



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

[REDACTED]
Minh W.,¹
Complainant,

v.

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

Appeal No. 2021004892

Agency No. 200P-0CFM-2020104491

DECISION

On September 5, 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 August 6, 2021, final decision 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Director of Regional Planning Support, GS-15, at the Agency's Office of Construction and Facilities Management (CFM), Western Region facility in Vallejo, California.

On September 18, 2020, Complainant filed an EEO complaint alleging that the Agency subjected him to unlawful retaliation for engaging in prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

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.

1. The Agency subjected him to a hostile work environment when:
 - a. On May 15, 2020, the Director of Facilities Operations (FO Director) accused Complainant of threatening her;
 - b. On or about May 2020, the Director Western Regional Office, Office of Design and Construction (ODC) (Regional Director) complained to Complainant's supervisor after Complainant contacted HR about a possible candidate for positions advertised in the Agency's Quick Start Home Page;
 - c. On July 6 and 7, 2020, the Regional Director attempted to disinvite Complainant from bi-weekly program review calls and, during the call, accused him of not identifying himself and cutting him off as he raised questions;
 - d. On July 8, 2020, during a weekly meeting, the Regional Director referred to Complainant as "others" and refuted an example Complainant provided;
 - e. On July 22, 2020, the Regional Director accused Complainant of not informing her about an issue concerning a West LA project before "dropping the bomb;"
 - f. On July 27, 2020, the Regional Director directed the U.S. Army Corps of Engineers to not include Complainant in communications; and
 - g. On an unspecified date, the Regional Director contradicted Complainant during a meeting concerning a \$40 million budget request.²
2. On May 21, 2020, Complainant became aware that his non-selection for the position of Permanent West Region Director was the result of a conflict of interest.³

Complainant stated that his previous EEO activity consisted of speaking up about potential EEO violations on behalf of minorities, opposing discrimination, conducting an EEO fact-finding, serving as a witness in an EEO complaint, and opposing other prohibited practices. He stated

² We note that the Agency's decision listing the claims erroneously identified the FO Director as the responsible management official in claims 1(f) and (g).

³ The complaint also included three additional allegations, specifically a violation of Merit System principles in arbitrarily rotating personnel to cover vacancies, preventing two qualified candidates from filling positions, and an internal fact-finding investigation, which the Agency dismissed for failure to state a claim. See Report of Investigation (ROI) at 55-56.

that as a result of his EEO activity, he has been subjected to a hostile work environment by the FO Director and the Regional Director.

Specifically, on May 15, 2020, Complainant asserted that on a phone call with the FO Director, he expressed concerns regarding the treatment of one of the Project Executives stating it could potentially be viewed as an EEO violation, and the FO Director responded by asking if he was threatening her and saying, "If you are 'saying this' and 'mentioning that' to someone, that would be inappropriate." See Report of Investigation (ROI) at 115. He stated that afterwards, he believed the FO Director consulted with her supervisor, the Regional Director, and filed a Report of Contact alleging threatening behavior. See id. As a result of the Report of Contact, Complainant was subjected to a fact-finding investigation. See ROI at 104-105.

Afterwards, Complainant asserted that he was subjected to various incidents of harassment, beginning with the Regional Director accusing him of improperly interfering in personnel hiring practices when he inquired about the application process for a vacancy announcement which he knew one of his subordinates was interested in. See ROI at 115-16. He stated that this response interfered with his engaging in recruitments, which is one of the performance elements of his job as a supervisor. See id. He further stated that since then, the Regional Director has subjected him to harassment by excluding him from bi-weekly program review calls which interferes with his ability to perform his work, belittling him in meetings, and restricting his communications and access. See ROI at 116. He explained that with respect to incident 1(e), the previous day, July 21, he had attended a routine conference call of the West LA Project Delivery Team who are working on a \$1 billion New Critical Care Center and was informed of a delay in resolving a design comment that could drive an expensive redesign or construction delay. See ROI at 118. The next day on July 22, at the weekly staff call, he reported what had happened since timely resolution may require some senior-level engagement with both the CFM and ODC but the Regional Director responded angrily, accusing him of "dropping the bomb." See ROI at 118. He stated that the Regional Director has also instructed the US Army Corps of Engineers not to include him in any communications in an attempt to isolate and exclude him. See ROI at 119-20, 122.

With respect to the single discrete incident in claim 2, Complainant asserted that he applied for the position of Permanent West Region Director on or about June 20, 2019 and was interviewed for the position on September 13, 2019. See ROI at 140, 143. He stated that he learned that the Regional Director was selected for the position although he stated that he has 10 years more experience than she does in the Agency and about 20 years more experience in healthcare construction. See ROI at 150-51. He asserts that he later came to believe the interview panel and the selection process were unfair, violating Merit Systems principles, because of his past history with the interview panelists and their knowledge of his prior protected activity.⁴ See ROI at 144-46.

⁴ As an example, Complainant explained that in 2018, when he initially raised and supported harassment allegations against the Regional Director made by members of the US Army Corps of Engineers to one of the interview panelists, the Veterans Integrated Service Network (VISN)

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 decision found that the Agency articulated a legitimate, nondiscriminatory reason for the non-selection because Complainant did not interview as well as the Regional Director, who was the Selectee, specifically noting that when asked, Complainant stated that he was not sure that he was the best candidate for the position. The decision further found that Complainant did not establish that the Agency's reason was a pretext for discrimination. The decision found that Complainant also failed to establish that any of the alleged incidents of harassment were due to his protected activity and therefore that Complainant failed to establish that he was subjected to a hostile work environment. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant appealed the Agency's decision, arguing first that the Agency incorrectly framed his claims and wrongly dismissed some of his claims. On the merits, Complainant focuses largely on the non-selection, arguing that the selection process was unfair by giving so much weight to the interview.

In response, the Agency limits its argument to the non-selection, arguing that Complainant's challenges to the fairness of the selection process have no merit and that Complainant has failed to establish any discriminatory animus for the non-selection.

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").

Deputy Network Director (VISN Director), who was the Regional Director's supervisor at the time, he later found out that the VISN Director never followed up with one of the witnesses Complainant named. See ROI at 155. Complainant believed that those harassment allegations against the Regional Director were instead simply condoned as just being "her way," without adequate investigation. See ROI at 155.

Dismissal for Failure to State a Claim

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an Agency shall dismiss a complaint that fails to state a claim. An Agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994).

The Agency dismissed for failure to state a claim three allegations, specifically, (1) that management arbitrarily rotated Project Management personnel to cover vacancies in violation of Merit Systems principles, (2) that management prevented two qualified candidates from filling positions and then did not rescind a directive that she was ordered to rescind by leadership; and finally (3) that Complainant was the subject of a fact-finding investigation.

We find that the Agency correctly dismissed the first two allegations, the arbitrary rotation of Project Management personnel to cover vacancies and the prevention of two qualified candidates to fill positions as Complainant himself was not aggrieved by either of the allegations and Complainant does not have standing to pursue grievances on behalf of other unnamed employees. See Complainant v. Dep't of Homeland Sec'y, EEOC Appeal No. 0120143160 (Feb. 11, 2015). Moreover, to the extent Complainant alleged a violation of Merit System principles, we note that such violations, absent allegations of discrimination, are not within the jurisdiction of the Commission and do not state a claim under the EEO statutes. See Aida E. v. U.S. Postal Serv., EEOC Appeal No. 0120171543 (July 11, 2017).

We find that the Agency's dismissal of the third claim, that Complainant was the subject of a fact-finding investigation, was improperly dismissed as Complainant alleged reprisal as the basis for his claims. The Commission has a policy of considering reprisal claims with a broad view of coverage. See Complainant v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 at II.B (Aug. 25, 2016). We find that being subject to a fact-finding investigation is an action that is reasonably likely to deter Complainant or others from engaging in protected EEO activity and that it should have been

considered as part of Complainant's overall harassment claim.⁵ We will therefore include the fact-finding investigation as one of the incidents of Complainant's harassment claim.

Disparate Treatment

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This established order of analysis, in which the first step normally consists of determining the existence of a prima facie case, need not be followed where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue. Since the instant complaint involves an allegation of disparate treatment and since the agency articulates a legitimate nondiscriminatory reason for not selecting complainant, it is Complainant's burden to demonstrate by a preponderance of the evidence that the agency's non-selection was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

We find that the Agency articulated legitimate, nondiscriminatory reasons for the non-selection, i.e., that Complainant did not interview as well as the Regional Director who was the Selectee. The Associate Executive Director for Operations (Executive Director), who was the Selecting Official, stated that the Regional Director was the consensus candidate selected by the interview panel. See ROI at 462-63. He further explained that the Regional Director as the Selectee had experience at both the VISN level and on major projects and brought a wealth of experience to the position. See ROI at 463. He also stated that in the interview, Complainant stated that he was not sure that he would be the best candidate for the position. See ROI at 463. The VISN Director, who also served on the interview panel, stated that to his recollection, the Regional Director was selected because her interview answers were thorough and thoughtful, providing solid examples of her experience with large projects and as a contracting officer for FEMA, and demonstrating an understanding of the skills and experience relevant to the position. See ROI at 473-74. The record also contains the contemporaneous scoring sheet of the scores given to the candidates, including Complainant and the Regional Director, based on their resumes and their interviews, which indicate that Complainant received a total score of 155 while the Regional Director received a total score of 160. See ROI at 787.

We find that Complainant did not establish that the Agency's reasons were a pretext for discrimination. To the extent Complainant challenges the Agency's reliance on the interview process, rather than on his work experience, we note that this is not evidence of a discriminatory motive.⁶ Moreover, the Commission has long held that a person's length of experience does not

⁵ We note that the fact-finding investigation may have been due to the incident listed as claim 1(a) where the FO Director accused Complainant of threatening her and therefore, we find that it was adequately investigated.

⁶ While we acknowledge Complainant's explanation for his stating in the interview that he was not certain he was the best candidate for the position because he did not want to brag and

necessarily mean he is better qualified. See Macready v. Dep't of Justice, EEOC Appeal No. 01991433 (Apr. 4, 2002). We have consistently recognized that an agency has broad discretion to carry out personnel decisions and should not be second-guessed by the reviewing authority absent evidence of unlawful motivation. See Burdine, 450 U.S. at 259; Vanek v. Dep't of the Treasury, EEOC Request No. 05940906 (January 16, 1997). Furthermore, most of Complainant's arguments largely center around his assertions of the impropriety of having the Selecting Official serve on the interview panel as an alleged violation of merit systems principles or of internal agency policies on promotions, which are not within the jurisdiction of the Commission and are irrelevant to whether or not a violation of any EEO statutes occurred. See Anglea R. v. Dep't of Justice, EEOC Appeal No. 2020005476 (Feb. 14, 2022). The question is not whether the Agency made the best, or even a sound, business decision; it is whether the real reason is discrimination. Pretext inquiry is not concerned with bad judgment, impeccability, dislike, or a mistake. Marvin W. v. Dep't of Homeland Sec'y, EEOC Appeal No. 0120170438 (Dec. 12, 2018).

Retaliatory Harassment

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 Northern 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 Northern 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.

intended to convey a proper respect for the responsibilities and challenges of the position, the fact that the interview panelists did not view his response in that light is irrelevant to the issue of pretext. See ROI at 148.

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. den., 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).

In this case, Complainant alleges that he has been subjected to a hostile work environment primarily by the FO Director and the Regional Director in reprisal for his prior protected activity in supporting other people’s EEO activity and in raising a possible perceived EEO issue with the FO Director. He stated that the FO Director filed a Report of Contact accusing him of threatening her, which then resulted in a fact-finding investigation about him, after he expressed concerns about a possible EEO violation. See ROI at 114-115. He further states that the Regional Director has generally subjected him to hostility, excluding him from biweekly program review calls, belittling him in meetings, and restricting his communications and access. See ROI at 116.

We find that the record provides ample support for Complainant’s assertions that he has been subjected to hostile treatment by the FO Director and the Regional Director. Complainant’s supervisor stated that he was contacted by the Regional Director with an unjustified complaint about Complainant allegedly interfering with hiring practices, explaining that the Regional Director appeared to be trying to cause trouble for Complainant by mischaracterizing Complainant’s simple efforts at communication about a lateral career move that had previously been planned when Complainant was following “essential leadership best practices.” See ROI at 322-23. He further corroborated Complainant’s assertions of harassment, stating that to his knowledge, the Regional Director has “stultif[ied] [Complainant’s] attempt to ensure best informed deliberations and decisions,” and marginalized his participation. See ROI at 323-25. He stated that both the FO Director and the Regional Director have subjected Complainant to “unnecessary and inappropriate exclusionary practice. See ROI at 324. The Acting Associate Executive Director of Operations (Operations Director) stated that in staff meetings, the Regional Director never referred to Complainant by name and contradicted or refuted information provided by Complainant concerning information from one of the western region’s projects. See ROI at 357-58. He further stated that, contrary to the Regional Director’s accusation that Complainant “dropp[ed] the bomb” in raising a potential issue with the West LA project, he believed Complainant acted properly because it was an issue that the ODC regional leadership should have been informed of and given an opportunity to participate in the discussion. See ROI at 358-59. He stated that there was constant friction between the Regional Director and Complainant and that the Regional Director tried to exclude Complainant at every opportunity, even where Complainant had directly or indirectly been involved on projects that impacted her current decisions. See ROI at 361. One of the Program Managers in the West

Region stated that the Regional Director's instruction to exclude Complainant from the monthly US Army Corps of Engineers meetings and the bi-weekly program review calls was viewed as inappropriate because as the Director of Planning, Complainant's knowledge of programming, planning, and related Congressional budget cases would be useful in meetings. See ROI at 431. The Director of Project Delivery further corroborated Complainant's assertions that the FO Director and the Regional Director treated Complainant unprofessionally, stating that the Regional Director "cut [Complainant] off on several occasions in front of the entire group when he attempted to provide information that would have been helpful to our project execution." See ROI at 446-47. He further stated that when Complainant brought up the news about the West LA project in order to assist with timely information, the Regional Director belittled Complainant in front of the nationwide group in a way that he asserted was "uncalled for." See ROI at 448.

We find the evidence in the record establishes a claim of retaliatory harassment based on these events. To begin with, we find that the FO Director's actions in filing a Report of Contact about Complainant which led to Complainant being the subject of a fact-finding investigation could dissuade a reasonable person from engaging in protected activity. We further find that the Regional Director's behavior in excluding Complainant from meetings and generally subjecting him to belittling and hostile behavior in staff meetings would also dissuade a reasonable person from engaging in protected activity.⁷ In addition, we find that Complainant has established a nexus between the 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). We note that, although the Regional Director asserted that she was not aware of Complainant's prior EEO activity, she was not asked about her knowledge of Complainant's involvement in support of other people's EEO activity. See ROI at 365. In addition, we do not find her assertion of ignorance to be credible because Complainant stated that after the incident where the FO Director filed a Report of Contact accusing him of threatening her, he participated in an Alternate Dispute Resolution (ADR) meeting in which both the FO Director and the Regional Director were involved. See ROI at 105. The record also contains numerous emails between various Agency employees referring to Complainant's involvement as a supporting witness in EEO complaints against the Regional Director. We therefore find that the preponderance of the evidence indicates that the Regional Director was aware of Complainant's prior EEO activity, beginning with the incident which resulted in the FO Director filing a Report of Contact about Complainant. Because the evidence indicates that the FO Director and the Regional Director subjected Complainant to hostile

⁷ We note that Complainant may be entitled to compensatory damages to the extent that he is able to show a compensable harm as a result of the retaliatory incidents. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009) citing Binseel v. Dep't of the Army, EEOC Request No. 05970584 (Oct. 8, 1998) (a finding of retaliation on its face does not automatically entitle a complainant to a damages award).

treatment which could dissuade a reasonable person from engaging in protected activity, we conclude that the Agency subjected Complainant to unlawful retaliation as alleged.

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). 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 FO Director and the Regional Director’s retaliatory harassment. To begin with, we note that there had previously been EEO complaints made against the Regional Director by more than one employee, including one of the Program Managers, who stated that she was never contacted about her complaint about the Regional Director’s behavior. See ROI at 426. We further note that the Regional Director was selected for the position of Permanent West Region Director after these complaints against her were made.⁸ See ROI at 419, 426. The Operations Director stated that he was aware of the friction between the Regional Director and Complainant and witnessed some of the Regional Director’s conduct and in response, he “attempted ... to convince them that direct counsel between the two of them was a benefit to the program,” but took no other action. See ROI at 361. Complainant stated that after the incident in claim 1(a) and the subsequent Report of Contact, he participated in an ADR meeting which included his supervisor, the FO Director, and the Regional Director and at the end of the meeting, the CFM Deputy Executive Director stated that there should be additional meetings between Complainant and the Regional Director but that no additional meetings took place. See ROI at 105. Complainant further stated that after the ADR meeting, an Action Plan was adopted and agreed to but not properly implemented and he further asserted that the FO Director and the Regional Director both resisted the Action Plan. See ROI at 106. The evidence does not indicate that the Agency took any additional action to ensure that the FO Director and the Regional Director complied with the Action Plan or

⁸ Although not directly related to the current complaint, we are troubled by the Agency’s apparent indifference to the complaints made concerning the Regional Director’s conduct towards more than one employee.

otherwise refrained from harassing Complainant. We therefore 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 his claim of disparate treatment in claim 2. 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 (C0618)

The Agency is ordered to take the following remedial actions:

1. Within sixty (60) calendar days of the date this decision is issued, the Agency shall complete a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant in a final decision 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 ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of interactive EEO training to the FO Director and the Regional Director in the Agency's Office of Construction and Facilities Management, Western Region facility in Vallejo, California. The required training shall address management's responsibilities with regard to eliminating discrimination and reprisal in the workplace. 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 one hundred and twenty (120) calendar days of the date this decision is issued, the Agency shall consider taking disciplinary action against the FO Director and the Regional Director. The Commission does not consider training to be a disciplinary action. 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.

4. 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).

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of Construction and Facilities Management, Western Region facility 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 (H0610)

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

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.

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

January 31, 2023
Date