



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

[REDACTED]
Tanya D.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 2022002544

Hearing No. 510-2019-00252X

Agency No. FBI 2015-00205

DECISION

On April 7, 2022, 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 March 8, 2022, final order 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Special Agent at the Agency's Miami International Airport and at the Main Office in Miami, Florida.

On July 14, 2015, Complainant was informed that she was being permanently transferred from her assignment at the Miami Airport and being reassigned to the Main Office in Miami. She asserted that the Assistant Special Agent in Charge (ASAC) told her at the time it was because of her "mobility issues" due to her medical conditions. See Report of Investigation (ROI) 1, Ex. 9 at 27-28.

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

On July 27, 2015, she was reassigned from the Counterterrorism Branch, Squad T-8 to the Counterintelligence Branch, Squad I-5, working out of the Main Office. See Report of Investigation (ROI) 1, Ex. 9 at 32. On being reassigned, she stated that she told the Supervisory Special Agent (SSA) that she needed a flexible schedule because of medical appointments and physical therapy. See ROI 2, Ex. 9 at 2-3.

Complainant asserted that she is a “60% disabled veteran,” with gastrointestinal (GI) issues, irritable bowel syndrome (IBS), diverticulitis, as well as injuries to her knees, hips, and ankles. See ROI 1, Ex. 9 at 2-3. She stated that under her two previous supervisors while she was working at the Miami airport, she was permitted a flexible schedule to accommodate her medical appointments which allowed her to remain fit for duty in spite of her physical ailments. See ROI 1, Ex. 9 at 6-7. After being reassigned to the I-5 Squad out of the Miami main office, she was no longer allowed a flexible schedule.

Complainant submitted a request for a reasonable accommodation in July 2015, requesting to be allowed to return to work at the Miami airport and be allowed a flexible schedule to accommodate her medical appointments. See AJ Ex. 2 at 132, 134. On August 25, 2015, the Reasonable Accommodation Program Coordinator (RA Coordinator) sent an email to the ASAC and the Special Agent in Charge (SAC) informing them that the Office of Equal Employment Opportunity Affairs (OEEOA) had completed its review of Complainant’s reasonable accommodation request and determined that “[Complainant] is eligible for a reasonable accommodation,” and that the OEEOA recommended that Complainant’s requests to be reassigned to the Miami airport and be permitted a flexible schedule be approved. See ROI 1, Ex. 18. The SAC responded to the RA Coordinator’s email by stating that transferring Complainant back to the Miami Airport “was unreasonable,” because it was already fully staffed and the I-5 higher priority threat squad was under-staffed. See ROI 1, Ex. 19. He further stated that Complainant “may take appropriate leave to address medical appointments and/or therapy,” and that Complainant could also “coordinate and/or schedule her medical appointments and/or therapy before and/or after business hours.” See ROI 1, Ex. 19.

In response, the RA Coordinator emailed the SAC informing him that, “[y]our justification for denial of [Complainant’s] request for accommodation puts the FBI at great liability.” See ROI 1, Ex. 20. Thereafter, on November 13, 2015, the SAC sent Complainant a letter repeating that Complainant’s request for reassignment to the Miami Airport would be denied because the Airport was “at appropriate staffing levels,” and that her schedule had been adjusted to “9:15 a.m. to 6:00 p.m.” as an accommodation for her medical appointments but that she could also use sick leave or annual leave to attend her medical appointments during her work shift, if necessary. See ROI 1, Ex. 21.

On August 27, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of sex (female), disability, and reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:

1. On October 19, 2015, the Supervisory Special Agent (SSA), the Assistant Special Agent in Charge (ASAC), and Special Agent in Charge (SAC) scrutinized Complainant's time and attendance records.
2. On October 20, 2015, and October 26, 2015, the SSA, ASAC, and SAC questioned Complainant's work product.
3. On October 26, 2015, the ASAC informed Complainant she could only take twenty-minute breaks during the day.

Thereafter, Complainant filed another EEO complaint alleging that the Agency discriminated against her on the same bases when:

1. On December 8, 2015, the Assistant Director, Office of Equal Employment Opportunity Affairs (AD) expressed concerns for both Complainant's fitness for duty and that "[she] is not executing the responsibilities of [her] job."
2. As of December 14, 2015, the SAC had still not provided Complainant a reasonable accommodation for her disability.
3. On December 15, 2015, the SSA threatened Complainant with being charged with insubordination.
4. On unspecified dates, the SSA, ASAC, and SAC subjected Complainant to extra scrutiny.
5. On April 25, 2016, Complainant received notice that she had been referred to the Inspection Division, Internal Investigations Section, for alleged time and attendance fraud.

At the conclusion of the investigations, the Agency provided Complainant with a copy of the reports of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

The Agency filed a motion to dismiss, arguing that Complainant's complaints were now moot due to her retirement from employment on August 5, 2016.² The AJ dismissed the complaints as moot because Complainant had not requested compensatory damages.

² Complainant also filed another EEO complaint, alleging, inter alia, that the Agency constructively terminated her employment by forcing her to retire. The Agency found that Complainant had not established that she was subjected to discrimination and the Commission affirmed the Agency's dismissal, finding that Complainant made a voluntary decision to resign because she thought her employment might be terminated and she wanted to protect her pension. See Sharon C. v. Dep't of Justice, EEOC Appeal No. 2019002044 (Aug. 11, 2020).

Complainant appealed and the Commission reversed the dismissal, finding that Complainant had raised compensatory damages because of her repeated assertions that the Agency's actions and denial of her reasonable accommodation had caused her severe stress which aggravated her disabilities and hurt her health. See Tanya D. v. Dep't of Justice, EEOC Appeal No. 0120173031 (Nov. 20, 2018).

On remand, on November 15, 2020, the Agency filed a motion for a decision without a hearing, which the AJ granted over Complainant's objections, issuing a decision by summary judgment on February 2, 2022. The AJ found that Complainant was not an individual with a disability and that the Agency articulate legitimate, nondiscriminatory reasons for its actions in reassigning Complainant to a main office position and scrutinizing her time and attendance records. The AJ further found that there was no evidence in the record to indicate the Agency's motives were due to discriminatory animus. The AJ therefore concluded that Complainant did not establish that she was discriminated against as alleged. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant first contends that the AJ erred by making credibility findings which should not be made at the summary judgment stage. On the merits, Complainant argues that the AJ did not consider all the evidence or apply the correct standard in determining whether the Agency established that providing Complainant with her requested accommodation would cause an undue hardship.³

The Agency did not submit a brief in response.

ANALYSIS AND FINDINGS

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

³ On appeal, Complainant does not challenge the AJ's findings with respect to Complainant's claims of disparate treatment and harassment for the Agency's actions in scrutinizing her time and attendance or threatening to charge her with insubordination. We therefore exercise our discretion to review only the denial of reasonable accommodation claim raised in Complainant's appeal. See Equal Employment Opportunity Management Directive 110, Chapter 9 Section 10 (November 9, 1999); see also Kimshin v. U.S. Postal Serv., EEOC Appeal No. 0120081490 (Sept. 11, 2009).

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 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 Chapter 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”).

Summary Judgment

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. However, we agree with Complainant that the AJ impermissibly relied on credibility determinations in making their decision. For example, the AJ referred to Complainant’s “self-serving statements” in finding that it was only after her efforts to obtain a flexible schedule failed that “her impairments, according to her physician, suddenly existed...” See AJ Decision at 20-21 (emphasis added). Such a statement minimizing Complainant’s well-documented and long-standing physical ailments relies on a determination that Complainant herself was not credible and as such, it was impermissible at this stage.

While we are mindful that the hearing process is intended to be an extension of the investigative process, in this case, we find that a remand for a hearing is not necessary considering the long passage of time since the events at issue, the fact that Complainant has since retired from her employment, and most significantly, the only issue raised on appeal concerns Complainant’s

denial of reasonable accommodation claim, which is well-documented and does not require a credibility finding.

Reasonable Accommodation

Under the Commission's regulations, an agency is required to reasonably accommodate the known limitations of a qualified individual with a disability, unless the agency can show that the accommodation would cause an undue hardship. See 29 C.F.R. 1630.2(p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (October 17, 2002). Moreover, once an employer becomes aware of the need for an accommodation, the employer has an obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3).

To establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability; (2) she is a qualified individual with a disability; and (3) the Agency failed to provide 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). "The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such 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).

We find that Complainant is an individual with a disability. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii). In this case, the record includes pages of Complainant's medical records which document Complainant's various medical conditions, including irritable bowel syndrome, cervical disc disease, and multiple issues with her right hip, knees, left foot and right ankle, all of which required numerous surgeries over the last 20 years. See Agency Production, Ex. 2 at 100-101. Complainant stated that she experiences almost constant pain and that at times, she has difficulty in walking and/or running. See ROI 1, Ex. 9 at 3. The record also includes letters from her physicians stating that Complainant needed to receive chiropractic treatment three times a week as well as a physical therapy and rehabilitation regimen including water therapy. See Agency Production, Ex. 2 at 141; ROI 2 Ex. 14. Her doctor confirmed that Complainant is limited in her ability to walk, lift, bend, or crouch. See ROI 2 Ex. 14. We find that due to her numerous physical ailments, the record establishes that Complainant is an individual with a disability.

After a complainant has shown that she is an individual with a disability, the complainant must then establish that she is a “qualified individual with a disability,” an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). Here, the record contains a statement from the Assistant Special Agent in Charge of the Counterterrorism Branch in Miami who stated that she has worked with Complainant since 2011 and to her knowledge, Complainant is fit for duty and has consistently been rated “Successful” and “Excellent” on her performance appraisals in that time. See ROI 1, Ex. 10 at 2-3. While we acknowledge that there is evidence in the record of performance issues with Complainant, we note that aside from Complainant’s need to take breaks, the issues relate to Complainant’s diligence in performing her job, rather than any indication that she is not qualified to perform the job. For example, the Supervisory Special Agent (SSA 2) at the Miami Airport stated Complainant is “slow with paperwork, but she does a good job when she puts her mind to it,” while the ASAC confirmed that, “[w]hen [Complainant] is focused, she does good work, but that focus is hard to maintain and frequently misdirected.” See ROI 1, Ex. 11 at 4; ROI 1, Ex. 12A at 4.

Moreover, to the extent the AJ and Complainant’s supervisors appear to have considered Complainant’s performance issues in determining that Complainant was not entitled to an accommodation, we emphasize that any concerns with the quality of Complainant’s performance are irrelevant. The pertinent question is whether the Agency could have accommodated Complainant’s disability without incurring an undue hardship, not whether Complainant’s performance merited special privileges. See *Alonso T. v. Equal Empl. Opp’y Comm’n*, EEOC Appeal No. 0120162340 (Jan. 15, 2020) (“Reasonable accommodation is a right, not a privilege.”) In addition, while some of her supervisors indicate concerns with her mobility, there is no evidence in the record that Complainant was deemed physically unfit for duty nor has the Agency specifically established that there are essential functions of her position which Complainant was not physically able to perform. Hypothetical speculation that Complainant’s physical condition may inhibit her ability to perform the essential functions of her job are not sufficient without actual evidence to that effect, especially in light of the fact that Complainant’s performance was, as noted earlier, consistently rated as “Successful” and “Excellent.” We further note that the SAC did not mention any concerns with Complainant’s physical ability to perform her job in denying Complainant’s reasonable accommodation request to be reassigned to the Miami Airport. See ROI 1, Ex. 21. We therefore find that Complainant is a qualified individual with a disability.

Having found that Complainant is a qualified individual with a disability, the Agency was required to provide a reasonable and effective accommodation, unless the Agency can show that the accommodation would cause an undue hardship. See 29 C.F.R. 1630.2(p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (October 17, 2002). 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.”

In denying Complainant’s request for an accommodation by reassigning her to the Miami Airport, the SAC stated that Complainant could not be reassigned because the Miami Airport was already at appropriate staffing levels and the I-5 squad at which Complainant was currently working was under-staffed. See ROI 1, Exs. 19, 21. We find, however, that this is not sufficient to meet the Agency’s burden of establishing that reassigning Complainant would cause an undue hardship. The Agency did not submit any evidence to corroborate the SAC’s statement but rather relied only on the SAC’s assertions. This is not sufficient without more to establish that reassigning Complainant to the Miami Airport would have constituted an undue hardship. See Fernando H. v. Social Sec’y Admin., EEOC Appeal No. 2021114066 (Dec. 21, 2021) (“A showing of undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense.”)

In addition, we reject the Agency’s contention that it provided Complainant with a reasonable and effective accommodation by adjusting her schedule to 9:15 am to 6:00 pm and permitting her to take leave as necessary to accommodate her medical appointments and/or therapy. See ROI 1, Ex. 21. The evidence in the record does not establish that such a minimal adjustment in Complainant’s schedule was effective. Complainant stated that it was simply not possible for her to attend a medical appointment in the morning and then be able to report to work in a timely manner. See ROI 2, Ex. 9 at 7-8. She further explained that the hours for access to a pool for her water therapy was limited and that such water therapy was the only exercise she can tolerate without excessive pain that would permit her to maintain her physical fitness for duty. See ROI 1, Ex. 9 at 3-4. She also stated that due to her numerous surgeries, she did not have sick leave to use. See ROI 1, Ex. 9 at 4; ROI 2, Ex. 9 at 7.

Additionally, we note that the Commission has held that although an employer may choose among effective accommodations, “forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation.” Denese G. v. Dep’t of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016). In doing so, the Commission explained that the goal of 29 C.F.R. §1630.1 is to provide equal employment opportunities for individuals with disabilities. Leave removes an employee from the workplace and therefore denies the employee the opportunity to keep working with reasonable accommodation. See id.; see also Woodson v. Int’l Bus. Machines, Inc., 2007 WL 4170560, at 5 (N.D. Cal. Nov. 19, 2007) (leave is sufficient as a reasonable accommodation only if other accommodations in a job would be ineffective). Accordingly, we conclude that the Agency violated the Rehabilitation Act by failing to provide Complainant with a reasonable and effective accommodation for her disabilities by refusing to provide her with a flexible schedule.

We further 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).

In this case, we are troubled by the fact that there is no evidence in the record that the Agency ever attempted to engage in the interactive process with Complainant. The only indication of such an interaction is the fact that the SAC told Complainant at some point that she could be permitted to work a 10:15 am to 7 pm shift instead.⁴ See ROI 2, Ex. 9 at 7; ROI 2, Ex. 11 at 3. Moreover, we are disturbed by the fact that there is no indication that the SAC made any further attempt to accommodate Complainant even after being specifically informed by the RA Coordinator that denying Complainant's request to be reassigned "puts the FBI at great liability." See ROI 1, Ex. 20. Under the circumstances, we find that the Agency did not engage in good-faith efforts to accommodate Complainant.

Finally, we note that because Complainant has since retired from the Agency, the only relief she may be provided is compensatory damages. Because we find that the Agency violated the Rehabilitation Act by not engaging in a good-faith effort to accommodate Complainant and by not providing Complainant with an effective and reasonable accommodation, we find that the Agency is liable for compensatory damages and remand this case for the Agency to conduct a supplementary investigation into the amount of pecuniary and non-pecuniary damages Complainant incurred as a result of the Agency's failure to accommodate her.

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. However, we affirm the Agency's final order finding that Complainant did not establish that she was subjected to disparate treatment and a hostile work environment based on her sex and reprisal. Accordingly, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision. The complaint is REMANDED for compliance with this decision and the Order below.

⁴ We note that Complainant stated that even that change in her schedule would still not permit her to go to a medical appointment and report to work on time and as such, we do not find that that the offered schedule change would have been an effective accommodation. See ROI 2, Ex. 9 at 7.

ORDER (D0617)

The Agency is ordered to take the following remedial actions:

1. Within 60 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine the amount of compensatory damages to which Complainant is entitled. 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 30 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.
2. Within 90 calendar days from the date this decision is issued, the Agency shall provide six hours of interactive or in-person training to the responsible management officials identified in this decision, including the SSA, ASAC, and the SAC, on the Rehabilitation Act and the Agency's obligation to provide a reasonable accommodation and engage in the interactive process. The Agency shall provide proof of the officials' attendance, as well as the contents of the in-person training provided. The Agency may contact our Training and Outreach Division for Assistance in obtaining the necessary training via <https://www.eeoc.gov/federal-sector/federal-training-outreach>.
3. Within 120 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials identified in this decision, including the ASAC and the SAC. 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).
4. Within thirty (30) days of the date this decision is issued, the Agency shall post a notice 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 shall include supporting documentation verifying that the corrective actions have been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its main office in Miami and the Miami International Airport 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 21, 2022
Date