



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

[REDACTED]  
Stanton S.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2022001199

Agency No. 200H-0646-2020103675

**DECISION**

On December 31, 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 December 2, 2021, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

**BACKGROUND**

Prior to the events giving rise to this complaint, Complainant worked as a Plumber at the Agency's Oakland Medical Center (University Drive) in Pittsburgh, Pennsylvania. In 2015, Complainant filed an EEO complaint alleging that he was subjected to a hostile work environment due to his race, disability, and reprisal for prior protected activity. The Commission found that Complainant established that he was subjected to race-based harassment and ordered, among other things, that the Agency reassign Complainant to a Plumber position or a substantially equivalent position at the Heinz Campus VA Medical Center and noting that Complainant could not be reassigned to work at the University Drive facility or with any of his former co-workers again. See Stanton S. v. Dep't of Vet. Aff., EEOC Appeal No. 0120170582 (Apr. 16, 2019).

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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.

Pursuant to the Commission's order in that appeal, Complainant was offered and accepted a position as a Plumber at the Agency's Heinz Campus VA Medical Center in Pittsburgh, Pennsylvania, where he started on July 22, 2019.

On June 19, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the bases of disability (mental) and reprisal for prior protected EEO activity when:

1. From July 21, 2019 until March 17, 2020, Complainant was denied uniforms, work boots, identification card, full building access, and training;
2. On or about August 9, 2019, Complainant's pay was withheld;
3. On August 19, 2019 and February 3, 2020, Complainant's Supervisor mocked him about his pay being withheld;
4. On or about August 15, 2019, his Supervisor scrutinized his work, accused him of poor performance or misconduct, and directed co-workers to file Reports of Contact about him;
5. On October 9, 2019, the Supervisor withheld information from him that was conveyed to others at a safety meeting;
6. As of February 12, 2020, Complainant felt compelled to take medical leave due to the discrimination and retaliation;
7. On May 14, 2020, Complainant became aware he was charged 69 hours leave without pay (LWOP) although Complainant was approved for Family and Medical Leave Act (FMLA) leave until June 14, 2020.<sup>2</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency found that, assuming arguendo that Complainant established a prima facie case with respect to the discrete incidents, the Agency articulated legitimate, nondiscriminatory reasons for its actions and Complainant did not establish that any of the reasons were a pretext for discrimination. The Agency further found that the incidents considered together were not severe or pervasive enough to constitute a hostile work environment. The Agency therefore concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

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<sup>2</sup> Complainant clarified in his affidavit that he was charged with being Absent Without Leave (AWOL), rather than LWOP. See ROI at 110. Thereafter, the charge of AWOL was retroactively converted to LWOP. See ROI at 310-24. The Agency accepted claims 1, 2, 6, and 7 as discrete acts of harassment, as well as including them as part of Complainant's harassment claim. See Report of Investigation (ROI) at 25-29.

### CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency provided only vague, conclusory excuses for its multiple instances of disparate treatment that gave Complainant the impression that he was not welcome at his new position, including not providing him with a uniform or building access. Complainant also assigns error to the Agency for deliberately downplaying the cumulative negative effect of the multiple instances of harassment to find that they were not severe or pervasive enough to constitute a hostile work environment.

The Agency did not submit a brief in response.

### 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”).

#### *Disparate Treatment*

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Tex. Dep’t of Cmty. Aff. v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency’s actions were motivated by discrimination. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep’t of Transp., EEOC

Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

With respect to the discrete incidents in claims 1 and 2, Complainant being denied uniforms, work boots, full building access, and training and Complainant's pay being withheld, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. The evidence in the record indicates that there were multiple issues of miscommunication with Human Resources (HR) that resulted in the issues with Complainant's pay, uniforms, building access and training. See Report of Investigation (ROI) at 371-376. Specifically, the record indicates an error in the coding of Complainant's time sheet was the cause of Complainant's pay being withheld at the start of his reassignment. See ROI at 371-74. The record contains contemporaneous emails which indicate that the HR manager was notified of Complainant's reassignment too late for Complainant to be added to the list for the employee on-boarding program on July 22, 2019. See ROI at 375-76. With respect to his uniforms and work boots, Complainant had not turned in his uniforms when he went on extended leave prior to beginning his reassignment and had at least a couple of his old uniforms, although he was required to wait for several weeks before additional uniforms in Complainant's size arrived. See ROI at 377-78. The Agency further explained that the HR office was undergoing "multiple staffing transitions" at the time which resulted in a number of issues for other new employees, including Complainant.<sup>3</sup> See ROI at 377.

While we acknowledge that Complainant had reason to be frustrated with the numerous specific issues he encountered at the beginning of his reassignment, we find that he has not established that the Agency's reasons were a pretext for discrimination. The evidence in the record does not provide any indication of a discriminatory motive on the part of HR; rather, the evidence indicates that the issues were due to inadvertent mistakes. We note specifically that the evidence does not indicate that Complainant's supervisor was directly responsible for any of the mistakes or delays. Rather, Complainant's supervisor stated that the issues were due to mistakes by HR, not by him. See ROI at 123-25. However, while we cannot find that Complainant has established that he was subjected to disparate treatment due to these claims, we are highly troubled by the fact that the evidence indicates that the Supervisor was starkly passive with respect to these issues, taking little to no action to even explain the cause to Complainant, let alone assist Complainant with resolving them.

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<sup>3</sup> Although we do not find that Complainant has established that that these incidents were motivated by any discriminatory animus, we are concerned by the Agency's apparent incompetence in handling Complainant's reassignment as the Agency was provided a month's notice prior to Complainant's beginning his reassignment and was not prepared for Complainant's reassignment with respect to any aspects of his job.

*Hostile Work Environment*

As an initial matter, we note that, to the extent Complainant challenges the Agency's actions with respect to implementing FMLA leave in claim 7, the incident cannot state a discrete act of harassment as it is outside of our jurisdiction. See Stensgard v. U.S. Postal Serv., EEOC Appeal No. 0120122478 (Sept. 26, 2012) (finding a claim challenging denial of FMLA rights to be a collateral attack on the FMLA process, which is regulated by the Department of Labor, and outside the jurisdiction of the EEOC). We note, however, that the Commission has upheld discrimination allegations where the complainant is challenging the actions of an Agency manager rather than the decision of an adjudicatory body. See Allene R. v. U.S. Postal Serv., EEOC Appeal No. 0120160434 (Jan. 28, 2016) req. for recon. denied EEOC Request No. 0520160206 (Sept. 8, 2016) (reversing the agency's finding of impermissible collateral attack on the FMLA process where the complainant's manager treated her differently than others by refusing to approve her sick-leave requests as FMLA-protected). In this case, to the extent Complainant's claim challenges his Supervisor's actions with respect to his FMLA leave that resulted in his being charged AWOL, we will consider the incident as part of Complainant's harassment claim.

In order to establish a claim of harassment on the basis of reprisal, Complainant must show that: (1) he engaged in prior EEO activity; (2) he was subjected to unwelcome conduct related to his prior EEO activity; (3) the harassment complained of was based on prior EEO activity; (4) the harassment had the purpose or effect of unreasonably interfering with his work performance 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).

As a general matter, the statutory anti-retaliation provisions prohibit any adverse treatment that is sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination. See Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. Id. Moreover, the threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment. Retaliatory harassing conduct can be challenged under the Burlington standard even if it is not severe or pervasive enough to alter the terms and conditions of employment. "If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.B, e.g. 17.

Given the importance of maintaining "unfettered access to [the] statutory remedial mechanisms" in the anti-retaliation provisions, we have found a broad range of actions to be retaliatory.

For example, we have held that a supervisor threatening an employee by saying, “What goes around, comes around” when discussing an EEO complaint constitutes reprisal. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), req. for recons. denied, EEOC Request No. 0520090654 (Dec. 16, 2010). Actions, such as warning a complainant not to make false accusations or risk disciplinary action may also amount to retaliation on its face. See Manuel R. v. Dep’t of Agric., EEOC Appeal No. 0120142958 (Dec. 2, 2016) (declining to find retaliation where, after a hearing, the record failed to show that the named responsible management official warned complainant not to make false allegations or risk losing his job).

Here, we find that the record establishes that Complainant’s Supervisor subjected Complainant to retaliatory harassment based on a demonstrated pattern of indifference to Complainant’s needs amounting to exclusion and hostility which we find would dissuade a reasonable person from engaging in protected activity.

As an initial matter, it is undisputed that Complainant engaged in prior EEO activity through his successful EEO complaint which resulted in his reassignment to the Heinz Campus. Further, Complainant asserted that he was subjected to unwelcomed conduct. As such, we find that Complainant has established elements 1 and 2 of his prima facie case of retaliatory harassment.

Now we turn to Complainant to establish element 3 that the harassment complained of was based on prior EEO activity and element 4 that the alleged events were sufficiently material to deter protected activity. We find that the record provides ample support for Complainant’s statement that his Supervisor made it clear from the beginning that the Supervisor “resented” that Complainant had been reassigned to work under the Supervisor as a result of Complainant’s successful EEO complaint. See ROI at 105. For example, when Complainant’s pay was withheld at the start of his reassignment, Complainant alleged that his Supervisor mocked him by patting his front pants pocket and making a comment to the effect that he had Complainant’s pay in his pocket and then when Complainant asked him for his pay, the Supervisor said something about it not being worth talking about and walked away.<sup>4</sup> See ROI at 100. Complainant further stated that there was a special in-person safety training which was held at his former University Drive work facility, which Complainant could not attend due to his restriction from returning to the site of his former harassment. See ROI at 94. He stated that he e-mailed his Supervisor, asking if there were any meeting notes or training materials he could look at instead and his Supervisor never responded. See ROI at 94; 218.

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<sup>4</sup> We note that the Agency conducted an internal fact-finding investigation into the incident and concluded that the Supervisor had engaged in inappropriate conduct in violation of internal Agency policy and issued the Supervisor a written reprimand for the incident on October 22, 2019. See ROI at 405-406; 430-31. We further note that we are skeptical of the Supervisor’s statement that he has no recollection of making such a comment or the incident at all, which casts serious doubt on the credibility of the Supervisor’s statements. See ROI at 127.

Complainant further explained that every employee's ID is bar-coded to permit access to the buildings on the Heinz campus but when he eventually received his ID a couple weeks after starting, his ID card did not give him building access and when he told his Supervisor about the issue, his Supervisor told him that it was because he was "under investigation by the VA Police."<sup>5</sup> See ROI at 95. We note that the record indicates that Complainant's ID did not give him building access for well over a month after he began his reassignment and that, as a result, Complainant had to walk through the kitchen to access his work tools in the morning and then wait outside for other employees to come and let him in. See ROI at 95. In all that time, the record is starkly lacking in any evidence that the Supervisor took any action to help Complainant or somehow expedite the process to give Complainant building access, except for a single email from the Supervisor sent on September 4, 2019, which we emphasize was more than a month after Complainant had started work. See ROI at 384.

The record also provides some support for Complainant's assertion in claim 4 that the Supervisor directed Complainant's co-workers to file Reports of Contact about him. One of Complainant's co-workers stated that the Supervisor told him to write a Report of Contact about what the co-worker felt was a "petty" incident involving Complainant, while another co-worker stated that he heard from another co-worker that the co-worker had been asked by the Supervisor to write a Report of Contact about Complainant and the co-worker refused. See ROI at 358-59. Finally, an HR Specialist explained that when an employee goes on FMLA leave, it is management's responsibility to track an employee's hours of leave and inform the employee when they are nearing the end of the allotted number of hours and notify the employee of their options regarding leave going forward. See ROI at 149. In this case, Complainant stated that he was not provided any prior notice that he was nearing the end of his hours of FMLA leave but only received an after-the-fact letter from Supervisor informing him that his leave had expired and he had already been charged with being AWOL for 69 hours. See ROI at 110, 234-38.

The Supervisor stated only that Complainant was marked as AWOL because he had used up all his leave. See ROI at 130, 134. We note that the letter the Supervisor sent to Complainant about being placed AWOL began with the misleading statement that Complainant had "failed to report to work since 2/11/20," and made no mention of the fact that Complainant had been out on FMLA Leave. See ROI at 234. Moreover, aside from the general lack of credibility of the Supervisor's statements, as noted supra, Complainant stated that on August 15, 2019, less than a full month after Complainant had started his reassignment, his Supervisor warned him of a "pattern of leave usage," which we find provides some indication that the Supervisor's actions which resulted in Complainant's being marked AWOL were not inadvertent but deliberate. See ROI at 91.

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<sup>5</sup> We note that the Supervisor did not specifically deny making such a statement but answered only that he was "not aware" of any investigation. See ROI at 124. In addition to the Supervisor's highly questionable assertion that he has no recollection of the incident mocking Complainant for his pay being withheld, we are troubled by the Supervisor's apparent lack of candor in his affidavit.

We find the evidence in the record establishes a claim of retaliatory harassment. The Supervisor's demonstrated pattern of unresponsiveness and unwillingness to provide any support for Complainant and his other actions towards Complainant amounted to a pattern of hostility towards Complainant which could dissuade a reasonable person from engaging in protected activity. The Supervisor somewhat coyly acknowledged that he was told "a little information of the past history," the week before Complainant began his reassignment. See ROI at 133. We conclude that Complainant has established a nexus between the Supervisor's adverse treatment and his protected activity. See *Clay v. Dep't of the Treasury*, EEOC Appeal No. 01A35231 (Jan. 25, 2005) (stating that 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).

### *Vicarious Liability*

Once retaliatory harassment is found, we must determine whether the Agency should be held liable for its existence. An employer is subject to vicarious liability for unlawful harassment if the harassment was "created by a supervisor with immediate (or successively higher) authority over the employee." Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, OLC Control Number EEOC-CVG-1999-2 (Jun. 18, 1999) (available at [eeoc.gov](http://eeoc.gov)). An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. Id. However, where the harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability, which it must prove by a preponderance of the evidence. The defense consists of two elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassment; and (b) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Here, the retaliatory harassment did not include tangible employment actions and the Agency can raise an affirmative defense to liability. However, we find that the Agency failed to meet the requirements of this defense and is vicariously liable for the Supervisor's retaliatory harassment. While we acknowledge that the Agency at least made some effort to correct the Supervisor's behavior by issuing the Supervisor a written reprimand for his mocking Complainant over the denial of his pay, we note that the Agency's action was ineffective in creating any change in the Supervisor's behavior. The record contains an email which the Executive Director of the Pittsburgh VA System sent to the EEO Director on August 9, 2019 regarding the Supervisor's mocking Complainant over his pay being withheld, stating "We definitely have work to do on the culture in that group." See ROI at 403-404. We further note that Complainant reported the harassment to the Acting VISN Director, who contacted the Executive Director regarding Complainant's ongoing harassment issues but does not appear to have taken any additional action. See ROI at 147. We emphasize that the record indicates that, aside from issuing the Supervisor the written reprimand for the comment over Complainant's pay, no further action was taken to monitor the Supervisor's conduct or otherwise prevent the Supervisor from engaging in continued harassment. See *Complainant v. Int'l Boundary and Water Comm'n.*, EEOC Request



No. 0520130669 (Feb. 11, 2014) (rejecting agency's argument that it should not be held liable for reprisal because the supervisor who made the retaliatory comment was counseled for his inappropriate behavior). We find that Complainant has established that the Agency subjected him to retaliatory harassment for which the Agency is liable. We therefore reverse the Agency's finding that Complainant did not establish that he was subjected to harassment.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision with respect to Complainant's claims of disparate treatment in claims 1, 2, and 7. However, we REVERSE the Agency's finding on his harassment claim and REMAND the claim to the Agency for further processing in accordance with the Order below.

### ORDER (D0617)

The Agency is ordered to take the following remedial actions:

1. Although we note that a finding of retaliation does not automatically entitle a complainant to a damages award, Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998), in this case, we find that Complainant has established that he is entitled to compensatory damages in light of the fact that the Agency's retaliatory harassment amounts to a continuation of the Agency's previous discrimination against Complainant. Within sixty (60) calendar days of the date this decision is issued, the Agency shall complete a supplemental investigation and will afford Complainant the opportunity to establish the amount of any compensatory damages, whether pecuniary or non-pecuniary, to which Complainant is entitled. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, and will provide all relevant information requested by the Agency. The Agency shall issue a final decision regarding the amount of compensatory damages due Complainant with appeal rights to the Commission. The Agency shall pay this amount to Complainant within thirty (30) calendar days of the date of the determination of the amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within one hundred and twenty (120) calendar days of the date this decision is issued, the Agency shall restore any Leave Complainant took because of the harassment. In addition, the Agency shall compensate Complainant for any Leave Without Pay taken because of the harassment.<sup>6</sup>
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of interactive EEO training to all managers and supervisors who oversee Plumbers in the Agency's Heinz Campus VA Medical Center in Pittsburgh, Pennsylvania, including Complainant's Supervisor. The required training shall emphasize management's responsibilities with regard to eliminating discrimination and reprisal in the workplace.
4. Within one hundred and twenty (120) calendar days of the date this decision is issued, the Agency shall consider taking disciplinary action against the Supervisor. The Commission does not consider training to be a disciplinary action. We further note that the written reprimand which the Agency already issued does not constitute disciplinary action for purposes of this Order. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline.
5. The Agency shall pay Complainant reasonable attorney's fees and costs as set forth in the paragraph below entitled "Attorney's Fees."
6. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

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<sup>6</sup> We note that due to the ongoing harassment and the consequent exacerbation of Complainant's PTSD and anxiety, Complainant's doctor has restricted Complainant from returning to any VA facility, thereby necessitating that Complainant take extended Leave Without Pay. See ROI at 257.

POSTING ORDER (G0617)

The Agency is ordered to post at its Heinz Campus VA Medical Center in Pittsburgh, Pennsylvania 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).

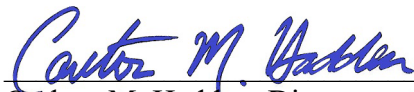
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

October 11, 2022

Date