



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

[REDACTED]  
Minerva Z.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2021002154

Hearing No. 570-2016-00929X

Agency No. 2004-0372-2015104699

**DECISION**

On February 23, 2021, 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 February 19, 2021 final decision (FAD) 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 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 in part and VACATES in part, the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Rating Veterans Service Representative (RVSR), GS-0996-12, at the Appeals Management Service Center (AMC) in Washington, D.C.

In formal EEO complaints filed on June 11, 2015 and September 16, 2015, Complainant alleged that the Agency discriminated against her as referenced below.

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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.

VA Complaint No. 2004-0372-2015102552 (Complaint A)<sup>2</sup>

In her first EEO complaint, Complainant alleged that she was subjected to discrimination and a hostile work environment on the bases of race (African American), sex (female), and reprisal (prior protected EEO activity) when: (1) on February 4, 2015, via email, Complainant informed the Assistant Director (S4) that she felt the February 3, 2013 meeting dealing with hostile workplace environment and discrimination was unsuccessful and she was not satisfied with the outcome; (2) on February 13, 2015, S4 scolded Complainant in the presence of her coworkers; (3) on February 25, 2015, Complainant was issued a proposed Letter of Reprimand (LOR) for Conduct Unbecoming of a Federal Employee; (4) on March 10, 2015, Complainant requested a change of her tour of duty, but her request was denied; (5) on March 12, 2015, Complainant's third-line supervisor (S3) issued Complainant the LOR; (6) on March 18, 2015, Complainant's first-line supervisor (S1) failed to input Complainant's January 2015 productivity output and seven hours of productivity output for February 5, 2015; (7) on May 19, 2015, Complainant's request for telework was denied; (8) as of June 10, 2015, Complainant had not been informed as to whether her request for an exemption for mandatory overtime in March and April 2015 had been approved or denied; and (9) on October 15, 2015, S3 issued Complainant a Notice of Proposed Removal (NPR).<sup>3</sup>

VA Case 2004-0372-2015104699 (Complaint B)<sup>4</sup>

In her second EEO complaint, Complainant alleged that she was subjected to discrimination, sexual harassment and a hostile work environment based on her race (African American), sex (female), disability (anxiety and Post Traumatic Stress Disorder (PTSD)), and reprisal (prior protected EEO activity) when: (1) in 2013,<sup>5</sup> S1 subjected Complainant to unwanted sexual advances and tried to kiss her neck which she rejected and pushed him away; (2) from February 2015 to March 2015, S1 regularly asked Complainant if she would consider marrying him after his divorce; (3) beginning in March 2015, S1 gave Complainant a hard time about her monthly performance appraisal; (4) beginning in March 2015, S1 lingered around Complainant's desk and would stalk Complainant; (5) on March 20, 30 and May 19, 2015, Complainant requested deductible time for the months of January and February 2015, but she was never credited for the deductible time; (6) from May 2015 to present, S1 harassed and stalked Complainant by calling her and hanging up three times a day along with stopping by her desk to see what she was doing; (7) from May 20, 2015 through August 11, 2015, a Human Resources Specialist (LRAC)

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<sup>2</sup> Events 4, 5, 6, and 7 were accepted by the Agency's as discrete acts of disparate treatment discrimination and Event 7 was accepted as part of Complainant's failure to accommodate claim raised in Case No. 2004-0372-2015104699.

<sup>3</sup> On October 28, 2015, Complainant requested to amend her complaint to include the NPR. This allegation was accepted as Claim 9 in this complaint and then again as Claim 20 in Case No. 2004-0372-2015104699. The Agency consolidated these allegations for the purpose of its FAD.

<sup>4</sup> Claims 10, 17, and 19 were accepted by ORMDI as discrete acts of disparate treatment discrimination.

<sup>5</sup> Complainant testified that she believes this event occurred in 2014.

continually asked Complainant if she had talked with her union representative about settling her EEO case and said if she withdrew her complaint, the LOR would be removed; (8) on June 9, 2015, S1 informed Complainant that he could not put her in for an award or give her good comments in her performance appraisals because she kept too much company around her desk; (9) in June 2015, S1 went to Complainant's desk and told her "you don't love me no more;" (10) on June 30, 2015, Complainant's request for a reasonable accommodation was partially denied; (11) on July 14, 2015, Complainant emailed S1 about her June 2015 appraisal and explained that her figures had been incorrectly calculated but S1 took no remedial action; (12) on July 20, 2015, S1 falsely accused Complainant of failing to put in tickets; (13) on July 21, 2015, Complainant requested a reasonable accommodation and emailed S1 and another supervisor (SVSR2) asking for clarification about why she was denied participation in the Telework Pilot Program (TPP), but she did not receive a response; (14) on July 22, and 23, 2015, S1 wrote down the names of the male employees that stopped by Complainant's desk and informed their supervisors; (15) on July 22, 2015, S1 called another supervisor (SVSR3) to direct two male coworkers (CW1 and CW2) to stay away from Complainant's desk; (16) on July 23, 2015, a male coworker (CW3) was directed to stay away from Complainant's desk; (17) on July 25, 2015, S1 denied Complainant's request for eight hours of overtime; (18) on July 28, 2015, S1 would appear at Complainant's desk when other male coworkers were present and asked if it was work-related; (19) on August 24, 2015, LRAC denied Complainant's August 17, 2015, accommodation request; and (20) on October 15, 2015, S3 issued Complainant a NPR for Inappropriate Disclosure of Patient Information and Lack of Candor.

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 EEOC Administrative Judge. Complainant timely requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). In the decision, the Agency concluded that Complainant proved that Agency management subjected her to reprisal with respect to the NPR but failed to prove discrimination or reprisal with respect to any other claim.

### FACTUAL BACKGROUND

#### *Claim A1 – Unsatisfactory Meeting to Address Hostile Work Environment*

Complainant asserted that her coworker had informed her that during a team huddle meeting with his unit, a supervisor (SVSR1) had mentioned Complainant's name indicating she cannot ask any questions from anyone on his team. Complainant stated that she then contacted S4 requesting a meeting to discuss issues specifically about employees who are being prohibited from seeking assistance from other peers as well as being targeted by SVSR1 and mandatory overtime and favoritism.

The meeting took place on February 3, 2015 and was attended by LRAC<sup>6</sup> and S3. Complainant asserted that during the meeting, the mandatory overtime issue was not discussed because S4 did not have any control over the overtime issue. According to Complainant, S4 understood that Complainant wanted to address the overtime issue and told her that she would get to that but first wanted to know what Complainant meant by favoritism. In response, Complainant asserted that she provided S4 with examples pertaining to detail assignments. Complainant claimed that S4 responded that she did not know there was a procedure for requesting a detail. Complainant stated that as the meeting was going downhill, LRAC stated: “like my grandmother said, closed mouths don’t get fed.” Complainant stated that when she brought up SVSR1 again, she was told by S4 that she had spoken to SVSR1 as well as an assistant supervisor (ASVSR) in which she was told by both that Complainant’s name was not mentioned during the meeting. S4 stated that she did not believe that SVSR1 was targeting her. In addition, Complainant claimed that S3 and LRAC told her that she needed to stop being sensitive. She indicated she expected S4 to address the issue with SVSR1. Complainant also wanted an apology from him. Complainant further claimed that the meeting ended without an outcome, which she found unacceptable. In addition, Complainant asserted that she had no idea S3 and LRAC would be attending the meeting and if she was aware of their attendance, she would have requested union representation.

S4 testified that she received an email from Complainant on February 4, 2015 to meet with her. She indicated during the meeting, the Complainant did not make allegations regarding hostile workplace or harassment. S4 stated that she learned in that meeting that Complainant was interested in a detail assignment, and she was encouraged to work with her supervisor and let the supervisor know what type of opportunities she was interested in. Complainant was also informed that no policy was put in place regarding speaking with peers on a different floor or team.

*Claim A2 – February 13, 2015, S4 scolded Complainant in Front of Coworkers*

Complainant claimed that a meeting was held with the Special Operations staff and S4 on February 13, 2015. Complainant stated that before the meeting started, S4 informed the staff that overtime was not going to be discussed and asked the group if there was anything else they wanted to discuss. Complainant stated that a co-worker (CW4) asked about wearing jeans on Fridays. Complainant said that she then turned to CW4 and said “[CW4], she [(S4)] don’t care,” to express that S4 did not care about the jeans issue. S4 then asked Complainant what she just said, to which Complainant replied: “you don’t care.” Complainant asserted that S4 responded back to Complainant, while tapping her fingers on the desk, yelling: “you can’t say that, don’t say that, I do care, and if I did not, I wouldn’t have those meetings with you guys.” Complainant said that she was not necessarily upset about the comments made by S4, but the way it was said.

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<sup>6</sup> LRAC holds the titles of Human Resources Employee Relations Specialist, Local Reasonable Accommodation Coordinator, EEO Alternative Dispute Resolution Coordinator, and EEO Program Manager.

After the meeting, S1 informed Complainant that she needed to watch herself because he did not know what was said during the meeting, but it ruffled some feathers. Complainant stated that the following week she received an email from a supervisor (SVSR2) requesting to meet with her. At the meeting, SVSR2 presented Complainant with a proposed LOR for the way she spoke to S4 on February 13, 2015.

S4 denied scolding Complainant in the presence of her co-workers. She states that during a meeting, an employee expressed concerns regarding the inability to wear jeans every day. S4 also stated that she discussed the importance of office attire and of balancing the interest of multiple parties when making a change to the office attire policy. In addition, S4 stated that the conversation was very productive and continued for approximately 10 minutes. S4 further affirmed that during the conversation, Complainant, while referring to her and looking in her direction, stated in an abrupt manner: "look at her, she doesn't even care." S4 stated that the statement was a destructive comment, she felt disrespected, and that her authority was undermined. S4 said that she responded to Complainant in a calm and professional tone that she did care about the employees at AMC, indicating this was why she has provided employees with the ability to meet with her and discuss suggestions employees have for improving morale and productivity. S4 confirmed that she did not have further conversations with the Complainant in reference to this matter.

#### *Claims A3 & A5 - Letter of Reprimand*

Complainant asserted that she was issued a proposed LOR by SVSR2. She further indicated that she responded to the proposed action in writing to an Assistant Veterans Service Center Manager (ASVSR2). She indicated on March 11, 2015, she received an email from S3 informing her that he needed to meet with her and for her to bring representation. LRAC was present at the meeting and stated that he was not answering any questions, nor were they having a discussion. According to Complainant, LRAC stated that he was going to read the accusations to her, and she would either sign or not. Complainant asserted that management's conduct at the meeting was unacceptable because she had already been scolded and felt that management's mind was already made up without her evidence being considered. Complainant noted that she had never been subjected to any disciplinary action before, nor did she discuss the reprimand with S3 or anyone in the Human Resources office (HR).

SVSR2 affirmed she was the management official who issued Complainant a proposed LOR for an incident which involved Complainant and S4 during a team meeting. She indicated she was unaware if Complainant had received any disciplinary actions prior to this one and was unaware if employees which she supervised were subjected to the same. Complainant was given an opportunity to respond to the proposed reprimand, and if she made one it would have been to either ASVSR2 or S3. She was unaware what the outcome of the proposed reprimand was as well as who issued the reprimand. SVSR2 asserted that Complainant did not inform her that she was subjected to harassment as a result of her receiving this proposed letter of reprimand.

S3 stated that he was the management official who issued Complainant the LOR for making disrespectful remarks towards S4 in a team meeting as supported by witness statements. S3 explained that he referred to the Agency's Handbook's Table of Penalties to determine what type of discipline would be implemented. S3 also consulted LRAC in which the legitimacy of the charge and weight of the evidence was discussed. S3 also stated that Complainant did not inform him that she was subjected to harassment.

*Claim A4 – March 10, 2015 Change in Tour of Duty Denied*

Complainant claimed that she asked S1 for a change in her tour of duty to accommodate her children's school schedule. Although S1 initially approved the request he stated that the final approval was to be made through the front office. From March to June 2015, Complainant continued to inquire about the change in tour to S1. Complainant claimed that because S1 did not know exactly what happened to the request, he asked her to send him another request. She indicated although the request was eventually approved by ASVSR2, she could not understand why it took so long for her to receive a decision when another employee (CW5) was approved quicker. She indicated although her requests for change in tour had been approved timely in the past, she felt she was being singled out because other employees' requests were approved timely and hers were not.

S1 stated that Complainant did make a request to him in writing for a change in tour of duty for a later arrival to work. He explained that in accordance with Agency policy, Complainant's request had to be approved by S1 *and* his supervisor. S1 stated that although Complainant's request was approved on June 15, 2015, it was not approved timely because there was an unintentional mix-up with her paperwork.

*Claim A6 – March 18, 2015 Productivity Output*

Complainant alleged that on March 18, 2015, she requested a copy of all her monthly performance reviews from S1. S1 updated her performance since it had not been updated since December 2014. Complainant further stated that when she received the monthly performance review for February 2015, it noted she was short on production which Complainant believed was incorrect. Complainant asserted that S1 assured her that he would input the information. Complainant stated that S1 investigated the matter and informed her that some of her deductible time<sup>7</sup> for January and February 2015 were not approved. She indicated she questioned the reason because it was the day there was no work and employees were on the Talent Management System training (TMS) the whole day. Complainant asserted that S1 told her he will reach out to the Compensation Services department and have the hours put in. Complainant claimed, however, that the hours were never approved.

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<sup>7</sup> Deductible time is allotted for certain permissible hours when the employee is not working on cases. An example of deductible time is leave usage. Deductible time is taken into consideration when an employee's productivity is assessed. When an employee cannot reach their production goals, they are required to provide an explanation for reduced productivity (i.e., deductible time).

S1 affirmed that because Complainant forgot to input her production information, she requested to have her production updated. He further asserted that he informed Complainant that anything pertaining to productivity information over 30 days only can be approved by upper management. S1 also informed Complainant that the information would be noted in her monthly evaluation to cover her until the information was updated. S1 stated that he did send a request to management on March 20, 2015, for review and input of the requested productivity output, as well as informing Complainant it was her responsibility that her work be put in ASPEN.<sup>8</sup> S1 indicated Complainant has never requested to have her productivity output inputted in ASPEN before.

*Claim A8 – June 10, 2015 Overtime*

On February 18, 2015, Complainant sent an email to an Assistant Supervisory Rating Veterans Service Representative (ASVSR3) requesting an exemption from mandatory overtime for the months of March and April 2015 for personal reasons. Complainant was told that her request was forwarded to the front office, but she did not receive any response to her request. Complainant asserted that since that time, she did not follow up with management regarding her request because the time period had since passed, she had received a disciplinary action in March 2015, and had also been working on an EEO matter. ASVSR3 affirmed that he is unaware if Complainant's request for exemption was granted because the email was forwarded to the front office for approval.

*Claims B1, B2, B4, B6, & B9 – Sexual Harassment*

Complainant stated that she and S1 were coworkers on the same team since 2012. According to Complainant, sometime in 2014, S1 came to her home at her request to install cameras and other equipment. During that visit, Complainant claimed that she rebuffed S1's attempts to kiss her. Complainant stated that S1 apologized and said: "the devil got ahold of me." Complainant also stated that she paid him and told him to leave. She affirmed that S1 had never demonstrated this behavior to her before. There were no witnesses to this event. Complainant did not inform management of this situation.

S1 denied the allegation that he ever tried to kiss Complainant. S1 also states that during this time frame, Complainant would always come to his office and talk about her personal life. Before he was her supervisor, he did handyman work for her at her house, but that was all. Complainant initiated EEO activity in or about February 2015. Around the same time, Complainant asserted that S1 (who had recently become her first-line supervisor) started making unwanted sexually aggressive comments towards her which she found offensive and intimidating. She stated that she made it known to S1 that she did not like it. According to Complainant, shortly thereafter, S1 started targeting and stalking her. Complainant asserted that that S1 would regularly go to the cubicle next to her when she was alone and make noises until she got up to see what was going on.

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<sup>8</sup> ASPEN is a patient tracking and reporting software and is used by the Agency to record the claims that are processed.

Complainant further claimed that when she asked S1 for a copy of her performance appraisals, he got close to her face and stated: “you don't love me no more.” Complainant claimed that she then pushed him away. Since he was giving her a hard time in getting her appraisals, she contacted a union representative (U3) for assistance.

Complainant alleged that around March 2015, S1 began to counsel her about being away from her desk and started to monitor any male co-workers that came to her desk and then run them off. Complainant claimed that S1 never monitored any females that came to her desk. Complainant stated that S1 would ask the male employees if they were at Complainant’s desk for work-related reasons. Complainant stated that her coworkers were not treated the same.

Complainant also claimed that on June 9, July 29, and August 12, 2015, S1 sent out an email to remind the team that hanging around other people's desks when it was not break time was not permitted. Complainant stated that S1 only made an issue of this when she would go to someone's desk or there was someone at her desk.<sup>9</sup> Complainant also alleged that S1 went around to the supervisors from other teams and asked them to let him know if Complainant was stopping at their team member’s desks. Complainant asserted that one supervisor (SVSR4) would ask her to leave when she came by anyone from her team and was told to return to her own team.

In addition, Complainant asserted that S1 would also call her telephone, and when she answered he would hang up. S1 further stated that when she called him about this, he claimed he accidentally dialed her number. Complainant claimed that he would call her again about an hour later. According to Complainant, S1 did this on May 20, June 10, July 9, and on July 14, 2015.

A male co-worker (CW6) witnessed Complainant receiving a call on a couple of occasions where S1 claimed that he mistakenly dialed Complainant. CW6 also testified that he witnessed S1 “lingering” around Complainant’s desk looking for her even on the days when she was working from home or had the day off. According to CW6, when Complainant was at her desk, S1 would ask her questions or just check if she was there. CW6 also stated that at times S1 would ask CW6 if he had seen Complainant. CW6 also testified that when he would be at Complainant’s desk talking to her, S1 would call and just hang up or then apologize for dialing the wrong number. CW6 further stated that he and Complainant would work on cases together, and he would hear S1 say he dialed the wrong number or by accident. CW6 affirmed that S1 set up a meeting with the Veteran Service Center Manager (M1), and the whole Special Operations team under the “guise” that there was too much talking at work and it was disturbing the whole operation.

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<sup>9</sup> Complainant claimed that she notified S3 about this issue, but he did not respond. Complainant stated that she also notified a union representative who conducted a “silent investigation” but did not observe any harassment. However, Complainant alleged that during the union’s investigation she was not at work so there was no way an investigation could have been thorough.

CW6 testified that he discussed these events with Complainant during a meeting on July 29, 2015. CW6 witnessed an incident where Complainant left her desk, S1 made a phone call and approximately five minutes later Complainant returned stating she was tired of SVSR4 having her leave SVSR4's team area. CW6 stated that Complainant felt everything was aimed at her because she would have people at her desk. CW6 stated that S1 spent a lot of time trying to figure out either where Complainant was or complaining that people were socializing too much. CW6 noted that since Complainant moved to a different team, S1 stopped walking over in his area anymore and all the discussions about employees talking too much ended.

Another coworker (CW7) stated that she witnessed S1 lingering around Complainant's desk on several occasions. She witnessed S1 asking CW1 in a loud voice if the reason he was at Complainant's desk was work-related. CW7 asserted that when she went to Complainant's desk S1 never said anything to her. CW7 noted that others in Complainant's work area have guests at their desks at times and S1 would come over to their desks and have a conversation with them. CW7 stated that she would be at Complainant's desk during her break time and S1 would come over and stand there. In addition, CW7 stated that SVSR4 would always harass Complainant and run her out of their section, but never anyone else.

CW7 also witnessed S1 calling and hanging up on Complainant. When she was on a break, she came to Complainant's desk and he called her, but hung up the phone. She knew it was S1 calling since she saw his number on Complainant's caller ID. CW7 also states that she witnessed on several occasions when S1 would come over and just stand there or would join in on their conversation or start a new one. CW7 discussed these events with Complainant who felt uncomfortable going to S1. CW7 asserts that she advised Complainant to go to the union, but the union was no help.

U2 testified that Complainant emailed the union president complaining that she felt harassed by her supervisor because her supervisor monitored her at all times, that her statements were being "verified," and she was scolded for having people at her desk when others on her team did the same thing without comment. U2 stated that Complainant said she had examples and witnesses, but she did not elaborate on what they were. U2 was asked by the union president to look into Complainant's complaint. U2 stated that he did a "quiet observation" on July 22, 2015. He observed that there was no unusual behavior on this date. He visited the Special Operations work area twice on this date and walked around the area. He did not observe any strange behavior or hear any conversations and did not observe any groups of people at any of the desks. He asked S1 if he generally was having any issues on his team. S1 volunteered that he had some people from other teams spending long periods of time in Special Operations, but these issues were being addressed by the supervisors of those teams and not him. S1 felt it was being resolved. U2 asserted that he informed Complainant of his findings and told her he needed more specific information before he could investigate anything. U2 stated that Complainant opted to pursue her case without his assistance.

S1 denied committing any of the actions alleged by Complainant. During the relevant time frame, S1 stated that Complainant was frequently away from her desk. He noted that he would come by Complainant's desk to check to see if she was there because his job is to make sure the employees are working. S1 affirmed that he received complaints from two Veterans Service Representatives (CW8) (female) and (CW9) (male) that Complainant constantly had people at her desk which would make it very difficult to concentrate on work. S1 explained that in response to these complaints, he sent an email to the staff to make sure they understood the policy on breaks and lunch and to emphasize that they needed to be working unless they were on breaks or at lunch.

CW8 testified that her first-line supervisor is SVSR4. CW8 testified that in June 2015, she informed S1 that she could not do her work with the high volume of people constantly at Complainant's desk and subsequently requested that her desk location be relocated to another cubicle across the room.

CW9 testified that his first-line supervisor was S1. CW9 stated that between February and June 2015, he was a "cubicle" neighbor of Complainant sharing a connected cubicle wall. CW9 affirmed that during this time, Complainant would have frequent visitors throughout the day on numerous occasions. CW9 testified that he did inform S1 that these frequent visitors were disruptive to many people on the team.

#### *Claims 3B, 8B, 11B – Performance Appraisal*

Complainant stated that she asked S1 for a copy of her monthly performance appraisal and he gave her a hard time about it.<sup>10</sup> Complainant further stated that she emailed S1 on June 9, 2015, regarding her May 2015 performance appraisal. Specifically, Complainant wanted to know why S1 never referenced her positive contributions in his appraisals even though he would provide her with verbal praise. Complainant asserted that S1 explained that if he referenced the positive contributions in writing, he would also have to note the negative aspects like the workers constantly around her desk.

Complainant also asserted that the quality portion of her monthly performance was calculated incorrectly which would put her below standard. The Quality Review team is tasked with calculating quality, and the Quality Review supervisor (QR), is head of this team. Complainant asserted that no one could ever give her a formula of how quality was calculated. The last award she received was in August 2013, when she had a different supervisor. Complainant stated that she asked QR, U1, and S1 about the calculations, but nothing has been done about it. Complainant asserted that QR did not respond to her when she emailed him, and U1 told her other people had the same inquiries and the union was looking into it. She never had any problems before with the calculation of her figures, but when her work environment began to change and her concentration was affected, she started getting errors. She did not discuss these events with any Human Resource officials.

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<sup>10</sup> RVSRs have monthly performance appraisals to monitor production and quality.

S1 denied giving Complainant a hard time about her monthly performance appraisals or telling her that she would not get an award or he would not give her good remarks because she kept too much company around her desk. He stated that he issued Complainant her monthly performance appraisals to let her know how she was doing regarding production and quality. He gave her regular feedback, but she wanted more than regular feedback. S1 confirmed that he did tell Complainant that if he wrote something good, then he would have to write the bad too because she was never at her desk. He stated that he was trying to make her into a good employee, but noted that she is a GS-12 RVSR with more than two years of experience and often asked questions that a new RVSR would ask which he believes had something to do with her socializing too much. S1 also confirmed that he kept people from hanging around Complainant's desk in order to help her, but he never documented this in her performance appraisals.

S1 also stated that he was trying to get Complainant's quality corrected. S1 explained that each RVSR is required to meet a certain level of cases per month and the cases must have good quality. S1 stated that Complainant's quality was good, but she had some errors. He helped her to fight one error and the error was overturned. He told her that he would make a note in her monthly production, but he was waiting for upper management to correct it because he does not have the authority to do so. He did inform her that this situation would not affect her performance appraisal.

S1 affirmed that he is tasked with calculating the figures, and he runs a report every month. He does not believe the figures were incorrectly calculated. Rather, S1 believed that Complainant likely failed to put something in the system to calculate her numbers or something was erroneously put in the system to calculate her numbers. S1 asserted that this situation involved only one case and would not have been detrimental to her production. S1 denied the characterization that he failed to take remedial action since he contacted upper management, S3, via email. S1 explained that when S3 did not respond, he sent another email about this, but by that time Complainant was no longer under his supervision.

S3 testified that he does not recall the event involving Complainant's June 2015 appraisal or that her figures had been incorrectly calculated. S3 explained that during this timeframe (June 2015), any appraisal would have been an informal monthly appraisal, and he would not normally be involved with this type of appraisal. S3 explained that the biggest reason for "calculating figures" is to enter the current production and quality numbers. If an employee disagreed with this, it was usually because they had deductible time that was not entered into ASPEN. S3 saw several of these cases each month from around 200 employees and could not recall specific employees. S3 stated that it was possible S1 may have addressed it with him. S3 confirmed that he did receive an email from S1 on June 16, 2015, showing that on June 8, 2015, Complainant requested that a March 2015 quality review error be overturned. He did not take any action since there was no request for him to take any action, and the Quality Review Team had already denied the rebuttal request and upheld the error.

*Claim 5B – Deductible Time January and February 2015*

Complainant stated that she did not realize her deductible time was denied because she did not receive her December 2014 and January 2015 performance appraisals. S1 became her supervisor in February 2015 and conducted a performance appraisal that month. During the February 2015 appraisal Complainant learned that the December 2014 and January 2015 deductible times were denied. S1 did not know why those deductible times were denied but said he would check with Comp Services because it had been over 30 days. Complainant asserted that S1 never followed up with her and she was never credited for the time.

S1 asserted that Complainant did request deductible time during this timeframe, but this situation was out of his hands because it was brought to his attention after 30 days. S1 explained that anything over 30 days must be reviewed and approved by S3. S1 stated that all employees know that anything over 30 days must be approved by upper management. S1 also stated that employees were instructed to make sure they put in their production and deductible time weekly. S1 stated that he is not aware if Complainant was ever credited for this deductible time since he was not her supervisor during those appraisal periods. S1 asserts that he never talked to Complainant about this situation, but she did send him an email about the deductible time, which he forwarded to S3.

*Claim 7B – Harassment by LRAC*

The record indicates that after Complainant initiated EEO contact on March 25, 2015, and filed her formal EEO Complaint on June 11, 2015, LRAC was assigned to serve as the EEO Alternative Dispute Resolution Coordinator (ADRC).<sup>11</sup> As the ADRC, LRAC needed to communicate with Complainant's union representative at the time (U4). The record does not provide detailed information as to LRAC's specific duties in the role of ADRC. However, the undisputed record indicates that during the Alternative Dispute Resolution process LRAC needed to speak with U4, presumably to coordinate a possible early resolution to the pending EEO complaint.

Complainant asserted that LRAC could not get in contact with U4 and consequently, LRAC would seek Complainant's help in locating him. According to Complainant, U4 shared with her that the Agency proposed a settlement in which it would be willing to remove the LOR from her personnel file if she dropped her EEO complaint. Complainant stated that she told U4 and the Agency that she would not agree to those terms. According to Complainant, after she rejected the proposed settlement, LRAC started harassing her by coming to her cubicle on numerous occasions looking for U4 and asking her to drop her EEO case in exchange for the removal of the LOR.

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<sup>11</sup>LRAC testified without explanation that his role in Complainant's EEO complaint is "processing paperwork."

Specifically, Complainant stated that on May 20, 2015, LRAC emailed Complainant and requested that she come to the HR office. According to Complainant, LRAC asked her again if she had talked to U4 and told her that “they” wanted to be “done with this” but he was unable to discuss matters until she spoke with U4. Complainant also affirmed that from late May to early June 2015, LRAC continued to stop by Complainant's desk one to two times per week to ask her to settle her EEO complaint. Complainant further asserted that on June 10, 2015, LRAC approached her desk and asked her if she had talked to U4 again. Complainant explained that she had not and LRAC told Complainant to call U4 while he stood at her desk. Complainant stated that she declined and explained that she was working. Complainant asserted that LRAC came to her desk several more times from June 10, 2015 to June 30, 2015. Complainant stated that on June 24, 2015, she emailed U4 and complained that LRAC had been approaching her at her desk repeatedly trying to get her to settle.<sup>12</sup> Complainant further stated that on June 30, 2015 LRAC came to her desk twice within 30 minutes. Complainant stated that she explained that she would go speak to him on her break. According to Complainant, 30 minutes later LRAC came back and told Complainant that he needed to talk to her and asked when she was going to come to his office. Complainant affirmed that she met with LRAC during her 10:00 a.m. break and he advised her that she had been approved for two days telework and that he would remove the LOR if she dismissed her EEO complaint.

In addition, Complainant claimed that on July 14, 2015, Complainant emailed LRAC about the status of her representative and his repeated attempts to get her to dismiss her EEO complaint.<sup>13</sup> Complainant stated that on August 11, 2015, LRAC accosted Complainant at her desk again and asked if she had decided to settle her case in exchange for rescission of the LOR. Complainant alleged that LRAC has continued to harass Complainant and pressure her to dismiss her EEO complaint by repeatedly approaching her desk and requesting that she meet with him. Complainant states that during the week of November 15, 2015, LRAC approached Complainant's desk two separate times and asked if she had talked to U4 about settling her EEO complaint and requested that she meet with him in his office. Complainant stated that she did not meet with LRAC.

Complainant states that she notified LRAC by email that she felt his actions were harassing, but he did not respond.<sup>14</sup>

LRAC denied being notified by Complainant that any of his conduct was harassing. LRAC asserted that he only approached Complainant about contacting U4, but not about settling her EEO case. He further stated that he had tried on numerous occasions to reach U4, but he could not reach him. LRAC also affirmed that he asked Complainant if she had changed representation. He emphatically stated he never told her that he would remove the LOR if she dismissed her EEO complaint. LRAC does not address the number of times he allegedly approached Complainant looking for U4.

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<sup>12</sup> The record does not contain this alleged email to U4.

<sup>13</sup> The record does not contain this alleged email.

<sup>14</sup> The record does not contain this alleged email.

*Claims 7A, 10A, 10B, 13B, & 19B – Reasonable Accommodation*

On May 1, 2018 Complainant applied to participate in the TPP. In her application Complainant explained why she wanted to telework as follows:

Teleworking will reduce my stress and anxiety.  
Teleworking will improve my productivity and boost morale.  
Teleworking will reduce the exacerbation of my service-connected disabilities.  
Teleworking will allow me to save a significant amount of out of pocket commuting costs

On May 18, 2015, Complainant forwarded her TPP application to S1. On May 19, 2015, Complainant received notification from the Acting Veterans Service Center Manager (M1) that she was not selected for the TPP.<sup>15</sup> On May 20, 2018, Complainant asked S1 for an accommodation. S1 told Complainant to contact the Human Resources department about her request. LRAC gave Complainant an application to complete and a form for her doctor to explain why she needed a reasonable accommodation. Complainant requested “three to four” days of telework per week to accommodate her mental health condition. In her request dated May 20, 2018, Complainant stated the following:

My work environment has become very stressful and causing exacerbation of my service-connected disabilities. Participation in the telework program would help to alleviate stress and anxiety that I feel when coming into the office. It affects my concentration/focus which causes my production is suffering. This not only affects me as a veteran but also affects the veterans that I serve every day. I don't feel that there is any other accommodation that will work to resolve this. I have tried things to reduce my stress in this environment but was unsuccessful. My daily tasks include providing a service while researching, weighing evidence, reasoning, providing explanations, etc. All of which is greatly affected. Through teleworking I am able to control my work environment; thus, increasing my morale, concentration, ability to focus and increase productivity. [sic]

Complainant provided a letter from her Primary Care Physician (PCP) dated June 10, 2015 stating as follows:

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<sup>15</sup> Approximately 21 people were selected and approximately four people were rejected from participation in this program. Some people accepted into the TPP received two days of telework per week and some others received three days of telework per week. LRAC noted that there is no particular reason why some employees are initially granted different number of days a week to telework, but initially it was a trial period for the employee to adjust to the technology, to the new work environment, and to make sure the accommodation was working for the employee.

[Complainant] is a disabled veteran who is service connected for PTSD. She finds that an increasingly stressful work environment is exacerbating her symptoms of anxiety. She would benefit from telework 4 days a week. Please accommodate this request.

Complainant provided a letter from a Department of Veterans' Affairs Psychiatric-Mental Health Nurse Practitioner (PMHNP) dated June 12, 2015, which states as follows:

As it relates to [Complainant's] request for reasonable accommodation to telework 3-4 times a week; please be apprised that veteran is 50% service connected for PTSD. Veteran continues to experience chronic symptoms of anxiety, hyper arousal, lack of trust, hyper vigilance. Veteran also reports anxiety surrounding report of mandatory overtime. The present work environment is over-stimulating for veteran as she tries to continue to meet and exceed responsibilities attached to her current professional role. Please carefully consider veteran's request to be able to telework part of the work week.

LRAC granted Complainant two days of telework stating as follows:

You have been granted telework 2 day per a week for (90) days. Effective July 20, 2015. This accommodation will end on October 20, 2015, at which time we will reevaluate. Confer with your supervisor about the results of your reasonable accommodation request. Please note, if your presence is necessary due to an organizational event on one of your regularly scheduled telework days (i.e., training requirements, mission needs, administrative necessity), you must coordinate with your supervisor to change your telework day(s). Also, you must complete and remain current on all telework related training requirements and performance standards during this accommodation.<sup>16</sup>

On October 15, 2015, within the 90-day trial period, Complainant received the NPR. On November 16, 2015, LRAC notified Complainant as follows:<sup>17</sup>

You have been granted telework 4 days a week. Confer with your supervisor about the results of your reasonable accommodation request. Please note, if your presence is necessary due to an organizational event on one of your regularly scheduled telework days (i.e. training requirements, mission needs, administrative necessity), you must coordinate with your supervisor to change your telework day(s). Also you must complete and remain current on all telework agreements and related training requirements and performance standards during this accommodation.

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<sup>16</sup> LRAC does not explain the reasoning behind the decision to grant Complainant two days of telework rather than the requested "three to four days."

<sup>17</sup> The Agency asserts that the NPR delayed the reassessment of Complainant's accommodation.

S1 asserted that he does not know exactly what accommodation Complainant requested, and as a supervisor, he was not allowed to know the particulars of an employee's accommodation request. He was not aware of her accommodation request until LRAC came to him about it to complete some paperwork. S1 does not know whether Complainant's request to participate in the TPP was part of her accommodation request. According to S1, the TPP was decided by upper management. S1 stated that he does not know why she was denied participation in the program. According to S1, the people selected to participate in the TPP are different races, male and female, and at least one of them has a disability. He does not know if they have any prior EEO activity.

LRAC noted that he discussed Complainant's request for four days of telework per week with M1, however, he does not provide any details of their discussion. LRAC also states that he discussed the accommodation request with Complainant on several occasions and found it very hard to work with or speak with Complainant since she can be "very nasty and rude." LRAC found discussions with Complainant to be unproductive since "she does [not] want to listen." LRAC also asserted that his interactions with Complainant have consisted of her "making false statements about work and work interactions." LRAC further stated that Complainant has shown "that she will be rude and unprofessional if things are not in her favor." LRAC asserted that Complainant's "character is unreliable and not believable since he has been a victim of her lies and misguided efforts to attack anyone that she feels crosses her."

LRAC also asserted that Complainant was not denied reasonable accommodation since she received two telework days, which she agreed to when she signed the form even though he notes that she continued to request all four days which she eventually received. LRAC explained that he sent Complainant the reasonable accommodation policy and explained to her that a reasonable accommodation is not just what she wants, but what works best for her and the Agency.

*Claim 12B – July 20, 2015 Falsely Accused of Failing to Put in Tickets*

On her first day teleworking, Complainant was having technical issues getting into the Citrix Access Gateway (CAG) which is the software system that is used to format documents for rating decisions. Complainant stated that she followed the proper procedure and put in a ticket with the Information Technology (IT) Help Desk. Complainant stated that she forwarded S1 a copy of the IT Help Desk's email confirming that she followed the proper procedure. Nevertheless, S1 contacted the IT Help Desk to put in a ticket for her. Complainant stated she does not know why S1 accused her of not putting in a ticket with the IT Help Desk. According to Complainant, S1 later notified her that he called the IT Help Desk and confirmed that Complainant had put in a ticket.

S1 denied accusing Complainant of failing to put in an IT Help Desk ticket but was relaying a message from the IT Help Desk. S1 explained that the standard process allows either the supervisor or the employee to put in a ticket for the employee. S1 states that there was some type of issue with someone at the IT Help Desk since IT initially indicated that Complainant did not put in a ticket.

S1 stated that he notified Complainant what the IT Help Desk told him. When he called the IT Help Desk again, he was notified that Complainant did in fact put in a ticket, so the issue was resolved.

*Claims 14B, 15B, 16B & 18B – Coworkers Kept Away from Complainant’s Desk*

Complainant asserted that S1 wrote down names of the male employees that stopped by her desk. In addition, Complainant also stated that on July 22, 2015, S1 contacted SVSR3 (a supervisor to a different team), to direct CW1 (male), CW2 (male), and CW3 (male) to stop hanging around Complainant’s desk. Complainant further stated that she was not at her desk on July 22, 2015, so she does not know why S1 wanted to direct them to stay away from her desk. Complainant asserted that CW3 called her in disbelief about SVSR3 talking to him. CW3 asserted that S1 and then his supervisor (SVSR3), directed him to stay away from Complainant's desk. CW3 stated that he was not given a justification for this instruction.

S1 confirmed that he did write down the names of the male employees who stopped by Complainant’s desk because the supervisors were told by S3 and ASVSR2 that if anybody is around somebody's desk for too long, the supervisors will be informed in order to get work done. S1 stated that if employees were at someone’s desk for too long, and it was not break time or lunchtime, it was likely not work-related. S1 further stated that lingering around someone’s desk for more than 15 minutes was considered excessive. S1 believed that the employees who would hang around Complainant’s desk were not there for work-related reasons because those employees have different supervisors. According to S1, after SVSR3 spoke to his employees, they did not continue to come to her desk.

SVSR3 testified that S1 called him and directed him to tell CW2 and CW6 to stay away from Complainant’s desk because they were disrupting S1’s team. SVSR4 does not recall if S1 contacted her about her employees being at Complainant's desk. SVSR4 does not feel that S1 intended to harass Complainant because he is a respected supervisor and colleague. She has worked with him for about three years and has never heard any complaints about his work ethic.

*Claim 17B – July 25, 2015 Denied Overtime*

Complainant asserted that on July 25, 2015, she was teleworking and contacted S1 to ask about case priority for overtime. According to Complainant, S1 placed two cases in her work queue, and she worked those cases the entire day until 4:30 p.m. At about 4:45 p.m. (after Complainant was no longer working) S1 notified her via email that she did not send him an email about her start and stop time for overtime purposes. When Complainant saw this email the following workday, she told him that she did not realize she needed to send him such an email. Complainant asserted that S1 should have been aware when she was working because she was signed in as being “available.” However, Complainant learned that her overtime for that day had been denied. According to Complainant, S1 said it was denied because she did not submit a start or stop time. She reminded him that they were communicating all that day, he had assigned her some cases to do, and she did not understand why she was denied overtime.

Complainant also stated that S1 did not send her any policies or procedures to support his reason for denying her overtime and she is not aware of any specific policies regarding hours worked when teleworking. Complainant eventually received the overtime hours a couple of pay periods later in August 2015. Complainant stated that she did not discuss the initial denial of overtime with any management or Human Resources official.

S1 denied any involvement in the decision to deny Complainant's overtime; it was ASVSR2 who made that decision. S1 also stated that he does not know the reason why her request was initially denied.

*Claims A9 & 20B – October 15, 2015 NPR*

Undisputed documentary evidence indicates that on or about September 13, 2015, QR, a union representative (U5), and another management official (i.e., the fact-finding team), conducted a "spot check" and review of ASPEN credits taken during the months of August and September 2015.<sup>18</sup>

On September 15, 2015, S1 emailed S3 as follows:

On July 27, 2015, I Informed [Complainant] that she entered in ASPEN that she worked a paper case on Saturday 07/25/15, while on work at home status. Upon further review, I discovered that the case that she stated that she worked on Saturday was actually worked by another employee on 07/27/15, I informed her of this on 07/27/15 and to date, I have received no response or explanation.<sup>19</sup>

S3 sent LRAC an email on September 21, 2015 which stated as follows:

ASPEN is the tool utilized to track the production credits taken for each case worked. Each case has a certain level of weighted action, in the form of points, taken on each case depending on the complexity of the case, An employee that completes rating decisions will enter the file number of the case, the end product for the case, the number of conditions rated, and the total weighted action credit for that file. These credits are outlined in the employee's performance standard. When reviewing the file in ASPEN, the file number of the case, the end product for the case, the number of conditions rated, and the total weighted action credit for that file are reviewed for correctness. Any discrepant data is reviewed to determine if the entry was entered by accident or if it is deemed to be intended to

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<sup>18</sup> Documentary evidence indicates that the fact-finding team (FFT) conducted its spot check review for a period of 30 days ending on October 13, 2015.

<sup>19</sup> The record does not indicate whether or not S1's email was solicited by upper management. However, given the fact that it was provided after the spot check and review commenced, it seems likely that S1 was asked to explain discrepancies found by the FFT during the spot check and review.

mislead the production credit taken. In the instance of this case, the data entered into ASPEN is considered to have been entered with the intent to mislead.

Complainant stated that on October 14, 2015, she met with HRS, another Labor Relations Specialist (HRS2), U1, a supervisor (SVSR3) and her attorney, where she was presented with the NPR by S3 for: (1) Disclosure of Patient Information stemming from her disclosure of veteran information to her attorney when copying him on an email chain that she believed to be discriminatory; and (2) Lack of Candor for taking too much credit for cases, taking duplicate credit (inputting the incorrect social security number into the system) and taking credit for a case that she did not complete.

Complainant was placed on 30 days of administrative leave effective immediately and told she had 14 days to respond in writing to the NPR. Complainant submitted a rebuttal to the proposed termination on November 12, 2015. She indicated prior to receiving her proposed termination, she did not receive any counseling related to the violations at issue. On November 16, 2015, management notified Complainant that her proposed termination was reduced to a verbal counseling and she could return to work immediately.

Complainant believed that the proposed termination was another example of harassment and retaliation by S3, QR and S1 that started in February 2015. Complainant asserts that she received an NPR for alleged violations that had been a chronic issue throughout the organization for some time prior to October 2015. Complainant claimed that she received disparate treatment from similarly situated employees and did not receive prior warnings or training related to the alleged violations. She also notes that the NPR was issued four months after the first alleged violation, which she believes indicates ill motives. Complainant further asserts that the underlying evidence presented in the NPR is based on information provided by QR and S1, who are both named in an EEO complaint that Complainant filed on September 16, 2015.

S3 stated that he consulted with Human Resources and Regional Counsel and the table of punishments was utilized to determine the best course of disciplinary action. S1 denied any involvement in the NPR. S1 stated that he was aware of the charge related to the inappropriate disclosure of patient information but was not aware of the Lack of Candor charge. S1 further noted that he was no longer Complainant's supervisor at the time Complainant was issued the NPR.

### 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").

*Claim 7B – Harassment/Reprisal by LRAC*

As an initial matter, we note that 29 C.F.R. § 1614.108(b) requires, inter alia, that the Agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. *Id.*; EEO MD-110, at Chap. 6, § IV.B. An investigation must include “a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant's group as compared with the treatment of similarly situated employees . . . and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.” *Id.* at § IV.C. Also, an investigator must identify and obtain “all relevant evidence from all sources regardless of how it may affect the outcome.” *Id.* at § VI.D. Upon review, the Commission finds that the investigation was not adequate and that the record lacks the thoroughness required for the fact finder to address the ultimate issue of whether LRAC engaged in reprisal by pressuring Complainant to settle her EEO complaint.

If Complainant's assertions are true that LRAC continually pressured her to settle her EEO complaint despite being told that she was not interested in discussing settlement with him, such conduct would constitute reprisal. See Riddick v. Dep't of Veterans Affairs, EEOC Appeal No. 0720110011 (Nov. 18, 2011) (several attempts by management officials to get Complainant to settle her pending EEO complaint against the complainant wishes would reasonably likely deter protected EEO activity, and crossed the line past legitimate settlement negotiations); see also Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120140487 (Apr. 11, 2014) (being pressured into dropping an EEO complaint is an action that is reasonably likely to deter Complainant or others from engaging in protected activity); Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122748 (Feb. 3, 2014).

LRAC denies raising the issue of settlement or the LOR with Complainant but does admit asking Complainant to help him locate U4. LRAC's testimony does not address how many times he approached Complainant for help and the EEO investigator failed to seek more detailed information from him. It does not appear from the record that the Agency or Complainant was asked to provide the two emails referenced in her testimony which could corroborate Complainant's claims. In addition, the EEO investigator did not obtain U4's testimony and did not note that U4 was otherwise unavailable. Complainant also testified that a coworker who sat next to her cubicle (CW9) may have witnessed LRAC's alleged conduct. However, the EEO investigator never questioned CW9 about this issue. Also, the record shows that LRAC's direct supervisor (S4) noted that she was aware that U4 could not be located. However, S4 was not asked about LRAC's role as the ADRC or what, specifically, she understood LRAC needed to contact U4 about.

Complainant also asserted that during a meeting when LRAC notified her that she was granted two days of telework, he again tried to pressure Complainant into dropping her EEO complaint in exchange for the removal of the LOR. The EEO investigator failed to seek LRAC's response to this allegation as well.

Since relevant information necessary to determine the facts alleged are missing from the record rendering the EEO investigation incomplete and inadequate, we must vacate the Agency's finding with respect to this claim and remand it for a supplemental investigation as set forth in the Order below.

### *Disparate Treatment*

Complainant must satisfy a three-part evidentiary scheme to prevail on a claim of disparate treatment 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); Prewitt v. United States Postal Service, 662 F.2d 292 (5<sup>th</sup> Cir. 1981) (applying this analytical framework to cases brought under the Rehabilitation Act).

### Letter of Reprimand

Complainant does not deny that she made the comments about S4 on February 13, 2015. She asserts that her remarks were directed at the subject of the conversation (wearing jeans to work) and her frustration that it was taking up so much time in the meeting. Nevertheless, the record shows that Complainant's remarks disrupted the flow of the meeting on an issue that S4 deemed important to the team, and her tone was disrespectful. In addition, we note that the record is devoid of evidence of discriminatory or retaliatory animus. Accordingly, the evidence does not support Complainant's claim of discrimination or reprisal with respect to this claim.

### Tour of Duty

Complainant asserts that she made multiple requests beginning in March 2015 about the status of her request for a tour of duty change but did not receive formal approval until June 2015. She alleged that the delay was deliberate and motivated by discrimination and retaliation towards her. However, aside from Complainant's bare, uncorroborated statements, the record is devoid of evidence to show that management deliberately delayed the official approval of her shift change. Accordingly, the evidence does not support Complainant's claim of discrimination or reprisal with respect to this claim.

### Denied Overtime

We find that the record shows that the initial denial of overtime occurred because of a misunderstanding about the requirement to have overtime work approved before working it. Complainant acknowledged this requirement and admitted she did not comply with it. While she argues that the requirement should not have applied as S1 was well aware she was teleworking in overtime status, she provided no evidence that this could be done during that pay period, rather than at a later time when it could be reviewed and approved by upper management. Accordingly, the evidence does not support Complainant's claim of discrimination or retaliation with respect to this claim.

### *Sexual Harassment*

To establish a claim of sexual harassment creating a hostile work environment, Complainant must raise a genuine issue of material fact as to whether: (1) she belongs to a protected class; (2) she was subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based on sex; (4) the harassment affected a term or condition of employment, either unreasonably interfering with the work environment or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994).<sup>20</sup>

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<sup>20</sup> 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.

Aside from Complainant's bare, uncorroborated assertions, the record is devoid of evidence to support the finding that S1 made lewd, offensive or sex-based comments to Complainant. Complainant complains of additional non-sexual events that she includes as part of her sexual harassment claim. These include what Complainant described as "stalking" by S1 and calling her on the telephone and then hanging up. The record shows that the stalking allegations involve S1's surveillance of Complainant due to his concerns about her failure to remain at her workstation and what he believed to be her excessive fraternization with other employees. Complainant asserts that S1 only tried to interrupt her interactions with male employees; however, we find the record shows that he was concerned about her fraternization with female employees as well.

In addition, we do not find such incidents to be sufficiently severe or pervasive as to constitute hostile work environment based on sex under the Commission's regulations. EEO laws are not a civility code and forbid "only behavior so objectively offensive as to alter the conditions of the victim's employment." See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998). Accordingly, the evidence does not support Complainant's claim of sexual harassment.

#### *Non-Sexual Harassment*

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, or religion is unlawful, if it is sufficiently severe or pervasive. 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 their 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).

Complainant's allegations of non-sexual harassment focus on S1's oversight of her daily activities in the workplace. Complainant also alleges that S1 accused her of failing to submit tickets to IT, and generally scrutinized her activities in the workplace, including evaluating Complainant's performance and inputting accurate productivity data into the team data system. We find that Complainant failed to show that S1's oversight of her work was related to her race, sex, disability, or in reprisal for her prior EEO activity. As with her disparate treatment claims, Complainant has not presented evidence to refute management's rationale for its actions. Accordingly, the evidence does not support Complainant's claim of non-sexual harassment.

*Disability - Reasonable Accommodation*

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). An employee is not required to use the “magic” words “reasonable accommodation” when making a request. Instead, the employee need only inform the agency that he or she needs an adjustment or change at work for a reason related to a medical condition. See Triplett-Graham v. U.S. Postal Serv., EEOC Appeal No. 01A44720 (Feb. 24, 2006).

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). An individual with a disability is “qualified” if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). When an employee's disability or need for an accommodation is not known or obvious, an employer may ask an employee for reasonable documentation about his or her disability, limitations, and accommodation requirements. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, Question 7 (July 27, 2000).

A reasonable accommodation must be effective. See U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002) (“the word ‘accommodation’. . . conveys the need for effectiveness”). That is, a reasonable accommodation should provide the individual with a disability with “an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability.” 29 C.F.R. Part 6130 app. § 1630.9. If more than one accommodation will enable an individual to perform the essential functions of his or her position, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” Id.; see also Enforcement Guidance on Reasonable Accommodation at Question 9. “The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.” 29 C.F.R. Part 6130 app. § 1630.9.

Allowing an employee to telework is a form of a reasonable accommodation. “An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.” An “undue hardship” is a significant difficulty or expense in light of the agency's circumstances and resources. See 29 C.F.R. § 1630.2(p). The agency bears the burden of establishing, through case-specific evidence, that a reasonable accommodation would cause an undue hardship. U.S. Airways, Inc. v. Barnett, 535 U.S. at 402. “Generalized conclusions will not suffice to support a claim of undue hardship.” Enforcement Guidance on Reasonable Accommodation, “Undue Hardship Issues.” An employer may deny an employee's request to telework if it can show that an alternative accommodation would be effective or that telework would cause an undue hardship. Enforcement Guidance on Reasonable Accommodation, at Question 34. The agency has a burden of production to show that there is an effective alternative accommodation.

An employer should respond expeditiously to a request for reasonable accommodation. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (revised Oct. 17, 2002) at question 10. If the employer and the individual with a disability need to engage in an interactive process, this too should proceed as quickly as possible. Id. Similarly, the employer should act promptly to provide the reasonable accommodation. Id. Unnecessary delays can result in a violation of the ADA. Id. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for delay, (2) the length of the delay, (3) how much the individual with a disability and the employer each contributed to the delay, (4) what the employer was doing during the delay, and (5) whether the required accommodation was simple or complex to provide. Id. at n. 38. Villanueva v. Dep't of Homeland Security, EEOC No. 01A34968 (Aug. 10, 2006).

The undisputed record shows that Complainant is a qualified individual with a disability within the meaning of the Rehabilitation Act and is entitled to its protections. Complainant initially requested an accommodation when she applied for telework through the TPP on May 1, 2015, as she explained in that application that she was requesting telework because it would help with her anxiety at work and her PTSD. While the Agency failed to recognize Complainant's accommodation request in early May 2015, we find that the delay in processing Complainant's accommodation request by a few weeks was not a substantial delay. However, we caution the Agency that such a failure in the future could result in a different conclusion.

On May 20, 2015, after Complainant submitted a “formal” request for accommodation the Agency began the interactive process by requesting medical documentation which Complainant provided by June 12, 2015. The Agency denied Complainant's request for “three to four days” of telework per week and instead granted her telework two days per week. LRAC further determined that the telework schedule would be reevaluated in 90 days but gave no explanation as to why that was necessary. Complainant accepted the two-day telework but reiterated her desire for four days. The two-day telework schedule began on July 25, 2015.

The Agency asserts that it provided Complainant with an effective accommodation when it offered to allow her to telework two days per week. We disagree. Complainant submitted a doctor's statement on June 10, 2015 that expressly requested four days and another on June 12, 2015, that expressly stated that Complainant should telework "three to four days" per week. Accordingly, the undisputed record establishes that an effective accommodation consisted of a minimum of three days of telework per week. Nothing in the medical documentation or from Complainant suggested that two days of telework per week would be effective, nor has the Agency offered other evidence to support its contention that two days of telework would be an effective accommodation. See Alonso T., v. Equal Emp. Opp. Comm., EEOC Appeal No. 0120162340 (Jan. 15, 2020).

We note that, under the Rehabilitation Act, it is anticipated that, to the extent necessary, the employer will engage in the interactive process with the individual requesting accommodation to clarify the individual's needs and identify the appropriate reasonable accommodation. 29 C.F.R. §1630.2(o)(3). However, failure to engage in the interactive process does not constitute a violation of the Rehabilitation Act. Employer liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job. Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002) (although agency cannot be held liable solely for failure to engage in interactive process, it can be held liable where failure to engage in process resulted in failure to provide reasonable accommodation), request to recon. denied, EEOC Request No. 05A30114 (Jan. 9, 2003). Similarly, employer liability may be avoided where failure of the requesting individual to engage in the interactive process results in the parties being unable to identify an effective accommodation. See Estate of William K. Taylor, Jr. v. Dep't of Homeland Sec., EEOC Appeal No. 0120090482 (June 20, 2013) (complainant's failure to provide requested documentation caused failure to receive possible accommodation), request to recon. denied, EEOC Request No. 0520130591 (Jan. 16, 2014).

Contrary to the Agency's assertion, we find that the record is devoid of evidence to support the Agency's conclusion that two days of telework per week provided an effective accommodation. The Agency here had information from Complainant's doctors identifying what, in their opinion as medical professionals, was the effective accommodation for Complainant's disability (i.e., between three and four days of telework). The Agency simply failed to engage in the interactive process to determine from Complainant's physicians if two days *could* also have provided an effective accommodation.<sup>21</sup> Id. Accordingly, contrary to the Agency's assertions, we find that the does not establish that two-days of telework was an effective accommodation. As such, in order to deny Complainant a third day of telework, the Agency is required to establish that such an accommodation created an undue burden.

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<sup>21</sup> For example, the Agency could have sought a more detailed explanation as to why three days as opposed to a two-day per week schedule was necessary. The Agency could have also asked the medical professionals if alternative accommodations would have been equally effective (e.g., isolated workspace or work hours when less employee are around).

We find that the Agency has failed to show that an additional day of telework would cause an undue burden. Not only has the Agency failed to assert that the third day of telework created an undue burden, the record shows that numerous similarly situated employees were performing three days of telework. Moreover, in November 2015 (approximately three months later), the Agency granted Complainant four days of telework.

Where a finding of discrimination involves a failure to provide reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the complainant with a reasonable accommodation. 42 U.S.C. § 1981a(a)(3); see also Jones v. Dep't of Agric., EEOC Appeal No. 0120080833 (July 18, 2012); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). Here, the Agency offered Complainant only two days of telework per week even though her doctor specifically recommended three to four days of telework, and Complainant requested four days per week. There is no evidence that the Agency sought information from Complainant or her doctors to determine whether only two days of telework would be effective. Instead, LRAC appears to have substituted his judgment for that of Complainant's doctor and determined that two days of telework would be sufficient to accommodate her disability. Under these circumstances, we find that the Agency did not engage in good-faith efforts to accommodate Complainant. See Alonso T. v. Equal Empl. Opp. Comm., EEOC Appeal No. 0120162340 (Jan. 15, 2020).

### *Reprisal*

Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in 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). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a time and in such manner that a retaliatory motive may be inferred. See Clay v. Dep't of the Treasury, EEOC Appeal No. 01A35231 (Jan. 25, 2005); Dominica H. v. Dep't of Health and Human Servs., EEOC No. 0120150971 (Nov. 22, 2017).

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 § II.B(2) (August 25, 2016). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

The record shows that Complainant initiated EEO contact on March 25, 2015 and August 3, 2015 and filed formal EEO complaints on June 11, 2015 and September 16, 2015. Complainant asserts that the harassment commenced in February 2015.

The record also shows that LRAC was aware of Complainant's EEO activity. While the record shows that several management officials were aware of at least some aspects of Complainant's EEO activity, the record is devoid of evidence of retaliatory animus on the part of any responsible official with respect to each alleged employment action, including the NPR as discussed below.<sup>22</sup>

#### Notice of Proposed Removal

We agree with the Agency's argument on appeal that the evidence does not support the determination that Complainant's protected EEO activity was a motivating factor in the issuance of the NPR. Specifically, the evidence does not support the finding that S1 initiated or instigated the review of ASPEN in mid-September or otherwise had an active role in compiling the evidence file to support the NPR.<sup>23</sup> The record is also devoid of evidence to suggest that S1 was involved in the decision to issue the NPR.

The record does not support the necessary causal connection between the protected activity and the adverse action. The undisputed record indicates that S1 was not Complainant's supervisor at the time the NPR was issued and was not fully informed about the bases of the NPR. Accordingly, we find that the Agency erred in concluding that Complainant was subjected to reprisal when she was received the NPR.

#### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency violated the Rehabilitation Act when it did not provide Complainant with a reasonable accommodation. We further find that Complainant did not establish that the Agency subjected her to a hostile work environment and discrimination based on race, disability, sex, and her prior EEO protected activity with respect to all other claims, except for Claim 7B which we VACATE and REMAND for a supplemental investigation as set forth below. Accordingly, the Commission AFFIRMS in part, REVERSES in part and VACATES in part the Agency's final decision. The complaint is REMANDED for compliance with this decision and the Order below.

#### ORDER

1. Within 60 days from the date this decision is issued, the Agency shall conduct and complete a supplemental investigation with respect to Claim 7B that is consistent with the requirements of 29 C.F.R. § 1614.108(b), in EEO MD-110, Chapter 6 and consistent with this decision. The supplemental investigation shall include, but is not limited to: (a) an affidavit or other declaration from U4 and CW9 addressing their knowledge of the

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<sup>22</sup> However, as stated above, we do not reach the merits of Claim 7B.

<sup>23</sup> The record is also devoid of evidence that any of the responsible management officials involved in the NPR were motivated by retaliatory animus.

facts relevant to Claim 7B; (b) an affidavit from S4 which provides a detailed explanation of LRAC's role as ADRC and what, specifically, she understood LRAC needed to contact U4 about; (c) an affidavit or other declaration from LRAC providing: (i) a full detailed explanation as to the extent of his job duties relevant to Claim 7B; (ii) details regarding each time he communicated with Complainant relevant to Claim 7B;<sup>24</sup> (d) all documentary evidence relevant to LRAC's job duties relevant to Claim 7B; (e) all documentary evidence in the Agency's possession relevant to Claim 7B, including but not limited to: (i) the two emails identified by Complainant in her testimony; (ii) all email correspondence between Complainant and U4 relevant to Claim 7B; (iii) all email correspondence between U4 and LRAC relevant to Claim 7B; and (iv) all email correspondence between LRAC and Complainant relevant to Claim 7B.

If the investigator is unable to obtain the requested testimonial or documentary evidence, the investigator shall provide an explanation in the record. The Agency shall provide Complainant the opportunity to provide a rebuttal affidavit once he has received the supplemental investigative report. Complainant shall cooperate, as appropriate, with the Agency in its actions in supplementing the investigation. In the supplemental investigative report, exhibits should be identified in the bookmark sections of the electronic submissions to the Commission and not only identified as an exhibit with a number. The Agency shall issue a new decision following the completion of the investigation. A copy of the supplemental investigative report and a new final decision, unless the parties have otherwise resolved this matter, must be provided to the Compliance Officer as referenced below.

2. 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 in accordance with our decision herein.
3. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) and request objective evidence from Complainant in support of her request for compensatory damages within 45 calendar days of the date Complainant receives the Agency's notice. No later than 60 calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.

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<sup>24</sup> This should include the allegation that LRAC raised the issue of settling her EEO complaint and telework accommodations at the same time.

4. Within 90 calendar days from the date this decision is issued, the Agency shall provide eight hours of interactive or in-person training to the officials identified in this decision as LRAC and any other management official who had reviewed Complainant's application for the TPP, regarding management's responsibilities under the Rehabilitation Act. The Agency shall provide proof of the officials' attendance, as well as the contents of the in-person training provided.
5. The Agency shall consider taking appropriate disciplinary action against LRAC. The Agency shall report its decision to the Compliance Officer referenced herein. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the identified management officials have left the Agency's employment, the Agency shall furnish documentation of the departure date(s).

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

#### POSTING ORDER (G0617)

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

#### ATTORNEY'S FEES (H1019)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RIGHT TO REQUEST COUNSEL (Z0815)

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

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

September 22, 2022

Date