenant Colonel, the highest ranking full time active guard reserve officer during that work week. Supply Sergeant recounted the April 25, 2016 incidents with Complainant and explained his fear of dogs stemmed from a childhood experience with a German Shepard. He attached an Army Directive regarding when a soldier is permitted to have a service dog.

The Lieutenant Colonel advised, in a May 4, 2016 email, that while CEO would address Complainant's use of her service dog in her civilian capacity, her chain of command in her military capacity needed to advise her of the rules while in uniform. The Lieutenant Colonel directed the Commander to do so before Complainant attended Battle Assembly. The Lieutenant Colonel included his email correspondence with the Staff Judge Advocate's office (JAG) regarding Complainant's use of a service dog, and highly recommended she contact JAG. JAG had informed the Lieutenant Colonel that the civilian and military sides have different rules, regulations, and policies for the use of service animals, and advised that before Complainant attempted to bring her dog in her military capacity, for things like participating in a drill, that her military chain of command address the matter with her. This prior correspondence did not discuss Complainant's disability.

Later in the day, JAG provided additional advice to the Lieutenant Colonel and the record strongly suggests this was received by the Commander. JAG stated the military does not authorize the use of service dogs for psychological support.

Further, JAG advised that military procedures require the unit surgeon to counsel Complainant on the possible consequences of a service dog on her military career, and he would also be the right person to be on a multidiscipline team involved in the approval process.

On the same day, the Commander replied to JAG that Complainant's service dog was not for psychological support, rather, he was trained to sense a chemical imbalance that causes seizures. She asked if that changed things, to which JAG replied that Complainant still had to go through the approval process before she could bring in her dog in for the military side of her job. On or about the same day, the Commander forwarded her email to JAG to the Command Surgeon.

On May 9, 2016, the Commander emailed Complainant, communicating that CEO handled the civilian side, but the military side was more complicated. She informed Complainant that she could not report to duty at any military unit with her service dog until the approval process was completed. The Commander offered that until then, Complainant could perform her weekend reserve duty, of participating in Battle Assemblies, from another location, as long as her direct military supervisor signed off on her forms listing what she accomplished (RST Form) and verifying her hours (on DA Form 1380) for pay purposes. The Commander copied CEO; the Non-Commissioned Officer in Charge (NCOIC) of the Safety Office<sup>6</sup>, and the Lieutenant Colonel. The Commander included her earlier email to JAG regarding the purpose of the service dog – to sense seizures coming on.

The next day, Complainant replied to the Commander, and copied the same individuals included by the Commander, stating that the Commander had no need to disclose her medical information to the civilian side and doing so violated her medical confidentiality. The Commander responded, stating she was trying to assist Complainant and denied making an improper disclosure of medical information.

On June 27, 2017, Complainant asked if she could do an educational safety program at Family Day in her capacity as Safety Director & Occupational Health Specialist (civilian). She copied the CEO; the Lieutenant Colonel; the Colonel, O-6, who was the Deputy Chief of Staff and also worked in the Safety Office and, according to Complainant, in March 2016 became her first line supervisor in her capacity of a civilian in the Safety Office; a person who the Deputy Chief of Staff identified as Complainant's "Civilian Supervisor"; and Command Sergeant Major who was her supervisor for her soldier military reserve duties.

On the same day the Commander replied to Complainant that while it was not a bad idea, she was not certain Family Day was the proper venue for a Safety brief, and to please coordinate with the Safety Office NCOIC. The Commander copied all the people Complainant had included, with the addition of the Safety Office NCOIC, a First Sergeant and a Captain. The Commander also included the email string of Commander's email to JAG regarding the purpose of her service dog. Report of Investigation (ROI), Exhs. A, Bates No. 35 (lower right) (EEO complaint); F-11.a, at 319 – 320 (Complainant's EEO investigatory declaration).

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<sup>6</sup> Where Complainant worked in a civilian capacity.

In its decision, the Agency noted that Commander attested that she copied the Safety Office NCOIC because he is in the Complainant's military chain of command, but Complainant later advised her she reports to CEO because she does not get along with the NCOIC. According to the Agency, Commander also explained that the NCOIC of the Safety Office must be aware of anything that could affect the Office's mission, and she copied Complainant's company's First Sergeant because he would likely be counseling her, as JAG suggested.

Regarding incidents 1.d and 1.e, the Agency concluded it would be unreasonable to preclude management from obtaining legal counsel in its efforts to process a reasonable accommodation request. During these incidents, as well as incidents 1.f, 1.g, and 2.a, the Agency found that the Commander's disclosure of medical information did not violate the Rehabilitation Act because it pertained to Complainant's fitness to perform essential functions of her military position as a reserve soldier. Additionally, the Agency noted that Complainant herself disclosed her medical condition to the Commander in April 2016, when she stated the dog was a seizure dog, rendering the information public.

The instant appeal followed.

On appeal, Complainant argues claim 4 was improperly dismissed for failure to state a claim because the reprimand was reprisal for her prior EEO activity as a civilian. She contends that the Agency "severed" incidents from her hostile work environment claim, regarding individuals' interactions with her and her service dog. Moreover, she asserts that the record does not show Supply Sergeant was diagnosed with a phobia of dogs.

Complainant continues that the Commander violated her confidentiality under the Rehabilitation Act by disclosing her medical condition, of a seizure disorder, for reasons outside the limited exceptions allowed for disclosure in the Rehabilitation Act. For example, the Commander stated she included the NCOIC in an email with the disclosure because he needed to know anything that could affect his mission – not one of the exceptions. According to Complainant, the Agency incorrectly found that it was not liable for disclosing she had a seizure disorder since she disclosed the information to the Commander at conference, because the Commission has explicitly ruled that the confidentiality requirements of the Rehabilitation Act "also extend to medical information that an individual voluntarily discloses to an employer".

In response to Complainant's appeal, the Agency maintains that some of Complainant's claims did not occur as alleged, and her claims did not rise to the level of a hostile work environment. As for the Commander's disclosure that Complainant had a seizure disorder, argues the Agency, Complainant's dual status required that her military chain of command was aware of her medical condition. Any other parties receiving the information were related to supporting management and guiding them through the reasonable accommodation process. Further, the Agency reiterates its belief that Complainant's self-disclosure of her medical condition to the Commander, during the April 2016 conference, rendered the information public since it was not shared in confidence or for official purposes.

### 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”).

#### Incident 4

In Petitioner v. Department of the Air Force (National Guard Bureau), EEOC Petition No. 0420140014 (July 2, 2015), the Commission reiterated that dual status technicians are considered both uniformed military personnel as well as federal civilian employees. We stressed that dual status technicians are covered by the federal sector EEO process when the alleged discriminatory action arises from the individual's capacity as a federal civilian employee, and thus the Commission has jurisdiction over those cases. The Commission reiterated that each National Guard dual status technician complaint must be analyzed on a case-by-case basis to determine whether the Commission has jurisdiction. In making this determination, the fact that a complainant wears a uniform, works on a military base or works on military equipment is not dispositive of the jurisdictional question. Id.

In the instant case, the Agency permitted Complainant to perform weekend reserve duty from another location when she was not at Battle Assemblies. This required that a military reserve superior sign off on forms listing what she accomplished (RST Form) and verifying her recorded work hours (on a DA Form 1380). On August 15, 2017, the Agency completed an Army Regulation 15-6 investigation. It found that Complainant submitted an RST form that was purportedly signed off by her military supervisor, when, in fact, it was not. Further, the investigation noted that Complainant submitted two DA Form 1380s with the signature of someone other than her direct military supervisor, the logical person and it determined that no military superior could vouch for the truth of the forms. Consequently, Complainant was found to have made false statements on two DA Form 1380s, in violation of the Uniform Code of Military Justice.

Additionally, the investigation revealed that Complainant had not taken an annual Army Physical Fitness Test, nor the required bi-annual height/weight screening since April 9, 2015. Complainant’s non-compliance with these requirements was brought to her attention in September 2016, by the successor Commander at a Battle Assembly. In response, Complainant stated she was current on the testing and would submit documentation. However, she did not do so. The investigation concluded that Complainant violated the Uniform Code of Military Justice when she falsely told the Commander she had taken the required test and screenings.



The allegedly discriminatory reprimand set forth in incident 4, was issued as a result of the investigation (i.e. submitting false forms and making false statements to the successor Commander). This matter is not a close call. The reprimand was made in Complainant's capacity as a uniformed military officer, not a civilian employee. The alleged source of the reprisal motive does not change this. On appeal, Complainant raises that the Agency stopped payment to her documented in her Form 1380s, and the Commander falsely told the successor Commander there was no record of her taking the Army Physical Fitness Test and she did not perform her required duty. These matters fail to state a claim for the same reason as the reprimand. Likewise, Complainant's being denied attendance at Battlefield Assemblies onsite with her service dog fails to state a claim since this was also done in Complainant's capacity as a uniformed military officer, not a civilian employee.

Incidents 1.a, 1.b, 1.c, 1.h, and 2.b

We will assume without finding, for purposes of analysis, that Complainant is an individual with a disability. Complainant engaged in EEO activity when in February 2016, she requested as a reasonable accommodation to be permitted to use a service dog, among other EEO activity.

We agree with the Agency that some of the incidents did not occur as alleged by Complainant. Although Complainant recounts that Supply Sergeant was unwelcoming about her use of a service dog, to the point of hostility, this is not a complete accounting of the incident. Supply Sergeant asked Complainant not to bring the dog into his office. In response, she not only ignored him but, brought the dog behind his desk and within two feet of him, while laughing. Supply Sergeant's reaction and Complainant's laughter make it likely she knew the way she handled her service dog made Supply Sergeant very uncomfortable, and she enjoyed this. In a May 13, 2016 memorandum, written closer in time to the incident than Complainant's declaration, Complainant stated that during the encounter Supply Sergeant told her "wow – I don't like dogs," and she replied she would take care of this by instead calling or emailing him for supplies. Complainant did not write in the memorandum that Supply Sergeant asked what was wrong with her, why she had the dog, and that she explained it was a service dog.

The EEO investigator asked Supply Sergeant if questioned Complainant about her disabilities and what she needed the dog for. Consistent with Complainant's memorandum, Supply Sergeant responded that later the same day, while visiting in the office of a Master Sergeant, Complainant brought the dog into the office,<sup>7</sup> and he asked her not to do that and explained he feared her breed of dog. According to Supply Sergeant, management had not yet advised a service dog was going to be in the workplace and he asked Complainant what the dog was for, not about her condition or a disability.

During a large June 19, 2016 town hall, Supply Sergeant attested that Complainant was there with her service dog, as he was, and she left with the service dog.

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<sup>7</sup> In an email to the Lieutenant Colonel a day after the incident, Supply Sergeant wrote Complainant came by the door with the dog.

A few minutes later he could hear the dog's chain approaching, but did not see the dog. Moments later, he felt the dog's nose touching his backside. According to Supply Sergeant, he jumped up and asked Complainant to get her dog and said he does not play with them. He denied discussing the dog after the meeting and stated that he immediately left the building, while other joked about his fear of Complainant's dog.

The Family Programs Coordinator, who was present at the town hall and seat near Supply Sergeant, stated Supply Sergeant jumped from his seat and caused a commotion as he moved and pushed chairs in reaction to the presence of the service dog, before trying to regain his composure. The "IT" Sergeant, also at the town hall, stated that Supply Sergeant was standing by the door, Complainant's dog sniffed his leg, and Supply Sergeant made a scene.

In Complainant's accounting of the incident, she failed to mention she allowed her dog to get so close to Supply Sergeant that he touched him with his nose. Rather, she asserted that Supply Sergeant's hyperventilating at the town hall was feigned.

In another earlier incident, Complainant stated she and her dog were partially inside the door of the Unit Administrator and Contractor was at the end of the hallway, over 100 feet away. When Contractor saw the dog, she screamed hysterically "AAAAHHHH!!!" "THAT'S A DOG!" "MR. [Unit Administrator] GET UP AND LET ME IN THE OTHER DOOR!!", which would allow her to avoid walking past the Unit Administrator's office.

The IT Sergeant, who witnessed the event, confirmed that Contractor "freaked out" and screamed. He had no doubt that Contractor was afraid.

This is not a reasonable accommodation case. For her civilian capacity, management approved Complainant's use of a service dog, continued to support the accommodation, and never withdrew its approval. As for individuals' interactions with Complainant's service dog and with Complainant regarding the dog's presence, this is a harassment case.

To prove her harassment claim, Complainant must establish that she was subjected to conduct so severe or so pervasive that a "reasonable person" in her position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case, her race, religion, age, and reprisal for prior protected EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., OLC Control No. EOC-CVG-1994-5 (Mar. 8, 1994).

We find that Contractor and Supply Sergeant's reactions to the presence of Complainant's service dog were not based on reprisal or her disability, but simply an extreme fear of her large German Shepherd dog. In addition to the evidence above, a Civilian Personnel Officer (Human Resources Specialist – Military), GS-0201-11, stated Supply Sergeant was terrified of dogs because he was attacked by one as a child.

Further, the instances of people barking at the dog and the like were not, even when considered with all the alleged harassing incidents, pervasive or severe enough to constitute harassment.

We agree with the Agency that regarding her civilian capacity, coworkers who told Complainant or complained to coworkers that dogs were not allowed in the building were not in her supervisory chain of command, had no authority to deny her use of a service dog, and were mistaken. Similarly, we find that Supply Sergeant's inquiry regarding what the dog was for, was not a disability related inquiry likely to elicit information about Complainant's disability. At time, Supply Sergeant knew so little about the dog that, as Complainant wrote in her memorandum, he asked whose dog it was. Supply Sergeant was Complainant's coworker and was not asking the question at the behest of management. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, OLC Control Number EEOC-CVG-2000-4 (July 27, 2000).

We also find, like the Agency, that the Commander's instruction after the town hall, to avoid Supply Sergeant when she was with her service dog, was not harassing in nature. The record reflects that Supply Sergeant was given the same advice. Other than asking for supplies, which Complainant could do by calling or email, she did not need to interact with Supply Sergeant to perform her duties. As for Complainant's claim that the Commander told her there was nothing she could do if Supply Sergeant killed the dog while defending himself, the Commander denied making such statement and explained that he cautioned that Supply Sergeant could hurt the dog when Complainant objected to entering Supply Sergeant's office. The Commander's advice was the truth, not harassment.

On appeal, Complainant argues that the Agency did not define or discuss all the incidents in her hostile work environment claim. We agree. But we find that these incidents, taken together with all the other incidents, were not severe or pervasive enough to constitute unlawful discriminatory harassment.

#### Incidents 1.d, 1.e, 1.f, 1.g, and 2.a.

Title I of the Americans with Disabilities Act of 1990 (ADA), and by extension the Rehabilitation Act,<sup>8</sup> requires that all information obtained on the medical condition or history of an applicant or employee must be maintained on separate forms and in separate files and must be treated as confidential medical records, except that:

- i. Supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations.
- ii. First aid and safety personnel may be told if the disability might require emergency treatment.

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<sup>8</sup> 29 C.F.R. § 1614.203(b).

- iii. Government officials investigating compliance with the Rehabilitation Act must be given relevant information on request.

See 42 U.S.C. §§ 12112(d)(3)(B), (4)(C); 29 C.F.R. § 1630.14; EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, OLC Control No. EOC-CVG-2003-1, Question 42 and footnote 111 (Oct. 17, 2002).

The Commission has also interpreted the exception to allow employers to:

- iv. Disclose medical information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations.
- v. Use medical information for insurance purposes.

See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), OLC Control No. EEOC-CVG-2000-4, at footnote 10 (July 26, 2000).

This confidentiality requirement is not limited to individuals with disabilities. Hampton v. United States Postal Service, EEOC Appeal No. 01A00132 (April 13, 2000).

As an initial matter, we find that when the Commander informed JAG that Complainant had the seizure disorder in seeking legal advice and JAG responded, the event did not constitute an unlawful disclosure. We add JAG responded only to the Commander without copying anyone. As for Complainant's assertion, that JAG's email that "psychological dogs are not authorized", presumed she had a mental illness, this is not supported by the record. The email in question was general legal advice, and in no way communicated the reason Complainant used or wanted to use a service dog.

The Agency argues that since Complainant was dual status, the Commander's disclosure of Complainant's seizure disorder to her military chain of command was necessary. It contends that any other party receiving the information was related to supporting management and guiding them through the reasonable accommodation process.

With one exception, which we will discuss below, the Agency does not contest that the Commander's disclosure of Complainant's seizure disorder concerns a medical condition that must be treated as confidential.

To the extent the Commander's disclosures of Complainant's seizure disorder were made to the military chain of command in Complainant's *military* capacity, we find the matter fails to state a claim. But in her May 9, 2016 disclosure, the Commander copied the NCOIC over the Safety Office, where Complainant worked as a *civilian*.

This disclosure does not fall under one of the ADA exceptions because CEO had already approved Complainant's reasonable accommodation request to use a service dog in her civilian capacity. Moreover, the Lieutenant Colonel had already informed the Commander that she was to address Complainant about the service dog rules for Complainant's uniform military capacity, and that the civilian side was being handled by CEO. The Commander's next disclosure, which was via a May 10, 2016 email wherein she again included the NCOIC, did not even concern reasonable accommodation or Complainant's fitness. Rather it was a rebuttal to Complainant's claim that the Commander violated her confidentiality. In the Commander's June 27, 2016 email, responding to Complainant's request to do a safety program at Family Day, she again made a disclosure which does not fit into any of the ADA exceptions. This disclosure violated the ADA because it was copied to the NCOIC; the Deputy Chief of Staff who was Complainant's first line supervisor in her civilian capacity; and a person who the Deputy Chief of Staff identified as Complainant's "Civilian Supervisor".

The Agency argues that when Complainant shared with the Commander, at an April 2016 conference, that the dog was trained to sense an oncoming seizure, this rendered the information public since it was not shared in confidence or for official purposes. We disagree that this releases the Agency from the ADA confidentiality requirement. The confidentiality requirement extends to medical information that an individual voluntarily discloses to an employer. Lampkins v. USPS, EEOC Appeal No. 0720080017 (Dec. 8, 2009).<sup>9</sup>

### CONCLUSION

The FAD is AFFIRMED in part and REVERSED in part. The Agency shall comply with the orders below.

### ORDER (D0617)

1. The issue of Complainant's entitlement to compensatory damages is remanded to the Agency. Within 60 days of the date of this decision, the Agency shall determine the amount of pecuniary and non-compensatory damages to compensate Complainant for the harm caused to her by the discrimination found in this decision, and pay her the undisputed amount within 60 days of the date this determination. Complainant must prove these compensatory damages by submitting to the Agency statements, documents, input and other evidence, and cooperate with the Agency's efforts to calculate these compensatory damages by responding to Agency requests for information and completing Agency forms within 30 days of when the Agency makes a request. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992)

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<sup>9</sup> But to the extent Complainant freely shared that she had a seizure disorder with coworkers and management, this could be an evidentiary factor on the amount of pain and suffering likely caused by the Agency's disclosures, impacting the amount of compensatory damages awarded.

(available at [eeoc.gov](http://eeoc.gov).) Within 120 calendar days from the date of this decision, the Agency shall issue a FAD which addresses compensatory damages with appeal rights to the EEOC.

2. Within 90 days of the date of this decision, the Agency's EEO function shall give training to the Commander, if she is still employed by the Agency, regarding the ADA/Rehabilitation Act confidentiality requirements for medical conditions in a form and manner it deems appropriate. The Agency may contact our Training and Outreach Division for Assistance in obtaining the necessary training via <https://www.eeoc.gov/federal-sector/federal-training-outreach>.

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). 29 C.F.R. § 1614.403(g). The report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its 80th Training Command (The Army School System (TASS)) facility in North Chesterfield, Virginia, 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 is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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

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

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

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0920)

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

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

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

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

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

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

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

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

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



RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

September 26, 2022

Date