



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

[REDACTED]
Lenny W.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(National Institutes of Health),
Agency.

Appeal No. 0120170311

Agency No. HHS-NIH-NIDDK-009-16

DECISION

Complainant timely 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 final decision concerning his 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.

ISSUES PRESENTED

The issues presented are: (1) whether Complainant established that he was denied reasonable accommodation for his disability; (2) whether Complainant established that the Agency's proffered explanation for its actions was pretext to mask unlawful discrimination based on his disability; and (3) whether Complainant established that he was subjected to a hostile work environment, as alleged.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Biologist, GS-7, with the Agency's National Institute of Diabetes, Digestive and Kidney Diseases (NIDDK), Phoenix

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

Epidemiology and Clinical Research Branch (PECRB), Diabetes Clinical Research Division, in Phoenix, Arizona. Report of Investigation (ROI), at 76. Complainant began his appointment to his position on April 19, 2015 and was subject to the satisfactory completion of a two-year probationary period. *Id.* The Supervisory Medical Technologist served as Complainant's first-level supervisor (S1) and the Chief of Obesity and Diabetes Clinical Research Section served as Complainant's second level supervisor (S2). Complainant's duties encompassed working in a lab, testing and processing food and urine samples, among other things.

Complainant has been deaf since infancy and his primary language is American Sign Language (ASL). *Id.* at 255. Complainant was hired by the Agency under the Schedule A hiring authority, a non-competitive appointment authority for applicants with disabilities. *Id.* at 76. Complainant cannot read lips or speak, and averred that the Agency became aware of his disability during his interview in December 2014. *Id.* at 255. Complainant averred that he used whiteboards, instant messenger, and the video phone service to communicate. *Id.* at 256. He stated he needed an ASL interpreter or Video Remote Interpreting (VRI) for lengthy conversations and during trainings.²

S1 averred that she emailed Complainant with a list of reasonable accommodations they could provide, which included pen and paper, whiteboards, instant messaging, email, a desktop computer with webcam, a video phone, and on-site interpreters. *Id.* at 316-17. S1 stated that she contacted IT for VRI for Complainant, but IT confirmed that VRI could only be provided at his desktop computer and not in the lab where he worked. *Id.* S1 explained that the laboratories do not have Wi-Fi on the network because having a laptop in the laboratories would have posed a safety hazard, and also would have required the purchase of an additional laptop and the installation of extra network drops. *Id.* She stated that interpreters were used for meetings, and whiteboards, pen and paper, instant messaging, or email were used to communicate if there was not an interpreter present. S1 felt that Complainant did not need an interpreter at certain times because he could still "see and feel." *Id.* Complainant was not provided with an interpreter or VRI during certain periods of his training and on other occasions while working in lab areas. *Id.* at 261.

During Complainant's training, his co-worker, a Visiting Fellow from Germany (the Doctor), found it difficult to communicate with him without any interpreting service. Complainant observed the Doctor would become frustrated by their communication barrier, and the Doctor would throw objects (including chairs), kick, yell, and hit objects to express his frustration. *Id.* Complainant attested that this violent behavior intensified in July 2015 (when the Doctor was his acting supervisor in the absence of S1), and he made S1 and S2 aware of the Doctor's behavior. *Id.* Complainant stated that he felt unsafe and unwelcome while at work due to the Doctor's behavior. *Id.* S1 and S2 denied being made aware of the Doctor's behavior towards Complainant and expressed their feeling that Complainant and the Doctor had a very cordial relationship. *Id.* at 341. However, the Health Technician attested that she witnessed the Doctor become angry, hit the walls, throw things, and slam things down because he could not communicate with Complainant. *Id.* at 365.

² Video Remote Interpreting (VRI) provides interpreting services for deaf persons remotely by way of a computer with internet connection or a tablet using a cellular connection.

The Health Technician stated that the Doctor would tell her that it made him angry that Complainant did not understand, and she reasoned that the Doctor became frustrated because Complainant could not hear. Id. The Health Technician further recalled that Complainant felt that he was harassed by the Doctor and recalled that he specifically reported the harassment to S1. Id. It was the Health Technician's belief that Complainant had been harassed by not only the Doctor, but by S1 as well. Id.

Meanwhile, on July 21, 2015, while Complainant was "attempting to break a vial for cell washing" it shattered. Id. at 262. Complainant then attempted to drop the vial, but S1 instructed him to keep holding it. Id. As a result, the compound contained in the vial spilled out and leaked through Complainant's gloves, burning his finger. Id. Complainant believed that S1 was not concerned for his safety and he expressed that his impairment made him "vulnerable for victimization." Id. at 263. In response, S1 averred that the glass vial could not be disposed of in a plastic bag due to safety. She further stated she was unaware that the compound had pierced through his gloves until hours later. S2 also believed that S1 was unaware that the compound had penetrated through Complainant's gloves. However, the Health Technician, who witnessed the event, felt that S1 acted improperly towards Complainant. The Health Technician specifically attested:

I was actually there in the lab when [Complainant] had gotten a reagent on his hand and it burned him. [S1] wouldn't let him wash his hands and that chemical is supposed to be washed off as soon as it has skin contact. She was standing next to him she knew the chemical had touched him. She double gloves for everything when she is working with dangerous chemicals. [S1] told [Complainant] to stay there and she would forcefully throw her hand down to demand him to stay. She treated him like an animal, like you would treat a dog. I have seen it even in our weekly meetings, we had an interrupter [sic] and [Complainant] would try and talk and [S1] would tell him to hush and to stop. He was really mistreated here and our policy as federal government that [sic] we don't discriminate against people like that who have a disability; I feel like he was discriminated against.

Id. at 365.

Complainant also maintained a training system was set up specifically for him wherein he had to perform a protocol three times without trainer intervention or he would fail. Id. at 306-309. Complainant averred that he was not able to successfully complete multiple protocols on the training checklist and believed he would be terminated because of his failure. Id. Complainant however attested that he was not provided with any feedback from S1 when he failed a protocol. Id. Complainant stated that he was not cleared to work independently like other employees and was constantly watched over and nitpicked over the performance of his duties. Id. at 264.

In response, S1 believed the training system set up for Complainant was reasonable and thought the system would allow Complainant to show proficiency in the performance of his duties.

S1 stated that she talked with Complainant constantly about why he was not getting signed off on his training protocols. She asserted that Complainant was doing a bad job in the performance of his duties because tasks took him months to learn. Id. at 15.

However, the Intramural Research Training Recipient attested that he “was not aware of any prescribed training necessary in order to gain the privilege to work independently.” Id. at 353. The Intramural Research Training Recipient specifically attested:

It was mentioned by Complainant that he was graded solely based on [S1’s] opinion and I don’t know how objective such a system could be. His training was based on her opinion of whether he had completed a task to her liking. I don’t necessarily know how objective that could have been.

Id. at 353.

The Health Technician also felt that Complainant was held to a higher standard than his coworkers and believed that Complainant received entirely too much training from S1. The Health Technician observed that Complainant was “constantly being watched” and was not allowed to do anything without supervision. Id. at 366. The Health Technician opined that Complainant was a very intelligent person, and she felt that he did not need that much training. According to the Health Technician, she did not see Complainant do anything wrong and questioned if S1 simply wanted to get rid of Complainant. Id.

Additionally, Complainant attested that on September 22, 2015, he asked S1 for a quick bathroom break on their way back from cell sizing. Id. at 267. He recalled that S1 said no and forced him back into Room 8 where a biopsy was being performed. Id. He said when they were in Room 8, S1 roughly pulled his lab coat when he began walking toward the bathroom. Id. The Clinical Registered Nurse, who witnessed the incident, thought it was improper for S1 to pull Complainant’s lab coat to say that he could not use the bathroom. Id. at 360. The Nurse believed that S1 was simply frustrated with Complainant’s disability. The Nurse attested:

I do not know of any policy that says you cannot take a bathroom break, if you have to go you have to go. I thought it was pretty lame. If we needed something [S1] could have covered for two minutes. There were two lab people so she could have covered. We could have waited, it wasn’t a procedure where we couldn’t wait a couple of minutes. [S1] could have done whatever needed to be done. I didn’t see it as that critical of a time point that he couldn’t take a bathroom break.

Id.

The Clinical Registered Nurse believed that S1 was upset and frustrated because Complainant learned differently than other employees due to his inability to hear. Id. at 361.

Also, on September 29, 2015, S1 reportedly told Complainant that he missed a date on some paperwork while they were working on a stool sample. Id. at 268-69.

Complainant averred that S1 then angrily ripped his hand from the sample and made him leave the lab. Id. Complainant stated that he was “emotionally crushed,” and he deduced that not having any interpreter on certain occasions while working made it easier for S1 to harass him. Id. at 269. S1 however denied being angry or ripping Complainant’s hand away. Rather, S1 averred that they started to process the stool, but Complainant had not written down the date and time on the stool combustion report. She said she asked Complainant to write down the date and time, and he said he would remember to do it later. S1 also stated that Complainant refused, for a second time, to re-inventory the samples, so she told Complainant to sit at his desk because it was clear he was not going to follow instructions.

On September 30, 2015, Complainant was issued a Notice of Termination.³ Id. at 431-434. S1 stated that Complainant was fired because he had refused to follow direct orders and was performing tasks unsupervised. Id. at 330-31. S1 maintained that she had sample integrity concerns because she had no way of knowing if the tasks Complainant was performing unsupervised were performed correctly. Id. S1 further maintained that Complainant would not read or review protocols in advance and was not prepared to perform the protocols during trainings. Id. S1 stated that Complainant would make critical decisions without asking her what to do. Id. As an example, S1 attested that on July 27, 2015, Complainant had processed a urine sample unsupervised, and that Complainant was unsure how to process such urine samples. Id. S2 concurred with S1’s decision in deciding to terminate Complainant’s employment. S2 averred that Complainant had failed to master the basic functions of his position, despite five months of training.

However, the Health Technician recalled that S1 did not treat Complainant well and believed that Complainant was subjected to discrimination. Id. at 365. The Health Technician observed that Complainant, in weekly meetings would try and speak through the interpreter, but S1 would tell him to “hush and to stop.” Id. The Clinical Registered Nurse attested that a coworker had said that Complainant was feeling uncomfortable and unwelcome. Id. at 361. The Clinical Registered Nurse also allegedly witnessed S1 “get loud” and become frustrated with Complainant. Id.

On December 18, 2015, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of disability (deaf) and reprisal for prior protected EEO activity⁴ when:

1. In April 15, 2015, and ongoing, his request for VRI services was denied. He was also limited to perform menial tasks of refrigerator and freezer logs, and was only allowed to perform other tasks while management watched over his shoulder;

³ The termination became effective on October 7, 2015.

⁴ According to Complainant, his EEO activity included, among other things, telling S1 that she was harassing him and that he might contact the EEO Office. Complainant also averred that he emailed and directly told S1 that he believed she was subjecting him to discrimination.

2. In July 2015, and ongoing, he was harassed by a worker and management failed to take action;
3. On July 21, 2015, he was forced to hold a poisonous residue vial, which burned his finger and he was not allowed to drop it when the vial broke;
4. On July 31, 2015, and in September 2015, he was required to work past eight hours without compensation;
5. In August 2015, and ongoing, he was held to higher standards than his co-workers;
6. In September 2015, he was denied training;
7. On September 22, 2015, he was denied access to the bathroom while S1 pulled his lab coat forcing him to work without a break;
8. On September 29, 2015, his hand was violently ripped from a task and then he was directed to leave;
9. In September 2015, he was provided no feedback regarding his performance; and
10. On September 30, 2015, he was issued a Notice of Termination.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination and harassment as alleged.

The Agency found that Complainant did not establish a prima facie case of discrimination based on disability. The Agency specifically found that although Complainant was a qualified individual with a disability, he failed to identify any similarly situated employee outside of his protected class who was treated more favorably. The Agency further found that it articulated legitimate, nondiscriminatory reasons for its actions, which Complainant did not show were pretextual. The Agency found that Complainant did not establish that he was subjected to disparate treatment discrimination. The Agency additionally found that Complainant did not establish that he was subjected to a hostile work environment, as he did not show that its actions were motivated by discriminatory or retaliatory animus. The Agency found that, taken as a whole, the incidents alleged by Complainant did not rise to the level of severe or pervasive so as to alter the conditions of Complainant's employment and do not support a claim of actionable hostile work environment harassment.

CONTENTIONS ON APPEAL

On appeal, Complainant, through his attorney, states that he is a well-qualified Biologist with a degree in molecular biosciences and biotechnology from a prestigious college. Complainant maintains that although the Agency does have a contract with a provider of VRI, his request for access to this service to communicate during his work in the labs was denied by the Agency. Complainant states that the Agency only provided live interpreters during initial scheduled trainings and did not provide interpreters in labs or during any routine work activities. Complainant asserts that he was required to make advance requests for interpreters and management would either approve or disapprove his request at their discretion. He contends that despite his request for VRI in the lab, his supervisors only attempted to instruct him through frustrated hand gestures and scribbled notes. Complainant states that due to his disability he was given only menial tasks to perform, including washing lab buckets and keeping freezer and refrigerator logs. He argues that he was limited to only perform such menial tasks for months, while being subjected to a degree of scrutiny far beyond that of his coworkers. Complainant believes that S1's accusation that he was critically deficient in washing buckets was clearly an example of S1 harassing him and subjecting him to discrimination.

Complainant further maintains that the Agency did not establish a reason for the denial of his VRI requests. Complainant maintains that the Agency's claim that VRI could not be used in lab areas due the lack of Wi-Fi was simply not a reasonable assertion. He asserts that the Agency did not show that the installation of Wi-Fi in lab areas would have been overly burdensome or costly. Complainant maintains that the installation of wireless internet access was absolutely not required to use VRI in labs. He asserts that 4G cellular internet connections are also suitable for VRI. Complainant states that any 4G tablet device could have been used without any changes to the Agency's network, and he could have even used his own smartphone, which he carried with him in the lab.

The Agency has not filed a brief in response to Complainant's appeal.

STANDARD OF REVIEW

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 (EEO MD-110), 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").

Denial of Reasonable Accommodation

The federal government, including the Agency, is charged with being a “model employer” of individuals with disabilities. See 29 C.F.R. § 1614.203(a). Inherent in this duty is an obligation to break down artificial barriers which preclude individuals with disabilities from participating on an equal footing in the work force. Accordingly, the Rehabilitation Act requires federal agencies to make various types of “reasonable accommodation” for federal employees who have disabilities. This requirement helps ensure that such federal employees will be able to perform the essential functions of their positions and enjoy all the benefits and privileges of employment enjoyed by non-disabled employees. See Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act (“Appendix to Part 1630”), at Section 1630.2(o): Reasonable Accommodation.

In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability; (2) he 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) (Enforcement Guidance). “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). 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). As the Agency does not dispute that Complainant is a qualified individual with a disability, we shall next address whether Complainant established that he was denied reasonable accommodation as alleged.

In claiming that he was denied accommodation, Complainant maintains that he was required to make advance requests for interpreters and management would either approve or disapprove his requests at their discretion. He contends that his request for VRI in the lab was denied and his supervisors only attempted to instruct him through frustrated hand gestures and scribbled notes. S1, however, said that Complainant was provided with several accommodations, including a pen and paper, whiteboards, instant messaging, email, a desktop computer with webcam, a video phone and on-site interpreters.

There is no dispute that Complainant was not provided with any form of interpreting service (in-person or remote) while being personally trained on the lab protocols described above and on other occasions. The record reflects that this caused a breakdown in communication between Complainant and S1. We note employees observed that S1 (and the Doctor also) felt frustrated due to the communication barrier between her and Complainant. We note in Haggard v. U.S. Postal Serv., EEOC Request No. 05960262 (Nov. 25, 1997), the Commission ordered the agency to provide a certified interpreter to complainant at all training, and that the term “training” be construed broadly to include, but not be limited to, safety talks, discussions on work procedures, policies or assignments, workshops, seminars, staff meetings and informational meetings, whether long-notice or short notice.

We note that an interpreter is required at all such events, whether or not a complainant asks for an interpreter. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122130 (Mar. 11, 2015), Feris v. Envtl. Prot. Agency, EEOC Appeal No. 01934828 (Aug. 10, 1995), request for reconsideration denied, EEOC Request No. 05950936 (July 19, 1996) (citing Bradley v. U.S. Postal Serv., EEOC Request No. 05920167 (Mar. 26, 1992); Jackson v. U.S. Postal Serv., EEOC Request No. 05880750 (Apr. 18, 1989)). We have held that an Agency's obligation to accommodate a deaf employee is not diminished where the employee has the ability to read lips. See Yost v. U.S. Postal Serv., EEOC Appeal No. 01A51547 (June 13, 2006) (citing Wait v. Soc. Sec. Admin., EEOC Appeal No. 01A11629 (Oct. 2, 2003)). Moreover, we have found the Rehabilitation Act requires that an agency reasonably accommodate hearing impaired employees by providing effective interpreter services during work-related activities where hearing impaired employees are expected to be present. See Ortiz v. U.S. Postal Serv., EEOC Request No. 05960270 (Oct 16, 1998).

Furthermore, we find that the record refutes S1's assertions that VRI could not be provided for Complainant in the laboratories: 1) due to a lack of Wi-Fi on the network; 2) because having a laptop in the laboratories would have posed a safety hazard; 3) that it would have required the purchase of an additional laptop; and 4) the need for installation of extra network drops. Other than S1's unsupported assertions, there is simply no evidence reflecting that Complainant could not use VRI in the laboratories. Rather, the record contains emails to Complainant dated August 20, and 21, 2015, from the Agency's Interpreting Services instructing Complainant how he could set up VRI on either his iPhone, tablet, or laptop. ROI, at 386, 501. Interpreting Services even instructed that VRI could be used with a cellphone carrier's wireless broadband network, instead of Wi-Fi. Id. In addition, Complainant maintained that his iPhone worked in the Laboratories, and therefore he could not understand why the Agency did not provide him with VRI. Id. at 305. We also note that the Lead Interpreter, who coordinates interpreting services for the Agency, attested that S1 instead said that she was not sure that VRI was a good fit for training all day or interpreting scientific terms. Id. at 357. Therefore, the record reflects that VRI could have been implemented for Complainant in the laboratories, but S1 simply chose not to do so for reasons other than she elaborated above.

As such, we find that the Agency failed to provide Complainant with a reasonable accommodation in violation of the Rehabilitation Act. We find no evidence in the record to support a finding that providing Complainant interpreter services during Complainant's training in the lab and on other occasions would have been unduly costly or that it would have fundamentally altered the nature of the Agency's operation. See 29 C.F.R. § 1630.2(p).

In addition, we find that Complainant is entitled to compensatory damages for the Agency's failure to accommodate him. Where a discriminatory practice involves the provision of a reasonable accommodation, 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. 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007).

We note that several employees felt that the denial of accommodation resulted in a breakdown in communication, which caused Complainant to experience a hostile work environment by S1 and the Doctor. The record reflects that this breakdown in communication, resulted in Complainant's firing, as we find below. Therefore, we find that the Agency did not act in good faith in this case. Complainant is therefore entitled to present a claim for compensatory damages on the Agency's failure to accommodate him. See West v. Gibson, 527 U.S. 212 (1999); see also Complainant v. Dep't of Justice, EEOC Appeal No. 0120121339 (May 8, 2015) (complainant entitled to present a claim for compensatory damages when she was in bad faith denied accommodation leading to her termination).

Supervisory Harassment/ Hostile Work Environment

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, religion or prior EEO activity is unlawful, if it is sufficiently patterned or pervasive. Wibstad v. U.S. Postal Serv., EEOC Appeal No. 01972699 (Aug. 14, 1998) (citing McKinney v. Dole, 765 F.2d 1129, 1138-39 (D.C. Cir. 1985)); Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 at 3, 9 (Mar. 8, 1994). A single incident or group of isolated incidents will not be regarded as discriminatory harassment unless the conduct is severe. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982). Whether the harassment is sufficiently severe to trigger a violation of Title VII [or the Rehabilitation Act] must be determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, 510 U.S. 17 (1993).

To establish a claim of hostile environment harassment, Complainant must show that: (1) he is a member of a statutorily protected class; (2) he 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 the 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).

Upon review, we find that S1's actions towards Complainant were based on his disability. The record reflects that S1 would mistreat Complainant when he would try and speak through his interpreter, telling him to "hush and to stop." We also note that the Clinical Registered Nurse opinioned S1 was upset and frustrated because Complainant learned differently than other employees due to his inability to hear. Therefore, we find that Complainant has established the first three prongs of the prima facie case of a hostile work environment.

Objectively Hostile or Abusive Work Environment

Here, we find that the Agency's conduct was sufficiently severe and pervasive to alter the conditions of Complainant's employment and create an abusive working environment. We find that a reasonable person would find that the cumulative effect of S1's actions created a hostile work environment. In so finding, we note that the Health Technician observed that S1 would not let Complainant wash his hands after a toxic chemical spilled on his gloves. The Health Technician witnessed S1 forcefully throw her hand down to demand Complainant to stay, and as a result the chemical burned Complainant's finger. It was the Health Technician's opinion that S1 treated Complainant "like an animal, like you would treat a dog." The record also reflects that S1 pulled Complainant's lab coat, refusing to allow him to use the restroom. The Clinical Registered Nurse thought it was "pretty lame" that Complainant was told he could not use the restroom. In addition, the record shows that S1 constantly watched over Complainant, provided him with menial tasks, and got loud with him in a demeaning manner. The Health Technician averred that S1 would tell Complainant to "hush and stop," as he attempted to speak through his interpreter in meetings. Complainant attested that he felt "emotionally crushed," when S1 instructed him to leave the lab, among other things. We also note that the Clinical Registered Nurse attested that a coworker had said that Complainant was feeling uncomfortable and unwelcome due to S1's treatment of him. It is clear that Complainant was subjected to a hostile work environment because he was deaf and that S1 was frustrated with Complainant's disability.

Liability—Supervisory Harassment

The Commission will now turn to whether there is a basis for imputing liability to the Agency. With respect to element (5), described above, 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 Vance v. Ball State Univ., 133 S. Ct. 2434, 2443 (2013); Burlington Indus., Inc., v. Ellerth, 524 U.S. 742 (1998); Fragher v. City of Boca Raton, 524 U.S. 775 (1998). Where the harassment results in a tangible employment action, such as a supervisor disciplining an employee, the action of the supervisor is viewed as the action of the employer, and strict liability attaches. See, e.g., Ellerth, 524 U.S. at 762-63.

In the present case, S1's actions towards Complainant culminated in a tangible employment action, namely S1 signed and issued Complainant his notice of termination. As such, we find that the Agency is liable for the hostile work environment created by the actions of the supervisor based on Complainant's disability.

Liability--Coworker Harassment

In a 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. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999). See Jones v. Dep't of Labor, EEOC Appeal No. 01A41672 (Oct. 22, 2004) (management official's failure to address

an ongoing tense situation between the complainant and a co-worker based on her protected class stated a claim under Title VII).

We note that Complainant observed that the Doctor would become frustrated by their communication barrier and would throw objects, kick, yell, and hit inanimate objects to express his frustration. Complainant attested that this violent behavior intensified in July 2015, and he made S1 and S2 aware of the Doctor's behavior. We note that Health Technician corroborated Complainant's allegations about the Doctor, attesting that she witnessed the Doctor become angry, hit the walls, throw things, and slam things down. The Health Technician stated that the Doctor would tell her that it made him angry that Complainant did not understand, and she reasoned that the Doctor became frustrated because Complainant could not hear. The Health Technician said that Complainant complained to S1 about the Doctor's harassment of him. Given S1's own harassment of Complainant, it is clear that Complainant's complaints about the Doctor went ignored.

We find that Complainant has established that management knew about the Doctor's harassment and failed to take immediate and appropriate action. There were no efforts to separate Complainant from the Doctor and inquire into the matter. Given the Agency's inaction in addressing Complainant's concerns about the Doctor, we find a sufficient basis to hold the Agency liable for the co-worker harassment, as well.⁵

Disparate Treatment (Termination)

In analyzing a disparate treatment claim under the Rehabilitation Act, where an agency denies that its decisions were motivated by a complainant's disability and there is no direct evidence of discrimination, we apply the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999); Swanks v. WMATA, 179 F.3d 929, 933-34 (D.C. Cir. 1999). Under this analysis, in order to establish a prima facie case, a complainant must demonstrate that: (1) he is an "individual with a disability"; (2) he is "qualified" for the position held or desired; (3) he was subjected to an adverse employment action; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001).

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tx. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

In instant case, as stated above, the Agency does not dispute that Complainant was a "qualified individual with a disability" who was terminated. Moreover, as discussed in our finding that

⁵ The Doctor was only with the Agency temporarily and has since left the Agency's employ.

Complainant was subjected to a hostile work environment, we find that the circumstances surrounding the adverse action (the termination) give rise to an inference of discrimination. As such, we find that Complainant has established a prima facie case of discrimination based on his disability.

The burden now shifts to the Agency to articulate legitimate, nondiscriminatory reasons for Complainant's termination. In doing so, S1 noted in Complainant's September 30, 2015, Notice of Termination that Complainant exhibited a pattern of a failure to follow supervisory directives and follow standard protocols. Examples given by S1 included the failure to timely turn in a tracking list; performing protocols without supervision; not reading the protocol for stool processing; not understanding and performing urine protocol properly; and improperly disposing of a piece of a stool, which resulted in S1 having to complete the task herself.

To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves, 530 U.S. at 143; Hicks, 509 U.S. at 519. We find that Complainant has clearly done so in the present case, and that the Agency erred in finding otherwise. We note that the Supreme Court has held that the fact-finder may find pretext where he/ she determines that the Agency's articulated reason is unworthy of belief. Reeves, 530 U.S. at 133.

We note that several employees questioned S1's objectivity in her evaluation of Complainant's performance. Specifically, the Intramural Research Training Recipient stated that he enjoyed working with Complainant and stated that Complainant was graded based solely on S1's opinion. ROI, at 353. The Intramural Research Training Recipient averred that he was not aware of any prescribed training necessary in order to gain the privilege to work independently, and he questioned the objectivity of S1's opinion when she evaluated whether a task was performed to her liking. Id.

In addition, the Health Technician felt that Complainant had been subjected to discrimination, as he observed that Complainant was held to a higher standard than his coworkers and observed that Complainant received entirely too much training from S1. Id. at 365-366 The Health Technician observed that Complainant was "constantly being watched" and was not allowed to do anything without supervision. Id. The Health Technician opined that Complainant was a very intelligent person and the only problem was his hearing and the fact that he could not verbally communicate. Id. According to the Health Technician, she did not see Complainant do anything wrong and questioned if S1 simply wanted to get rid of Complainant. Id. Further, the Clinical Registered Nurse opined that S1 was upset and frustrated because Complainant learned differently than other employees due to his inability to hear. Id. at 361.

Moreover, as mentioned above, employees observed that S1 would treat Complainant very poorly in relation to his disability. The Health Technician stated that S1 "treated [Complainant] like an animal, like you would treat a dog." Id. at 365. The Technician further averred that S1 would mistreat Complainant when he would try and speak through his interpreter, telling him to "hush and to stop." Id. Another employee thought it was lame that S1 would not let Complainant use the

restroom. Id. at 360. In addition, employees seemed to be dismayed with Complainant's firing. One employee said that he was sad to see Complainant go.

We therefore find that the Agency's proffered reasons for Complainant's termination are unworthy of belief. We find it dubious that the Agency would choose to terminate Complainant, especially given that he not provided with an interpreter on many occasions. It is clear that Complainant was never given a chance to adequately perform the duties of his position due to his disability. We note that Complainant began his appointment with the Agency on April 19, 2015, and was fired on September 30, 2015, less than six months into his two-year probationary period. During this short period of time, there was a clear communication barrier with Complainant caused by S1's unwillingness to provide him with an interpreter on many occasions. We find that Complainant has established that he was subjected to disparate treatment based on his disability as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the matter for further processing in accordance with the ORDER below.⁶

ORDER

The Agency is ordered to take the following remedial actions within one hundred twenty (120) days of the date this decision issued:

1. The Agency shall offer Complainant reinstatement to the position of Biologist, GS-7, at the Agency's facility in Phoenix, Arizona, or a substantially equivalent and agreeable position, retroactive to October 7, 2015. The Agency shall ensure that Complainant is not supervised by the management official identified as S1 in this decision. Complainant must respond to the Agency's offer within fifteen (15) calendar days of receipt of the offer. Should Complainant reject the offer of reinstatement, entitlement to back pay shall terminate as of that date of refusal.
2. Upon reinstatement, the Agency shall immediately ensure that Complainant is provided with reasonable accommodation, including a qualified sign language interpreter or effective VRI when necessary, to ensure that he has access to information communicated in the workplace equal to that of nondisabled employees (including in labs, meetings, and in trainings) consistent with this decision.

⁶ Given our conclusion that Complainant established that he was subjected to discrimination based on his disability, we need not address reprisal as a basis, as under the circumstances of this case, a finding on the basis of reprisal would not entitle him to any greater relief.

3. The Agency shall expunge from Complainant's Official Personnel File (OPF) all official Agency records referencing Complainant's termination.
4. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
5. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
6. The Agency shall give Complainant a notice of his right to submit objective evidence pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)) in support of his claim for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.
7. The Agency will ensure that S1 and S2 are provided with a minimum of 24 hours of substantial live in-person, or interactive, EEO training, with a focus on the Rehabilitation Act, reasonable accommodation, and hostile work environment.
8. The Agency shall strongly consider taking appropriate disciplinary action against S1 and/or S2. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the compliance officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S1 or S2 has left the Agency's employ, the Agency shall furnish documentation of her/his departure date.
9. The Agency shall post a notice, as discussed below in the statement entitled. "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that all of the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its National Institute of Diabetes, Digestive and Kidney Diseases (NIDDK), Phoenix Epidemiology and Clinical Research Branch (PECRB), Diabetes Clinical Research Division 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)), 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 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.

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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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

July 30, 2019

Date