



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]

Adina P.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021004593

Agency No. 200I-0544-2020106664

**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 July 27, 2021 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision, in part.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse Fecal Immunochemical Testing (FIT)/Colorectal Cancer Screening (CRCS) Coordinator at the Veterans Affairs Health Care System (VAHCS) located in Columbia, South Carolina.

On January 5, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (carpal tunnel surgery, Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome and undiagnosed cervical/lumbar impairment) and in reprisal for prior protected EEO activity when: (1) on September 14, 2020, Complainant's supervisor (S1) informed Complainant she would need to find another position where Cardiopulmonary Resuscitation (CPR) is not required if Complainant was not able to secure a waiver for a Basic Life Support (BLS) certificate; (2) since September 15,

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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.

2020, Complainant has been required to apply for a BLS temporary waiver every 60 days; (3) since October 14, 2020, management has denied and failed to accommodate Complainant to telework full-time for three months; and (4) since January 4, 2021, management has denied and failed to accommodate Complainant with a permanent BLS waiver and an additional 60 days of full-time telework.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). In the decision, the Agency concluded that Complainant failed to prove that she was subjected to discrimination or reprisal as alleged. The instant appeal followed.

### FACTUAL BACKGROUND

Complainant experiences complications from carpal tunnel surgery, Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome and an undiagnosed cervical and lumbar impairment causing neuropathic symptoms in her arms, back, right hip and right leg. She is undergoing neurological assessments to formally diagnose the cervical and lumbar impairment which causes difficulties related to ambulation, driving and incontinence.

Complainant has significant sensory loss in her right thumb with an impairment rating of 33 percent in the digit; sensory loss of the index and long finger resulting in a 25 percent permanent partial impairment of the index finger and 20 percent of the long finger. She experiences residual pain in the right hand that is significant and sensory deficiency in the radial distribution of the right hand with an impairment rating of 10 percent. The ratings when combined are a permanent partial impairment of 30% of her right hand. She has symptoms in the ulnar nerve distribution bilaterally, with no significant functional impairment present and a permanent partial impairment of three percent of her left foot as a result of deficiency of the left sural nerve. The right hand/wrist disability originated in March 2004 resulting from carpal tunnel and subsequent surgery. The cervical and lumbar neurological issues manifested in 2020 and Complainant is awaiting a formal diagnosis. Complainant asserted that both conditions are permanent.

As the FIT/CRCS Coordinator, Complainant's work is performed in an office setting with no direct contact with patients. She case manages veterans through their chart with indirect contact by telephone, email, and written correspondence. However, Complainant's functional statement states she can be responsible for direct patient care and as such, is required to perform manual BLS/CPR certification quarterly to maintain competency. This functional statement was created in 2012, when the FIT Coordinator position was identified as a critical fill based on the findings of an Office of Inspector General inquiry into the VAHCS. Since then, it has evolved into what it is now the CRCS Coordinator with no direct patient care. Complainant provides a more detailed description of her job duties as follows:

My job as the FIT/CRCS Coordinator is to receive the critical call from Micro Lab of the Veteran being identified as having microscopic blood in stool, notifying PCP of the lab result by placing a note on chart, then following up with

the Veteran to ensure that a GI consult was ordered by the PCP, GI consult is then triaged by GI provider and scheduled by a scheduling MSA and then the Veteran is completed for a colonoscopy. Once the procedure is completed, I ensure that a result letter is mailed to the Veteran by the GI provider and that the CRCS reminder is reset for when the Veteran is due for recall colonoscopy. I basically case manage the Veteran from the time that they are positive with blood in stool until they have had a completed procedure and the CRCS reminder is reset for 6 months, 3 years, 5 years or 10 years for a follow up colonoscopy. I annotate information in the Veteran's chart. Occasionally, I may need to speak with the Veteran on the phone to provide some additional education of the importance of colorectal cancer screening. I work in an office setting in the administration building and have no direct patient contact with any Veterans. My position is all case managing the Veteran through their chart. My job duties are purely administrative in nature and only require indirect patient contact.

As my functional statement incorrectly states I can be responsible for direct patient care. I am also required to perform BLS/CPR certification every 2 years to maintain competency.

Complainant asserts that she can perform the essential functions of her position with accommodation. Her current physical restrictions include limited exposure to extreme heat or cold, fine motor discrimination with right hand, and no repetitive pushing, pulling, and/or gripping with right hand greater than five pounds, limited driving, and ambulation. Complainant testified without dispute:

I cannot perform chest compressions at the depth and the repetitive number of cycles that others can on the new hard plastic/vinyl mannequin as and there is a lot of resistance, so I am not able to obtain my BLS certification. If provided the accommodation to take the alternative BLS certification course approved by the VA, I would be able to complete this job duty. I can perform all other job duties remotely.

Complainant's health care provider (P1) also recommended telework for up to 90 days while acquiring a formal diagnosis for her cervical/lumbar neurological condition. The hand/wrist-related restrictions are permanent, but the restrictions related to her neurological condition (walking and driving) were described as "currently only temporary awaiting the neurological assessment." P1 also stated: "[Complainant] cannot perform chest compressions at the depth and repetitive number of cycles required on the BLS mannequin without acting against the orders of her health care provider, so she is unable to renew her BLS certification. With accommodation, [Complainant] would be able to complete this position function. She can perform all other essential position functions remotely."

*BLS Certification Waiver*

On September 14, 2020, Complainant requested a 60-day waiver for the quarterly manual skills check portion of the Resuscitation Quality Improvement Program (RQI) training<sup>2</sup> through S1 and her second-line supervisor (S2) with medical documentation from her hand surgeon outlining her permanent disability and limitations. Later that day, she received an email from S2, directing her to speak with the Local Reasonable Accommodation Coordinator (LRAC) to file a reasonable accommodation request to obtain a permanent waiver. Complainant asserted that she was told by S2 that if she opted for a permanent waiver, then LRAC would need to identify a position where RQI was not required, likely something other than a nursing position. Although S2 denied making this statement, she conceded that was her belief at the time. We note that documentary evidence in the record establishes that S2 believed that Complainant would need a reassignment if she could not perform the BLS requirements.

Complainant contended that if allowed to complete the alternate RQI certification course, she would have been able to renew her BLS certification without acting against her health care provider's orders as well as recommended accommodations and continue in her current position. The alternate RQI certification course, known as the BLS Advisor course, was a new available course beginning in August 2020.

Complainant testified that on September 14, 2020, she inquired with her supervisor about options for employees that have limitations or disabilities about the BLS and was told there were none. Complainant explained to S1 that she had talked to the RQI official in Orlando who stated that there was a coach option of BLS for staff with limitations or disabilities and asked S1 if that was an option since it removed the physical component of compressions. S1 told Complainant that was not an option.

Complainant was encouraged to seek temporary BLS waivers to give her time to go through the reasonable accommodation process. The Agency granted two temporary BLS waiver requests for September 15, 2020 through November 15, 2020; and November 19, 2020 through January 19, 2021. The Agency's policy was to limit temporary waivers to two.

Complainant initiated a request for a permanent BLS waiver in late October 2020 through LRAC. On September 19, 2020, Complainant received an email from the VAHCS Director (D1) stating:

All clinical staff that are tied into patient care need to do ongoing CPR training/competency to ensure they are prepared to attend an individual in

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<sup>2</sup> The RQI is the innovative resuscitation training solution from the American Heart Association (AHA) that delivers quarterly training to support mastery of high-quality CPR skills. RQI gives healthcare providers the confidence and competency to respond with life-saving patient care. The RQI enterprise-wide resuscitation training program integrates learning management system functionality with the eSimulation patient cases, learning modules and mobile simulation training stations to provide a complete training system.

cardiac arrest as needed. Communication is always critical in these situations. Keep me posted. I am here to help you as needed.

On September 21, 2020, LRAC sent Complainant paperwork to begin the process of seeking a permanent BLS waiver. Complainant immediately responded to LRAC stating, in part:

I am not sure that I want to proceed this route as if I request a permanent waiver then I can no longer work as a nurse for the VA is what I have been informed. I cannot afford to lose my employment at this point and cannot afford to be demoted or stepped down to another position if there may be one available and therefore, I just cannot take the risk of completing this at this time. [sic]

On November 6, 2020, Complainant notified LRAC via email that she did not wish to proceed with this reasonable accommodation request. However, on November 10, 2020, Complainant responded to an earlier email that day from LRAC in which LRAC sought confirmation from Complainant that she no longer wanted to pursue a permanent waiver as follows:

[LRAC], This is not the case, as I completed the 2nd temporary waiver to be processed during this time. I am undergoing medical diagnostic tests for a definitive diagnosis. I am still open to complete the permanent waiver. I do have an appointment being scheduled for Mediation for EEO regarding this BLS/CPR, so I need to await guidance from my legal representative as well as the Mediation/EEO. Please do not proceed with a formal closure at this time as we are awaiting for Mediation/Resolution from EEO. I would like to proceed with the 2nd temporary waiver which would give myself an additional 60 days so that should be more than enough time to determine if we will be proceeding with the Permanent Waiver at that time.

In addition, the record contains subsequent medical documentation dated November 24, 2020, and signed by Complainant's health care practitioner on November 25, 2020, stating that Complainant was seeking an "alternative BLS advisor" course.

Complainant testified that S2 told her that she would not be permitted to take an alternative BLS certification course as a reasonable accommodation, and she would not be able to acquire a permanent BLS waiver and remain in her position. Complainant, however, also testified that LRAC told her that Complainant needed to do what she felt she needed to do and that she had submitted sufficient documentation to support her requests so that it could move through the process to be reviewed. However, Complainant affirmed without dispute that LRAC told her that the option of BLS coach was not utilized at their local facility. Complainant further asserted that LRAC explained to her why a permanent BLS waiver was not possible unless Complainant left her current position.

The record shows that Complainant spoke with D1 on September 14, 2020, and again, on or about February 6, 2021. D1 informed Complainant in both conversations that in her position she was required to be BLS-certified.

D1 also told Complainant that if she was not BLS-certified, she would need to look for another position. Complainant asserted that she ultimately did not continue seeking a permanent BLS waiver because she did not want a reassignment.

According to the Veterans Health Administration (VHA) National Program Director (DREI) the BLS Advisor course was a new AHA offering which became available late summer of 2020 and launched Agency-wide on October 1, 2020. DREI further explains:

The BLS Advisor validates that an employee can “coach” another team member on the immediate physical skills and steps required in a medical emergency until help arrives. I am not certain of the specifics regarding the potential reassignment of this employee. In the national directive, for employees to have a temporary or permanent waiver, there is a requirement to involve and gain concurrence from the ADPCS (Senior Nurse), Chief of Staff and at times the Director. This is to ensure that a work space has the right type and number of employees who can respond to a medical emergency and perform the necessary physical functions as required by their position/function. It is at the discretion of the local level to balance if they can support an employee unable to “perform” these skills and access to the immediate delivery of life saving skills. It is also up to the local level how they process their permanent (and temporary) waivers. Some facilities require employees to go through the reasonable accommodation process. If an employee reports a physical (or cognitive) disability that prevents them from performing specific tasks, they should be referred to the LRAC to determine next steps. Any clinical employee who is credentialed or privileged or provides direct care to a patient in an inpatient, outpatient or home based setting are required at a minimum to have Basic Life Support. This is often seen as a condition of employment. There are facilities who require employees needing a permanent waiver to be in a non-direct patient care setting.

The record also contains an email dated October 5, 2020, from a Senior EEO Attorney Advisor (SAA) from the Agency’s General Counsel’s office to DREI in response to DREI’s request for legal guidance with respect to implementing the BLS Advisor course as a reasonable accommodation. Specifically, SAA stated in part:

A BLS certification waiver is almost always granted to an employee because the employee has some kind of physical impairment/limitation that prevents him/her from performing the physical acts required to provide effective BLS. Since obtaining BLS certification using the new AHA method does not require the employee to perform any acts of physical exertion (or any physical actions at all for that matter), this method of BLS certification would be characterized as an alternative reasonable accommodation that would allow the employee to become BLS certified while avoiding the need for the employee to violate any functional limitations he/she might have.

S1, S2, LRAC and D1 all deny knowledge of the BLS Advisor course during the relevant timeframe. However, S1 testified that with respect to any permanent BLS waiver request that she referred Complainant to LRAC. S1 and S2 further testified that they did not have the authority to grant a permanent BLS waiver; only D1 had that authority. Complainant was not aware of anyone at the facility approved for the BLS Advisor course during the relevant timeframe.

D1 asserted that he remembered Complainant calling him on his phone on or about February 6, 2021, letting him know that she was concerned that she could not do CPR. D1 stated that he told Complainant that she should continue to work through her leadership, and that the team would assist her in providing training and coaching. D1 also asserted that he asked her if she had tried to do the live CPR session to demonstrate her competency. According to D1, Complainant responded that she could try to do the testing on the mannequin. D1 asserted that he then recommended that she arrange to attempt to complete the competency the following day if her time permitted. D1 asserted that Complainant responded that she would go down this path and thanked him for her time. D1 stated that he learned within the next 48 hours that Complainant passed the training on February 8, 2021, and successfully completed her RQI certification for the quarter.

The record shows that between October 1, 2020, and May 21, 2021, 2,484 people within the VHA had been assigned the BLS Advisor course. According to the Project Manager (PM) Resuscitation Education and Innovation, Simulation, Learning, Evaluation, Assessment and Research Network, Office of Healthcare Innovation and Learning, Office of Discovery, Education and Affiliate Networks, the BLS Advisor course was automatically assigned to users that are approved for a permanent waiver and was a requirement for the permanent waiver requirements in the VA Talent Management System (TMS).

#### *Request to Telework*

On October 14, 2020, Complainant submitted medical documentation from her health care provider (P2). P2 advised that Complainant's impairment was chronic pain of her cervical spine, upper shoulders and arms, radiating pain to lumbar region, right hip and right leg, experiencing generalized weakness in both arms, back and leg. P2 also stated that Complainant's pain, weakness and neuropathy were interfering with her ability to safely drive her car, walk, stand and sit for prolonged periods of time. P2 further stated that currently, Complainant "can only walk about 20 feet without becoming symptomatic. P2 also described Complainant as a fall risk. P2 recommended 90 days of full time telework "due to [Complainant's] inability to drive an automobile safely." P2 also stated that there was no reason why Complainant could not continue to perform her duties from home for the next three months. P2 also advised that Complainant was unable to perform CPR simulation for testing purposes.<sup>3</sup>

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<sup>3</sup> Complainant was permitted full-time telework through October 14, 2020, pursuant to a COVID telework agreement.

The October 24, 2020 medical documentation and request for full-time telework (and permanent BLS waiver) was provided to LRAC. On November 5, 2020, S1 denied Complainant's request to telework full-time. However, S1 approved telework three days per week as an alternative accommodation. On December 25, 2020, the Acting VAHCS Director (AMCD) granted Complainant's full-time telework request, effective January 4, 2021. However, he reduced the duration from 90 days to 30 days. On February 4, 2021, Complainant requested to extend the 30-day approval through February 17, 2021. S1 and S2 denied Complainant's request to extend the full-time telework a second time citing the need for nursing staff on site to address the COVID-19 increased patient workload. S2 asserted that there was a need to have everyone ready to step in for care management. S2 advised Complainant that there were no other options for accommodations that would allow Complainant to perform the essential functions of her position. Complainant notified S2 on February 10, 2021, that she was not accepting the alternative accommodation offered and submitted a request for reconsideration. Complainant also asserted without dispute that she has never conducted any direct patient care during the entirety of her time in the FIT/CRCS position including during the COVID-19 crisis.

Complainant noted that when she asked S1 for clarity as to why she was approved only three days of telework in November 2020 and had to report to the facility two days a week to sit in front of a computer in the Administration Building to audit charts despite her neurosurgeon's driving and ambulation restrictions, she was told the offer was "take it or leave it." Complainant asserted that S1 also told her that she has no way of monitoring her daily work when she works from home. Complainant refuted S1's argument stating she can monitor her work remotely which is exactly what had been done when she was permitted to telework full time prior to October 14, 2020. Additionally, Complainant contended after she requested telework as a reasonable accommodation, S1 began to express concerns, without basis, that Complainant was not completing her work and mentioned she was unable to monitor the work she was completing. Complainant asserted that prior to notifying S1 of her conditions and requesting a reasonable accommodation, S1 made no attempts to micromanage Complainant or her work. Furthermore, Complainant contended she was subjected to a hostile work environment when her reasonable accommodation request was denied and as a result, S1 began to micromanage her, she was made to feel her medical conditions did not matter, and she was not good enough to be a nurse if she had a disability.

S2 testified that all supervisors were responsible for managing their employees which included workload and performance. As part of any telework agreement, there was a requirement for the supervisor to monitor work. S2 further stated that she has never questioned Complainant's ability to complete her work. S2 also asserted that she has never micromanaged Complainant as she continues to work independently and comes to her when she needs assistance.



### 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”).

#### *Hostile Work Environment*

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, or religion is unlawful, if it is sufficiently severe or pervasive. To establish a claim of harassment a complainant must show that: (1) he or she belongs to a statutorily protected class; (2) he or she was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been “sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Here, we find that the totality of the alleged conduct was not sufficiently severe or pervasive to establish a hostile work environment. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, the Commission finds that Complainant failed to show that the Agency's actions were based on discriminatory or retaliatory animus. The evidentiary record reflects that the alleged incidents were more likely the result of routine supervision, managerial discipline, and general workplace disputes and tribulations. We note that the antidiscrimination statutes are not civility codes. Rather, they forbid “only behavior so objectively offensive as to alter the conditions of the victim's employment.” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998). Accordingly, we find that Complainant has not shown that she was subjected to a hostile work environment as alleged.

#### *Denial of Reasonable Accommodation*

Under the Commission's regulations, an Agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9.

A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, Question 1 (Oct. 17, 2002). When an individual's disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. Id. at Question 6.

In the instant case, it is undisputed that Complainant is an individual with a disability protected by the Rehabilitation Act. The record shows that Complainant has a permanent physical impairment that causes her limited use of her hand. With respect to Complainant's undiagnosed cervical and lumbar related impairments the record clearly shows that Complainant had developed such impairments no later than early October 2020 which lasted at least through February 2020 (at least five months). Complainant asserts that this impairment is permanent. Even assuming that Complainant's cervical and lumbar impairments were temporary, they still meet the definition of a disability under the Rehabilitation Act. Temporary impairments that take significantly longer than normal to heal, long-term impairments, or potentially long-term impairments of indefinite duration may be disabilities if they are severe. See Abeijon v. Dep't of Homeland Sec., EEOC Appeal No. 0120080156 (Aug. 8, 2012) (citing Executive Summary: Compliance Manual Section 902, Definition of the Term "Disability").

An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). "Essential functions" are the fundamental duties of a job, that is, the outcomes that must be achieved by someone in that position. Gwendolyn G. v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013). A proper way to determine whether an individual is qualified for a job is to ask whether that person can perform the essential functions of the job *when at work*. See Petitioner, v. Dep't of Homeland Sec., Agency., EEOC Petition No. 0320110053 (July 10, 2014) citing Cottrell v. U.S. Postal Serv., EEOC Appeal No. 07A0004 (Feb. 2, 2001); McCullough v. U.S. Postal Serv., EEOC Request No. 05950539 (Apr. 25, 1996); Ruiz v. U.S. Postal Serv., EEOC Request 05880859 (May 21, 1990). A manager's desired method or history with executing a task is not the applicable standard when considering a request for a reasonable accommodation. Instead, the Agency is required to make modifications or adjustments to the manner in which job duties are customarily performed to enable a qualified individual with a disability to complete the essential functions of the position. 29 C.F.R. § 1630.2(o)(1)(ii).

The Agency asserts that BLS certification and working on site at least two days per week are essential functions of Complainant's position solely because Complainant's functional statement states she can be responsible for direct patient care. Complainant stated that the functional statement is incorrect. In addition, not one management official disputed Complainant's assertion that the duties of her position were entirely administrative and that she has never performed direct patient care in her position, including during the periods of staff-shortages during the COVID-19 pandemic. Moreover, S2 testified that she has never questioned Complainant's ability to complete her work and that Complainant works independently.

Accordingly, we find that Complainant established that she was a qualified individual with a disability within the meaning of the Rehabilitation Act. Accordingly, the Agency was obligated to provide her with an effective reasonable accommodation.

In general, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles" and Question 40. Complainant explicitly requested reasonable accommodations and provided S1, S2, LRAC and D1 with sufficient medical documentation supporting such requests.

To the extent that the Agency asserts that Complainant abandoned her request for a permanent BLS waiver, we find that S2 and D1's actions clearly served to discourage Complainant from continuing to pursue the permanent BLS waiver. See Davoll v. Web, 194 F.3d 1116 (10<sup>th</sup> Cir. 1999) (court applying the "futile gesture" doctrine to Americans with Disability claims and stating that if the individual knows that the accommodation request would be futile, he might not need to initiate the interactive process.); see also Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (Cir. 2013) (employee's request for an accommodation is not required if the "employer has 'foreclosed the interactive process through its policies or explicit actions'"); Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015) (unpublished) ("in limited circumstances," an employee need not request accommodation "if such a request would be futile").

The record establishes that Complainant told responsible management officials that she did not perform direct patient care and needed a permanent BLS waiver and full-time telework due to her disability. Complainant even raised an option of taking an alternative BLS advisor course. In addition, while Complainant's functional statement listed her position as having the potential to perform direct patient care, had the responsible management officials engaged in an active dialogue to determine the actual essential functions of Complainant's position, officials would have learned that Complainant's position was purely administrative and that she did not need to work on site or obtain a BLS certification to perform the essential functions of her position.

Under the facts herein, once management officials became aware that Complainant had a disability, medical restrictions and need for an accommodation, they were obligated to begin the interactive process in determining whether Complainant could perform the essential functions of the position at issue with or without a reasonable accommodation. The record establishes that the Agency failed in this regard. 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. See 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 the 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).

The documentary and testimonial evidence in the record supports the finding that had management officials engaged in the interactive process required under the Rehabilitation Act, they would have learned that Complainant could not do compressions on a plastic mannequin without violating her medical restrictions and was severely limited in driving and ambulation. We also find that during the interactive process, management officials would have quickly learned that Complainant could take the alternative BLS advisor course and perform all her duties from home.

The Agency may choose among reasonable accommodations provided the chosen accommodation is effective. An “effective” accommodation either removes a workplace barrier, thereby providing an individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). The record shows that the Agency’s counteroffer of providing only two temporary BLS waivers, 30 days of full time telework, and only three days per week of telework the rest of the time was not an effective accommodation. Complainant’s health care providers were clear on the accommodations needed based on Complainant’s physical impairments. There is no basis in the record to support the limited telework provided. It appears from the record that the Agency chose an arbitrary amount of time for telework that was neither grounded in ability to perform all essential functions or meeting the disability-related needs of the employee. In addition, the two temporary BLS waivers were ineffective as Complainant’s hand disability was permanent.<sup>4</sup>

An employer does not have to provide a reasonable accommodation that would cause an “undue hardship” to the employer. However, generalized conclusions will not suffice to support a claim of undue hardship. Instead, 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. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice 915.002 (Oct. 17, 2002). The record is devoid of evidence that providing Complainant a reasonable accommodation would cause an undue hardship.

To the extent that management offered Complainant a reassignment as a reasonable accommodation for Complainant’s inability to complete the BLS certification, such offer was not appropriate here.

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<sup>4</sup> We note that the record shows that Complainant was pressured to try to complete the BLS testing by performing compressions on the mannequin and that she did in fact do so in February 2021. While Complainant passed the test, she violated her medical restrictions to do so. Under the Rehabilitation Act, she was not required to violate her medical restrictions.

Reassignment is the reasonable accommodation of last resort and should be considered only when there are no effective accommodations that would enable an employee to perform the essential functions of her current position or accommodating the employee in the current position would cause an undue hardship. See Donna S. v. Dep't of Def., EEOC Appeal No 0120160652 (May 16, 2018); see also 29 C.F.R. Part 1630. App. § 1630.2(n). As the record supports the finding that there were other effective accommodations, reassignment does not apply herein. Accordingly, the Commission finds that the Agency failed to provide Complainant reasonable accommodation in violation of the Rehabilitation Act.

### *Damages*

Where a finding of discrimination involves a failure to provide a reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the complainant with a reasonable accommodation. 42 U.S.C. § 1981a(a)(3); see also Jones v. Dep't of Agric., EEOC Appeal No. 0120080833 (July 18, 2012); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007); see also Buboltz v. Residential Advantages, Inc., 523 F.3d 864 (8th Cir. 2008), (while noting that failure to engage in the interactive process is not actionable unless a reasonable accommodation actually existed, court stated that “[w]hen an employer fails to engage in an interactive process, that is prima facie evidence of bad faith”). We find that S1, S2 and D1 failed to make a good faith effort to investigate the BLS Advisor course or to recognize that Complainant’s actual work duties were 100 percent administrative. Accordingly, we find damages may be awarded herein.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM in part and REVERSE in part the Agency’s final decision as set forth above. We REMAND this matter for further action in accordance with the Order below.

### ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency shall grant Complainant a permanent BLS waiver or permit her to take the alternative BLS advisor course and permit her to work full-time telework should her health care provider indicate that such reasonable accommodation is still needed.
2. The Agency shall restore any leave used by Complainant due to the Agency's failure to provide her with an effective reasonable accommodation as of October 14, 2020, and continuing;

3. The Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford her an opportunity to establish a causal relationship between the Agency's discriminatory action and her pecuniary or nonpecuniary losses, if any. Effective the date that this decision is issued, the Agency shall give Complainant notice of her 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)) in support of her claim for compensatory damages. Complainant shall have 30 days from the date Complainant receives the Agency's notice to submit her compensatory damages evidence. Complainant has a duty to cooperate in determining compensatory damages, including providing evidence/input/documents (including responding to Agency requests for documentation or completing agency forms). Within 60 days of the receipt of this decision, the Agency shall determine the appropriate amount of compensatory damages. Within 60 days of determining the amount of compensatory damages due Complainant, the Agency shall issue a final decision, with appeal rights to the Commission, on the issue of compensatory damages, and payment of any undisputed funds. 29 C.F.R. § 1614.110. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
4. Within ninety (90) calendar days of the date this decision is issued the Agency shall provide eight hours of in-person or interactive training to S1, S2 and D1 regarding their responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations under Section 501 of the Rehabilitation Act, particularly its duties regarding reasonable accommodation.
5. The Agency shall consider taking appropriate disciplinary action against S1, S2, and D1. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. 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 employ, the Agency shall furnish documentation of their departure date(s).
6. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

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

POSTING ORDER (G0617)

The Agency is ordered to post at the Columbia Veterans Affairs Health Care System located in Columbia, South Carolina, 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).

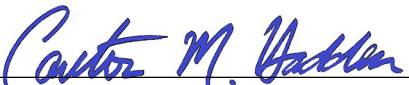
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (T0610)

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

June 26, 2023  
Date