



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

[REDACTED]
Sang G.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 0120170604

Hearing Nos. 420-2014-00241X, 420-2015-00116X, and 420-2016-00100X

Agency Nos. 2001-0322-201304583, 2001-0322-2014102744, and 2001-0322-2015102181

DECISION

On November 30, 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 October 31, 2016, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final decision.

ISSUES PRESENTED

The issues presented are (1) whether the Agency properly dismissed Complainant's claim that it denied his request for official time to speak with an EEO Counselor, (2) whether the Agency subjected Complainant to per se reprisal, and (3) whether the Agency discriminated against and subjected Complainant to harassment on the bases of race, disability, and reprisal for prior protected EEO activity.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Legal Administration Specialist, GS-10, at the Agency's VA Regional Office in Montgomery, Alabama.

Complainant filed formal EEO complaints on October 18, 2013 (Complaint Number 2001-0322-2013104583); June 5, 2014 (Complaint Number 2001-0322-2014102744); and June 13, 2015 (Complaint Number 2001-0322-2015102181). With respect to Complaint Number 2001-0322-2013104583, the Agency defined the accepted issues as whether the Agency subjected Complainant to a hostile work environment based on disability and reprisal for prior EEO activity when:

1. since August 20, 2013 (ongoing), Complainant's request for modifications (reasonable accommodation) to his new work area have been ignored, and his request to have scheduled breaks incorporated into his daily work schedule was denied;
2. on August 20, 2013, the Human Resources Liaison (HRL1) misinformed Complainant about how to file an Office of Workers Compensation Programs (OWCP) claim and the proper agency procedures for requesting COP leave;
3. on September 23, 2013, Complainant's supervisor (S1) changed his duties without notifying him;
4. on September 27, 2013, S1 delegated work to Complainant for which he was not trained; and
5. during a meeting held on September 27, 2013, S1 made reference to Complainant's EEO activity.

Citing 29 C.F.R. § 1614.107(a)(1), the Agency dismissed Complainant's allegation that S1 discriminatorily denied him official time to speak with the EEO Counselor and told him to go back to work.

With respect to Complaint Number 2001-0322-2014102744, which Complainant amended on October 17, 2014, the Agency defined the accepted issues as whether the Agency subjected Complainant to a hostile work environment based on disability, race (White), and reprisal for prior EEO activity when:

1. on March 23, 2014, S1 instructed Complainant to submit an annual leave request for being five minutes late;

2. on April 10, 2014, after Complainant indicated that he had stayed past his tour of duty on various occasions and not been properly compensated, S1 turned off his computer and told him to go home;
3. on April 22, 2014, Complainant learned that an African-American co-worker who performs the same duties received a performance award as a result of the assistance he received from S1;
4. prior to and on April 22, 2014 (ongoing), Complainant did not receive the same assistance from S1 as his co-workers and, instead, was issued warnings for not making production standards;
5. on April 23, 2014, S1 openly discussed Complainant's medical information and belittled him in front of other employees and veterans/customers;
6. on several occasions, including April 24, 2014, S1 has covered for non-Caucasian employees on breaks, but she has either not allowed Complainant to take breaks or required him to return early due to customer concerns and/or care;
7. on May 16, 2014, Complainant's request for leave without pay (LWOP) for the dates of May 19-23, 2014, was denied;
8. on May 28, 2014, Complainant was issued a reprimand;
9. on May 30, 2014, S1 told Complainant he could not use the rest room during working hours;
10. on May 30, 2014, the Veterans Service Center Manager (VSC Manager 1) told Complainant he could not take the 30 minutes of authorized absence given to the rest of the team;
11. on June 2, 2014, the Vocational Rehabilitation and Employment (VRE) Officer inquired about Complainant's current and prior EEO activity;
12. on June 3, 2014, S1 harassed Complainant about a possible work-related injury and sent him back to work rather than to Human Resources;
13. during a meeting on June 3; 2014, VSC Manager 1 told Complainant that his primary job was to serve veterans, not file EEO complaints;
14. since June 3, 2014 (ongoing), the Human Resources Liaison (HRL2) has not provided Complainant with the proper instructions for filing a claim over his possible work-related injury;

15. as of June 12, 2014 (ongoing), management has not responded to Complainant's request for reasonable accommodation, which he submitted on May 27, 2014;
16. as of October 1, 2014 (ongoing), management has failed to compensate Complainant (either with pay or compensatory time) for staying past his tour of duty (0.5 hours); and
17. on October 10, 2014, Complainant was issued a reprimand.

The Agency defined the accepted issues in Complaint Number 2001-0322-2015102181 as whether the Agency subjected Complainant to a hostile work environment in reprisal for protected EEO activity when:

1. on January 12, 2015, Complainant learned that HRL1 (a) contacted his doctor without his specific consent; (b) asked his doctor inappropriate questions relating to another medical doctor (without supporting evidence), and (c) sent his doctor personal emails unrelated to his request for leave under the Family Medical Leave Act (FMLA);
2. on or about January 14, 2015, Complainant was informed that he was charged Absent Without Leave (AWOL) for January 5-6, 2015;
3. by letter dated February 10, 2015, Complainant was issued a proposed suspension for two calendar days;
4. during the period of February 10 - March 11, 2015, the Privacy Officer did not fully investigate Complainant's privacy violation concern;
5. on February 18, 2015, Complainant was informed the facility would not take any action against HRL1 for her actions as outlined in Claim 1;
6. on April 15, 2015, Complainant was notified that a pay audit for the period of March - December 2014 indicated he was overpaid approximately \$5,000 as a result of administrative errors, which he is still responsible for repaying; and
7. on May 15, 2015, the Service Center Manager (VSC Manager 2) made negative remarks to Complainant about his EEO activity.

Complainant engaged in prior EEO activity when he contacted an EEO Counselor on October 12 and filed a formal complaint on November 23, 2011. According to Complainant, the Agency's Office of Employment Discrimination Complaint Adjudication (OEDCA) sustained his allegation that a supervisor had interfered in the EEO complaint process. He and the Agency settled the prior complaint in April 2013 and, as a result, he transferred from a Veterans Service Representative position to a Legal Administrative Specialist position.

In his affidavits, Complainant identified his disabilities as post-traumatic stress disorder, a back and neck injury that he described as degenerative disc disease and spinal stenosis/facet joint syndrome, fibromyalgia, and chronic migraine headaches.

Complaint Number 2001-0322-2013104583

In an August 14, 2013, email to HRL1, Complainant discussed his worker's compensation claim, asked to have his current work area reevaluated, stated that his current workstation was not set up the way that his previous workstations were, and inquired whether he needed to complete a new reasonable-accommodation request. HRL1 replied on August 16, 2013, that OWCP needed to verify Complainant's injury and treatment. She stated that she was not sure if Complainant had other questions and suggested that he contact OWCP if he did. She also stated that she had asked the Veterans Affairs Medical Center (VAMC) to have an ergonomic specialist evaluate Complainant's work area and suggested that, in the meantime, Complainant work with his supervisor to have changes made to his work area. An Agency Safety Specialist conducted an ergonomic survey on September 11, 2013. He stated in a memorandum that Complainant was pleased with his ergonomic chair, that he placed Complainant's keyboard on a keyboard tray, and that he repositioned the computer monitors.

In his affidavit, Complainant stated that the Agency had provided him with a chair, modifications to his keyboard and monitors, and two 10-15-minute breaks per day in his previous position as a Veterans Service Representative and that he asked that these reasonable accommodations continue in his new position. He also stated that he previously submitted medical documentation in which his doctor stated that he "needed to get up frequently" and "could walk around for 10 to 15 minutes twice a day." He initially did not put his request in writing because he "was just coming off of an EEO complaint that [he] won and. . . was trying to keep tempers from flaring." Complainant asserted that the ergonomic specialist told him that he would receive the accommodations and that VSC Manager 1 told him that the Agency would not approve his request for breaks.

HRL1, who also served as an EEO program manager, stated in her affidavit that she was aware of Complainant's prior EEO activity but had no knowledge of his disability. She also stated, however, that she had served as the reasonable accommodation coordinator and had coordinated the ergonomic assessment that was done on September 13, 2013. She asserted that the Agency made all of the recommended adaptations to Complainant's work space. Further, HRL1 stated that all employees are permitted to take a 15-minute break in the morning and a 15-minute break in the afternoon. She told S1 that Complainant could divide the allotted time into 5-minute breaks for a total of 15 minutes in the morning and 15 in the afternoon. HRL1 asserted that Complainant sent "lengthy emails," that "we would attempt to respond to all of his questions and then he would come back and contradict everything we said," and that he refused her requests for face-to-face meetings.

S1, who was aware of Complainant's prior EEO activity, stated in her affidavit that VSC Manager 1 informed her that Complainant could break his two 15-minute breaks into 5-minute breaks but could not receive additional break time because it "would reduce his production requirement." VSC Manager 1, who also was aware of Complainant's prior EEO activity, stated that there had been a "miscommunication" in 2011 when Complainant was told that he could have additional breaks. She stated that officials later "clarified" that they could not reduce his work day because he was a full-time employee who had to work eight hours per day. VSC Manager 1 asserted that Complainant's previous supervisor had erroneously given Complainant 30 minutes of nonproductive time per day. She also asserted that the Agency offered to let Complainant come to work for nine hours and take longer breaks, as long as he worked for eight hours.

Complainant asserted that he did not know the proper procedures for filing a workers' compensation claim, that he submitted a form when he was injured, that HRL1 told him that the Agency would get back to him if it needed more information, and that he never received a response concerning what he needed to do. HRL1 stated that the Agency gave Complainant "a lot of information" on the workers' compensation process, that she gave him her personal cellphone number, and that the Agency "went above and beyond."

Complainant stated in his affidavit that, when he accepted the Legal Administrative Assistant position, VCS Manager 1 told him that he would be preparing written responses to veterans' online questions. He alleged that, after he filed an EEO complaint, S1 assigned him to conduct interviews. He asserted that he was not properly trained for the work and that he had trouble meeting production standards.

S1 stated that Complainant had been backing up the personal-interview unit since his reassignment to the public-contact area and that she moved him to the unit because of the number of individuals seeking personal interviews. She asserted that Complainant had a 90-day probationary period after his reassignment, that he received on-the-job training and shadowed other employees who conducted interviews, that he performed well during the probationary period, and that she believed that he was "very capable" of conducting interviews. In addition, S1 stated that she assigned correspondence to Complainant because she needed help with it and that she believed he was trained to do the work because he had been doing it since he came to the public-contact area. She also stated that other employees also received correspondence work. Like S1, VSC Manager 1 stated that Complainant shadowed employees who conducted interviews, that he received training, and that other employees also performed correspondence work.

In a September 20, 2013, email to S1, Complainant requested official time to speak to the EEO Counselor to "add to [his] complaint." He asked S1 to let him know when he could set aside time to speak with the Counselor. S1 denied his request. She stated, "My interpretation of the e-mail previously sent to you by [VSC Manager 1] regarding Official Time for EEO Complaint is that official time during the informal stage of the EEO process cannot be approved."

She asked him to continue working on inquiries. Complainant forwarded S1's email to the EEO Counselor, who responded that he would include the information in the EEO Counselor's Report.

Complainant asserted that he attended a September 27, 2013, meeting with S1, another named supervisor (S2), and an unnamed union representative. He alleged that he told S1 that he had not been properly trained and that S1 told him that he should have been familiar with the terms of his EEO settlement agreement. S1 denied that she made any reference to Complainant's EEO activity during the September 27, 2013, meeting. In her affidavit, S2 stated that S1 referred to Complainant's position description during the meeting but not to his EEO activity or settlement.

Complaint Number 2001-0322-2014102744

In his affidavit, Complainant asserted that S1 held a meeting with everyone on the public contact team and told them that their tour of duty is 7:45 a.m. to 4:15 p.m. and that they would be charged leave if they left early. He acknowledged that he arrived five minutes late for work on March 23, 2014. He claimed, however, that three African American employees (a public contact outreach specialist (CW1), a veteran's service representative (CW2), and an intake specialist (CW3)) left work early on that day and were not charged leave. S1 stated that Complainant, another White employee, and an African American employee arrived approximately 10 minutes late that day and that she told all three employees to put in for 15 minutes of leave.

Complainant asserted that, 12 times between October 1, 2013, and February 28, 2014, he stayed late at work and that he notified management that he had not been compensated. Since then, according to Complainant, his supervisor has come to his desk at 4:15 p.m. and told him to leave. He acknowledged that the supervisor did this to other employees as well but argued that "it seemed more like management was looking for [him] in particular." S1, who denied that she ever turned off anyone's computer, stated that she reminded employees that they need to leave the building at 4:15 p.m.

Complainant alleged that CW1 received a performance bonus because S1 gave the employee extra work, such as correspondence and inquiries, that she did not give to Complainant. According to Complainant, those types of work assignments boosted an employee's production. He stated that he had received oral and written warnings about not making production standards. S1 stated that the Agency based awards "on the number of personal interviews for individuals in like positions who had the greatest number for a specified period of time." She emphasized that the awards depended on personal interviews only. She stated that she provided assistance to employees when they asked questions and that she has conversations with all employees who do not meet their production standards.

Complainant alleged that, on April 23, 2014, S1 came to him when he was helping a customer and said, "You had medical documentation saying you're not supposed to talk to people, you're sick."

He stated that the veteran whom he was helping wrote a statement about what happened, that he submitted the statement to “management,” and that he was issued a reprimand later that day. S1 denied that she ever discussed Complainant’s health in front of anyone.

Complainant stated that he typically sees customers all day long and that he cannot interrupt an interview to take a break. He also stated that, since he filed his EEO complaint, the problem “has been corrected to a degree.” He asserted that S1 covered for CW3 when he took breaks. S1 stated that she asked employees to coordinate their breaks so that the interview lobby was not left unattended, that she never asked Complainant to return from a break when he was on one, and that she never denied anyone a break. She stated that she covered for the front intake specialist because someone has to be at the front desk when people arrive.

Complainant requested LWOP for May 19-23, 2014.² In a May 15, 2014, memorandum to the Director, HRL2 recommended against approving the request because Complainant’s medical information stated, “only that the leave being requested is for personal reasons, not medical conditions.” On May 16, 2014, someone from the Director’s Office disapproved Complainant’s request and noted, “Doctor will need to clarify personal reasons and we will reconsider.”

Complainant alleged that the Agency discriminatorily denied his request for LWOP. He stated that he submitted documentation saying that his doctor had prescribed time off because of a mental health condition and that he did not believe that he needed to disclose that the condition was PTSD. He asserted that, although he submitted the request “a month and a half in advance,” the Agency did not respond to it until the Friday before the start of the leave. He also asserted that a supervisor, whom he did not identify, told him that she had been away, no one else could approve his request, and that she would not approve it because she did not want him to do something like go on a fishing trip. According to Complainant, managers instructed him to get more information from his doctor, “which they knew a doctor wouldn’t do on a Friday, . . . the day before the leave was supposed to have happened.” Complainant argued that managers held onto the request for more than a month in retaliation for his EEO activity.

S1 stated that she submitted Complainant’s request to the Acting Director, who disapproved it. HRL2 stated that Complainant submitted “a letter from a provider stating the reason for his request . . . was because [Complainant] had been compliant with all his previous doctor appointments and therefore the provider was asking for [Complainant] to have the time off from work. HRL2 stated that the Agency denied the leave request because the letter did not refer to any pending medical appointments and Complainant did not provide a personal or medical reason for the leave. Although Complainant “was therefore informed he would need to clarify personal or medical needs,” he did not submit the necessary information.

On April 23, 2014, S1 proposed to reprimand Complainant for inappropriate and disrespectful conduct.

² The record does not contain a copy of the request.

According to the proposal, Complainant was disrespectful when he told S1 in front of another employee that there would be a problem if she interrupted an interview he was conducting at the end of the day; raised his voice to her when she was assisting a veteran; shouted at her when she reminded him to shut down his computer and leave the building; accused her of harassment, called her a racist, and refused to leave her office; engaged in a verbal altercation with an Agency police officer; and used profanity when speaking to her in front of another employee. The Acting VSC Manager (Acting VSC Manager 1) sustained the charges and issued Complainant a May 28, 2014, reprimand. In his affidavit, Complainant stated that he had been trying to get S1's attention and did not believe that he had been disrespectful her. He denied that he called S1 a racist. According to Complainant, he told S1 in a meeting that "that there was behavior that [he] observed from her that [he] thought to be racially motivated and [he] wanted the harassment and that to stop." He argued that the decision to issue the reprimand did not take into account his claim that S1 had discussed his private medical information in front of a veteran. Acting VSC Manager 1 stated that he issued the reprimand because Complainant did not submit any substantive information in his rebuttal to the charges.

Complainant alleged that he went to the restroom on May 30, 2014, at 8:00 a.m. and that S1 later called him to her office and told him that he could not use the restroom. S1 asserted that she "only asked [Complainant] to be mindful that the building opens at 8:00" and that employees should be prepared to see customers when they arrive.

On May 30, 2014, the members of Complainant's team received 30 minutes of authorized-absence (AA) leave. According to Complainant, his coworkers took their AA leave at the end of the day but he could not do so because he was with a customer. He argued that a manager should have taken over the interview or the Agency should have permitted him to take the leave the next day.

Complainant alleged that, during a June 2, 2014, meeting the VRE Officer asked about his current and prior EEO activity. Complainant stated that HRL2 and the VRE Officer notified him that management was conducting an investigation of a hostile work environment and required him to discuss issues that he had already reported to the EEO office. The union steward, who attended the meeting and recalled that "the topic came up," did not recall that the VRE Officer asked about Complainant's current and prior EEO activity. HRL2 stated that he was not aware of the VRE Officer asking Complainant about his current and prior EEO activity.

Acting VSC Manager 1 stated that the "Director initiated two fact finding studies" because employees had complained about a hostile work environment; the VRE Officer conducted one of the studies, and HRL2 conducted the other study. HRL2 stated that three of Complainant's coworkers complained on April 29, 2014, that Complainant was creating a hostile work environment because of his behavior toward coworkers, S1, and veterans.³ He also stated that he submitted a June 10, 2014, report finding no threatening or hostile work environment.

³ CW1 stated that he was one of the employees who wrote to the Director and accused Complainant of creating a hostile work environment.

Complainant met with Acting VSC Manager 1, VSC Manager 1, and the union steward on June 3, 2014, to discuss production. According to Complainant, he told VSC Manager 1 that he needed official time to amend his EEO complaint. Complainant alleged that she replied, "that your primary duty is not to file EEO complaints, it's to serve veterans and your job duties are to serve veterans." The union steward confirmed that VSC Manager 1 made this statement. Acting VSC Manager 1 stated that Complainant and VSC Manager 1 "went back and forth about his request and at one point [VSC Manager 1] stated, 'You need to do your job. You seem to spend a lot of time on your EEO cases during business hours.'" In an affidavit, VSC Manager 1 stated, "While I do not recall making this specific statement, it is very likely I said words to this effect." She asserted that the "standard time granted to work on EEO cases was 8 hours," that an employee could receive an additional 8 hours of time if the EEO Office deemed it warranted, that the Agency already had granted Complainant 16 hours of time, and that he was requesting more time. According to VSC Manager 1, Complainant was one of four employees who worked in a "high traffic area and there was concern about how to effectively staff the area."

In a June 3, 2014, email to S1, Acting VSC Manager 1, and VSC Manager 1, Complainant stated that he believed that his neck condition was worsening and that he had trouble lifting his right arm the previous day. Noting that he believed that he had been injured at work, he asked to speak with a doctor. In response, VSC Manager 1 instructed Complainant to report immediately to Human Resources to complete a Form CA-1, to discuss the matter with HRL2, and then to report to her or Acting VSC Manager 1 for additional guidance. HRL2 stated in his affidavit that he completed a Form CA-2 (pertaining to occupational disease) rather than a Form CA-1 (pertaining to traumatic injury) while Complainant was in his office, explained the form to Complainant, and gave him the form to read and sign.

Complainant alleged that S1 sent him back to work and did not tell him to report to Human Resources when he informed her on June 3, 2014, that he may have sustained a work injury. Further, according to Complainant, HRL2 did not provide him with the proper instructions for filing a workers' compensation claim. Noting that she had just returned to work from leave on June 3, S1 stated that there may have been an incident while she was away and that she told Complainant that she was not aware of any injury.

Complainant and HRL2 exchanged several emails regarding workers-compensation procedures on June 11 and 12, 2014. HRL2 arranged a June 12, 2014, conference call with the VBA Director of Workers Compensation (WC Director), Complainant, the union steward, and HRL2. In his affidavit, HRL2 stated that he explained who the WC Director was to Complainant prior to the conference call. He asserted that, at the beginning of the call, Complainant questioned the WC Director's authority and knowledge, and the conversation went "downhill from there." He also asserted that Complainant interrupted him "multiple times" as he attempted to respond to Complainant's questions. Complainant left the meeting.

Complainant asked the Agency to move him to a work station without windows or florescent lights.

On March 12, HRL2 asked Complainant to have his physician complete a medical-documentation form. Complainant submitted medical documentation supporting the request on May 27, 2014. Acting VSC Manager 1 approved the request on June 17, and the Agency moved Complainant to a different cubicle on June 30, 2014. Complainant asserted in his affidavit that he requested the reasonable accommodation for his migraine headaches and that the Agency did not respond to his request in a timely manner. According to Complainant, he could not work when experiencing a “full-blown” migraine, a reasonable accommodation would have helped him to meet his production standards, and the Agency held him to his production standards even though it did not treat his accommodation request as a priority. He stated that he asked to be moved to a cubicle that did not have a window in front of it and to have direct, overhead lighting removed. He also stated that the Agency moved him to a different cubicle in September 2014. Complainant argued that the Agency took too long to provide the reasonable accommodation.

Acting VSC Manager 1 stated that the Agency moved Complainant to a different cubicle and adjusted the overhead lighting by removing some lightbulbs. According to Acting VSC Manager 1, the Agency could not remove all of the lightbulbs because of the need to ensure a safe environment for other employees and veterans. HRL2 stated that the Agency implemented an accommodation on June 30, 2014, by moving Complainant to a different work station; that the Agency previously had conducted two ergonomics studies for Complainant; that the Agency conducted a third ergonomics study at Complainant’s request; and that the Agency made additional changes to Complainant’s work space on August 21, 2014.

In an amendment to his complaint, Complainant alleged that the Agency did not compensate him for staying past his tour of duty on October 1, 2014. He asserted in his affidavit that he stayed 30 minutes late on that day because of an interview, that he reported it to his supervisor, that this happened again in November, and that he received .5 hours of compensation time for the November date. S1 stated in her affidavit that she was not aware that Complainant had worked past his duty hours in October 2014 and that the Agency had compensated Complainant for working past his duty hour on two days in November 2014.

By memorandum dated August 14, 2014, S1 proposed to reprimand Complainant for inappropriate and disrespectful behavior in the workplace. She stated that, during a conference call with the WC Director, Complainant was “belligerent & animated,” called HRL2 a liar, and was “aggressive” and “disrespectful.” Acting VSC Manager 1 sustained the charges and issued Complainant a reprimand on October 10, 2014. Complainant argued in his affidavit that the Agency’s Human Resources Department had not given him sufficient information about workers compensation, that HRL2 was very vague, that he was called into the conference-call meeting one day after he reported the issue to the EEO Office, that the WC Director told him that his EEO allegation would be dismissed because it was a workers compensation matter, and that he left the meeting because it was very hostile. Complainant asserted that he had been “direct” but had not badmouthed the people in the meeting. In her affidavit, S1 stated that Complainant had been disrespectful to management officials during the meeting. Acting VSC Manager 1 stated that the reprimand “was in line with progressive discipline because even though the behavior was similar the recipient of the behavior was different.”

The union steward stated that Complainant apparently was not aware of the WC Director's position and began to question his authority and knowledge during the conference call. According to the union steward, the "call immediately went to another level," Complainant left, the WC Director asked HRL2 to get the Director, and the WC Director told the Director that Complainant was "on the verge of losing control." The union steward stated that Complainant "was clearly frustrated" but not on the verge of losing control. He also stated that other employees had complained about a hostile work environment because of the "toxic relationship" between Complainant and S1.

Complaint Number 2001-0322-2015102181

In a January 6, 2015, letter to Complainant's treating physician (P1), HRL1 noted that P1 had submitted a November 20, 2014, FMLA form stating that Complainant could not perform any of his job functions and requesting that Complainant not work from November 21, 2014, through January 4, 2015. She also noted that the Agency had placed Complainant in a leave-without-pay status for the requested period. HRL1 stated that Complainant had not yet returned to work and had told his supervisor that he had not received documentation from P1 regarding his ability to return to work without restrictions. She described Complainant's duties and posed several questions, including whether Complainant could perform his duties without restriction, whether there were any aspects of his job that he could not perform, the causes for any inability to perform his job, and the approximate date on which Complainant could return to work without restriction. In addition, she asked whether P1 was aware that Complainant had submitted a December 1, 2014, doctor's note, from a different medical provider, clearing Complainant to return to work after only one week's absence.

In his affidavit, Complainant asserted that the Agency attached emails to the letter and that the emails "did not have anything to do with questions" raised in the letter. According to Complainant, the emails involved "private conversations" between him and management officials regarding prior requests for leave. He asserted that Agency officials did not inform him that they were contacting P1 and did not request his written consent. He stated that he learned about the Agency's letter when P1 contacted him and gave him the letter. In addition, Complainant argued that the letter's claim that he had submitted a doctor's note clearing him to return to work in contradiction to P1's order "was a complete misstatement."

HRL1 stated in her affidavit Complainant's "medical documentation was unclear" and that the Agency sent the letter to seek clarification. She asserted that, under the FMLA, the Human Resources Department did not need Complainant's permission to request clarification from Complainant's medical provider.

Complainant asked the Privacy Officer to investigate whether the Agency violated his privacy rights. He stated that P1 had given him a copy of the letter and its attachments and that the Agency had attached emails regarding "previous leave requests and other incidents [that] were not related to the current FMLA situation."

The Privacy Officer, who informed Complainant of her conclusions on February 11, 2015, found that the Agency had not violated Complainant's privacy rights. She stated that there was "no indication in any statements [that HRL1] was pursuing a medical diagnosis" and that "[a]ll statements, questions, and requests" in the letter complied with the FMLA.

Complainant alleged that the Agency's Privacy Officer did not fully investigate his claim. He asserted that the privacy investigation concerned only the letter and did not involve the emails. He argued that there was "malicious intent behind sending the documentation to" P1 and alleged that the Agency was trying to "disrupt" his relationship with P1. Complainant also argued that the Agency should have given him an opportunity to provide a written medical release and to obtain the information from P1 himself. The Privacy Officer stated in her affidavit that Complainant sent her a February 2, 2015, email alleging a privacy violation and that she "fully investigated the complainant's privacy concerns to the best of [her] ability."

Complainant stated that, because of the holidays, he had problems reaching P1 to obtain medical clearance to return to work by January 4, 2015. He stated that he contacted work officials, who told him that he could not return without medical clearance. He submitted a doctor's note on January 6, and his supervisor later told him that he could return on January 7, 2015. According to Complainant, officials told him "several days later" that there was a problem with the documentation and told him "weeks later" that the Agency would charge him with being AWOL because the documentation did not state that he could not work on January 5 and 6, 2015. He noted that the Agency later changed the charge from AWOL to LWOP.

By memorandum dated February 10, 2015, the Acting VSC Manager (Acting VSC Manager 2) proposed to suspend Complainant for two calendar days for failure to follow leave-requesting procedures and unauthorized absence on January 5 and 6, 2015. He stated that Complainant did not submit a proper leave request and was charged with being AWOL on those days. In a March 25, 2015, memorandum to Complainant, the Assistant Director stated that the AWOL charges were not substantiated and that the Agency placed Complainant in LWOP (FMLA) status for January 5-6, 2015. He noted that, in response to the proposed suspension, Complainant submitted medical documentation supporting FMLA leave for those days.

Complainant argued in his affidavit that the Agency did not follow proper procedures when charging him with being AWOL and that the proposed suspension misstated the facts. Further, Complainant asserted that he "was giving EEO testimony" on January 6, that the EEO Investigator was supposed to let S1 know, and that he unsuccessfully tried to contact S1. Acting VSC Manager 2 stated in his affidavit that S1 charged Complainant with being AWOL and that the Agency issued the proposed suspension because Complainant's actions violated an Agency policy.

Complainant stated the Defense Finance and Accounting Services (DFAS) sent him an April 2015 letter stating that he had been overpaid and needed to repay the debt. He asserted that he contacted the Agency's Human Resources Department and received a memorandum explaining the debt.

According to Complainant, DFAS representatives told him that they had not received a copy of the memorandum and that there were discrepancies between statements in the memorandum and information in DFAS systems. Complainant asserted that he asked the Agency to request a “debt inquiry,” that the Agency has not done so, and that the Agency has not given him a satisfactory explanation for the debt.

The Chief of the Support Services Division stated in her affidavit that the Jackson Human Resources Center (Jackson HRC) “requested a pay audit for the complainant. The local payroll requested a copy of the audit to properly respond to [Complainant’s] inquiry of his pay issue and debt.” She did not see a copy of the audit, did not know if the Jackson HRC informed Complainant of the audit, and “was not involved in the establishment or collection of a debt.”

The record contains a June 11, 2015, memorandum in which a Human Resources Specialist at the Jackson HRC informed Complainant that he had “an erroneous debt” and “should not have any debt at all.” The Specialist explained that Complainant’s “salary date was erroneously changed” when the Agency reassigned Complainant to the Legal Administration Specialist position in April 2013. Following a March 26, 2015, inquiry from HRL2, the Jackson HRC determined that the salary date was wrong and started to make corrections. According to the Human Resources Specialist, DFAS did not recognize the corrective actions, and the Agency subsequently submitted three remedy tickets. A November 3, 2015, email from an Agency employee to HRL1 and others stated that “[a]ll pay adjustments have been completed” and a “remedy ticket has been submitted to clear up and retro adjustments for pay.”

Complainant sent VSC Manager 2 a May 15, 2015, email stating that, per her instructions, he sent an email to an Agency attorney asking to take pictures of his current and former work areas. He stated that the attorney referred him to an EEOC Administrative Judge’s Acknowledgement and Order and did not respond to his subsequent email. VSC Manager 2 replied that the attorney “addressed your concerns in her original response; therefore, a follow-up response was not necessary. Any future communication(s) concerning your current EEO complaint will not vet through my office. Thank you for keeping me informed and I apologize for any confusion in my initial request.” Complainant has alleged that VSC Manager 2’s email constituted negative remarks about his EEO activity and was part of a hostile work environment. VSC Manager 2 denied making negative remarks.

At the conclusion of the investigations, the Agency provided Complainant with notices of his right to request hearings before an Equal Employment Opportunity Commission Administrative Judge. Complainant timely requested hearings on his complaints but subsequently withdrew his requests. Consequently, the Agency consolidated the three complaints and issued a final decision on October 31, 2015.

Final Agency Decision

In its decision, the Agency found that Complainant had not established that the Agency subjected him to discrimination or harassment.

With respect to Complaint Number 2001-3322-2013104583, the Agency found that it properly dismissed Complainant's claim regarding the denial of official time. The Agency concluded that it responded appropriately to Complainant's requests for reasonable accommodation by modifying his work environment and giving him the option of breaking up his allotted 15-minute breaks into smaller, more frequent breaks. The Agency also concluded that Complainant did not rebut its legitimate, nondiscriminatory reasons for changing his work duties and did not show that the Agency provided more training to similarly situated employees than it provided to him. Noting that S1 denied making any reference to Complainant's EEO activity during the September 27, 2013, meeting, the Agency found that Complainant had not established a claim of per se reprisal.

With respect to Complaint Number 2001-0322-2014102744, the Agency found that Complainant did not show that its legitimate, nondiscriminatory reasons for requiring him to submit an annual-leave request for being late and for giving a performance award to CW1 but not to him were pretexts for discrimination. The Agency further found that Complainant did not establish that S1 discussed his medical information in front of veterans and coworkers. The Agency also found that Complainant did not show that the Agency treated him less favorably than similarly situated employees with respect to breaks or AA leave. In addition, the Agency concluded that Complainant did not submit adequate medical documentation to support his request for LWOP and that it had a legitimate, nondiscriminatory reason for denying the request. Noting that Complainant did not refute the charges underlying the May 28, 2014, reprimand, the Agency found that the reprimand "was warranted." The Agency stated that it did not need to lower Complainant's production standards as a reasonable accommodation and concluded that that it did not unduly delay providing a reasonable accommodation in response to his May 27, 2014, request.

The Agency found that Complainant did not establish claims of per se reprisal. Assuming that the VRE Officer inquired about Complainant's EEO activity, the Agency found that "the fact that the Agency was conducting its own investigation into alleged harassment in the workplace hardly constitutes an effort to discourage Complainant from pursuing EEO activity." With respect to Complainant's allegation that VSC Manager 1 told him that his job was to serve veterans, not file EEO complaints, the Agency found that VSC Manager 1's statement did not have a chilling effect and "can be viewed as a reminder of Complainant's work obligations rather than an effort to dissuade him from pursuing EEO activity." According to the Agency, "while the language employed is cause for concern, we regard it as a reminder that Complainant's work obligations were paramount."

The Agency did not address Complainant's allegations, which he raised in an amendment to his complaint, that the Agency discriminatorily failed to pay him for staying past his tour of duty on October 1 and issued him a reprimand on October 10, 2014.

With respect to Complaint Number 2001-0322-2015102181, the Agency found that Complainant did not establish that the Agency engaged in reprisal when it charged him with AWOL and proposed to suspend him for two calendar days.

The Agency stated that there was no showing that it discriminatorily required Complainant to submit medical documentation upon his return from FMLA leave. The Agency also stated that the AWOL charge, which it ultimately dismissed, was based on Complainant's prior disciplinary history and was consistent with the Agency's table of penalties. In addition, the Agency concluded that Complainant did not show that the debt-collection matter resulted from retaliatory animus. The Agency noted that Complainant did not know who caused the alleged overpayment and presented no evidence that the person was aware of Complainant's EEO activity and acted in a retaliatory manner. Further, the Agency found that VSC Manager 2's May 15, 2015, email contained "no effort at intimidation" and did not constitute per se reprisal.

With respect to Complainant's harassment claim, the Agency noted that it had determined that 18 discrete-act claims were not discriminatory. The Agency found that the other claims raised in the three complaints were not sufficiently severe or pervasive to constitute harassment. The Agency concluded that, "as Complainant's allegations have either been factually unsubstantiated, determined to be nondiscriminatory, or do not rise to the level of severe or pervasive actions necessary for unlawful harassment," Complainant had not shown that the Agency subjected him to harassment on the basis of race, disability, or reprisal.

CONTENTIONS ON APPEAL

The parties raise no arguments on 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, 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").

ANALYSIS AND FINDINGS

Denial of Official Time

EEOC Regulation 29 C.F.R. § 1614.605(b) provides that, "if the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information." "Reasonable" means "whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information."

EEO MD-110, Chap. 6 § VII.C.1. The number of hours to which a complainant is entitled “will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency’s need to have its employees available to perform their normal duties on a regular basis.” Id. When an agency denies a request for official time, “the agency must include a written statement in the complaint file noting the reasons for the denial.” Id. § VII.C.6. When the denial occurs before the complaint is filed, “the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant subsequently files a complaint.” Id.

The Commission has stated that a claim regarding the denial of official time states a separately processable claim alleging a violation of the Commission’s regulation and does not require a determination of whether the denial was motivated by discrimination. Such a claim should not be processed in accordance with 29 C.F.R. 1614.108 because the focus is not on the motivation, but rather on the justification of why the complainant was denied a reasonable amount of official time. Essentially, the Commission has held that it has the authority to remedy a violation of 29 C.F.R. § 1614.605 without a finding of discrimination. See Edwards v. U. S. Postal Serv., EEOC Request No. 05960179 (Dec. 23, 1996).

In this case, the Agency erroneously dismissed Complainant’s claim that S1 denied his request for official time to speak with an EEO Counselor. Although the Agency did not need to investigate the claim pursuant to 29 C.F.R. § 1614.108 to determine whether the denial was discriminatory, it nonetheless should have determined whether the denial was justified. See Malone v. U.S. Postal Serv., EEOC Appeal No. 01994267 (Jan. 29, 2001) (claims regarding the denial of official time state a claim). S1 told Complainant that, pursuant to an email from VSC Manager 1, she could not approve the use of official time during the informal stage of the EEO process. It is not clear why this was so. For example, it is not clear whether Complainant already had received a reasonable amount of official time for speaking with an EEO Counselor regarding Complaint Number 2001-3322-2013104583 or whether the Agency inexplicably denied all employees official time for EEO counseling. We cannot determine from the record before us whether Complainant received an appropriate amount of official time to speak with an EEO Counselor. Accordingly, we will remand this matter to the Agency for an investigation and determination on this issue. See Xavier P. v. U.S. Postal Serv., EEOC Appeal No. 0120180972 (Apr. 4, 2018) (ordering agency to investigate complainant’s claim that he was denied official time for EEO matters and to issue decision with appeal rights to Commission); Natalie S. v. Dep’t of Veterans Affairs, EEOC Appeal Nos. 0120140815, 0120142049 (Jan 26, 2018) (same).

Per Se Reprisal

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). Although petty slights and trivial annoyances are not actionable, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable.

Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004 (Enforcement Guidance on Retaliation), at § II. B. (Aug. 25, 2016).

Given the importance of “[m]aintaining unfettered access to [the] statutory remedial mechanisms” of the anti-retaliation provisions, 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)), our cases have found that a broad range of actions can constitute reprisal. Comments that, on their face, discourage an employee from participating in the EEO process violate the letter and spirit of the EEOC regulations and evidence a per se violation of the law. Binseel v. Dep’t of the Army, EEOC Request No. 05970584 (Oct 8, 1998) (per se violation found where complainant told that filing an EEO suit was “wrong way to go about getting a promotion”). Agencies have a continuing duty to promote the full realization of equal employment opportunity in their policies and practices. 29 C.F.R. § 1614.101(a). This duty extends to every aspect of agency personnel policy and practice in the employment, development, advancement, and treatment of employees. Agencies are obligated to ensure that managers and supervisors perform “in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal employment opportunity.” 29 C.F.R. § 1614.102(a)(5). When a supervisor’s behavior has a potentially chilling effect on the use of the EEO complaint process -- the ultimate tool that employees have to enforce equal employment opportunity -- the behavior is a per se violation. See Vincent v. U.S. Postal Serv., EEOC Appeal No. 0120072908 (Aug. 3, 2009) (per se violation found where supervisor mentioned EEO complaints had been filed and said, “What goes around, comes around”); Woolf v. Dep’t of Energy, EEOC Appeal No. 0120033727 (June 4, 2009) (per se violation found when a labor management specialist told the complainant, “as a friend,” that her EEO claim would polarize the office); Bensing v. Dep’t of the Navy, EEOC Appeal No. 01970742 (Oct. 3, 2000) (per se violation found where supervisor conceded that he had objected to complainant’s contacts with EEO office and union representative).

Here, Complainant alleged that S1 told him that he should have been familiar with the terms of his EEO settlement agreement; that the VRE Officer asked about his EEO activity during a meeting; that VSC Manager 1 told him that his primary duty was to serve veterans, not file EEO complaints; and that VSC Manager 2 made negative remarks about his EEO activity. We find that the evidence of record does not establish that S1 referred to Complainant’s EEO settlement during the September 27, 2015, and that Complainant has not shown that the VRE Officer engaged in reprisal by asking him questions about issues that he already had discussed in his EEO complaints. Similarly, we find that VSC Manager 2’s May 15, 2015, email, which stated that Complainant’s future communications about his EEO complaint would not “vet” through her office, did not constitute reprisal.

We also find, however, that VSC Manager 1 engaged in per se reprisal when she told Complainant that his “primary duty is not to file EEO complaints, it’s to serve veterans and [his] job duties are to serve veterans.” Complainant and the union steward stated that VSC Manager 1 made this statement, and she acknowledged that she likely “said words to that effect.” This comment, on its face, discourages participation in the EEO process.

Telling an employee who has requested official time to amend an EEO complaint that his or her primary duty is not to file EEO complaints is likely to deter a reasonable employee from engaging in protected activity and has a potentially chilling effect on the EEO process. The Agency's conclusion that VSC Manager 1's statement was "a reminder of Complainant's work obligations" ignores the negative, disapproving reference to EEO activity. Complainant has a statutorily protected right to file an EEO complaint, and Agency officials have an obligation "to insure a continuing affirmative application and vigorous enforcement of the policy of equal employment opportunity." 29 C.F.R. § 1614.102(a)(5). Accordingly, we will order the Agency to provide EEO training to VSC Manager 1 and to post a notice of this finding.

Reasonable Accommodation

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) ("Enforcement Guidance on Reasonable Accommodation"). An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

A modification or adjustment is "reasonable" if it "seems reasonable on its face, i.e., ordinarily or in the run of cases," U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002); this means it is "reasonable" if it appears to be "feasible" or "plausible." Id. An accommodation also must be effective in meeting the needs of the individual. Id. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. If more than one accommodation will enable an individual to perform the essential functions of his or her position, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide." 29 C.F.R. pt. 6130 app. § 1630.9; see also Enforcement Guidance on Reasonable Accommodation at Question 9. "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability." 29 C.F.R. pt. 6130 app. § 1630.9.

The Agency has not disputed that Complainant is a qualified individual with a disability.

Having reviewed the evidence of record, we find that Complainant has not shown that the Agency discriminatorily denied him a reasonable accommodation. In Complaint Number 2001-0322-2013104583, Complainant alleged that the Agency ignored his request for modifications to his work area and denied his request for breaks. The record establishes that the Agency provided Complainant with an ergonomic chair, placed his computer keyboard on a tray, and repositioned his computer monitors. Complainant has not shown that these accommodations were ineffective.

Further, the evidence does not support Complainant's claim that the Agency denied his request for two 10-15-minute breaks per day. HRL1 stated that the Agency permits all employees to take a 15-minute break in the morning and a 15-minute break in the afternoon and that Complainant could divide the allotted time into 5-minute breaks. VSC Manager 1 stated that the Agency offered to let Complainant come to work for nine hours and take longer breaks. Complainant, who expressly stated in his affidavit that his doctor recommended that he get up frequently and walk around for 10 to 15 minutes twice per day, has not shown that these offers were not effective.

In Complaint Number 2001-0322-2014102744, Complainant alleged that, as of June 12, 2014, the Agency had not responded to his May 27, 2014, request for reasonable accommodation. The record establishes that Complainant submitted medical documentation supporting his request to be moved to a different cubicle on May 27, 2014. The Agency implemented an accommodation on June 30, subsequently conducted an ergonomics study, and made additional changes to his work space on August 21, 2014. We find that the Agency provided Complainant with a reasonable accommodation and that the record does not establish that the Agency unduly delayed its actions.

We further find that, to the extent that Complainant has alleged that the Agency discriminatorily failed to provide him with a reasonable accommodation when it did not grant his request for LWOP for May 19-23, 2014, the record does not support the allegation. The Agency denied Complainant's request because the letter from his doctor stated that the leave was for personal reasons and did not give a medical reason. Complainant has argued that the Agency delayed its response to his request and that a doctor would not provide information "on a Friday," but he has not shown that he attempted to contact his doctor to obtain the necessary information or that he otherwise submitted sufficient documentation to support his request.

Disability-Related Inquiries and Confidentiality of Medical Information

Under the Rehabilitation Act, employers may make disability-related inquiries or require medical examinations of employees only if they are job-related and consistent with business necessity. 29 C.F.R. §§ 1630.13(b), 1630.14(c). "Generally, a disability-related inquiry or medical examination of an employee may be 'job related and consistent with business necessity' when an employer 'has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.'"

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000) (Enforcement Guidance on Employee Inquiries and Examinations) at 15. Information “regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record” 29 C.F.R. § 1630.14(c)(1); see also 42 U.S.C. § 12112(d)(4)(C). This requirement applies to all medical information, including information that an individual voluntarily discloses. Enforcement Guidance on Employee Inquiries and Examinations at 4; see also EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, EEOC Notice 915.2002 (Oct. 10, 1995) (Enforcement Guidance on Preemployment Inquiries and Examinations) at 21-22. Documentation concerning an individual’s diagnosis or symptoms is confidential medical information. Enforcement Guidance on Preemployment Inquiries and Examinations at 22 n.26. Employers may share confidential medical information only in limited circumstances: supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; first aid and safety personnel may be told if the disability might require emergency treatment; and government officials investigating compliance with the ADA and Rehabilitation Act must be given relevant information on request. 29 C.F.R. § 1630.14(c)(1).

Complainant alleged that, on April 23, 2014, S1 spoke to him in front of a customer and stated, “You had medical documentation saying you’re not supposed to talk to people, you’re sick.” S1, however, denied discussing Complainant’s health in front of anyone. We find that the record does not establish a violation of the Rehabilitation Act under the facts of this case. Even if we credit Complainant’s version of the incident, we cannot say that S1’s vague reference disclosed his confidential medical information.

Complainant alleged that the Agency engaged in reprisal when HRL2 contacted his physician on January 6, 2015. To the extent that Complainant is arguing that the letter constituted an impermissible disability-related inquiry, we find his argument unpersuasive. Complainant had been away from work, on FMLA leave, for several weeks and had submitted conflicting medical information. The Agency was entitled to request information concerning his ability to return to work and perform the essential functions of his job. See Enforcement Guidance on Employee Inquiries and Examinations at Question 17 (employer may make disability-related inquiries when an employee who has been on extended leave seeks to return to work and employer has reasonable belief that employee’s present ability to perform essential job functions will be impaired by a medical condition).

Disparate Treatment

To prevail in a disparate-treatment claim absent direct evidence of discrimination, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978).

Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community 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 Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993). Complainant can do this by showing that the proffered explanations are unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons are not credible permits, but does not compel, a finding of discrimination. Hicks at 511.

We assume, for purposes of analysis only and without so finding, that Complainant has established prima facie cases of discrimination with respect to the remaining incidents that he raised in his complaints. We find that the Agency has articulated legitimate, nondiscrimination reasons for its actions and that Complainant has not shown that the articulated reasons are a pretext for discrimination.

For example, S1 stated that she moved Complainant to the personal-interview unit because of the number of individuals seeking interviews and that Complainant received on-the-job training and shadowed other employees. HRL1 explained that the Agency provided Complainant with information about workers' compensation, and the record establishes that Agency officials engaged in extensive communications with him on the subject.

The record also establishes that S1 required other employees who arrived late to submit leave requests, told other employees to leave at 4:15p.m., discussed production standards with other employees, based awards on the number of interviews an employee conducted, and covered for the intake specialist because someone needed to be at the front desk when people arrived. Although Complainant disagrees with some of the charges cited in the May 28, 2014, reprimand, he has not shown that the reprimand was discriminatory. He similarly has not shown that the October 10, 2014, reprimand was discriminatory. The record establishes that the Agency issued the reprimand because of Complainant's behavior during the conference call with the WC Director, not because of his race, disability, or prior EEO activity. Although Complainant asserted that he told S1 that he stayed late on October 1, 2014, she stated that she was not aware that he had worked past his duty hours. Given the undisputed evidence that the Agency compensated Complainant for working late on at least one day in November, we cannot say that the failure to compensate him in October resulted from discriminatory motivation. Further, Complainant has not shown that the Agency discriminatorily denied him AA leave. He acknowledges that the Agency awarded him the same amount of AA leave that other members of his team received on May 30, 2014. Although he asserted that he was conducting an interview at the end of the day and that managers should have taken over the interview or permitted him to take AA leave the next day, he has not shown that managers covered for any other employee in his unit on that day or that anyone else took AA leave the next day.

Further, Complainant has not shown that the Privacy Officer conducted an allegedly inadequate investigation of his complaint for discriminatory reasons. In addition, the record establishes that the Agency initially charged Complainant with being AWOL and proposed to suspend him because he did not follow the proper procedures for requesting leave for January 5-6, 2015. Finally, Complainant has not shown that the erroneous debt action resulted from discriminatory animus. The Human Resources Specialist explained that Complainant's "salary date was erroneously changed" when the Agency reassigned Complainant to the Legal Administration Specialist position. Although the reassignment resulted from an EEO settlement, we cannot say, based on the record before us, that the Agency intentionally changed Complainant's salary date in reprisal for his EEO activity.

As noted above, we find that VSC Manager 1's statement about Complainant's "primary duty" constituted per se reprisal. With respect to the other incidents raised in his complaints, including the incidents involving reasonable accommodation and medical information as well as those not specifically discussed, we find that Complainant has not shown that the Agency's explanations are unworthy of credence or that discriminatory animus more likely motivated the Agency's actions. Accordingly, we find that Complainant has not shown that the Agency subjected him to disparate treatment based on race, disability, or reprisal for prior EEO activity with respect to those incidents.

Harassment

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create a hostile or abusive working environment." The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive" and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation of Title VII 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." Id. at 23.

To establish a claim of harassment, Complainant must show that: (1) he is a member of a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment 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. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. 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 (Mar. 8, 1994) (Enforcement Guidance on Harris).

The evaluation “requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.” Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

In this case, the record does not support a finding that the Agency subjected Complainant to discriminatory harassment. With the exception of one incident of per se reprisal, the evidence does not establish that the incidents alleged by Complainant occurred because of his race, disability, or protected EEO activity. The one incident of per se reprisal, by itself, is not so severe or pervasive as to constitute harassment. A finding of discriminatory harassment is precluded based on our determination that Complainant did not show that the Agency’s other actions were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant has not demonstrated that the Agency subjected him to a hostile work environment based on race, disability, or reprisal for protected EEO activity.

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 with respect to Complainant’s allegations concerning the denial of official time and VSC Manager 1’s June 3, 2014, statement. We AFFIRM the Agency’s final decision with respect to all other allegations.

ORDER

The Agency is ORDERED to take the following remedial actions within one hundred and twenty (120) calendar days of this decision being issued:

1. The Agency shall investigate whether Complainant was provided a reasonable amount of official time to speak with an EEO Counselor regarding Complaint Number 2001-3322-2013104583. The Agency shall include in the record the following information: documentation showing how much time was requested; how much time was granted, if any; the justification for the denial of any requested time, including the denial of time on September 20, 2013; whether Complainant used leave to participate in the EEO process regarding Complaint Number 2001-3322-2013104583; and, if so, how much leave he used and for what purposes. The Agency shall notify Complainant of the opportunity to place into the record any evidence supporting his claim that he was denied a reasonable amount of official time. Thereafter, the Agency shall issue a final decision as to whether Complainant was denied a reasonable amount of official time, with appeal rights to the Commission. A copy of the report of investigation and the final decision on official time shall be sent to the Compliance Officer as referenced below.

2. The Agency shall conduct a supplemental investigation on the issue of Complainant's entitlement to compensatory damages with respect to the finding of per se reprisal and shall determine the amount of compensatory damages to which Complainant is entitled. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, if any, and will provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages with appeal rights to the Commission. A copy of the final decision must be submitted to the Compliance Officer referenced below. Within 30 days of its determination of the amount of compensatory damages owed to Complainant, the Agency shall pay Complainant that amount.
3. The Agency shall provide a minimum of eight hours of in-person or interactive EEO training to VSC Manager 1 with a special emphasis on reprisal and the obligation not to restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings under, the Federal equal employment opportunity laws.
4. The Agency shall consider taking appropriate disciplinary action against VSC Manager 1. 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 VSC Manager 1 has left the Agency's employ, the Agency shall furnish documentation of her departure date.
5. The Agency shall post a notice of this finding in accordance with the paragraph below.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision."

POSTING ORDER (G0617)

The Agency is ordered to post at its VA Regional Office facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 (K0618)

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 (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

March 20, 2019

Date