



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

[REDACTED]  
Elise S.,<sup>1</sup>  
Complainant,

v.

Michael R. Pompeo,  
Secretary,  
Department of State,  
Agency.

Appeal No. 0120170164

Hearing No. 570-2014-00992X

Agency No. DOS-F-096-13

**DECISION**

On October 5, 2016, 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 September 6, 2016, final decision<sup>2</sup> 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 AFFIRMS in part and REVERSES in part the Agency's final decisions.

**ISSUE PRESENTED**

The issue presented is whether the preponderance of the evidence in the record establishes that Complainant was subjected to discrimination based on disability and/or reprisal.

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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.

<sup>2</sup> The Agency's September 6, 2016, final decision failed to address all of Complainant's claims, so the Agency issued a second final decision on October 25, 2016. The instant appeal concerns both final decisions.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Freight Rate Specialist, GS-2131-09, at the Agency's Despatch Office, Regional Logistics Center, Bureau of Administration, in Iselin, New Jersey (Despatch Agency New York). Complainant's first-level supervisor was the Deputy Despatch Agent (S1), and her second-level supervisor was the Despatch Agent (S2).

In fiscal year 2012, Complainant filed an EEO complaint based on her disability, Non-Hodgkin's Lymphoma. Complainant and the Agency entered into a settlement agreement to settle that EEO complaint. At the time of events giving rise to the instant complaint, Complainant's Non-Hodgkin's Lymphoma was in remission, with a possibility of relapse. According to Complainant, the cancer and the cancer treatments had caused neuropathy, nerve damage, chronic fatigue, joint swelling and soreness, nausea, gastrointestinal issues, blurred vision, and anxiety. Complainant averred that the left side of her head was partially paralyzed from the removal of a tumor. Complainant also stated that she has hypertension, which is exacerbated by stress.

Complainant alleged that on September 3, 2012, she reported overhearing offensive comments about Chaz Bono being a lesbian to S2 but that S2 failed to take action. According to Complainant, in January 2013, S2 told her that he would do something, but the offensive comments about Chaz Bono continued. S2 denied that Complainant reported offensive comments about Chaz Bono to him.

The record contains a January 12, 2012, letter from Complainant's doctor, which notes that Complainant had a history of hypertension, lymphoma, and neuropathy and that she would need flexibility in her schedule for ongoing medical appointments and continued testing. In March 2012, Complainant was placed on an alternate work schedule (AWS) as a reasonable accommodation, to accommodate her cancer-related medical appointments. Complainant alleged that on December 7, 2012, S2 emailed her and told her not to "screw me over" and that she was not the "poster girl" for AWS because of her prior EEO complaint. S2 stated, conversely, that at the time of the email he was unaware that Complainant had engaged in protected EEO activity. The record does not contain a copy of the email in question.<sup>3</sup>

On December 13, 2012, the Disability Reasonable Accommodation Division (DRAD) Chief (HR1) notified Complainant that her AWS would expire at the end of the year and that she would revert to a traditional schedule on December 30, 2012. HR1 stated that if Complainant required a change to her schedule as a reasonable accommodation, she would need to submit updated medical documentation to the Director of Medical Clearances/Medical Officer (HR2).

According to Complainant, the medical documentation she submitted in January 2012 should have been sufficient. On January 18, 2013, HR1 reiterated in an email that Complainant would need to provide additional medical documentation if she wished to revert to the AWS as a reasonable accommodation.

On January 2, 2013, S2 emailed Complainant regarding her request for information about why she was removed from her AWS, stating, "The way that you were using [AWS] was causing a real burden in the office." Complainant responded, asking how her use of AWS was causing a burden. S2 responded, in relevant part:

As we discussed on other occasions, you believe that your scheduled excused day can float within a pay period. Further, when you submit a request for leave, more often than not, you have multiple changes to the request before you get to where you are happy with what you are requesting. Both of these situations have caused exceptional time to be taken to make sure that we are charging you the correct type and quantity of leave. This is a burden on an office where one manager has volunteered to do T&A because we do not have office administration specialists... As to other staff, I will simply say that we are getting the job done and no one is complaining. Recognize that your past time off has required some staff members to go to your desk for paperwork when a hot situation arises and you are not in. They take the pressure off you as you have requested of management in the past.

Report of Investigation (ROI) Volume I at 84-85. Complainant responded, stating that she believed that she was being retaliated against. S2 responded that he had always supported Complainant and told her that any further emails on the subject would be considered "harassment" until a response was received from HR1.

On January 18, 2013, S2 sent Complainant an email that stated that she was sending a lot of emails, some of which were passive aggressive, to coworkers in close proximity to her cubicle. According to Complainant, on January 18, 2013, she was attending a meeting with S2 when he stated that he wished that he could do what she did with her head and the way she moves her neck, referring to her partial paralysis from the removal of the tumor. Complainant stated that this was derogatory and offensive. S2 denied making this statement. Complainant averred that, at the meeting, she reported coworker harassment, including additional comments about Chaz Bono, but S2 did nothing. S2 denied that Complainant reported that she was being harassed by coworkers.

On January 29, 2013, S1 issued Complainant a "Fully Successful" performance evaluation for 2012. S1 stated that Complainant met the minimum requirements for her position, but that Complainant had at times failed to provide excellent customer service or to work collaboratively with her coworkers, which impeded efficiency. According to Complainant, this rating was retaliatory and punished her for her disability-related absences during the evaluation period.

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<sup>3</sup> It is not clear from the record whether the EEO Investigator requested a copy of the email from the Agency. Nevertheless, the Agency is reminded of its responsibility to gather all of the relevant evidence and develop an impartial and appropriate factual record. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. See 29 C.F.R. § 1614.108(b).

Complainant stated that she should have received the highest possible rating because of her high level of achievement and the volume of her workload. Complainant requested a higher-level review of her evaluation, and on January 31, 2013, S2 concurred with S1's rating for Complainant.

On January 29, 2013, S2 emailed Complainant, "It appears that you remain an Army of One. Wish I could help you. I tried." ROI Volume I at 240. The record does not contain the context of this email. Complainant averred that she subsequently emailed S2 stating that she believed that she was being subjected to discrimination and that he responded, "I have never seen a more self-serving dissertation regarding a simple matter in my life." On January 30, 2013, S2 emailed Complainant and stated that no one had advocated harder for her to be accommodated than he had. Complainant responded that no one at the Agency had helped her at all. S2 responded, discussing at length how someone had filed six EEO complaints against him in 2002 in order to undermine his credibility as an Agency representative in an EEO proceeding. S2 stated that, as a result of the EEO complaints against him:

I got 120 days suspension from management duty that led directly to my being transferred to Baghdad for 26 months without leave. Then four years in Frankfurt in agony every day with a bad back/leg and I had to move heavy boxes as part of my duties and run off to Baghdad for 30 days at a time to straighten out things that had been fouled up, then another 25 months to cap it. No raise, no promotion, I am capped at the highest rate that I will ever attain, and I am in NO-freaking-Jersey where I have no friends, no familiarization to the area, and a wife who seriously misses her friends in Ohio.

Also lost a house, kennel of dogs that I loved, a car and a pick-up truck and a wife. I don't miss the wife.

You think you can beat that? The complainant always gets some consideration. No matter how diligently you manage, you will always get smacked. I don't have another 10 years to go off to some nasty place and lose what little I have left.

ROI Volume I at 241. Complainant responded that her rights were violated and that there was no justification for terminating her reasonable accommodation, mentioning that she had "seen heads roll" in similar situations. S2 responded, "You sound dangerous." ROI Volume I at 242.

Until February 2013, Despatch Agency New York employees took turns cleaning the office kitchen. On February 7, 2013, Complainant emailed S2 and asked to be excused from kitchen cleaning duties because of health concerns. On February 7, 2013, S2 responded by telling her that such an action would segregate her from her coworkers and by asking if Complainant had a doctor's note. On February 7, 2013, S2 sent an email to all staff stating that the rotating cleaning schedule would be terminated immediately and that employees would be responsible for cleaning up after themselves. On February 8, 2013, S2 sent an email to all staff stating that employees who volunteered to clean the kitchen on Fridays would be able to leave work 20 minutes early.

On February 8, 2013, Complainant asked if she could water a plant in order to be afforded the same opportunity to leave 20 minutes early. On February 12, 2013, S2 emailed Complainant and told her that she could not use the kitchen area because she would not clean it and that, "Should you disagree, I am aware that you know the many offices who will hear your views." ROI Volume I at 196. S2 also told Complainant that watering one plant was not the same as cleaning the kitchen area and that she would not be able to leave early for doing so. On March 25, 2013, S2 sent Complainant an email that stated that she could use the kitchen area as long as she cleaned up after herself.

On February 20, 2013, S2 issued Complainant a "Memo of Expectations," which accused Complainant of engaging in "disruptive" behavior and failing to comply with management directives. S2 specifically mentioned Complainant involving managers outside of her chain of command and devoting a considerable amount of time to matters unrelated to her work. Complainant stated that beginning in February 2013 she would include management officials such as the Director of Logistics Operations and the Director of Regional Logistics on emails alleging discrimination and harassment but that they did not respond.

On February 21, 2013, S2 sent an email to Human Resources and copied Complainant. In the email, S2 complained about "this string of abuse that I have had to endure for two days and by extension since last week and, truly, through my tenure here" from Complainant. ROI Volume I at 243. S2 continued, "Obviously there is nothing that anyone in this office can do to calm [Complainant] and make her reach her full productive capability. Further, I am not required by any Civil Service regulation that I know of to continue enduring these continued diatribes. Her rights are obviously in conflict with my responsibilities and those of this office." Id.

On March 11, 2013, S2 sent out a staff email that omitted Complainant and stated that annual leave required 24 hours advanced notice and would be granted at the discretion of the manager. According to Complainant, S2 intentionally excluded her from this email, and she copied a number of Agency officials on an email accusing him of doing so. On March 12, 2013, S2 wrote, "Once again, please allow me to apologize for the inappropriate email that [Complainant] felt compelled to send to you rather than following her management chain. She is a very troubled staff member and both H.R. and I are working to resolve her issues." ROI Volume II at 463. S2 denied intentionally excluding Complainant from the email. On March 13, 2013, Complainant requested annual leave. On March 14, 2013, S2 emailed Complainant that policy required 48 hours advanced notice for annual leave but that he would defer approval of the leave to S1. Complainant alleged that S2 had a different annual leave policy for her than he did for other staff. Although S2 denied having a different annual leave policy for Complainant, S2 averred that Complainant had been requesting leave multiple times per week, changing her leave requests, and trying to combine her leave with her lunch break, which S2 stated was a burden for the timekeeper. The record contains a January 11, 2012, leave policy for all New York Despatch Agency employees, which states that planned annual leave should be requested at least 48 hours in advance.

On March 19, 2013, S2 sent Complainant an email responding to an email she had sent to all staff about a missing document. In the email, S2 stated, "I resolved this issue. Stop bothering and bullying the rest of the office." ROI Volume I at 244.

On March 25, 2013, the Executive Director of the Bureau of Administration (S3) issued Complainant a Letter of Reprimand for displaying disrespectful behavior towards management by continuously circumventing her chain of command when she emailed managers other than her first- and second-level supervisors. One of the cited examples involved Complainant contacting the Director of Regional Logistics and the Deputy Chief of Regional Logistics regarding an incident involving indecent exposure in the workplace. Another cited example involved Complainant copying the Director and Regional Director of Logistics Management and the Deputy Assistant Secretary of Human Resources regarding being singled out and excluded from S2's March 11, 2013, email regarding the annual leave policy. Complainant stated that she contacted managers outside of her chain of command because her supervisors were violating her rights.

On April 9, 2013, Complainant submitted updated medical documentation to HR2 in support of her reasonable accommodation request for a flexible AWS, as well as the ability to change her lunch hour on days when she had medical appointments. Specifically, Complainant requested an AWS consisting of eight 6:30 a.m. to 3:45 p.m. days, one 6:30 a.m. to 2:45 p.m., and an "off" day that could be moved within the pay period. On April 10, 2013, HR2 notified HR1 that Complainant had a disability but that there was a limited connection between her disability and the requested flexible AWS. He did not explain the basis for this determination. On May 10, 2013, HR1 issued a denial of Complainant's reasonable accommodation request, which stated that there was no nexus between her disability and the requested accommodation. HR1 informed Complainant about the availability of the Family and Medical Leave Act (FMLA) as an alternate accommodation. On May 29, 2013, HR2 emailed HR1, stating that he reviewed additional medical documentation, which established a connection between Complainant's disability and her request for a flexible AWS as an accommodation.

On April 30, 2013, Complainant requested to shift her lunch time on days when she was taking leave in order to minimize her leave usage. According to S2, he denied this request because the shift violates Agency policy regarding when lunch breaks may be taken. S1 indicated that requests to move lunch periods are only granted at a supervisor's discretion.

On April 26, 2013, Complainant requested sick leave due to what she perceived as a hostile work environment. According to Complainant, on May 1, 2013, S2 left her leave request on her chair, where all of her coworkers could see it. S2 stated that this paperwork was not sensitive or confidential and that he left leave requests on other employees' chairs as well.

On May 7, 2013, a Supervisory Human Resources Specialist (HR3) issued Complainant a proposed three-day suspension. The two charges were: (1) inappropriate conduct towards her supervisor; and (2) failure to follow instructions. As an example that supported the first charge, HR3 cited Complainant sending an email to her supervisor in which she accused management of discriminating against her by denying her the same benefits afforded to her coworkers.

HR3 cited seven emails between March 27, 2013, and April 2, 2013, in which Complainant copied the Deputy Assistant Secretary for the Bureau of Human Resources in which she alleged that she was being subjected to discrimination, retaliation, and/or harassment. Complainant stated that she again was being punished for contacting Agency officials to voice her complaints about discrimination, harassment, and retaliation. Complainant's representative replied orally and in writing to the proposed suspension on behalf of Complainant, asserting that her conduct was appropriate and that she was being retaliated against. On July 3, 2013, S3 suspended Complainant for one day, sustaining the first charge but not the second. S3 found that Complainant failed to establish that the proposed suspension was retaliatory or discriminatory. Complainant served her suspension on July 11, 2013.

On May 21, 2013, S2 sent Complainant an email, responding to her accusation that he was making false statements against her. S2 wrote, "You are stuck in a groove. You are smarter than this. Please don't take your valuable time paid for by the government to say the same things continuously. If you want to accuse me of making false statements, bring it on." ROI Volume I at 245.

According to Complainant, on June 6, 2013, S2 came to her cubicle and loudly announced that Complainant had filed a complaint regarding another employee. Complainant alleged that on June 6, 2013, S2 physically blocked her from leaving her cubicle and that a coworker (C1) witnessed what happened. According to S2, he came to Complainant's cubicle and tried to ask her a question, but she got up and started moving towards him in an agitated manner. S2 stated that he tried to get out of her way, but that Complainant injured his hip when she rammed past him. C1 stated that she did not remember this incident.

According to Complainant, on July 2, 2013, S1 issued her a negative midyear evaluation. Complainant stated that she met with S1 in June 2013 and that S1 did not identify any areas for improvement. S1 stated that Complainant was not following established booking procedures and that she needed to maintain a good working relationship with all stakeholders. Complainant alleged that around the time of her midyear evaluation S2 sent her an email comparing her work unfavorably to that of her "successful colleagues."

Complainant stated that she received her pay for the pay period ending July 13, 2013, approximately one week late because S1 failed to process her timesheet. Complainant served her suspension on July 11, 2013. According to Complainant, the Payroll Office told her that the timekeeper had failed to submit her timesheet in a timely manner. S1 stated that Human Resources stated that there was no delay in processing her pay for the pay period and that she should check with her bank.

On July 24, 2013, Complainant requested to attend PK-104 training for two weeks in October and November of 2013. On August 5, 2013, S1 denied Complainant's request because it fell during the office's busy season. S1 told Complainant that she could take the training when it was offered again in May 2014.

According to Complainant, on July 25, 2013, S1 told her to complete a task that she believed to fall under C1's area of responsibility. S1 stated that Complainant refused to conduct research as assigned. Complainant averred that on July 25, 2013, she went to S2's office to discuss the task but that S2 told her to get out of his office and to have her lawyer contact him. According to S2, Complainant was pointing and waving her hands at S2 while approaching him in a physically threatening manner, so he asked her to leave his office. Complainant requested leave on July 25, 2013. On her leave request, Complainant indicated that she needed leave due to the harassing behavior of S1 and S2. On July 25, 2013, S1 emailed Complainant and told her that before he could approve her leave request he needed her to remove the statement that the reason for the leave was harassing behavior from management. On July 26, 2013, S1 approved the leave request for July 25, 2013, but noted that management did not concur with Complainant's statement.

On July 26, 2013, Complainant requested annual leave for July 29, 2013. S1 denied the request because of a mandatory training that was taking place from July 29 to 31, 2013. According to Complainant, S1 approved leave for a coworker (C3) during the same timeframe. S1 stated that Complainant would benefit from the training given the issues raised at the midyear evaluation and noted that C3 was dealing with a family medical emergency at the time.

According to Complainant, in August 2013 S2 accused her of going to different floors of the building to make personal calls and told her that there were surveillance cameras. S2 stated that the building owner complained to him that sometimes Complainant was loud and disruptive to other tenants when on her cell phone.

In August 2013, Complainant applied for the GS-9/11 Traffic Management Specialist position advertised under vacancy announcement number A/LM-2013-0061. According to Complainant, in October or November of 2013 she learned that she had not been selected. Complainant averred that the selectee (C2) was preselected for the position. S1 and S2 stated that C2's resume reflected that she was the most qualified applicant, having performed the duties for over six years.

In October 2013, Complainant applied for the GS-9/11 Traffic Management Specialist positions advertised under vacancy announcement number A/LM-2014-0006. S1 and S2 stated that this vacancy announcement did not correspond to positions in New York and that they had no involvement with the selection process. Complainant stated that she contacted Human Resources and was informed that no selections were made under this vacancy announcement.

In July 2015, Complainant lost her work badge. According to Complainant, she requested to use an Agency vehicle to drive to the United Nations to pick up a new badge, but S1 told her to use her personal vehicle or take the train to get there. S1 stated that a new badge could be obtained by providing information over the phone, so the use of a government vehicle to complete the process in person was not warranted. Complainant stated that she complained to S2, who told her that she was the "wrong skin tone."<sup>4</sup> According to the record, Complainant is Caucasian. Complainant averred that other coworkers have used Agency vehicles for similar tasks without issue.

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<sup>4</sup> S2 retired on October 31, 2015, and did not participate in the investigation of this claim.

Complainant subsequently received a new badge without having to go to the United Nations. Complainant alleged that she complained to a Supervisory Management Specialist about S1 and S2 refusing to let her take the government vehicle but that he did not take action.

On September 4, 2015, Complainant received a Letter of Reprimand for failure to follow supervisory instructions. The Reprimand cited three incidents where Complainant raised her voice at supervisors or coworkers, slammed doors, and exhibited physically intimidating behavior. Complainant alleged that the Letter of Reprimand was retaliatory.

Complainant stated that on September 10, 2015, she complained that a coworker was throwing files in a disorderly manner on her desk, and that no action was taken. The record contains a September 11, 2015, email from S1 to the surface bookers, discussing the procedures for handling files. An Employee Relations Specialist (HR4) stated that Complainant requested a Diplomatic Security contact for the incident, which she was given.

On December 18, 2015, HR3 issued Complainant a proposed five-day suspension for failure to follow instructions. HR3 noted that the September 4, 2015, Letter of Reprimand instructed Complainant not to yell or raise her voice when interacting with her coworkers. In support of the proposed suspension, HR3 cited Complainant yelling at a coworker on October 9, 2015, so loudly that she could be heard by employees outside of the closed office door and that she raised her voice to S1 and S2 when they entered the coworker's office. On April 14, 2016, the five-day suspension was sustained by S3's Deputy.

### *Procedural Background*

Complainant initiated contact with an EEO Counselor on January 4, 2013. On May 14, 2013, Complainant filed an EEO complaint, which she subsequently amended, alleging that the Agency discriminated against her on the bases of disability (physical) and in reprisal for prior protected EEO activity arising under Section 501 of the Rehabilitation Act of 1973 when:<sup>5</sup>

1. On September 12, 2012, S2 denied Complainant's reasonable accommodation request to work one hour of overtime;<sup>6</sup>

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<sup>5</sup> On appeal, Complainant contends that the Agency failed to address all of her allegations. The Commission's framing of Complainant's allegations is based on Complainant's appeal brief, with names changed, some conclusory statements removed, and some minor rewording. This framing is more consistent with Complainant's formal EEO complaint, and the record indicates that Complainant timely preserved her objection to the framing of the claims by the Agency.

<sup>6</sup> Complainant's overtime claims were not accepted by the Agency or investigated. Because Complainant does not raise this issue on appeal, the Commission exercises its discretion to only address those issues raised on appeal.

2. On September 13, 2012, S2 failed to take action in response to discriminatory, unwelcome, and harassingly offensive comments regarding Chaz Bono being a lesbian;<sup>7</sup>
3. In or around November 2012, S2 denied Complainant a promotion when he informed her that the Agency was not offering her a GS-9/11/12 career ladder position because of her disability “issues” and that she should consider disability retirement;<sup>8</sup>
4. On or about November 14, 2012, S2 denied Complainant’s reasonable accommodation request to work one hour of overtime;
5. On December 7, 2012, S2 sent an email to Complainant denying her request for reasonable accommodation and stating, “Don’t screw me over,” that Complainant “will not be the poster girl for AWS” because of her prior EEO complaint, and that she would “have to live with that,” or words to that effect;
6. On December 31, 2012, S2 and HR1 rescinded Complainant’s reasonable accommodations;
7. On January 2, 2013, S2 threatened Complainant that additional emails to him regarding the rescission of her reasonable accommodations would “be considered harassment”;
8. On January 7, 2013, S2 denied Complainant’s reasonable accommodation request to work one hour of overtime;
9. On January 18, 2013, HR1 requested unnecessary and duplicative medical information from Complainant, thereby delaying her request for reasonable accommodation;
10. On or about January 18, 2013, S2 subjected Complainant to humiliating and offensive comments during a meeting. Specifically, S2 stated, “I wish I could do that with my head,” or words to that effect, referring to the way that Complainant, who had a tumor removed from the left side of her head and is partially paralyzed on the left side of her head, moves her head;
11. On or about January 18, 2013, S2 informed Complainant that it was not necessary for her to email employees who sat near her desk;
12. Beginning on January 18, 2013, S2 failed to take prompt corrective and remedial action in response to Complainant’s complaint of an employee harassing and acting disrespectfully towards her;
13. On January 29, 2013, S2 responded to Complainant’s concerns regarding her discriminatory treatment in the office by stating, “I have never seen a more self-serving dissertation regarding a simple matter in my life,” and “[i]t appears that you remain an Army of One,” or words to that effect;

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<sup>7</sup> Complainant does not allege discrimination based on sexual orientation.

<sup>8</sup> This allegation was not accepted by the Agency or investigated. As Complainant does not raise this issue on appeal, the Commission will not address this claim.

14. On January 29, 2013, S1 issued Complainant a Fully Successful performance rating, which did not accurately reflect Complainant's performance during the 2012 calendar year;
15. On January 30, 2013, S2 emailed Complainant regarding his prior experience with an employee who filed EEO complaints against him and in which he concluded, "You think you can beat that? The complainant always gets some consideration. No matter how diligently you manage, you will always get smacked. I don't have another 10 years to go off to some nasty place and lose what little I have left." Furthermore, in response to an email from Complainant in which she alleged that her reasonable accommodations were rescinded without justification and that her rights were violated, S2 responded, "You sound dangerous";
16. Beginning in February 2013, the Director of Logistics Operations and the Director of the Regional Logistics Center have failed to take prompt and appropriate corrective and remedial action in response to Complainant's reports of employment discrimination and harassment;
17. On February 7, 2013, S2 requested a doctor's note when Complainant requested to be exempted from the Agency's kitchen cleaning schedule as a reasonable accommodation for her disability;
18. On February 7, 2013, S2 requested that Complainant reconsider her reasonable accommodation request to be excused from cleaning the kitchen because her request "would further segregate [her] from the team";
19. On February 8, 2013, S2 offered employees who volunteered to clean the kitchen the ability to leave early on Fridays when Complainant could not volunteer to clean the kitchen;
20. On February 12, 2013, S2 informed Complainant that she would not be permitted to use the kitchen because she would not clean the kitchen;
21. On February 12, 2013, S2 stated in an email, "Should you disagree, I am aware that you know the many offices who will hear your views";
22. On February 20, 2013, S2 issued Complainant a "Memo of Expectations," which accused Complainant of engaging in "disruptive" behavior and failing to comply with management directives;
23. On February 21, 2013, S2 sent the following email to Complainant, S1, and Human Resources personnel:

Please note this string of abuse that I have had to endure for two days and by extension since last week and, truly, through my tenure here. Obviously there is nothing that anyone in this office can do to calm [Complainant] and make her reach her full productive capability.

Further, I am not required by any Civil Service regulation that I know of to continue enduring this [sic] these continued diatribes. Her rights are obviously in conflict with my responsibilities and those of this office.

24. On March 14, 2013, S2 required Complainant to request annual leave 48 hours in advance, although other employees were only required to request annual leave 24 hours in advance;
25. On March 25, 2013, S3 issued Complainant a Letter of Reprimand;
26. On various dates, including April 30, 2013, S1 denied Complainant's requests to move her lunch period;
27. On May 1, 2013, S2 printed out and left Complainant's April 26, 2013, request for sick leave due to the hostile work environment on her desk chair, where all other employees could see it;
28. On May 7, 2013, HR3 issued Complainant a proposed three-day suspension;
29. On May 10, 2013, HR1 denied Complainant's request for reasonable accommodation;
30. On various dates, including May 16, 2013, S1 and S2 denied Complainant's requests for assistance with her work;<sup>9</sup>
31. On May 21, 2013, S2 emailed Complainant, "You are stuck in a groove. You are smarter than this. Please don't take your valuable time paid for by the government to say the same things continuously. [I]f you want to accuse me of making false statements, bring it on";
32. On June 4, 2013, HR1 denied Complainant's request for reconsideration of the denial of her reasonable accommodation request;<sup>10</sup>
33. On June 6, 2013, S2 physically blocked Complainant in her cubicle and announced loudly in front of her coworkers that she had filed a complaint regarding another employee;
34. On July 2, 2013, S1 issued Complainant a negative midyear evaluation that alleged that she was "not following the established booking procedures";
35. On July 3, 2013, S3 issued Complainant a one-day suspension;
36. On July 25, 2013, S2 acted aggressively towards Complainant when she met with him in his office to discuss a work-related matter and instructed her to "Get out of my office," or words to that effect, and to have her attorney call him;
37. On July 25, 2013, S1 failed to provide assistance to Complainant with a work-related matter and falsely accused her of failing to perform her duties;
38. On July 25, 2013, S1 harassed Complainant regarding her request for sick leave and her explanation that she was requesting leave due to management's harassment;
39. On July 26, 2013, S1 denied Complainant's request for annual leave due to a mandatory training, but he had approved leave for C3 during the same timeframe;
40. In July 2013, S1 and S2 failed to submit a timesheet for Complainant to payroll, which resulted in her not being paid for Pay Period 13, and refused to help her

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<sup>9</sup> This claim was neither accepted nor investigated by the Agency. Complainant does not specifically raise this issue on appeal, and the Commission will not address it.

<sup>10</sup> This claim was neither accepted nor investigated by the Agency. Because Complainant does not raise this issue on appeal, the Commission declines to address it.

- remedy the situation, even though S1 and S2 had agreed to assist C3 with her payroll issues;
41. On August 5, 2013, S1 denied Complainant's request to attend PK-104 training;
  42. In August 2013, S2 accused Complainant of using her cell phone on different floors of the building;
  43. In August 2013, S2 accused Complainant of violating security rules pertaining to locked files;<sup>11</sup>
  44. On September 6, 2013, Complainant learned that she had not been selected for the GS-9/11 Traffic Management Specialist positions advertised under vacancy announcement number A/LM-2013-0061;
  45. On November 26, 2013, Complainant learned that she had not been selected for the GS-9/11 Traffic Management Specialist positions advertised under vacancy announcement number A/LM-2014-0006;
  46. In or around August 2015, S2 denied Complainant's request to drive an Agency vehicle to the United Nations to complete a work task;
  47. In or around August 2015, S2 stated to Complainant that she was the "wrong skin tone," after he refused her request to take an Agency vehicle to the United Nations;
  48. In or around August 2015, a Supervisory Management Specialist failed to take corrective action after Complainant reported that she was being subjected to threatening and intimidating behavior by S1 and S2;
  49. On September 4, 2015, S3's Deputy issued Complainant a Letter of Reprimand for "failure to follow supervisory instructions";
  50. On September 10, 2015, a Traffic Management Specialist Supervisor failed to take corrective action after Complainant informed her that a coworker refused to stop throwing items on top of Complainant's desk; and
  51. On April 21, 2016, S3's Deputy issued Complainant a five-day suspension.<sup>12</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing, but subsequently withdrew her request. Consequently, the Agency issued two final decisions pursuant to 29 C.F.R. § 1614.110(b). As noted earlier, the Agency's September 6, 2016, final decision failed to address all of Complainant's claims, so the Agency issued a second final decision on October 25, 2016. Both decisions concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

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<sup>11</sup> This allegation was not accepted or investigated by the Agency. Because Complainant has not specifically raised it on appeal, the Commission will not address this issue.

<sup>12</sup> There is no indication that this amended claim was accepted by the AJ when the complaint was pending at hearing, and this claim was not investigated. However, Complainant provided relevant documents that were produced by the Agency during discovery, such that the Commission can adjudicate this claim on the merits.

### CONTENTIONS ON APPEAL

#### *Complainant's Contentions on Appeal*

On appeal, Complainant contends that, even with the issuance of the second final decision, the Agency failed to address all of her claims. Complainant argues that the Agency failed to properly frame her allegations of harassment as specifically pled.

Complainant requests that the Agency's final decisions finding no discrimination be reversed. According to Complainant, she established that she was subjected to reprisal, that she was subjected to a hostile work environment, that she was subjected to disparate treatment, and that she was denied a reasonable accommodation.

#### *Agency's Contentions on Appeal*

In response to Complainant's appeal, the Agency contends that Complainant failed to provide a legal basis for reversing its final decisions.

### 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 Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

#### *Hostile Work Environment Based on Reprisal and Disability*

Here, we find that Complainant has established that she was subjected to a hostile work environment based on reprisal and disability and that the Agency is vicariously liable for the harassment. To establish a claim of harassment a 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 employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

With respect to element (5), an employer is subject to vicarious liability for harassment when it is created by a supervisor with immediate (or successively higher) authority over the employee. See 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, 118 S. Ct. 2275, 2292-93 (1998). However, where the harassment does not result in a tangible employment action the agency can raise an affirmative defense, which is subject to proof by a preponderance of the evidence, by demonstrating: (1) that it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) that complainant unreasonably failed to take advantage of any preventive or corrective opportunities provided by the agency or to avoid harm otherwise. See Burlington Industries, supra; Faragher, supra; Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999). This defense is not available when the harassment results in a tangible employment action (e.g., a discharge, demotion, or undesirable reassignment) being taken against the employee. In the case of co-worker harassment, an agency is responsible for acts of harassment in the workplace where the agency (or its agents) knew or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. Id.

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). On the one hand, petty slights and trivial annoyances are not actionable. On the other, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B) (Aug. 25, 2016).

Given the importance of maintaining “unfettered access to [the] statutory remedial mechanisms” in the anti-retaliation provisions in Title VII, our cases have found that a broad range of actions can fall into this category. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006) quoting Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). For example, we have held that a supervisor threatening an employee by saying “What goes around, comes around” when discussing an EEO complaint constitutes an adverse action. Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009), request for recon. denied, EEOC Request No. 0520090654 (Dec. 16, 2010). We have also found that a supervisor attempting to counsel an employee against pursuing an EEO complaint “as a friend,” even if intended innocently, is an adverse action. Woolf v. Dep't of Energy, EEOC Appeal No. 0120083727 (June 4, 2009) (violation found when a labor management specialist told the complainant, “as a friend,” that her EEO claim would polarize the office).

On January 2, 2013, S2 emailed Complainant and stated that her reasonable accommodation had been a “burden” for the office. When asked to explain, S2 responded that it had been difficult to administer Complainant’s time and attendance and that coworkers had been required to cover her assignments when she was absent. We note that requesting a reasonable accommodation constitutes protected EEO activity and find that informing an employee that her reasonable accommodation for her disability was a burden is reasonably likely to deter a reasonable employee from engaging in protected activity.

On January 30, 2013, S2 sent Complainant an email with a lengthy diatribe about his past negative experience from when an employee filed multiple EEO complaints against him. We find that an email from a supervisor to a subordinate complaining at great length about the negative consequences he experienced after someone filed EEO complaints against him would be reasonably likely to deter a reasonable employee from engaging in protected activity.

On February 20, 2013, Complainant received a Memo of Expectations. On March 25, 2013, Complainant received a Letter of Reprimand. On May 7, 2013, Complainant received a proposed three-day suspension, which was subsequently mitigated to a one-day suspension. All of these disciplinary documents cited instances of Complainant contacting upper management and/or management officials outside of her chain of command to report allegations of discrimination, retaliation, and/or harassment by her first- and second-level supervisors as problematic. However, each time Complainant brought her EEO concerns about her supervisors to Agency leadership, she was engaging in protected EEO activity. Disciplining an individual for raising EEO concerns with Agency leadership could have a chilling effect on the EEO process, leading employees not to report instances of discrimination or harassment by their supervisors. See *Ela O. v. Dep’t of Treasury*, EEOC Appeal No. 0120122603 (May 8, 2015). We find that these progressive disciplinary actions, which punish Complainant for engaging in protected EEO activity, would also be reasonably likely to deter a reasonable employee from engaging in protected activity.

Complainant also alleged that she was subjected to harassment based on disability. As a preliminary matter, we consider whether Complainant has established that she is an “individual with a disability” within the meaning of the Rehabilitation Act. An “individual with disability” is a person who has, has a record of, or is regarded as having a physical or mental impairment which substantially limits one or more of that person’s major life activities, *i.e.*, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. See 29 C.F.R. § 1630.2(j). Major life activities include, in part, the operation of a major bodily function. 29 C.F.R. § 1630.2(i)(1)(ii). Complainant stated that, as a result of her cancer, she experienced neuropathy, nerve damage, chronic fatigue, joint swelling and soreness, nausea, gastrointestinal issues, blurred vision, and anxiety. Complainant also averred that the left side of her head was partially paralyzed from the removal of a tumor and that she has hypertension, which is exacerbated by stress. We find that Complainant has established that she is an individual with a disability under the Rehabilitation Act, as she is substantially limited in multiple major life activities, including seeing, thinking, and the operation of the nervous system and the gastrointestinal tract.

We next consider whether Complainant was subjected to harassment based on disability. Complainant alleged that she was discriminated against when S2 told her to request annual leave 48 hours in advance, despite allowing other employees to request annual leave 24 hours in advance. Complainant also alleged that S2 told her that she could not use the office kitchen because she could not volunteer to clean it due to her compromised immune system. The record reflects that on February 12, 2013, S2 told Complainant that she could not use the kitchen at all, even if she cleaned up after herself. S2 did not reverse course until March 25, 2013, when he informed her that she could use the kitchen as long as she cleaned up after herself. We find that these incidents consist of harassment based on disability.

The alleged harassment clearly affected the terms and conditions of Complainant's employment, as she was subjected to discriminatory disciplinary actions and held to different standards than her coworkers when it came to leave usage. Considered as a whole, we find that these incidents of harassment are sufficiently severe to constitute a hostile work environment. S2, Complainant's second-level supervisor, was responsible for the disability- and reprisal-based harassment. We find that the Agency is vicariously liable for S2's harassment. The Agency has not established an affirmative defense, as the preponderance of the evidence does not establish that it exercised reasonable care to prevent and correct promptly any harassing behavior. In fact, Complainant repeatedly reached out to Agency officials to report harassment, and, not only did the harassment continue, she was disciplined for contacting officials outside of her chain of command to report the harassment. Therefore, Complainant has established that she was subjected to a hostile work environment based on reprisal and disability.

#### *Denial of a Reasonable Accommodation*

In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability; (2) she is a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002) (Reasonable Accommodation Enforcement Guidance).

An agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). "The term "qualified," with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

Upon a complainant's request for reasonable accommodation, an employer may require that documentation about the disability and the functional limitations come from an appropriate health care or rehabilitation professional.

See Reasonable Accommodation Enforcement Guidance at Question 6. When an employee's disability or need for an accommodation is not known or obvious, an employer may ask an employee for reasonable documentation about his or her disability, limitations, and accommodation requirements. See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915.002, at Question 7 (July 27, 2000).

Complainant alleged that beginning on December 31, 2012, she was denied a reasonable accommodation consisting of a flexible AWS and the ability to move her lunch break to minimize her leave usage. Complainant's January 2012 medical documentation indicated Complainant's medical conditions were ongoing and that the duration of the medical conditions was unknown. However, we note that the Agency is permitted to periodically ask for updated medical information where the chronic nature of a disability is not established. Complainant provided updated medical documentation on April 9, 2013, but the Agency found that the updated documentation did not establish a nexus between her disability and the requested accommodation. We disagree. The nexus between Complainant's disability and the need for accommodation was as evident in the 2013 medical documentation as it was in the original 2012 medical documentation. Complainant requested AWS to assist in scheduling medical appointments related to her disability. While there is no express statement to this effect, it appears that Human resources personnel erroneously believed, at least initially, that attending medical appointments related to a disability was not something the Agency was required to accommodate.

We further find that the Agency's May 10, 2013, proposal of FMLA as an alternative accommodation that would permit her to attend her medical appointments did not fulfil its obligation under the Rehabilitation Act to reasonably accommodate Complainant. If Complainant utilized FMLA, she would be required to take unpaid leave or use sick or annual leave when she had medical appointments, whereas with a flexible AWS she could have minimized her leave usage by moving her AWS "off" day within the pay period. Although an employer may choose among effective accommodations, "forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation." Denese G. v. Dep't of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016) (citing Mamola v. Group Mfg. Servs., Inc., 2010 WL 1433491 (D. Ariz. Apr. 9, 2010); Woodson v. Int'l Bus. Machines, Inc., 2007 WL 4170560 (N.D. Cal. Nov. 19, 2007)). Thus, "absent undue hardship, an agency should provide reasonable accommodations that permit an employee to keep working rather than choosing to put the employee on leave." Id.

The burden now shifts to the Agency to provide case-specific evidence proving that providing reasonable accommodation would cause an undue hardship in the particular circumstances. A determination of undue hardship should be based on several factors, including: (1) the nature and cost of the accommodation needed; (2) the overall financial 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. See Preston v. U.S. Postal Serv., EEOC Appeal No. 0120054230 (Aug. 9, 2007); Enforcement Guidance on Reasonable Accommodation. Given that Complainant was permitted to utilize a flexible AWS and move her lunch break to minimize her leave usage in 2012, we find that the Agency has not established that maintaining Complainant's accommodation constituted an undue hardship. We therefore find that Complainant established that she was denied a reasonable accommodation after she submitted updated medical documentation on April 9, 2013.

Moreover, we find that the Agency failed to make good faith efforts to reasonably accommodate Complainant, and remand the matter for a supplemental investigation into whether Complainant is entitled to compensatory damages. Under Section 102 of the Civil Rights Act of 1991, compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. However, this section also provides that an agency is not liable for compensatory damages in cases of disability discrimination where it demonstrates that it made a good faith effort to accommodate the complainant's disability. A good faith effort can be demonstrated by proof that the agency, in consultation with the disabled individual, attempted to identify and make a reasonable accommodation. Schauer v. Soc. Sec. Admin., EEOC Appeal No. 01970854 (July 13, 2001). Here, the Agency subjected her to unlawful harassment based on disability and disciplined Complainant for requesting that the Agency reasonably accommodate her. These actions demonstrate a lack of good faith in the Agency's accommodation efforts.

#### *Disparate Treatment*

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). She must generally establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). The prima facie inquiry may be dispensed with in this case, however, since the Agency has articulated legitimate and nondiscriminatory reasons for its conduct. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-17 (1983); Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981); Holley, supra; Pavelka v. Dep't of the Navy, EEOC Request No. 05950351 (Dec. 14, 1995).

Complainant alleged that she was subjected to discrimination and reprisal when she was issued a Fully Successful rating for 2012. The Agency's legitimate, nondiscriminatory explanation for the rating was that Complainant did not always provide excellent customer service or collaborate effectively with her coworkers. Complainant cited her past Outstanding and Exceptional evaluations as evidence of pretext.

However, we find that the preponderance of the evidence in the record does not establish that the Agency's proffered legitimate, nondiscriminatory reason was a pretext for discrimination based on disability or reprisal.

Complainant alleged discrimination with respect to her requests to move her lunch period being denied. The Agency's legitimate, nondiscriminatory reason for denying her April 30, 2013, request was that Complainant wanted to move her lunch break outside of the allowable hours for taking a lunch break. Although Complainant contended that her coworkers were able to move their lunch periods, we find that Complainant has not established by the preponderance of the evidence that the legitimate, nondiscriminatory reason was pretextual.

Complainant alleged discrimination with respect to her July 2, 2013, midyear review. The Agency's legitimate, nondiscriminatory explanation is that Complainant was not following all of the proper procedures. Complainant generally asserts that this was a false statement, but we find that the preponderance of the evidence does not establish that this legitimate, nondiscriminatory reason is a pretext for discrimination or retaliation.

Complainant alleged that she was subjected to discrimination when her July 26, 2013, annual leave request was denied. The Agency's legitimate, nondiscriminatory reason for denying her annual leave request was that there was mandatory training on the date in question. Although Complainant notes that C3 was permitted to take leave during the training, the record reflects that C3 was having a family emergency at the time. We find that the preponderance of the evidence in the record does not establish that the Agency's legitimate, nondiscriminatory reason was a pretext for discrimination based on disability or reprisal.

Complainant alleged that she was discriminated against when she received her paycheck late. The Agency's legitimate, nondiscriminatory explanation for its actions is that it processed Complainant's timesheet in a timely manner and that any delay was due to Complainant's financial institution. Complainant asserted that she experienced a financial hardship as a result of the delay, but the preponderance of the evidence in the record does not establish pretext for discrimination.

Complainant alleged discrimination with respect to her denied request to attend PK-104 training. The Agency has provided a legitimate, nondiscriminatory reason for denying the request, which is that Complainant requested to take the training during a busy period for the Agency. The record reflects that Complainant's supervisor told her she could take the training when it was offered during a less busy time, and Complainant has not otherwise established that this legitimate, nondiscriminatory reason is a pretext designed to mask discriminatory or retaliatory animus.

According to Complainant, she was discriminated against when she was not selected for two Traffic Management Specialist vacancies. The Agency stated that Complainant was not selected for the New York vacancy because she did not have as much relevant experience as C2, and the record reflects that no one was selected from the other vacancy announcement.

Complainant stated that she had more years of federal service than C2, but this does not establish that the Agency's legitimate, nondiscriminatory explanation that C2 had more relevant experience for the position was pretextual. We find that the preponderance of the evidence in the record does not establish pretext for discrimination or retaliation.

Complainant alleged that she was subjected to discrimination when her request to drive an Agency vehicle to the United Nations was denied. The Agency's legitimate, nondiscriminatory reason for not allowing Complainant to drive an Agency vehicle is that she could obtain a new badge without traveling to the United Nations. The record reflects that Complainant subsequently obtained a new badge without driving or otherwise traveling to the United Nations. We therefore find that Complainant has failed to establish by the preponderance of the evidence that the Agency's legitimate, nondiscriminatory reason is pretextual.

Complainant alleged that she was discriminated against when she received a Letter of Reprimand on September 4, 2015. The Agency's legitimate, nondiscriminatory reasons for issuing the Reprimand were three incidents of unprofessional and disruptive behavior by Complainant. Unlike the bases for the other disciplinary actions issued to Complainant, we find that this constitutes a legitimate and nondiscriminatory explanation. Although Complainant contends that the Letter of Reprimand was inaccurate and that it was an act of reprisal, Complainant has not established by the preponderance of the evidence in the record that the Agency's legitimate, nondiscriminatory reasons are pretextual.

Complainant alleged discrimination with respect to her April 14, 2016, five-day suspension. The Agency's legitimate, nondiscriminatory reason for sustaining the suspension was that Complainant yelled at a coworker and raised her voice towards her supervisor on October 9, 2015, after being cautioned to use professional communication in the workplace in the Reprimand. We find that this explanation is also both legitimate and nondiscriminatory, and we further find that Complainant has not established by the preponderance of the evidence that this legitimate, nondiscriminatory reason is pretextual.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that Complainant has established that the Agency subjected her to a hostile work environment based on reprisal and disability and that the Agency denied her a reasonable accommodation.

Therefore, we AFFIRM in part and REVERSE in part the Agency's final decisions finding no discrimination. We REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

### ORDER

The Agency shall take the following remedial action:

1. To the extent that it has not already done so and to the extent that Complainant still requires it, the Agency shall immediately engage in the interactive process with Complainant and provide her with a reasonable accommodation for her disability.
2. Within ninety (90) calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages, determine the amount of compensatory damages due Complainant, and issue a final decision on compensatory damages with appeal rights to the Commission. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
3. Within sixty (60) calendar days of the date this decision is issued, the Agency shall restore to Complainant any leave used as the result of the unlawful harassment or the removal of Complainant's reasonable accommodation and shall compensate Complainant for any leave without pay taken as a result of the discriminatory harassment, including the discriminatory one-day suspension served on July 11, 2013, or as a result of the removal of Complainant's reasonable accommodation,. Complainant shall cooperate with the Agency and provide it with information concerning what leave and leave without pay she took as a result of the harassment and the removal of her reasonable accommodation.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall expunge all records related to the February 20, 2013, Memo of Expectations, the March 25, 2013, Letter of Reprimand, the May 7, 2013, proposed suspension, and the July 3, 2013, decision to suspend from its all of its personnel records, including from Complainant's eOPF.
5. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide a minimum of four hours of in-person or interactive training to all supervisors at its Despatch Agency New York facility and to all Agency Human Resources personnel who service the Despatch Agency New York facility. The training shall have a special emphasis on reprisal, disability discrimination, the reasonable accommodation process, and harassment.
6. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider discipline against the responsible Despatch Agency New York management officials and Human Resources officials, including, at a minimum, S1 and S2. The Agency shall report its decision to the Compliance Officer. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision. If S1 or S2 is no longer employed by the Agency, as either an employee or a contractor, the Agency shall provide evidence of their departure date(s).
7. Within thirty (30) calendar days of the date this decision is issued the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Despatch Agency New York facility in Iselin, New Jersey 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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. 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 (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 25, 2019  
 Date