



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Hermila B.,¹
Complainant,

v.

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

Appeal No. 2021004575

Agency No. 200H-0646-2020102927

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 20, 2021 final decision concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Physician Assistant (PA), GS-12, at the Agency's VA Medical Center in Pittsburgh, Pennsylvania.

On June 12, 2020, Complainant filed a formal EEO complaint claiming that the Agency subjected her to a hostile work environment based on disability (post-traumatic stress disorder, anxiety disorder, panic disorder, and depression) and in reprisal for prior protected EEO activity (opposing discrimination)² 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.

² Complainant testified that her protected EEO activity consisted of opposing her supervisor's "discriminatory harassing conduct on or about September 19, 2018," when Complainant alleges that he required her to continue to work on the facility's 11th floor, which was the same floor she

1. From March 19, 2018, until September 19, 2018, while out on medical leave, Complainant's first line supervisor (the PA Supervisor) sent emails "pressuring" Complainant to return to work, instructing her to send an email each day that she was out, and contacted her on several occasions asking her to speak with VA Police about the sexual assault that occurred at work and precipitated her need for medical leave.
2. On or about September 20, 2018, the PA Supervisor asked her to return to the work area where she was assaulted and told her that she would have to apply for reasonable accommodation if she could not do so.
3. On September 20, 2018, the PA Supervisor assigned Complainant to patient care, in violation her medical restrictions requiring that she gradually transition to seeing patients over a two-week period after her return to work.
4. From September 25, 2018, to March 18, 2019, Complainant felt compelled to go back on medical leave due to the PA Supervisor's alleged conduct.
5. On February 3, 2020, Complainant's Supervisor questioned her and other about her daily activities.
6. On February 4, 2020, Complainant's detail assignment supervisor, the Vice President of Primary Care Service, terminated her reasonable accommodation of telework and instructed her to report for work at the Heinz Campus.
7. On February 5, 2020, Complainant's Supervisor instructed Complainant to send daily emails about work performed and her location, and to copy the Vice President of Primary Care Service and the Advanced Medical Support Assistant when she took a leave day.
8. From February 5, 2020, to March 12, 2020, Complainant was denied the reasonable accommodation of telework.
9. Between February 16, 2020, and March 12, 2020, when Complainant was required to report to the Heinz Campus for work, Complainant used 87.5 hours of leave.
10. On March 3, 2020, the PA Supervisor began to check when Complainant arrived at work and whether her Skype green light was on showing she was available.

was sexually assaulted. Complainant further testified that she then requested reasonable accommodation upon her second return to the office in February 2019, and later submitted a written complaint to the Director, Assistant Director, Associate Director, and Chief of Policy on March 3, 2020, alleging that her supervisor had been harassing her.

11. On March 4, 2020, the PA Supervisor harassed and threatened her when he went to see her at her office unannounced, after she had requested that union representation be present when he came to see her.

The evidence developed during Agency's investigation into these claims showed Complainant worked as a Physician Assistant at the Medical Center's University Drive facility and was violently sexually assaulted on March 18, 2018, on the eleventh floor.

Following the March 18, 2018 sexual assault, Complainant asserted the PA Supervisor pressured her to speak with VA police. However, Complainant ultimately went on extended medical leave from March 2018 through September 2018, while her workers' compensation claim was pending. The Agency asserts that the PA Supervisor kept in contact with Complainant to ensure that Complainant's leave was accurately recorded and that her workers' compensation claim was processed correctly. However, Complainant asserted the PA Supervisor repeatedly pressured her to return to work before she was medically released. Complainant further stated that the PA Supervisor required her to call in each day to inform him of her intent to take leave even though the collective bargaining agreement did not require daily notifications for extended absences. Therefore, Complainant asserted that she felt pressured to return to work and did so on September 20, 2018.

Upon her September 20, 2018 return to the office, Complainant was assigned a new office on the second floor. However, Complainant alleged that the PA Supervisor informed her that at some point, she would have to attend meetings on the eleventh floor, which was the same floor where her March 2018 sexual assault occurred. Complainant also asserted that the Agency failed to provide her a reasonable accommodation (gradually transition her to seeing patients over a two-week period) upon her return to the office. As a result of the Agency's alleged failure to accommodate her and with the potential of having to work on the eleventh floor, Complainant stated that she left the office and went on medical leave from September 25, 2018, through March 18, 2019.

Upon Complainant's second return to the office in March 2019, Complainant was given a temporary six-month detail in the Primary Care Service Line located at the Heinz campus. This detail would re-certify every thirty days. Consequently, Complainant's position was no longer at University Drive. During her detail, the Primary Care Service Line Vice President (Primary Care Service VP) oversaw Complainant's work, but the PA Supervisor remained Complainant's immediate supervisor and was responsible for Complainant's timecard and leave.

Complainant claimed the PA Supervisor objected to her detail assignment. The record supports that the Human Resources Manager explained that Complainant's detail assignment was based on medical need and that Complainant was "being detailed to Primary Care until her medical indicates otherwise." However, on March 29, 2019, the Local Reasonable Accommodations Coordinator (LRAC) emailed Complainant and informed her that her light duty assignment to Primary Care Service was scheduled to end on April 16, 2019.

The LRAC then requested that Complainant submit additional documentation regarding her medical restrictions if she wanted to apply for an extension of her light duty assignment.

On April 24, 2019, Complainant submitted a request for reasonable accommodation. Complainant requested the following: (1) to work in an environment other than University Drive; (2) limited face-to-face contact with patients, and (3) to work from home or another place to keep in-person contact with male patients and employees at a minimum. Complainant was provided an interim accommodation while her request was pending. This interim accommodation consisted of continuation of her temporary detailed assignment to Primary Care Service where the Primary Care VP would oversee Complainant's work while the PA Supervisor remained Complainant's immediate supervisor and was responsible for her time and attendance/leave.

While in Primary Care Service, Complainant submitted a request to telework on an ad-hoc basis and Complainant noted on the request that she intended to use telework as a reasonable accommodation for a qualified disability. The record indicates that Complainant's request was granted on June 12, 2019. The request was approved and signed by the Primary Care Service VP, even though he denied having any involvement with Complainant's request or any knowledge that Complainant had a disability, but he did acknowledge that Complainant's position was telework eligible. The PA Supervisor also denied having any knowledge of approval of Complainant's telework request and claimed to not have received a copy of the approved telework agreement until July 16, 2019.

On November 18, 2019, the PA Supervisor sent a letter to Human Resources requesting that Complainant's April 2019 reasonable accommodation request be denied. In the letter, the PA Supervisor reasoned that Complainant's accommodation request would not allow her to perform the essential functions in any Surgical Service Line role as a Physician Assistant because the position requires the employee to see all patients (male and female), all physician assistant roles are only located in the University Drive campus, and daily face-to-face encounters/personal contact are part of the requirements of the position. The PA Supervisor also reasoned that Complainant was currently stationed in a different location (Heinz campus) which made it significantly difficult to adequately supervise her work or to use her for cross coverage for surgical services when additional assistant is needed.

On January 19, 2020, the LRAC emailed Complainant notifying her that there were no available accommodations that would allow her to perform the essential functions of her position. Therefore, the LRAC indicated that a 90-day job search for a fully funded vacant position would begin.

On February 4, 2020, the Primary Care Service VP emailed Complainant and requested that she report in-person to the Heinz location for the "foreseeable future" in order to improve the lines of communication, between him, the PA Supervisor and the Advanced Medical Support Assistant. Complainant argued that this email effectively terminated her telework agreement which Complainant asserted was approved as a reasonable accommodation even though she did not submit this request through the LRAC.

On February 5, 2020, Complainant emailed the PA Supervisor and the Primary Care Service VP and agreed, per the PA Supervisor's instruction, to inform them and the Advanced Medical Support Assistant of her time off, keep her Skype on green, respond to emails within a timely manner, report in-person to the Heinz location until her telework capabilities were determined, and keep a synopsis of her daily activities. Complainant argued that these requirements were only specific to her, and Complainant further argued that she did not have documented work performance issues that would warrant this level of oversight of her work.

On March 2, 2020,³ the PA Supervisor informed Complainant that she could resume telework on an ad hoc basis. However, Complainant asserted that she used 87.5 hours of leave during the period her telework accommodation was suspended.

During March 2020, Complainant stated that the PA Supervisor monitored when she began working and checked to see if her green Skype like was on to indicate that she was available. Complainant viewed this action as harassment, especially when Complainant determined that the PA Supervisor was asking other employees, who were not in Complainant's chain of command, to monitor when her Skype indicator light was green signaling she was working. Complainant further argued that the PA Supervisor made an unannounced visit to on March 4, 2020. Complainant argued that she believed that the PA Supervisor harassed her by these actions. However, the PA Supervisor asserted that he was performing his duties as a manager.

On March 6, 2020, Complainant submitted a complaint to the Director alleging that she had been harassed by the PA Supervisor from her initial return to the office in September 2018 through appearing to her office unannounced on March 4, 2020.

Following the investigation into the accepted claims, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a final decision.

On July 20, 2021, the Agency issued a final decision, pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination or discriminatory harassment occurred as alleged.⁴

³ The Agency incorrectly identifies this date as March 12, 2020 in the final decision. The record includes a March 2, 2020 email from the PA Supervisor to Complainant stating, "per our discussion with HR, you still have the telework agreement in place and can be used when necessary, however, as we noted previously, we need an email to myself, [the Primary Care Service VP], and [the Advanced Medical Assistant] when this is occurring along with the work plan for the day." Therefore, the correct date Complainant's reasonable accommodation was restored was March 2, 2020 and not March 12, 2020 as the Agency stated in the final decision.

⁴ In the decision, the Agency dismissed claims related to Complainant's September 20, 2018 work assignments and the September 25, 2018 to March 18, 2019 medical leave on procedural grounds. However, the Agency accepted these claims for consideration in the analysis of Complainant's overall harassment claim. Complainant does dispute the dismissal on appeal. Therefore, we need not address this dismissal in our decision.

The instant appeal followed.

ANALYSIS AND FINDINGS

Reasonable Accommodation: Telework Request

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation.

Complainant testified that she was diagnosed with post-traumatic stress disorder/PTSD, anxiety disorder, panic disorder, and depression after she experienced a violent sexual assault in her office on the 11th floor on March 18, 2018, at the University Drive office. Complainant explained that her conditions were permanent, and she experienced flash backs, nightmares, anxiety/panic attacks, depression, and insomnia. Complainant also indicated that she had rheumatoid arthritis that made walking difficult especially when she had to walk to the Primary Care location several times a day. Complainant further indicated that she had disabled parking which she would use to park closer to the entrances of the two buildings. Based on this evidence, we find that Complainant is a qualified individual within the meaning of the Rehabilitation Act.

The record reflects that the Human Resources Specialist (HR Specialist) testified that Complainant returned to work in September 2018 with medical documentation indicating that she could work “full duty without restrictions.” Consequently, there was no record that Complainant had requested a reasonable accommodation to gradually make the transition to seeing patients over a two-week period.

However, the record reflects that Complainant submitted an accommodation request for telework in June 2019, following her second return to the Agency in February/March 2019. Contrary to the Agency’s arguments, the record reflects that Complainant requested telework as a reasonable accommodation even though Complainant did not submit her request through the LRAC. On the June 12, 2019 request, Complainant indicated that she was requesting the ability to telework due to a qualifying disability in Primary Care Service. Complainant requested “ad-hoc” telework for a period of “12 months+.” The record further supports that the Primary Care Service VP indicated that her position at the time was telework approved.

The evidence shows that Complainant teleworked in Primary Care Service located on the Heinz campus without issue from June 2019 until February 2020.⁵ However, on February 4, 2020, the Primary Care VP notified Complainant that she would have to begin reporting in-person to the Heinz campus. In pertinent part, the letter stated the following:

For the foreseeable future, I would like for you to be onsite at Heinz to participate in the Consult Case Management Hub. I am not privy as to whether you are on sick leave at present nor am I made aware as to your whereabouts when you are on tour. To improve our lines of communication, being onsite will be necessary, unless there are extenuating circumstances that would dictate otherwise, upon approval of [the PA Supervisor]. It is my feeling that if you are anywhere but Heinz, [the PA Supervisor] should be made aware and make certain [the Advanced Medical Support Assistant]⁶ is also aware how to communicate with

⁵ The record indicates that the PA Supervisor was unaware that Complainant's telework agreement had been approved. Consequently, on July 3, 2019, the PA Supervisor informed Complainant in an email in response to her email indicating that she was teleworking, "[w]e do not have any approval for you to be doing work via remote access." Complainant emailed the PA Supervisor and the Primary Care Service VP on July 10, 2019, and informed them that she was approved for "remote access of the current interim accommodation [she was] in, per the RA agreement and needs of service." Complainant also indicated that she assumed that the PA Physician had been aware as she needed supervisory approval for the request, because she and the Primary Care Service VP had agreed that remote access was appropriate for certain situations within the service needs. On July 16, 2019, the PA Supervisor confirmed that he had received a copy of the June 2019 telework agreement approved by the Primary Care Service VP.

⁶ The Advanced Medical Support Assistant is the main employee who indicated that Complainant was not available on Skype. The record indicates that Complainant called a meeting on November 12, 2019, with the Primary Care Service VP and the Advanced Medical Support Assistant to address Complainant's concerns that the Advanced Medical Support Assistant had relayed, on multiple occasions, Complainant's general responses to the Advanced Medical Support Assistant's questions to address specific patient needs which created a risk of potential medial error. Complainant explained that the Advanced Medical Assistant never informed her that she was relaying her answers to treat specific patients. As a result, Complainant testified that the Advanced Medical Support Assistant was instructed to contact Complainant via telephone, CPRS, or email, and she was to refrain from contacting Complainant via Skype.

A little over a week after this meeting, the Advanced Medical Support Assistant accused Complainant of not being available on Skype on November 21, 2019, for a period of eleven hours, and as a result, was not able to answer the Advanced Medical Support Assistant's questions. Complainant testified that during this period, she was traveling to attend a three-day work conference in Washington, D.C. which the Advanced Medical Support Assistant and the Primary Care Service VP was aware that she was attending.

you. If you are on tour, you should be available by Skype and VA email. If you have any concerns about the form of your attendance, please discuss with [the PA Specialist] and he and I will dialogue.

The rationale the Primary Care Service VP provided in his email for was based on generalized accusations that Complainant was unavailable via Skype, her whereabouts were unknown, and these issues contributed to poor communication between Complainant and the Primary Care Service VP, the PA Supervisor, and the Advanced Medical Support Assistant. The Primary Care Service VP's February 4, 2020 email contains no specific allegations of failure to communicate on Complainant's part, including any indication of the number of alleged late emails she responded to, the number of alleged missed calls, and the duration of her alleged delayed responses. Notably, the main example of Complainant not being available during Skype was a complaint generated by the Advanced Medical Support Assistant approximately two weeks after the Advanced Medical Support Assistant was directed to communicate with Complainant via telephone, CPRS, or email, and not Skype. The Advanced Medical Support Assistant contacted Complainant anyway via Skype during a period that Complainant was on travel to attend a work conference.

Although the Primary Care Service VP denied, in his affidavit, having any involvement with the approval or denial of Complainant's telework accommodation, the record reflects that he was the management official responsible for both granting the request and suspending the request. Contrary to the Primary Care Service VP denying any knowledge of Complainant's disability, and that he only knew that she wanted to avoid direct patient care, the record supports that he had actual knowledge of her disability at the time he issued the February 2020 email. Documentation in the record includes a December 23, 2019 email from Complainant to the Primary Care Service VP informing him that her PTSD and anxiety had been "really bad" after she had recently learned that the assailant who raped her had been found and was sentenced to jail. Moreover, the Primary Care Service VP should have also known that Complainant had a disability when she indicated on her request to telework that she had a disability and was using the ability to telework to accommodate her disability.

The record supports that neither the Primary Care Service VP nor the PA Supervisor consulted the LRAC before issuing the February 4, 2020 email. Instead, the PA Supervisor sought guidance from the LRAC only *after* Complainant inquired, in a February 18, 2020 email, when she could "resume telework when needed for the indicated reasons per [her] RA request." On February 18, 2020, the PA Supervisor emailed the Human Recourses/Employee Relations Specialist (HR/ER Specialist) and inquired whether Complainant's telework agreement could be cancelled. The PA Supervisor indicated that there have been "issues with communication with her (not avail by Skype or email) and we have no way of tracking workload." The HR/ER Specialist advised the PA Supervisor that the Primary Care Service VP would need to provide "written counseling as to the specific performance concerns of [Complainant]" to demonstrate that Complainant was not performing the essential functions of her position while teleworking. The HR/ER Specialist further indicated, in pertinent part, the following:

I know we would need probably more than just the skype indicator not being green. It would have to mention the specific concerns like how many emails she is late in responding to, missed phone calls, and how long it takes her to respond. Based upon the criteria in the Master Agreement, we would need to counsel the employee in writing first, then if performance continues then issue her a removal of telework notice and inform the union.

Even though no formal RA paperwork was signed that telework was a requested accommodation, the fact that the Agency granted it as part of her request now puts the burden back on the Agency to show why it can no longer grant Telework and that would still follow then the guidelines on removing an employee from telework per the Master Agreement.

However, the PA Supervisor admitted in his February 25, 2020 response that he likely did not have the required documentation to support cancellation of Complainant's telework agreement. Notably, the PA Supervisor indicated, in pertinent part,

I would have to defer to [the Primary Care Service VP] to decide re: documenting subpar performance. My guess however is he would be reluctant to say so and would not be able to get enough feedback to support this. [The Primary Care Service VP] suggested to me that [Complainant's] counterpart in the Consult Hub Management program, [the Advanced Medical Support Assistant], was the main one who could not reach [Complainant] while teleworking but when I approached her, she had nothing to so. I suspect she would not be willing to compete a ROC to documents non-compliance. Since this episode, I was very specific with [Complainant] that her Skype light is to remain green, respond to emails quickly, and to daily document via email if out for meetings and what her daily activities entail to better follow along. I'm guessing I will need to monitor this moving forward to have any data to base pulling the telework agreement.

The record supports that the PA Supervisor did not have sufficient documentation to support that Complainant had "subpar performance" and he believed that the Primary Care Service VP would be "reluctant to say so." The PA Supervisor also acknowledged that the Advanced Medical Support Assistant declined to relay her complaints about Complainant to him even after he asked her. Ultimately, the PA Supervisor concluded that "I will need to monitor this moving forward to have any data to base pulling the telework agreement."

Consequently, the record indicates that at the time of Complainant's telework accommodation was suspended, the management officials did not have sufficient documentation to support that Complainant could not perform the essential functions of her position with or without accommodation. Despite this realization, and despite the HR/ER Specialist advising the PA Supervisor on February 25, 2020, to contact Complainant "sooner" rather than later about her telework accommodation, the PA Supervisor waited an additional six days to notify Complainant on March 2, 2020, that she could resume teleworking.

Therefore, the record supports that the Agency violated the Rehabilitation Act when it temporarily suspended Complainant's reasonable accommodation to telework from February 5, 2020, through March 2, 2020, without sufficient documentation to support that Complainant was not performing the essential functions of her position while teleworking. Therefore, we remand this matter to the Agency for remedial action in accordance with our Order below.

Disparate Treatment (87.5 Hours of Leave)

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For complainant to prevail, she must first establish a prima facie of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

As previously stated, we find that Complainant is a qualified individual with a disability.

The HR/ER Specialist testified that Complainant took leave for not being present for duty during the relevant timeframe. However, Complainant testified that when she was denied the ability to telework beginning in February 2020, her PTSD symptoms exacerbated which resulted in her having to take 87.5 hours of leave during this period. The record indicates that Complainant had informed the PA Supervisor and the LRAC management as early as July 12, 2019, explaining how teleworking on an ad-hoc basis accommodated anxiety and PTSD. Complainant explain in her email the following:

I wanted to reach out so we are all on the same page. I did not add [the Primary Care Service VP] or the others as I would like to keep it to the people that know my situation. The other reason I have remote access is for my RA agreement for

times when my anxiety is really bad in the morning from my nightmares, or at times when I am having panic attacks at work. This allows me to continue to work from home without having to use time off. I haven't had many of these instances, but for example, a few weeks ago, the [Advanced Medical Support Assistant] let an EMS working into my office through our Jack and Jill bathroom while my office door was locked. She is unaware of my situation. He closed the door behind him to clean the floors. I had a pretty intense panic attack because I was alone in the room and stuck behind my desk. I could not calm down, so I alerted [the Primary Care Service VP] that I would continue the day from telework. He was fine with this. I did not explain why to him as he had said he supports telework, so I didn't need to go into detail.

I'd like to note that I am proud of myself that I was able to continue to work after an incident like that. I would not have been able to in the not so long ago past. I am glad that I had the opportunity to do so through my RA accommodation.

Moving forward, I explained to the [Advanced Medical Support Assistant] I am working with that I prefer to be out of the office for anytime EMS is in there, and she now understands. You can reach out to [the Primary Care Service VP] to confirm he supports telework for my current interim accommodation.

Complainant had previously explained to both the PA Supervisor and the LRAC that teleworking on an ad hoc basis allowed her to continue working after experiencing an intense panic attack while working in the office when left alone with a male employee working in her office area. Additionally, Complainant contacted the HR Manager on February 24, 2020, and informed her that,

I use telework in the a.m. or on days when my anxiety is really bad about coming in. I have a lot of stress added from the RA agreement expiring soon, looking for a new position, and the new facts identified with my case. I have had to use more time off than I normally would If I could have teleworked during those is I was not able to be here due to my panic/anxiety attacks.

However, as previously discussed the Agency arbitrarily suspended Complainant's ability to telework from February 5, 2020, through March 2, 2020, which covers the period Complainant testified that she had to take leave in lieu of teleworking for her medical conditions. Consequently, Complainant is entitled to restored leave she took in lieu of telework during the period her telework accommodation was denied from February 5, 2020, through March 2, 2020. The ER/LR Specialist did not have a total record of the leave amount Complainant used during the period her telework accommodation was denied. Therefore, we remand this matter back to the Agency for further processing in accordance with our Order below.

Harassment

To establish a claim of hostile environment harassment, Complainant must show that: (1) she belongs to a statutorily protected class; (2) 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 her 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 Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

In other words, to prove her harassment claim, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a “reasonable person” in Complainant’s position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case, her disabilities or prior EEO activity. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself.

Pressured to Contact VA Police

Complainant testified that before she left for extended medical leave following her March 2018 sexual assault, the PA Supervisor pressured her to contact VA police. However, a copy of an April 27, 2018, email from the PA Supervisor to Complainant reflects that the PA Supervisor informed Complainant that the investigator informed him that he was directed to close the investigation, and no one would contact her anymore. The PA Supervisor further informed Complainant that if she “wishes to pursue the matter with the V Police, the investigation would be reopened.” Complainant responded on April 27, 2018, stating “thank you for the information.” Consequently, there is no indication that Complainant was pressured by the PA Supervisor to contact VA police.

Pressured to Return to Work March 2018 – September 2018

Regarding Complainant’s allegations that the PA Supervisor pressured her to return to work, the record reflects that Complainant informed the PA Supervisor that she intended to use “pending workman’s comp leave without pay” while she was out of the office on extended leave following her March 2018 sexual assault. However, the PA Supervisor required Complainant to inform him daily as to whether she ended to take sick or annual leave even though the collective bargaining agreement stated that daily reports for extended absences were not required. Similarly, the Human Resources Specialist explained that he was “unable to advise why [the PA Supervisor] required Complainant to call to work each day.” Complainant indicated that reporting her absences each day made her relive the stress she experienced from the sexual assault.

Additionally, Complainant testified that the PA Supervisor informed her over the phone that his unit was short-handed, and that he needed to know how much longer she needed to be absent. However, the PA Supervisor denied asking Complainant this information. Ultimately, Complainant stated that she requested her physicians to release her early because she feared that she would lose her job.

Email correspondence between Complainant and the PA Supervisor reveal that the PA Supervisor provided Complainant information to assist her with processing her leave requests. Specifically, on April 26, 2018, the PA Supervisor notified Complainant that if she wished to use leave without pay (LWOP) leave pending approval for the workers' compensation beyond thirty days, that request would require approval from the Director. Therefore, the PA Supervisor directed Complainant to send him an email requesting to use LWOP, the reason for the request, and indicating that she did not want to exhaust her present time because her workers' compensation claim is in progress.

The PA Supervisor also emailed Complainant on May 2, 2018, informing her that CA-2 form had been converted to a CA-1 but still needed her electronic signature. The PA Supervisor further explained that until her CA-1 was signed, she could not proceed with a valid workers' compensation claim. On May 24, 2018, Complainant requested confirmation as to whether the PA Supervisor received the documents she sent, and the PA Supervisor confirmed receipt and notified her that he would forward her documents the first of the week. In June 2018, the record indicates that the PA Supervisor emailed Complainant to provide her updates on the status of her LWOP request and notified her on June 19, 2018, that her LWOP request was completed would be submitted to his supervisor the following day for submission to the Director for approval.

The record supports that prior to July 26, 2018, the PA Supervisor's emails to Complainant centered on helping Complainant get her LWOP request approved. Beginning on July 26, 2018, the PA Supervisor requested that Complainant inform him if she would be cleared to work following her appointment the next day. Complainant subsequently informed the PA Supervisor that she was not cleared to return to work and her next appointment was September 4, 2018. When the PA Supervisor followed up with Complainant on September 4, 2018, Complainant informed him that she would return to the office on September 19, 2018. Complainant also indicated that her counselor did not believe that she was ready to return, but Complainant stated that "it [was] ultimately [her] choice" to return. Complainant also inquired from the PA Supervisor where she would be working and the location of her new office. The PA Supervisor informed Complainant that she would work in General Surgery Service and that he would be there in the morning to meet her. On September 6, 2018, Complainant emailed the PA Supervisor to inquire whether she would be able to attend a conference scheduled for October 2018, and on September 12, 2018, Complainant asked if the PA Supervisor if he could remove a blanket from her old office that was used during the assault. Consequently, there is no indication from this correspondence that the PA Supervisor pressured Complainant to return. Rather the record demonstrates that Complainant decided that she wanted to return to the office and Complainant did not indicate any of her correspondence with the PA Supervisor that she opposed returning to the office.

Pressured to Work on 11th Floor in September 2018

Regarding Complainant's assertion that the PA Supervisor pressured her to return report to the eleventh floor following her return to the office, our review of the record indicates that besides Complainant's assertions, there is no other evidence in the record to support this claim as alleged. The PA Supervisor testified that Complainant's new office was located on the second floor. The Criminal Investigator and the Registered Nurse of the Surgery Service Line confirmed that Complainant informed them that the PA Supervisor told her that at some point, she would have to work on the eleventh floor. However, neither individual indicated that they heard this statement from the PA Supervisor. Additionally, a Physician Assistant testified that Complainant's office was located on the second floor, she had a meeting with Complainant on the second floor, and she did not recall ever seeing Complainant on the eleventh floor where the Physician Assistant's office was located from September 20, 2018, through when Complainant left work on September 25, 2018.

We find that considering these allegations, even if true, there is inadequate evidence to establish that considerations of Complainant's disability or retaliatory animus motivated management's actions towards Complainant. Here, documentation in the record supports that the PA Supervisor only informed Complainant of her option to contact the VA police. Additionally, the PA Supervisor was relaying the information he received from the investigator to Complainant. Moreover, the record supports that the PA Supervisor contacted Complainant to assist with processing her LWOP. The email correspondence does not indicate that Complainant opposed the PA Supervisor's requestions regarding her return. Rather Complainant asks the PA Supervisor questions in preparation for her return to work which included her work assignment, location of her office, and whether she would be able to attend an October 2018 conference.

Additionally, Complainant indicates that her return to the office was ultimately her decision even though her counselor advised against her returning to work, and the record supports that Complainant was assigned to the second floor and never reported to the eleventh floor. Although it is unclear why the PA Supervisor required Complainant to daily call in about her leave preference, there is no indication in the email correspondence between Complainant and the PA Supervisor supporting that these daily reports caused Complainant emotional stress.

We acknowledge that the record supports that the PA Supervisor failed to correctly record Complainant's time which was corrected on more than one occasion by the Human Resources Specialist. However, the record indicates that the PA Supervisor complied with the Human Resources Specialist's instructions and ultimately Complainant's timecard was corrected. Aside from Complainant's bare assertions there is simply no evidence that the disputed actions were motivated in any way by Complainant's disability or reprisal for prior protected EEO activity and, therefore, Complainant's claim of discriminatory harassment regarding these claims is precluded. See Oakley v. U.S. Postal Service, EEOC Appeal No. 019982923 (Sept. 21, 2000).

February/March 2020 Monitoring of Work Daily Work Activities/March 2020 Meeting

The PA Supervisor testified that he required all physician assistants who teleworked to submit daily emails detailing their work for that day. In Complainant's case, the PA Supervisor explained that it was clear to him from the Primary Care Service VP's emails that the Primary Care Service VP was not always aware of when Complainant was teleworking, when she was working in the office, or when she was on leave which impacted the working of lines of communication on the service. The PA Supervisor reasoned that the daily emails allowed Complainant and other employees to document their work productivity and supports the teleworking agreement that the employee will complete all work as necessary.

However, inconsistencies in the record reflect that there is insufficient evidence to support that Complainant's work productivity or lack thereof warranted an intense level of observation beginning on February 5, 2020. The PA Supervisor testified that the Primary Care Service VP had informed him of concerns regarding Complainant's performance. However, documentation in the record fails to indicate that there were any substantial issues with Complainant's performance that would have warranted the PA Supervisor's heightened oversight over Complainant's work beginning on February 5, 2020. The PA Supervisor indicated issues with Complainant's work performance based on what he asserted the Primary Care Service VP had relayed to him. Consequently, the Primary Care Service VP indicated in his February 4, 2020 email to Complainant that she was unreachable and that he was still waiting for her update him on the Redcap database development. Thus, the Primary Care Service VP stated that there were issues with Complainant's performance. However, the Primary Care Service VP testified, in his affidavit, that Complainant's project assignment "was going well." Moreover, aside from the Advanced Support Medical Assistant's November 2019 complaint, there were no other specific issues indicated in the record (i.e., letters of counseling or reprimands) regarding Complainant's work productivity from March 2019, when she began her first detail to the Primary Care Service, through February 4, 2020, when she received the email instructing her to report in-person to work.

In fact, the record supports that the Primary Care Service VP rated Complainant "high satisfactory" for two performance categories and "outstanding" for three performance categories on her December 28, 2019, proficiency report covering the period March 18, 2019, through December 28, 2019. Additionally, the Assistant Director indicated on Complainant's other proficiency report covering the period December 29, 2019, through December 28, 2020, covering the period that Complainant was detailed to the Western Market, that he "concur[red] with [Complainant's] self-assessment and feedback from [the Primary Care Service VP]" which resulted in Complainant receiving an "outstanding" rating on all performance categories.

Additionally, documentation in the record supports that the PA Supervisor opposed Complainant's initial March 2019 detail to Primary Care Service even after the HR Manager informed him that Complainant's detail to Primary Care Service was based on medical need. The PA Supervisor responded,

I guess my concern is how long can this 30d recert repeat as I still have concerns re: Supervising someone I have no real contact or ability to monitor? Is there an end date as to full reassignment as I have concerns she could ever function at the level we need her in surgery as we would need in the OR and we started having issues with her dexterity prior to her leaving.

Here, the record supports that the PA Supervisor had a major concern with the length of time Complainant would be detailed to Primary Care Service without consideration that her detail to this division, as well as her subsequent interim accommodation, were all based on her medical need. The PA Supervisor further doubted Complainant's ability to perform the essential functions of her position after her reassignment ended. Ironically, the PA Supervisor in inappropriately speculated that Complainant's dexterity, a physical condition, would prevent her from performing her original job duties at the University Drive campus before Complainant had an opportunity to return to the University Drive campus. Additionally, the PA Supervisor was only responsible for monitoring Complainant's attendance and leave and the monitoring of Complainant's work performance was the Primary Care Service VP's responsibility.

While the Primary Care Service VP testified that it was appropriate for the PA Supervisor to inquire about the status of Complainant's work and attendance because he was her immediate supervisor, and she was detailed to work in an unrelated service line, there is no indication that Complainant's work performance, in particular, necessitated a heightened level of oversight/scrutiny. In particular, the PA Supervisor required Complainant, beginning on February 5, 2020, to keep her Skype on and available while working as well as provide daily synopsis of all of her daily work activities.

Notably, the requirement to remain available on Skype during the duration of her tour of duty was a requirement only specific to Complainant. All twelve of the PA Supervisor's physician assistants testified that the PA Supervisor never instructed them to remain available on Skype (i.e., with a green light indicator) for the entire duration of their tours of duty. None of these employees indicated that there was an Agency policy directing them to do so. Ironically, the record supports that Skype monitoring was not an effective tool to determine an employee's availability. On February 5, 2020, the same day that Complainant was instructed to keep her Skype on green, Complainant notified the PA Supervisor, the Primary Care Service VP, and the Advanced Medical Support Assistant that "Skype is not updating." Also on that same day, the PA supervisor emailed Complainant acknowledging that he needed to "see how to be sure that [Skype] is not showing unavailable during tour time." Consequently, the very tool the PA Supervisor sought to use to monitor Complainant's whereabouts was not accurate.

After the PA Supervisor notified Complainant on March 2, 2020, that she could resume teleworking on an ad hoc basis after documentation failed to support that her telework accommodation could be removed due to poor performance, it is evident that the PA Supervisor sought to find additional evidence of Complainant's poor performance even though there was no evidence of deficiencies.

Specifically, the HR/ER Specialist informed the PA Supervisor on February 25, 2020, that he would need additional information before removing Complainant's telework accommodation. Specifically, the HR/ER specialist advised:

Ok yes, I recommend seeing what information can be provided from any of her peers, counterpart, or [the Primary Care Service VP]. We would at least need that first before moving on with removing her from telework. Since she was outstanding last year as you mention, we would definitely have to do this before removing [her] from telework.

Consequently, the PA Supervisor followed suit, contacted other employees, including those not in Complainant's chain of command, about her whereabouts, and imposed additional oversight restrictions on Complainant. At the time, the PA Supervisor had already removed Complainant's telework accommodation. Nevertheless, after the PA Supervisor reinstated Complainant's telework accommodation on March 2, 2020, the PA Supervisor continued his quest to find evidence the necessary evidence of Complainant's poor performance by also reinstating the same overnight work requirements (keeping Skype available and daily work reports) he imposed on her in February 2020.

Notably, the PA Supervisor continued this heightened oversight over Complainant's work after Complainant had previously complained to the HR Manager and the ER/LR Specialist on February 24, 2020, regarding the requirements the PA Supervisor had imposed on her. Complainant explained that the removal of her telework accommodation prevented her from working because she used the accommodation on days her anxiety was really bad. Complainant further explained that she had to use more time off than normal due to her panic/anxiety attacks. Complainant noted that she had been required to send an email and contact the PCC when she was absent for work even though she was only required to either submit an email or call the PCC, not both. Complainant further stated that "I already feel I am being forced out of my job for reasons beyond my control, now I just feel like is adding unnecessary stress to my everyday work."

Additionally, on March 2, 2020, the PA Supervisor informed Complainant that the PCC report indicated that she arrived to work late on March 2, 2020. The PA Supervisor then informed Complainant that she would be charged absent without leave until her Family Medical Leave Act (FMLA) leave was approved, or if her absence was related to her FMLA, then she could have her absent without leave charge reversed in fifteen days. Consequently, the PA Supervisor was aware of the possibility that Complainant's absence could have been related to her disability as she had already taken more sick leave⁷ during this period due to an increase in her panic/anxiety attacks resulting from her beginning temporarily denied her telework accommodation.

⁷ The record indicates that Complainant emailed the HR Manager on February 27, 2020, stating that she had exhausted all of her sick leave due to her inability not to report to work due to increased anxiety. Complainant further explained that on February 26, 2020, she was charged 0.5

The record further supports that the PA Supervisor engaged in continued discriminatory and retaliatory harassment towards Complainant when he showed up announced to her office on March 4, 2020 at 6:40am, ten minutes after the start of Complainant's tour of duty. Complainant testified that the day prior, the PA Supervisor questioned whether she had arrived to work at 6:30am because green light (Skype) was not on at that time. Complainant stated that she informed him, via email on March 3, 2020, that she could not physically keep her Skype green light indicator on all the time because she had to account for the time she left her work area to go to the printer, bathroom, or report to Primary Care. Complainant further questioned how the PA Supervisor was aware of her Skype status when his Skype status had indicated that he was "away" for 15 hours. Complainant concluded that the PA Supervisor had asked another individual if she was logged in which the PA Supervisor denied.⁸ The PA Supervisor indicated that he wanted to discuss this matter during a meeting at which Complainant asked to be notified of the anticipated date so that she could have a union representative present. Complainant stated,

I have not felt comfortable with some of the recent interactions via email we have had, and the current status of my job and my future employment, I really am too stressed to deal with this constant checkup check-in. I am becoming paranoid and scared for my job.

The PA Supervisor responded that he would stop by Complainant's office "in the near future" to discuss the issue in-person. The PA Supervisor, further informed Complainant, after consulting with the HR/ER Specialist, that a union representative was not necessary because their conversation was not disciplinary and would not have any negative impact on her position. The PA Supervisor also indicated that his visit was not an examination leading to any disciplinary action nor counseling. Consequently, the PA Supervisor arrived announced at Complainant's office the following day at 6:40am. The PA Supervisor testified that when he saw Complainant, she "seemed concern and anxious." Similarly, Complainant testified that she was "nervous" when she heard the knock on the door because no one ever reported to work that early, and Complainant knew that the PA Supervisor typically arrived later in the morning. Complainant also testified that she experienced a panic attack that lasted 45 minutes after the PA Supervisor left her office.

Although the PA Supervisor testified, and his twelve physician assistants confirmed, that he would conduct random unannounced check-in visits with his subordinates to better monitor work performance of his employees, the PA Supervisor and the ER/LR Specialist were also aware of Complainant's prior reasonable accommodation request to limit contact with males as a direct result of the sexual assault she experienced at work in March 2018.

hours of absent without leave because the PA Supervisor would not allow her to use annual leave. Complainant sought guidance from the HR Manager but never received a response.

⁸ Documentation in the record supports that the PA Supervisor contacted other employees to solicit information about Complainant's arrival times to work.

The PA Supervisor and the ER/LR Specialists were further aware that Complainant had she suffered an “intense panic attack” in July 2019 when she was left alone in a room with another male employee. Despite this information and despite Complainant informing the PA Supervisor that she felt “uncomfortable” meeting with him alone, the PA Supervisor elected to visit Complainant unannounced anyway, and as a direct result, Complainant suffered another panic attack. Thereafter, Complainant reported the incident on March 6, 2020, to the Director and explained that the PA Supervisor had subjected her to a hostile work environment.

In sum, the record supports that the Agency management subject Complainant to hostile work environment harassment based on disability when management: (1) abruptly cancelled her telework accommodation without justification, (2) imposed additional work requirements on Complainant to improve her work performance and communication even though there was no substantial evidence that Complainant had these performance issues, (3) continued to monitor Complainant’s performance at a heightened level after her telework accommodation was reinstated even though the record failed to demonstrate evidence of poor performance, and (4) arrived at Complainant’s office unannounced even though Complainant had previously requested limited contact with male employees following a sexual assault that occurred previously at the Agency.

Next, we discuss whether the Agency is liable for the PA Supervisor and the Primary Care Service VP’s actions. An employer is subject to vicarious liability for harassment if it is “created by a supervisor with immediate (or successively higher) authority over the employee.” Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2270 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 11b S.Ct 2275, 2292-93 (1998). It is undisputed that the PA Supervisor was Complainant’s immediate supervisor and the Primary Care Service VP had supervisory control over Complainant’s work performance during her detail in the Primary Care Service unit. The record further supports that the harassment Complainant endured resulted in tangible employment actions including a denial of a reasonable accommodation and a change in work requirements/duties. Therefore, the Agency does not have the ability to raise an affirmative defense to avoid vicarious liability for the harassment. Burlington, 118 S.Ct. at 2270; Faragher, 118 S.Ct. at 2293; Enforcement Guidance Vicarious Liability for Unlawful Harassment by Supervisors, EEOC notice No. 915.002 (June 18, 1999).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we determine that the Agency violated the Rehabilitation Act when it engaged in following actions:

1. Cancelled her telework accommodation without justification from February 5, 2020, through March 2, 2020 resulting in Complainant having to take sick leave during this period.
2. Monitored Complainant’s work performance and imposed additional work requires on Complainant even through there was no substantial evidence of poor performance.

3. Visited Complainant's office unannounced even though Complainant had a reasonable accommodation to keep contact with male employees at a minimum following Complainant's prior sexual assault which occurred at work.

We therefore REVERSE the Agency's finding of no discrimination regarding claims 5 through 11 and we REMAND these to the Agency for further action in accordance with this decision and the ORDER below. However, we AFFIRM the Agency's finding of no discrimination for claims 1 through 4.

ORDER

The Agency is ordered to take the following remedial action regarding the remanded claims referenced above:

1. **Within 90 calendar days of the date this decision is issued**, restore the 97.5 hours of sick leave Complainant took during the period that Complainant was denied.
2. **Within 90 calendar days of the date this decision is issued**, conduct an investigation to determine whether Complainant is entitled to compensatory damages and if so, the amount of damages Complainant is entitled for this violation of the Rehabilitation Act.
 - a. Notify Complainant of her right to submit objective evidence based our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993) and request objective evidence from Complainant in support of compensatory damages (providing an option and instructions to request an extension in the case of extenuating circumstances).
 - b. Based on the results of the investigation, issue a written decision on Complainant's entitlement to an award of compensatory damages with appeal rights to this Commission.
 - c. Pay Complainant the determined amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to the 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 Office, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. **Within 90 calendar days of the date decision is issued**, provide at least eight (8) hours of interactive in-person EEO training to the PA Supervisor and the Primary Care Service VP regarding their responsibilities under the Rehabilitation Act with special emphasis on their obligation to provide reasonable accommodation. 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>.

4. **Within 90 calendar days from the date this decision is issued**, the Agency shall consider taking appropriate disciplinary action against the PA Supervisor and the Primary Care Service VP. The Commission does not consider training to be disciplinary action. 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 the PA Supervisor and the Primary Care Service VP have left the Agency's employ, the Agency shall furnish documentation of his departure dates.
5. **Within 30 calendar days of the date this decision is issued**, the Agency shall post a notice in accordance with Paragraph (G0617) below.
6. **If Complainant was represented by an attorney**, the Agency shall pay reasonable attorney's fees for this complaint in accordance with Paragraph (H1019) below.⁹

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 its VA Pittsburgh Healthcare Service 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).

⁹ Complainant may also be entitled to additional attorney's fees for legal assistance in preparing this appeal and her subsequent request for compensatory damages.

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).

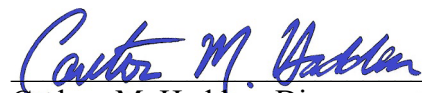
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

September 28, 2023

Date