



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Pamela L.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2022002023

Agency No. 2004-0730-2019105343

**DECISION**

On March 4, 2022, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's February 4, 2022, 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 Revenue Utilization Review (RUR) Nurse, Level III Step 12 at the Mid-Atlantic Consolidated Patient Account Center (MACPAC) in Asheville, North Carolina. In a formal EEO complaint filed on October 7, 2019 and amended on December 12, 2019, Complainant alleged that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (Ulcerative Colitis/Pancolitis) and in reprisal for protected EEO activity when:

1. On August 7, 2019 and thereafter, Complainant received a disapproval notice for an amended request to a previously approved reasonable accommodation (RA);

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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.

2. On August 7, 2019, the Assistant Nurse Manager, Complainant's first-line supervisor (S1), increased Complainant's workload;
3. On September 10, 2019, Complainant received a "High Satisfactory" performance appraisal rating rather than an "Outstanding" rating;
4. On October 22, 2019, management increased Complainant's workload by adding the VA Medical Center in Hampton, Virginia to her daily task;
5. On October 22, 2019, management displaced Complainant from her office space at the VA Medical Center in Salem, Virginia;
6. On November 13, 2019, management sent a mass email to Complainant's coworkers notifying them of Complainant's new work restriction to include the adjustments to their workloads;
7. On an unspecified date, management delayed responding to Complainant's request for sick leave; and
8. On an unspecified date, management failed to make corrections to the Master schedule regarding leave requests.

At the conclusion of the ensuing investigation and a supplemental investigation, the Agency provided Complainant with copies of the investigative and supplemental reports (IR and SIR) and notice of her right to request a hearing before an Equal Employment Opportunity Commission 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. This appeal followed.<sup>2</sup>

Complainant was diagnosed with ulcerative colitis/pancolitis in October 2015. This condition is an autoimmune disease that causes inflammation in the digestive tract. Symptoms include rectal bleeding, bloody diarrhea, and abdominal cramps. See e.g. Ulcerative Colitis - National Association for Continence (nafc.org). The condition is permanent and is characterized by frequent and unpredictable bowel movements. IR 71. According to Complainant, S1, the Nurse Manager who served as her second-level supervisor (S2), and the Program Manager who served as her third-level supervisor (S3), were all aware of her disability. IR 71-72.

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<sup>2</sup> In her appeal brief, Complainant asserts, for the first time, that she was constructively discharged on February 28, 2021. The Commission does not consider allegations raised for the first time on appeal. Domingo M. v. Dep't of the Treasury, EEOC Appeal No. 0120162280 (Sept. 6, 2018). Complainant is advised that if she wishes to pursue her claim of constructive discharge through the EEO process, she should initiate contact with an EEO counselor.

She was taking medication by intravenous infusion every eight weeks, a process which took between three and four hours. IR 74. She identified nearly 100 side effects from the medication. The most common side effects included headaches, body aches, and fever. IR 74-76. When asked what everyday life functions her condition limited, Complainant replied that she suffered fatigue from constantly interrupted sleep due to the near-constant urge to go to the bathroom, weakness and inability to focus, weight loss, and joint pain, all of which limited her daily activities, particular sitting. IR 72. In 2016, Complainant was given a reasonable accommodation that included annually approved Family and Medical Leave Act (FMLA) leave and full telework with an option to go into the office when able to. IR 77.

### *Allegation (1)*

Complainant's position as a RUR Nurse was essentially a customer service position, which required her to interact with administrators, medical personnel, patients, and insurance carriers. The incumbent had to be able to communicate with people of varying educational levels and diverse backgrounds. He or she also had to be flexible in handling assignments. Physically, the position required long periods of continued sitting in front of a computer and typing. IR 173-75. Complainant averred that RUR nurses had over thirty areas from which work assignments were generated. These areas were referred to as "buckets." SIR 344.

On August 7, 2019, Complainant submitted her request to amend her 2016 reasonable accommodation.<sup>3</sup> IR 78, 109; SIR 15. She stated the following in boxes (9) and (10) of the 0857a form entitled, "Written Confirmation of Request for Accommodation:"

Box (9) Accommodation Requested: Amendment requested to "existing" RA on file regarding autoimmune disease of severe ulcerative colitis for which indefinite, active, and on-going infusions for treatment continue in attempt for remission/control of the disease. 1. The addendum to the on- file approved RA being requested is for approval to work the Salem facility only and to be assigned limited alpha, i.e., A-Bin the Salem lists which are required to comply with meeting my bi-annual QR's, per my functional statement, IP, OP, Mental Health, QUICS, and RX buckets). This would eliminate daily stress exacerbating condition on file (see reason(s) below).

Box (10) Reason for Request: Due to current, active disease, FMLA has been approved and is used. Inpatient, Outpatient, MH, workloads daily and is very time-sensitive as the major insurance carriers only allow a small window of time for auth 's. If auth ' s not done in accordance with policy, revenue could be lost. When FMLA is used due to flares, the workload has to be re-distributed. Upon

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<sup>3</sup> This was actually a resubmission of a request that Complainant first made on June 19, 2019 and withdrew on August 6, 2019 after she received word that it would not be approved. IR 78, 80-81, 109, 113, 179, 187-89, 195, 243-60; SIR 15, 381-86.

return, follow-up is time-sensitive. Reduction of work in these buckets, as noted above, with noted alpha change of AB in the OP/IP, Mental Health and RX buckets, will help in stress reduction and flares and use of FMLA. Frequent bathroom breaks are part of the condition for which the RA was originally approved. Under the current assignment, these breaks are at times difficult to take. The decrease in workload in the noted buckets would accommodate the bathroom breaks.

IR 186, 273. An interactive discussion between Complainant and S1 took place on August 12, 2019. The document which captured the discussion identified S1 as the designated management official (DMO). The following points were addressed:

1. Q: What are the functional limitations preventing you from performing your essential functions? A: The functional limitations relate to the ability to sit for prolonged periods as very frequent urgent daily trips to the bathroom are needed.
2. Q: What essential functions do you feel are affected by your functional limitations? A: D/T multiple bathroom visits each day the alpha split is heavy and workload has increased along with requirements to contact insurance companies for auths, etc. unable to properly tend to phone calls or fear of missed calls due to toileting issues and severe bouts of pain. Being left on hold and having to use the bathroom and get to the bathroom and then have to be in severe pain on toilet and on the phone is impossible. Have wound up with bowel incontinence because of this.
3. Q: What can the facility do to accommodate you? Any recommended barriers you feel could be removed allowing you to perform the essential functions of your position? A: The facility can allow me to be assigned to work the Salem VAMC only and a smaller alpha split (A-B) in the inpatient, outpatient, and mental health buckets. The other buckets can remain in a fair and equitable distribution. It has been noted by management the first half of the alpha is heavier than other parts of the alphabet when numbers have been pulled.
4. Q: How will the requested reasonable accommodation help you continue performing the essential functions of your position. A: The stress of working less letters of the alpha in the inpatient, outpatient, and mental health buckets would alleviate the stress of missing calls, being placed on long holds, making multiple calls, putting together large faxes, all of which impact the bathroom visits necessary and breaks and lunch times that are needed in caring for myself.
5. Q: How long is it anticipated the accommodation will be needed? (RAC/DMO CANNOT put an end date on the RA approval UNLESS the medical provide recommends an end date). A: Indefinite as treatment must be continued per

Chief of Gastroenterology nature of original RA has not changed and treatment on-going.

6. Q: Do you have any recommendations on alternative accommodations that may be effective at meeting your functional limitations? Any potential alternatives by either the DMO or Employee to consider? (Provide alternatives that the DMO or employee have in mind in order to obtain feedback on effectiveness/possibility.) No, at this time this accommodation would allow employee to continue to perform all tasks with reduction only in the buckets noted.

IR 220-21. On August 23, 2019, S1, in her capacity as the DMO, made the determination on Complainant's request. S1 stated the following in boxes (7) through (9) and (12) of the form documenting her decision:

Box (7) – You requested the following accommodation: You requested to be assigned to work the Salem facility only and to have a modification only in the inpatient, outpatient, and mental health buckets for a smaller section of the alpha, A-B, in these buckets only while still working all other buckets as assigned now *and if needed, to take a heavier alpha in those buckets to offset the smaller alpha in the ones noted above* (emphasis supplied).

Box (8) – Your request is approved and will begin on August 12, 2019.

Box (9) – Although we are not providing the accommodation requested, we are offering an accommodation which we believe would be effective: The effective alternative accommodation being offered is: an additional 15 minutes of personal break time on a daily basis; to be used, as needed, throughout the day to address your medical condition. The additional 15 minutes if used will need to be made up that same day. If for any reason that time cannot be made up that same day, available leave will need to be taken. If the time is not made up the same day and the employee chooses not to use their leave to cover the additional personal break time, the time will be marked as LWOP. The 15 additional minutes can be broken down, as needed, throughout the day. . . .

Box (12) – Detailed reasons for the denial of the original request: While this is not a denial, it is an alternative accommodation which is covered and allowed. . . .

IR 147, 191-92, 204. S3 upheld the determination on September 3, 2019. IR 83. Complainant declined the Agency's offer on September 11, 2019. IR 147, 168.

*Allegation (2)*

Complainant averred that on August 7, 2019, S1 had increased her workload despite her disability and need for accommodation. She maintained that her workload had been on the rise since October, 2018, and that as late as January 2020, S3 assigned her extra duties without S1 ever adjusting her workflow. IR 88-90. S1 responded that S2 had the final say on how work was to be distributed. S1 further noted that Complainant had been given a temporary accommodation due to problems related to her hand, and that management assigned work fairly and equitably to all nurses. She maintained that Complainant's workload was not increased. IR 116-17. S2 stated that all of the nurses were experiencing workload increases and workload adjustments were made based on backlogs and departmental needs. IR 132-33. S3 denied having any knowledge of this allegation. IR 148.

*Allegation (3)*

Complainant claimed that despite receiving ratings of "Outstanding" in previous years and scoring 100 percent on all her quarterly reviews during the 2018-2019 performance cycle, S2 gave her an overall proficiency rating of "High Satisfactory" for that period on September 10, 2019. IR 92-93, 266-70, 274, 284; SIR 5. According to S2, management encouraged those staff nurses who wanted a rating higher than satisfactory to participate in projects, join committees, obtain certifications, get higher degrees or otherwise go above and beyond by helping other teams catch up on their workloads and clear up backlogs. IR 134. S2 further stated that she had discussed Complainant's performance with S1 and was leaning toward rating her as "Satisfactory" but then recalled Complainant delivering a power-point presentation on workload redistribution, which S2 regarded as an attempt to go "above and beyond." IR 135-36. S3 affirmed that a 100 percent proficiency rating did not guarantee receipt of an outstanding performance appraisal because proficiency ratings were only a small part of their overall evaluation. SIR 27. Another staff nurse who received a rating of "High Satisfactory" also had proficiency ratings of 100 percent. Although this comparator had been rated by another assistant nurse manager, S2 had been the reviewing official. SIR 256-58.

*Allegation (4)*

Complainant alleged that on October 22, 2019, S1 increased Complainant's workload by adding the Medical Center in Hampton, Virginia to her daily task list despite telling Complainant on September 10, 2019, that she would only be covering the Salem facility. IR 99-100. S1 responded that Complainant's workload was not increased, and that the assignments were covered by three experienced nurses and three newer nurses. S1 also pointed out that she was not the nurse manager at the time and did not have the final say in how assignments were allocated. IR 110. S2 asserted that Complainant's work assignments would have varied based on available coverage and departmental needs. IR 136.

*Allegation (5)*

Complainant claimed that on October 22, 2019, S2 had taken away the personal workspace that Complainant had utilized whenever she came into the office to work. This space was located at the Salem medical complex. IR 103-04. S2 responded that because of workspace limitations, those employees who were on a 100 percent telework schedule had to relinquish their in-office space so that those who had to come into the office would have a place to work. S2 pointed out that Complainant was on 100 percent telework through her 2016 reasonable accommodation agreement and had not used her space in the Salem office in over a year. IR 138-39. S3 confirmed that the office space in Salem was needed for accounting technicians. IR 153.

*Allegation (6)*

Complainant claimed that on November 13, 2019, management sent a mass email to her coworkers notifying them that Complainant had new work restriction which would require them to make adjustments to their workloads. She stated that her orthopedic surgeon had placed her on a temporary restriction which entailed no typing with her left hand, and that when she notified management of this restrictions, someone in management had sent an email to her coworkers indicating that the fallout from this restriction would place a burden on them. She disagreed that her restriction created more work for her colleagues. IR 106. She found it unacceptable that management had suggested that she had burdened the system because she had a temporary restriction. IR 107. The email in question was sent by another Assistant Nurse Manager to S1 on November 13, 2019 which read:

[S1] and I discussed again and [Complainant] will only work Salem and [Coworker A] only Hampton A-Z on buckets discussed. This will put a burden on both [Coworker B] and [Coworker C] on auths and appeals, but would expect to see a huge dent in Nuance. \* \* \* Sending this out, ok?

To which S1 replied by email, “sounds good.” IR 262. The Assistant Nurse Manager averred that Complainant had asked for a workload arrangement that would not require her to type as she had just had hand surgery, and that he asked her to work with her three coworkers to come up with a plan to share the workload. He noted that Complainant had actually requested to do some more work in Nuance, which he had consented to. In addition, he stated that he forwarded the email to S1 to verify that it was okay before sending it out. He emphasized that the purpose of sending the email out to all four employees was to ensure continuity and clarification as the four employees covered each other’s sites. IR 160-61.

*Allegation (7)*

Complainant averred that shortly after she had filed her EEO complaint in connection with her reasonable accommodation claim, management began delaying their responses to her routine requests for sick leave, despite her having turned in the paperwork weeks ahead of time. SIR 6.

When asked why she believed that management was harassing her in connection with her requests for sick leave, Complainant replied that management had plenty of notice regarding her sick leave requests but chose to ignore those requests until the last possible moment. SIR 8, 350. S1 responded that all requests for sick leave are answered as soon as possible, and if the request is urgent, they may leave the office right away. SIR 19.

#### *Allegation (8)*

Complainant alleged that on October 16, 2019, she sent an email asking management to correct the dates on the master schedule that had her marked down as being on leave for over a week when she had cancelled the leave requests in question. She averred that as of two weeks after she had made her requests, the master schedule had still not been updated to reflect her leave cancellations. SIR 9-10. She also stated that the master schedule needed to be accurate and up to date, and that if it was not, the staff calendar would not be accurate or up to date either. SIR 352. When asked which management official was responsible for making corrections to the master schedule, S1 answered that no bargaining unit employee has access to the master schedule and that she did not know who was responsible for making corrections to the master schedule. SIR 21.

### 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”).

#### *Failure to Accommodate Disability – Incident (1)*

An agency must make reasonable accommodation for the known physical and mental limitations of a qualified individual with a disability unless it can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), 1630.2(p). A qualified individual with a disability is an “individual with a disability” who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). In its final decision, the Agency made the following findings with respect to this issue:

Complainant testified that she was diagnosed with Ulcerative Colitis/Pancolitis in October 2015, and that her condition is life-long. Complainant testified that she



has been hospitalized on more than one occasion due to her condition, and that her condition impacts her ability to sleep, maintain a regular weight, and that she has dietary restrictions, weakness, unpredictable bathroom needs, and arthralgia pain in her joints as a result of her condition. We find that Complainant is an individual with a disability within the meaning of the Rehabilitation Act.

Complainant testified that she is able to perform all aspects of her job as described in the functional statement; however, she stated that she struggled significantly with performing some aspects of her job duties. Specifically, she has struggled with a heavier workload, as it impacts her ability to take regular breaks, including meal breaks; has been forced to take frequent restroom breaks and even perform duties in the restroom; and has difficulties with extensive time on the phone. We therefore find that Complainant is a qualified individual with a disability within the meaning of the Rehabilitation Act.

Final Agency Decision, p. 11. We concur with these findings. The burden now shifts to the Agency to provide evidence demonstrating that providing reasonable accommodation would cause an undue hardship in the particular circumstances. Lisa C. v. U.S. Postal Serv., EEOC Appeal No. 2019005689 (Nov. 16, 2020). A determination of undue hardship should be based on several factors, including: (1) the nature and cost of the accommodation needed; (2) the overall resources of the facility making the reasonable accommodation, the number of persons employed at this facility, the effect on expenses and resources of the facility; (3) the overall financial resources, size, number of employees, and type and location of facilities of the employer; (4) the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and (5) the impact of the accommodation on the operation of the facility. Id.

In applying these factors, we find that the Agency appears to be arguing that the fifth factor is significant. S1, S2, and S3 characterized her reasonable accommodation addendum as a request to reduce her workload by as much as 90 percent. IR 129-30, 169, SIR 16, 37, 346. But the evidentiary record indicates that S1, S2, and S3 either mischaracterized or misunderstood what Complainant was asking for. Throughout her affidavit testimony and in her email correspondence with the Local Reasonable Accommodation Coordinators (LRACs), S1, S2, and S3, Complainant maintained that all she wanted was to reduce the number of assignments that required her to be on the telephone. The nature of her condition was such that urges to go to the bathroom came suddenly and often without warning. Although the alternative accommodation offered allowed her to take breaks, it did not address the problems of having to make telephone calls, participate in long telephone conversations, or being placed on long holds when the urge to use the bathroom flared up. As was documented above, Complainant offered to take work from other buckets that would not require telephone time or would require less telephone time. IR 84. She stated that management's offer of an alternative accommodation did not address her constant and unpredictable need to use the bathroom, and that, not infrequently, she had soiled herself while trying to handle extensive telephone conversations or being placed on long holds.

IR 84-85; SIR 5, 344-46, 355, 369-71. Thus, we find that, while the Agency did offer an accommodation, it was not sufficient to address the specific issue of reducing the number of work assignments requiring time spent on the telephone. Consequently, we conclude that the Agency failed to meet its burden to prove that being assigned work that minimized time spent on the telephone would have imposed an undue hardship upon its operations.

We now turn to whether Complainant is entitled to compensatory damages. An Agency is not liable for compensatory damages under the Rehabilitation Act where it has consulted with Complainant and engaged in good faith efforts to provide a reasonable accommodation but has fallen short of what is legally required. Cyrus H. v. Dep't of Homeland Security, EEOC Appeal No. 2022000047 (June 15, 2023). On the other hand, where an Agency has failed to provide a reasonable accommodation, compensatory damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. Id.

In an email to the HR Specialist handling the matter dated September 20, 2019, S3 noted that most of the work Complainant wanted removed from her daily function could be done either via payer websites or efax, and that they could make sure Complainant was using the automated options to avoid so many phone calls. IR 211. There are no indications in the record that this was ever followed up on. When one of the LRACs was asked whether management had explored any alternative accommodations specifically tailored to reduce Complainant's phone usage, but not her other job duties, she replied that her predecessor has strongly suggested that management meet with Complainant to explore options to reduce phone usage, but that there was no follow-up correspondence in their files indicating the outcome of that discussion. SIR 36-37. When asked to explain why Complainant's offer to take on additional work from other buckets would not have been sufficient to offset her requested reduction in assignments from the inpatient, outpatient, and mental health buckets, S1 had no answer and said that she was "confused" by what appeared to be a straightforward question. SIR 16. Taken together, these omissions reflect the Agency's failure to acknowledge Complainant's offer to take on a heavier workload in remaining buckets to offset reduction in telephone-related work assignments from the inpatient, outpatient, and mental health buckets, work that she clearly could have done and still tend to her medical condition. The Agency's failure to make a good faith effort to accommodate Complainant's disability entitles her to make a claim for compensatory damages.

#### *Disparate Treatment – Incidents (3) & (5)*

To prevail on her disparate treatment claim, Complainant would have to satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As a threshold matter, she would generally have to establish a prima facie case by demonstrating that she was subjected to adverse employment actions under circumstances that would support an inference of discrimination. Furnco Const. Corp. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since S1, S2 and S3 all articulated legitimate and nondiscriminatory reasons for their actions. See U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983).

With respect to incident (3), S2 and S3 stated that the performance appraisal rating of “High Satisfactory” was consistent with S2’s observations of Complainant’s performance throughout the rating period. With regard to incident (5), S2 stated that the space was needed to handle the influx of new staff that needed office space, and that those in full-time telework did not need that space.

To ultimately prevail, Complainant must also prove, by a preponderance of the evidence, the explanations provided by S1, S2, and S3 were pretexts for discrimination or reprisal. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Hon. Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). Pretext can be demonstrated by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. Larraine D. v. Dep’t of Def., EEOC Appeal No. 2022002980 (Oct. 27, 2022). When asked why she believed her protected classes were factors in her receipt of a “High Satisfactory” performance rating, Complainant responded that because she received compliance ratings on 100 percent, no legitimate or reliable reason for reducing her rating from “Outstanding.” IR 94-95. But as was pointed out, another staff nurse who also attained compliance ratings of 100 percent received a “High Satisfactory” rating. When asked the same question about her loss of office space, Complainant replied that the incident was part of a pattern of harassment, retaliation, and discrimination against her for challenging what she called the Agency’s denial of her reasonable accommodation request. IR 105. Beyond her own conclusory assertions, Complainant has presented neither affidavits, declarations, or unsworn statements from witnesses other than herself nor documents which contradict or undercut the explanations provided by S1, S2, or S3 or which would cause us to question their truthfulness as witnesses. We therefore find that neither of these incidents can be attributed to unlawful consideration of Complainant’s disability or EEO activity on the part of S1, S2, or S3.

#### *Breach of Confidentiality of Medical Information – Incident (6)*

The Rehabilitation Act specifically prohibits the disclosure of medical information except in these five situations: (1) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (2) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; (3) government officials investigating compliance with this chapter shall be provided relevant information on request; (4) the information may in certain circumstances be disclosed to workers' compensation offices or insurance carriers; and (5) agency officials may be given the information to maintain records and evaluate and report on the Agency's performance in processing reasonable accommodation requests. Velva B., et al v. U.S. Postal Serv., EEOC Appeal No. 0720160006 (Sept. 25, 2017). In this case, there was no disclosure of Complainant’s medical information to any unauthorized parties. The email from the Assistant Nurse Manager to S1 merely pointed out that the adjustment to the work assignments would result in an increase in authorizations and appeals but would also result in a large decrease in the “Nuance” area.

This email cannot reasonably be interpreted to mean that Complainant was burdening the system because of her medical condition. We therefore find no violation of our regulations regarding confidentiality of medical information.

*Hostile Work Environment – Incidents (2), (4), (6), (7) & (8)*

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. Darrell K. v. Dep’t of Homeland Security, EEOC Appeal No. 2022001463 (July 13, 2023). Complainant must also prove that the conduct was taken because of a protected basis. Id. Only if Complainant establishes both of those elements, hostility and motive, will the question of Agency liability present itself. Id.

The incidents comprising Complainant’s harassment claim consist of workload adjustments, an email communication regarding workload adjustments, leave requests, and leave scheduling. Such routine work assignments and instructions do not rise to the level of harassment because they are common workplace occurrences. Jared F. v. Dep’t of Agric., EEOC Request No. 2023002098 (July 24, 2023). Unless it is reasonably established that the common workplace occurrence was somehow abusive or offensive, and that it was taken in order to harass Complainant on the basis of her protected class, we do not find such common workplace occurrences sufficiently severe or pervasive to rise to the level of a hostile work environment or harassment as Complainant alleges. Eulalia B. v. U.S. Postal Serv., EEOC Appeal No. 2021005046 (July 11, 2023). And in this case, Complainant has made no showing that any of the actions of S1, S2, S3, or any other management official were undertaken with the intent to harass her. Consequently, none of these incidents, either by themselves or connectively, are sufficiently severe or pervasive to constitute harassment.

Even if the conduct did rise to the level of a hostile work environment, Complainant would still have to establish the existence of a discriminatory motive or intent on the part of S1, S2, or S3. Indicators of unlawful motive can include discriminatory statements or past personal treatment attributable to those responsible for the personnel action that led to the filing of the complaint, unequal application of Agency policy, deviations from standard procedures without explanation or justification and inadequately explained inconsistencies in the evidentiary record. Tammy S. v. Dep’t of the Army, EEOC Appeal No. 2021000578 (May 5, 2022). When asked why she believed that she had been subjected to discrimination and reprisal at the hands of S1, S2, and S3, Complainant asserted that her workload had been increasing despite her protestations and started becoming more pronounced after she filed her EEO complaint, that she was unfairly referred to as a burden to the office because of her medical condition, and that she was being retaliated against for requesting a reasonable accommodation. IR 91, 100-02, 107-08; SIR 8. 11-12. Again, apart from her own assertions, Complainant has not presented any evidence from which one can infer the existence of an unlawful motive on the part of S1, S2, S3, or any other management officials. She has not presented any documentary or testimonial evidence that tends to establish the existence of at least one of the indicators of unlawful motive listed above.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final decision regarding Allegation (1), and AFFIRM the final decision with regard to Allegations (2) through (8).

### ORDER (C0618)

The Agency is ordered to take the following remedial actions:

1. 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.
2. Within 90 calendar days of the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training EEO training to the management officials identified as S1, S2, and S3 with an emphasis on providing reasonable accommodations under the Rehabilitation Act of 1973. The Agency may contact the Commission's Training and Outreach Division via email at FederalTrainingandOutreach@eeoc.gov for assistance in obtaining the necessary training.
3. The Agency shall consider taking disciplinary action against the responsible management officials identified as S1, S2, and S3. The Commission does not consider training to be disciplinary action. Within 120 calendar days from the date this decision is issued, 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 S1, S2, or S3 have left the Agency's employ, the Agency shall furnish documentation of their departure dates.

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 Mid-Atlantic Consolidated Account Center in Asheville, North 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.**

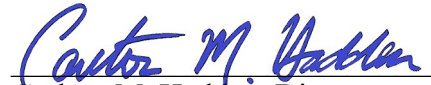
#### RIGHT TO REQUEST COUNSEL (Z0815)

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

September 18, 2023  
Date