



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

[REDACTED]  
Mac O.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021004377

Hearing No. 430-2020-00440X

Agency No. 2004-0590-2019102279

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 25, 2021 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Associate Director (Chaplain) for Diversity and Connections at the Agency's National Chaplain Service in Hampton, Virginia.<sup>2</sup>

On September 25, 2018, Complainant met with a Chaplain at the Agency's Black Hills, South Dakota location during a site visit and discussed an ongoing personnel matter with another employee who worked with the Chaplain.

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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.

<sup>2</sup> This center was closed at the end of December 2019, and moved to Washington, D.C.

In a report of contact produced by the Chaplain concerning the meeting with Complainant, he stated that Complainant presented a proposal to resolve the issue with this employee, including giving the employee a separate office, a new supervisor, and an outstanding performance rating; and withdrawing the employee's proposed discipline. The Chaplain noted that Complainant stated that he was "an EEO-trained person," and that the proposed discipline did not fit the progressive discipline model and was inappropriate. Complainant also stated that "from an EEO perspective" it was "wrong" and "crazy" for the Chaplain to be in the same office space as the employee, and that it "would be a bloodbath. She pulls out a knife or gun, and she says it's because she felt her life was in danger, and you're done." Complainant asked the Chaplain to "get on board" with the proposed resolutions to the issue. The Chaplain conveyed that he felt threatened by Complainant. Report of Investigation (ROI) at 267-8.

Complainant also completed a report of contact documenting his interaction with the Chaplain. Complainant stated that he attempted to mediate the conflict with the other employee and denied attempting to threaten or coerce the Chaplain. Complainant reported that he pointed out that there was an absence of any written counseling to the employee prior to the issuance of a proposed suspension, and that progressive discipline was lacking in this case. Complainant expressed concern that the employee would not receive a fair performance evaluation, and that the recently proposed discipline was a pretext for an upcoming termination. Agency's Motion for Summary Judgment, Exhibit 3.

On December 13, 2018, the then-Director of the National Chaplain Center (Director 1) issued a memorandum to the Black Hills Director regarding Complainant's site visit. Director 1 stated that he reviewed the reports of contact by the Chaplain and Complainant, and he concluded that the site visit was not conducted according to protocol. As such, Director 1 withdrew any recommendation and stated that no further action was planned. ROI at 266. Director 1 retired and a new Director of the National Chaplain Center (Director 2) was appointed in January 2019. ROI at 185, 139.

Complainant averred that, starting in January 2019, he has not been allowed to conduct any site visits and that other Associate Directors were allowed to cover his assigned areas. For example, Complainant was unable to speak at a service in Sioux Falls, South Dakota. ROI at 89. In February 2019, Complainant requested the ability to telework five days per week, and Director 2 responded that they would revisit the matter in approximately eight months. Complainant started teleworking in August 2019, due to mold in his office. ROI at 91.

On January 29, 2019, the Chaplain requested Director 2's "counsel" regarding a matter involving the union and a personnel matter. The Chaplain explained that he has known Director 2 since 2016, and that she had mentored him. The Chaplain and Director 2 exchanged emails and set up an initial teleconference for February 1, 2019. They had an additional telephone call on or about February 4, 2019, after Director 2 informed the Chaplain that she "had another thought." Complainant's Memorandum of Law in Opposition to Agency's Motion for Summary Judgment, Exhibits K-O, Chaplain Deposition at 26-7. The Chaplain testified that Director 2 told him to ask for a letter from the Black Hills Director, and that he drafted a memorandum. Id. at 78, 82.

On February 15, 2019, the Black Hills Director issued a memorandum addressed to Director 2, stating that she had “grave concerns” regarding Complainant’s conduct, which started during the September 2018 site visit. The Black Hills Director noted that, on January 23, 2019, an Agency executive learned that an email between Complainant and the local Union President was provided as evidence for a grievance. The Black Hills Director stated that the information from Complainant was erroneous “inciting strained relationships between management, the employee and our local [Union] President.” The Black Hills Director requested that Complainant “cease and desist all communication with any personnel from [Black Hills] unless he uses only officially sanctioned means of communication and routes any and all communications through [the Black Hills Director’s] office.” ROI at 260-1. Director 2 confirmed that she informed Complainant of the Black Hills Director’s request. ROI at 146.

In February 2019, Director 2 did not allow Complainant to speak at Brigham Young University or at a Senior Executive Service installation. ROI at 97, 99. Complainant averred that, on June 28, 2019, Director 2 issued him a performance rating of Fully Successful. ROI at 100, 271-6.

#### *EEO Complaint*

On March 27, 2019, Complainant filed an EEO complaint alleging that the Agency subjected him to discrimination and harassment on the bases of race (African American), and age (66), and in reprisal for prior protected EEO activity, when:

1. since January 2019, Director 2 has not allowed Complainant to conduct site visits at any location other than Crystal City, Virginia;
2. on February 6, 2019, Director 2 constructively denied Complainant the opportunity to telework five days per week;
3. on or about February 12, 2019, Director 2 told Complainant to not talk to other Black Hills employees because he submitted a whistleblower complaint to his chain of command;
4. on February 1, and 12, 2019, and March 1, 2019, Director 2 denied Complainant the opportunity to conduct site visits;
5. on or about February 16, 2019, Director 2 did not allow Complainant to speak at an Interfaith Conference at Brigham Young University;
6. on February 22, 2019, Director 2 constructively denied Complainant the opportunity to perform a Senior Executive Service installation; and
7. on June 28, 2019, Complainant received a “Fully Successful” performance evaluation.

At the conclusion of the investigation, Complainant was provided a copy of the investigative file, and he requested a hearing before an EEOC Administrative Judge (AJ). The Agency submitted a motion for a decision without a hearing, which Complainant opposed.

The AJ issued a decision by summary judgment finding no discrimination. The AJ stated that, after reviewing the claims and record evidence, and weighing all inferences in Complainant's favor, the record was devoid of any evidence to support his claims of discrimination. The AJ found that the complained of incidents were stressful, but they did not rise to the level of sufficiently severe or pervasive to support a hostile work environment. The AJ concluded that there was insufficient evidence in this case to proceed to a hearing and granted summary judgment for the Agency.

The Agency's final action implemented the AJ's decision. The instant appeal followed, and Complainant filed a brief in support of his appeal.<sup>3</sup> The Agency opposed Complainant's appeal.

### ANALYSIS AND FINDINGS

#### Standard of Review

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chap. 9, § VI.A. (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").

#### Decision on Merits by Summary Judgment

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<sup>3</sup> The Agency objected to Complainant's brief as untimely, arguing that it was due by August 28, 2021, but filed on August 30, 2021, without an extension. However, we note that August 28, 2021, was a Saturday and 29 C.F.R. § 1614.604(d) states that if the last day of a filing period falls on a Saturday, Sunday, or federal holiday, the filing period will be extended to include the next business day. As such, we find that Complainant's appeal brief was timely filed on the next business day of August 30, 2021.

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant argues that there are material facts in dispute, such as whether the management officials were motivated by retaliatory animus when it directed him to stop speaking with Black Hills employees. With the complete record, including the parties' exhibits submitted with their respective filings such as witness deposition transcripts, we find additional evidence is not necessary for the claims at issue and that this case is ripe for a decision without a hearing.

Through his attorney, Complainant, argues that the AJ erred in granting summary judgment on his claims alleging discrimination based on his race, and in reprisal for protected EEO activity, for claims 1-4, and 7. Complainant noted that he was not appealing the AJ's determination on his age claim; withdrew claims 5 and 6; and did not challenge the AJ's determination on his harassment claim. We note that the Commission has the discretion to review only those issues specifically raised in an appeal. See EEO MD-110, at Chap. 9, § IV.A.3. Based on Complainant's specific arguments on appeal, we will only address his allegations of race discrimination for claims 1, 2, and 4, and reprisal for claims 1, 3, 4, and 7, in the instant decision.

#### *Race Discrimination (Claim 1, 2, and 4)*

To prevail in a disparate treatment claim such as this, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). He must generally establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978).

Once Complainant has established a prima facie case, the burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is his obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); U.S. Postal Serv. v. Aikens, 460 U.S. 711, 715-716 (1983).

#### Claims 1 and 4

We note that, in his appeal, Complainant asserts that Director 2 denied him the ability to conduct site visits beginning in February 2019. As such, we will consider the claims as of February 2019, not January 2019. We also note that the visit to Sioux Falls was not necessarily a site visit, but rather, a speaking engagement for a dedication, but Complainant included this incident as part of claim 4. ROI at 96.

We find that Complainant established a prima facie case of race discrimination because he identified two Associate Directors, who were outside of his protected class, and were selected to visit Cleveland, Ohio, and Sioux Falls, instead of Complainant. In response, Director 2 averred that she denied Complainant the opportunity for site visits due to a reorganization and a decline in fulltime staff, and she determined that site visits would be conducted by Subject Matter Expert Chaplains, and not Associate Directors. ROI at 141, 148.

However, we find that Complainant has shown that the proffered reasons were pretexts for discrimination. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency's explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

Complainant asserts that Director 2's response is false because the reorganization did not take effect until January 2020. The Agency did not refute Complainant's contention in its opposition brief. In her deposition, Director 2 contradicted the initial responses provided in her affidavit. As noted by Complainant, Director 2 later testified that the reorganization was not finalized until January 2020, which was well after she informed Complainant that he would no longer be allowed to conduct site visits in February 2019. Director 2 Deposition at 77-8.

In addition, Director 2 testified that there was no funding for site visits in fiscal year 2019; no associate chaplain conducted a site visit in 2019; and the last site visit occurred in September 2018; yet she also admitted that an Associate Director conducted a site visit to Cleveland, which conflicted with her previous responses. *Id.* at 94-5, 184-5.

The record contained the site visit report, completed by another Associate Director, for the visit conducted in Cleveland on March 7, 2019, proving that there was a site visit by an Associate Director in fiscal year 2019, after September 2018. Agency's Motion for Summary Judgment, Exhibit 9.

Regarding the Sioux Falls speaking engagement, Director 2 testified that another Associate Director was chosen, instead of Complainant, because Complainant was already traveling a lot and the other Associate Director had a direct flight to Sioux Falls, making his trip cheaper. Director 2 Deposition at 185-8. However, on March 5, 2019, Director 2 emailed Complainant to inform him that the other Associate Director would be traveling to Sioux Falls because, while Black Hills is another location, "the issues are inter-related." Complainant's Memorandum of Law in Opposition to Agency's Motion for Summary Judgment, Exhibit V. Overall, we find that Director 2's inconsistent and shifting responses, and the other record evidence which contradicted her explanations, establishes pretext for discrimination. Accordingly, we find that Complainant proved that the Agency subjected him to race discrimination when it stopped allowing him to conduct site visits starting in February 2019, and we REVERSE the Agency's finding for claims 1 and 4.

### Claim 2

Complainant argues that he was subjected to disparate treatment based on race when Director 2 denied his telework request, and he identified two White comparators who were allowed to telework. Crediting that Complainant established a prima facie case of race discrimination for claim 2, we find that Director 2 articulated a legitimate, nondiscriminatory reason for denying Complainant's request. Specifically, Director 2 averred that Complainant presented his request when she was brand new in her position, and that she would follow Director 1's previous decision that Complainant was unable to telework. ROI at 143. Director 2 added that the comparators had telework agreements signed by Director 1. Director 2 Deposition at 55.

We find that Complainant has not shown that the proffered reasons were pretexts for discrimination. We note that Complainant did not dispute that Director 1 had previously determined that Complainant could not telework, and he did not provide any arguments or evidence to show that Director 2's response for claim 2 was not worthy of belief. As such, we find that Complainant did not establish that the Agency discriminated against him based on race when Director 2 denied his telework request, and we AFFIRM the Agency's finding for claim 2.

### *Reprisal (Claims 1, 3, 4, and 7)*

A complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he 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). The Commission defines protected activity as (1) opposing a practice made unlawful by one of the employment discrimination statutes; or (2) filing a charge,

testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the applicable statute. EEOC Compliance Manual on Retaliation, No. 915.004 at II.A. (Aug. 25, 2016).

The Commission has a policy of considering reprisal claims with a broad view of coverage. Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (April 4, 2000).

In this case, we find that Complainant engaged in protected EEO activity when he opposed the alleged discriminatory harassment and proposed discipline of a Black Hills employee during his site visit in September 2018.<sup>4</sup> In an affidavit, the Union President explained that an employee filed an EEO complaint alleging that the Chaplain mistreated her because she was female. She alleged he tried to impose a dress code because he did not like how the employee wore her hair and did not polish her fingernails, but the dress code was not applied to the male employees. When Complainant visited Black Hills in September 2018, the Union President shared the concerns, and they remained in touch because Complainant was concerned about the issues raised by the female staff. The Union President added that she mentioned Complainant to the Black Hills Director, who replied that “the agency had acted against him,” and appeared upset that Complainant raised his concerns about the treatment of female staff members by the Chaplain. Complainant’s Memorandum of Law in Opposition to Agency’s Motion for Summary Judgment, Exhibit KKK. We find that the Union President’s statements support that Complainant engaged in protected EEO activity with his expressed concern and support regarding the allegations of discrimination and harassment raised by Black Hills employees.

The record also shows that the management officials considered Complainant’s conduct to be EEO activity. The Chaplain noted in his report of contact that Complainant asserted that he was “an EEO-trained person,” and “from an EEO perspective,” the Chaplain was wrong. ROI at 267. In addition, the Black Hills Director testified that she felt that Complainant was “acting in a manner more appropriate to an EEO counselor” in his efforts to address the employee’s issues; she was motivated to write the February 15<sup>th</sup> memorandum, after learning that Complainant was communicating with the employee; and that her “grave concerns” were due to Complainant’s “agreements with an employee.” Black Hills Director Deposition at 32, 61.

In its opposition, the Agency argues that Director 2 did not discover the issue until she received the February 15<sup>th</sup> memorandum, which was not related to Complainant’s opposition of discrimination back in September 2018, but rather, that Complainant was providing erroneous information.

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<sup>4</sup> The Commission has found that protected activity consisting of opposition to discrimination must be reasonable in manner. While the Chaplain alleged that Complainant threatened him, we note that Complainant denied threatening the Chaplain and there is no record evidence that the Agency considered Complainant’s actions to be threatening.



However, Director 2 confirmed that, in her initial conversation with the Chaplain, he informed her that he did not appreciate Complainant talking with the employee and a union delegate, and the Chaplain corroborated that he gave Director 2 a background of the situation and shared his report of contact with her. Director 2 Deposition at 129, Chaplain Deposition at 77. As such, we find that the relevant management officials were aware of Complainant's protected EEO activity.

#### Claims 1 and 4

We find that the evidence establishes a nexus between Complainant's protected EEO activity and the adverse action based on the temporal proximity of the Chaplain's communications in early February 2019 with Director 2 regarding his issues with Complainant's conduct. On February 22, 2019, Director 2 emailed Complainant a recap of meetings she held with him. For example, they spoke on February 22, 2019, and Director 2 informed Complainant that she would not have him visit any medical centers at this time. Complainant's Memorandum of Law in Opposition to Agency's Motion for Summary Judgment, Exhibit U. We find that the close proximity between Director 2's awareness of Complainant's protected EEO activity in early February 2019, and her decision to not allow Complainant to visit any other Agency locations less than one month later is sufficient to raise an inference of reprisal. See, e.g., Morris v. U.S. Postal Serv., EEOC Appeal No. 01A51604 (June 14, 2005) (finding that temporal proximity of approximately one month between adverse action and protected conduct was sufficient to raise an inference of retaliation).

As noted above, we find that Complainant established pretext for discrimination for claims 1 and 4 due to Director 2's inconsistent and untrue responses for the claims. Accordingly, we also find that Complainant proved that the Agency retaliated against him for protected EEO activity when it stopped allowing him to conduct site visits starting in February 2019, and we REVERSE the Agency's finding for claims 1 and 4.

#### Claim 3

For claim 3, we find that the Chaplain's direct reference to Complainant's professed "EEO perspective," and the Black Hills Director's opinion that Complainant's conduct was more like that of an EEO counselor, establishes the requisite nexus between his EEO activity and the subsequent adverse action of directing Complainant to refrain from communicating with any Black Hills employees.

Next, we find that it is appropriate to consider claim 3 under a cat's paw theory, as argued by Complainant on appeal. Under a cat's paw theory, animus and responsibility for adverse action can be attributed to a supervisor who was not the ultimate decision maker, if that supervisor intended the adverse action to be a consequence of his or her discriminatory conduct. See Feder v. Dep't of Justice, EEOC Appeal No. 0720110014 (July 19, 2012) (appropriate under cat's paw theory to impute manager's retaliatory animus to deciding official where a manager wielded sufficient informal power to influence a deciding official, who acted as a conduit for the manager's retaliatory animus related to a complainant's reasonable accommodation).

Here, the evidence shows that the Chaplain believed that Complainant was supporting the employee who made the allegations against the Chaplain. Chaplain Deposition at 65. The Chaplain averred that he contacted Director 2 to discuss Complainant with the expectation that Director 2 would assist him because she was Complainant's supervisor at the time. The Chaplain added that he drafted the memorandum for the Black Hills Director's signature because he knew that, by providing it to Director 2, she would act on it. Id. at 77-8, 82. The Black Hills Director admitted that she was motivated to write the February 15<sup>th</sup> memorandum, after learning that Complainant was communicating with the employee. Black Hills Director Deposition at 61. While Director 2 conveyed the message to Complainant, we find that she did so on behalf of the Chaplain and the Black Hills Director; as such, the cat's paw theory is applicable.

We also find that the Agency's action would reasonably chill protected EEO activity since the instruction to cease all communications with Black Hills employees prevents Complainant's ability to further engage in his protected EEO activity of supporting an employee in her opposition to alleged discrimination and harassment. Accordingly, we find that the Agency retaliated against Complainant when it instructed him to stop communicating with Black Hills employees, unless through the Black Hills Director's office, and we REVERSE the Agency's decision for claim 3.

#### Claim 7

Regarding claim 7, the record shows that Director 2 gave Complainant a Fully Successful for his 2019 performance rating, and in his evaluation, she noted "the [Veteran Integrated Services Network] VISN 23 Network Director sent a complaint in February about a Site Visit of [Complainant] from September 2018," and "[t]he Network Director noted how [Complainant] sided with the Union against the VAMC Director." ROI at 276. We find that it is reasonable to conclude that Director 2's statement that Complainant "sided" with the Union was related to his support of an employee's allegations against the Chaplain, which were raised during the September 2018 site visit. As such, Director 2's notations about the "complaint" about the September 2018 site visit, and that Complainant "sided with the Union," in his performance appraisal establishes the nexus with Complainant's protected EEO activity.

We further find that Complainant's Fully Successful rating, which was lower than the Excellent rating he received in November 2018, is an adverse action that is likely to deter a reasonable person from engaging in EEO activity. ROI at 287. See Ebony M. v. Dep't of Agriculture, EEOC Appeal No. 0120140153 (Nov. 14, 2017); Tamara G. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120112387 (Dec. 3, 2015). Director 2 explained that she gave Complainant a Fully Successful rating based on "many errors and incorrect information" in his self-assessment and not meeting the requirements of an Exceptional rating. ROI at 162. However, we find that Director 2 did not explain how the included text was related to any of Complainant's performance objectives, and we find its insertion in his lowered performance evaluation would reasonably chill protected EEO activity. As such, we find that Complainant established that the Agency retaliated against him when it issued him a Fully Successful performance rating, and we REVERSE the Agency's finding for claim 7.

### 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 order finding that Complainant did not establish that he was subjected to race discrimination for claim 2; and we REVERSE the Agency's final order regarding Complainant's allegations of race discrimination for claims 1 and 4, and the allegations of retaliation for claims 1, 3, 4 and 7.

### ORDER (C0618)

The Agency is ordered to take the following remedial action:

1. To the extent that the instruction for Complainant to cease communications with Black Hills employees is still applicable, the Agency shall immediately rescind the instruction.
2. Within 30 days of the date this decision is issued, the Agency will withdraw Complainant's 2019 performance evaluation, and a different management official shall issue a revised 2019 performance evaluation, removing any language related to his protected EEO activity; and which accurately reflects Complainant's performance for the relevant timeframe. If Complainant receives a higher performance rating, the Agency shall pay any awards, and provide other benefits that Complainant is entitled to, within 30 days of the updated 2019 performance evaluation.
3. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorneys' fees, and costs, related to our findings that Complainant was subjected to race discrimination for claims 1 and 4, and retaliation for claims 1, 3, 4, and 7. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, attorneys' fees, and costs, no later than 30 days after the completion of the investigation.
2. Within 90 days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to Director 2, with an emphasis on the Agency's obligation to not discriminate against employees based on race or retaliate against employees who have engaged in protected EEO activity. The Agency shall also provide four (4) hours of interactive EEO training to the Chaplain and the Black Hills Director, with an emphasis on the Agency's obligation not to retaliate against employees who have engaged in protected EEO activity.<sup>5</sup>

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<sup>5</sup> Director 2's identity can be found on page 138 of the ROI; the Chaplain's identity is disclosed in his report of contact on page 267 of the ROI; and the Black Hills Director is revealed as the author of the February 15, 2019, memorandum on pages 260-1 of the ROI.

3. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against Director 2, the Chaplain, and the Black Hills Director. 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 any of the responsible management officials have left the Agency's employment, then the Agency shall furnish documentation of their departure date(s).
4. Within 30 days of the date this decision is issued, the Agency shall post notices in accordance with the paragraph below.

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 evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its National Chaplain Service and Black Hills facilities 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

November 29, 2022

Date