



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

[REDACTED]
Bryant F.,¹
Complainant,

v.

Kevin McAleenan,
Acting Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 0120171192

Hearing Nos. 540-2015-00054X,
540-2016-00021X

Agency Nos. HS-CBP-00179-2014,
HS-CBP-02415-2015²

DECISION

On February 10, 2017, 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 January 11, 2017, final decision concerning his equal employment opportunity (EEO) complaints 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 MODIFIES the Agency's final decision.

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

² The Report of Investigation for HS-CBP-00179-2014 will be referred to as ROI 1, and the Report of Investigation for HS-CBP-02415-2015 will be referred to as ROI 2.

ISSUE PRESENTED

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

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as an Investigative Program Specialist (IPS) Special Agent, GS-1801-14, in the Agency's Tucson, Arizona Field Office. Complainant is Hispanic. Complainant's first-level supervisor was the Assistant Special Agent in Charge (ASAC, S1), and his second-level supervisor was the Special Agent in Charge (SAC, S2).

On April 23, 2012, Complainant broke his right wrist while attending training. Complainant stated that the broken bone failed to heal. In October 2012, Complainant had reconstructive surgery on his wrist. Complainant returned to work on November 14, 2012, with the restriction that he was only able to complete desk work. ROI 1 at 202. A March 5, 2013, doctor's note specified that Complainant should not complete field work. ROI 1 at 206. On June 4, 2013, Complainant had a second reconstructive surgery on his wrist. On August 12, 2013, Complainant was released to "light duty" work. ROI 1 at 210. An October 24, 2013, doctor's note stated that Complainant was able to complete light-duty work consisting of office work only. ROI 1 at 213. In March 2014, Complainant had another surgery on his wrist. On February 23, 2015, Complainant had a surgery that fused all of the bones in his wrist. According to Complainant, the fusion resulted in a complete loss of ability to move his right wrist and hand. Complainant averred that this impairment limits his ability to care for himself and perform other activities, such as cleaning or writing.

According to Complainant, from September 2012 through July 2013, S1 placed him on the Duty Agent roster even though he was on light duty and could not complete the assignments safely because he could not carry his service weapon. Complainant stated that the assigned Duty Agent is responsible for responding as a first-responder to officer-involved shootings, vehicle accidents involving government employees, assaults on officers, arrests involving government employees, employee deaths, and employee misconduct. Complainant alleged that he told S1 that he could not complete the assignments but that S1 told him that it was "too complicated" to remove Complainant from the schedule. S1 averred that he kept Complainant on the roster because it was easier to do so. According to S1, agents who cannot perform their Duty Agent assignments ask coworkers to cover for them. S1 stated that Complainant did not express concern about having his name on the roster.

Complainant averred that from late November 2012 through October 17, 2013, management repeatedly ridiculed the cast on his arm. Complainant stated that S1, S2, and the Internal Affairs ASAC (S3) frequently joked that Complainant was "the bowling team captain," asking him how his bowling game went, and asking about his bowling score. According to Complainant, management would make these jokes and comments on a daily basis.

S1 denied making any comments about Complainant's cast, but he stated that he heard S3 ask Complainant whether he picked up a 7/10 split on one occasion. S2 stated that on three or four occasions he asked Complainant if he won while bowling or how the bowling league was because it looked like he was wearing a bowling brace. S2 averred that he heard S3 ask Complainant if he got a 7/10 split while bowling approximately three times, but he denied hearing S1 make comments to Complainant. According to S2, joking in this manner is a common practice in law enforcement. S3 stated that on multiple occasions he asked Complainant about getting a 7/10 split because it looked like he was wearing a bowling glove. According to S3, he and Complainant generally joked around with each other. A Mission Support Specialist (C1) stated that one day S1, S2, and S3, made multiple comments about Complainant being on a bowling team when Complainant entered the room. An IPS Special Agent (C2) stated that she generally remembered people making fun of Complainant. Complainant alleged that on November 1, 2013, he told S1 that he did not appreciate these comments and that S1 told him, "When I'm making fun of you, so what? It's just for fun!" S1 stated that he was not aware that Complainant was offended by anyone's jokes and that he advised S2 and S3 not to make these jokes with Complainant.

Complainant alleged that on March 29, 2013, S1 told him that he would have to undergo a fitness-for-duty examination (FFDE) because it had been a year since he broke his wrist. According to Complainant, S1 was angry at him because he was on light duty. S1 denied telling Complainant that he would have to undergo a FFDE. According to S1, he and Complainant were discussing an upcoming surgery, and Complainant expressed concern about his ability to handle a firearm after the surgery. S1 stated that he told Complainant that if the Agency had any concerns after he was released to full duty, the Agency could send him for FFDE.

Complainant averred that on April 16, 2013, S1 approached him, told him to prepare a chronology of events related to his injury and treatment, and asked, "When are you going to become a real agent and do real work?" S1 denied asking Complainant that question. S1 stated that he asked for a chronology because he had recently been promoted and did not have any information about Complainant's injury. Complainant stated that on April 16, 2013, S1 also harassed him about the gasoline expenditures for his assigned government-owned vehicle (GOV), a 2008 Ford Expedition. According to Complainant, he was permitted to drive the GOV between work and home. Complainant stated that on May 15, 2013, S1 again complained about his GOV gasoline expenditures. S1 denied complaining about Complainant's gasoline expenditures. Complainant alleged that S1 and S2 wanted Complainant's assigned GOV because it was larger than their assigned GOVs. According to S1, Complainant asked if he could have a smaller GOV because Complainant's child was complaining that the Ford Expedition was not good for the environment.

Complainant stated that on May 24, 2013, an IPS Special Agent (C3) told him that S1 had told her that he would "fix" Complainant for not standing duty. According to Complainant, he interpreted this remark as S1 indicating that he would punish Complainant. S1 denied making this statement. C3 stated that she did not remember S1's exact words but that S1 did say that he wanted to make Complainant's life as miserable as possible.

Complainant averred that on September 30, 2013, S1 ordered him to relieve an IPS Special Agent (C4) who was conducting surveillance and preparing to provide takedown support as part of a joint operation with the Federal Bureau of Investigation (FBI). According to Complainant, he told S1 that he could not perform field work, but S1 made him relieve C4 and participate in the surveillance operation. S1 stated that he told Complainant to relieve C4 because C4 had been working for more than 12 hours. According to S1, he told Complainant to perform surveillance only from inside his vehicle and that he should not take part in executing a search warrant. S1 averred that this assignment did not violate Complainant's medical restrictions because there was no medical documentation that stated that Complainant could not perform field work or that he could only work in the office.

Complainant stated that on October 10 and 24, 2013, S1 complained that Complainant did not deserve his GOV and about the amount of his gasoline expenditures. According to Complainant, on October 24, 2013, he was assigned a 2008 Ford Taurus X, and the Ford Expedition was reassigned to S1. S1 stated that he changed Complainant's assigned GOV because Complainant asked for a smaller vehicle.

Complainant alleged that on October 17, 2013, S2 entered the break room and asked, "Is [Complainant] still trying to get out of his duty?" in front of Complainant and several coworkers. S2 stated that he made this comment as a joke because Complainant was talking about his wrist. Complainant averred that on October 17, 2013, S2 privately complained about Complainant's performance of his Technical Agent duties because the internet service was slow. S2 stated that the internet was slow and that he asked Complainant about it because it was Complainant's responsibility as the Technical Agent. According to Complainant, later in the day, S1 approached him and asked "what good" Complainant was if the internet was slow. Complainant alleged that S1 said that if Complainant could not be a "real Agent," he should at least be able to make sure the "other shit" worked. Complainant stated that on October 18, 2013, S1 asked Complainant "what good" he was if he could not keep the wireless modem running. S1 denied making these comments, but he stated that he informed Complainant several times that the internet was not working.

Complainant averred that on October 23, 2013, S1 told an IPS Special Agent (C5) that Complainant could cover his Duty Agent assignment while C5 was on leave for a death in the family from October 25 to November 1, 2013. According to Complainant, he covered for C5 on October 25, 2013, but the remaining days were reassigned to other Agents. S1 stated that this assignment did not violate Complainant's medical restrictions because he was not restricted to only office work. According to S1, when Complainant provided additional medical documentation that indicated that he could only perform office work, he found other Agents to cover for C5.

According to Complainant, on October 25, 2013, S1 emailed him and asked him to provide all medical documentation related to his injury and a timeline of events related to his injury and treatment. Complainant averred that S1 also stated that until Complainant was released to full duty, he could not perform work outside of the office and would need permission to leave the office during duty hours.

S1 averred that Complainant's new medical documentation changed his restrictions, so he asked Complainant for clarification. According to S1, he told Complainant that he could no longer perform work outside of the office, in accordance with the new documentation.

Complainant stated that on October 28, 2013, management revoked his use of the GOV for work to home purposes. S1 stated that Complainant was no longer entitled to use a GOV for work to home purposes because he was not able to perform any field work. According to S2, Special Agents are assigned to respond to after hours and offsite issues, and Complainant's medical documentation indicated that he was not able to perform these duties.

Complainant averred that on October 31, 2013, S1 assigned him to provide coverage for him while he was on leave from December 30, 2013, through January 3, 2014. According to Complainant, he told S1 that he could only cover his duties in the office. S1 stated that he only asked Complainant to cover his office duties. According to S1, S3 was responsible for covering his other duties. Complainant stated that on December 19, 2013, S1 told him that he would not need to provide coverage for those dates after all.

According to Complainant, on November 1, 2013, S1 asked for updated medical documentation concerning his inability to perform field work. Complainant stated that his restrictions had not changed, but he provided updated medical documentation, anyway. S1 averred that he requested additional documentation because Complainant's medical documentation which stated that he could only perform office work was vague and did not specifically discuss his limitations other than no field work.

Complainant alleged that on November 6, 2013, S1 directed him to install a covert camera at a Port of Entry. According to Complainant, he objected to the assignment because it was in the field and had the potential to be dangerous. Complainant stated that after some discussion S1 changed his mind and did not make Complainant install the camera. S1 denied directing Complainant to install the camera. According to S1, Complainant had been talking with a vendor about the feasibility of setting up the camera, and S1 asked if he could go with the vendor for the installation. S1 averred that when Complainant reminded him that he could not perform field work, he thanked Complainant for the reminder.

Complainant stated that on November 22, 2013, S1 sent an email to all Tucson Internal Affairs employees, reminding them not to park personal vehicles in the garage. According to Complainant, he felt that S1 was singling him out, and he has not parked in the garage since receiving the email. S1 stated that on May 9, 2013, S2 sent out an email telling employees that only support staff and employees assigned to polygraph duties were permitted to park their personal vehicles in the garage. S1 denied singling anyone out. According to S1, November 22, 2013, was a rainy day, and there was no space in the garage for GOVs.

Complainant averred that on December 18, 2013, S2 suspended Complainant's authorization to carry a firearm and his ability to earn administratively uncontrollable overtime (AUO).

According to Complainant, although S2 told him that it was for medical reasons, he believed that it was reprisal for contacting an EEO Counselor in November 2013. S2 stated that Complainant could not medically perform AUO duties or use a firearm.

According to Complainant, on November 13, 2014, a Special Investigations Unit Agent (I1) notified him that the Tucson Office of Internal Affairs (OIA) management team had reported him to the Agency's Joint Intake Center (JIC) for harassment and intimidation. Complainant averred that I1 told him that S3 reported that Complainant was walking past his office multiple times a day and staring at S3 in a menacing and threatening way. Complainant stated that I1 also told him that S3 thought that Complainant was following him out of the building very closely at the end of the day. Complainant stated that he had to walk past S3's office to get to the restroom, and he denied staring at S3. S3 stated that starting in fall 2014, Complainant would walk by his office multiple times a day, stop or slow down, and give him a "hate stare" that was menacing and intimidating. According to S3, Complainant would also follow him out of the office and to his vehicle at the end of the day. S3 averred that he reported Complainant's behavior to the JIC because it was escalating, and he was concerned about the potential for violence. S2 stated that he observed Complainant staring at S3.

Complainant stated that on December 8, 2014, C5 told him that he was not comfortable being around Complainant and two coworkers (C6 and C7). According to Complainant, C6 and C7 filed EEO complaints around the same time that he had filed his first complaint. C5 stated that he was worried that management would think he was a troublemaker if he spent time with Complainant, C6, and C7 at the same time.

On December 9, 2014, Complainant notified S1 that he had an appointment with the Diversity and Civil Rights Officer (EEO1) on December 10, 2014. Complainant stated that S1 gave him permission to attend the appointment. According to Complainant, EEO1 told him at the appointment that a Labor and Employee Relations Specialist (HR1) called her to ask why Complainant was meeting with EEO1.³ According to Complainant, S1 is married to a Labor and Employee Relations Specialist (HR2). Complainant alleged that S1, HR1, and HR2 were trying to intimidate him to prevent him from filing another EEO complaint. S1 stated that he informed HR1 about Complainant's appointment because he had a question about how to account for official time for the appointment. The record contains a December 10, 2014, email from HR1 to S1, which states, "Good morning!! Just got off the phone with [EEO1]. Give me a call when you are settled in." ROI 2 at 408. S1 stated that he did not remember a call with HR1. HR1 stated that she did not remember talking to EEO1 but that she probably did so to ask how Complainant should enter the leave for his appointment.

On June 16, 2015, S1 assigned Complainant to be the Vehicle Control Officer (VCO) as an additional collateral duty assignment.

³ EEO1 was not interviewed during the investigation of Complainant's complaint. The EEO Counselor's Report states that on December 10, 2014, HR1 called EEO1 to ask if Complainant was meeting with her regarding an EEO complaint. ROI 2 at 45.

According to Complainant, he told S1 that he already had 11 collateral duty assignments and could not handle another one. Complainant alleged that S1 appeared angry but that S1 eventually stated that he would find someone else to be the VCO. S1 averred that Complainant's other 11 collateral duty assignments required minimal time. According to S1, he assigned the collateral duty assignments to Complainant because he could not interview subjects or witnesses like other Agents.

Complainant alleged that management is subjecting him to a hostile work environment consisting of the previously discussed incidents because they want him to be so miserable that he quits his job. During the investigation into one of Complainant's complaints, when the EEO Investigator asked if he had anything additional to add to his statement, S2 stated, "I believe that [Complainant] is making these allegations to harass and undermine the authority of the ASACs and myself." ROI 1 at 374.

Procedural Background

On November 12, 2013, Complainant initiated contact with an EEO Counselor. On February 4, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic), disability (broken wrist), and reprisal for prior protected EEO activity (contacting an EEO Counselor to initiate the EEO complaint process) when:

1. On March 29, 2013, S1 threatened Complainant with a FFDE if he was not released to full duty;
2. On April 16, 2013, S1 directed Complainant to provide a chronology of events relating to his injury and treatment, made an insulting comment to him, and complained about Complainant's gasoline expenditures;
3. From September 2012 through June 2013, S1 placed Complainant on the duty roster while Complainant was on light-duty status;
4. On May 15, 2013, S1 complained about Complainant's gasoline expenditures;
5. On May 24, 2013, S1 said that he would "fix" Complainant for not standing duty as the Duty Agent;
6. On September 30, 2013, S1 ordered Complainant to perform field work in violation of his light-duty limitations;
7. From approximately late November 2012 through October 17, 2013, management officials ridiculed Complainant's use of a cast;
8. On October 10, 2013, S1 stated that Complainant did not deserve the GOV assigned to him and complained about Complainant's gasoline expenditures;
9. On October 17, 2013, S2 publicly asked whether Complainant was still avoiding Duty Agent assignments;
10. On October 17 and 18, 2013, S1 and S2 complained about Complainant's performance as Technical Agent;
11. On October 24, 2013, S1 indicated that Complainant did not deserve the GOV assigned to him and complained about Complainant's gasoline expenditures;

12. On October 25, 2013, S1 assigned Complainant to serve as the primary Duty Agent during regular duty hours;
13. On October 25, 2013, S1 directed Complainant to provide medical documentation of his restrictions on performing field work and a timeline of events related to his wrist injury and informed him that he was not permitted to perform work outside the office or leave the office during duty hours without management clearance until he could provide a medical release to full duty;
14. On October 28, 2013, management revoked Complainant's use of a GOV for commuting purposes;
15. On October 31, 2013, S1 assigned Complainant to provide coverage for him while S1 was on leave from December 30, 2013, through January 3, 2014;
16. On November 1, 2013, S1 directed Complainant to provide updated medical documentation of his restriction on performing field work;
17. On November 6, 2013, S1 ordered Complainant to install a covert camera at a port of entry, contrary to his physician's restrictions;
18. On November 22, 2013, S1 sent an email reminding employees not to park personal vehicles in the garage and did not permit Complainant to park in the garage any longer; and
19. On December 18, 2013, S2 suspended Complainant's authorization to carry a firearm and to earn AUO.

On December 30, 2014, Complainant filed a second EEO complaint, which he subsequently amended, alleging that the Agency discriminated against him on the bases of national origin (Hispanic), disability (broken wrist), and reprisal for prior protected EEO activity arising under Title VII and the Rehabilitation Act when:

20. On November 13, 2014, Complainant received notification that he was being investigated for alleged harassment and/or intimidation of the OIA Tucson Field Office management team;
21. On December 8, 2014, C5 informed Complainant that he felt uncomfortable being around Complainant and two other coworkers who had filed EEO complaints;
22. On December 10, 2014, HR1 asked EEO1 whether Complainant had an appointment with her and what the purpose of the meeting was;
23. On June 16, 2015, S1 assigned Complainant to be the VCO as an additional collateral duty assignment; and
24. Beginning in November 2014, management attempted to constructively discharge Complainant by making the work environment so intolerable that a reasonable person would not be able to stay.

At the conclusion of the investigations, 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 (AJ). Complainant timely requested a hearing for both complaints, which were consolidated by the AJ assigned to the cases, but Complainant subsequently withdrew his requests for hearing. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

Therein, the Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that he established by preponderant evidence in the record that he was subjected to reprisal and to a hostile work environment. Complainant requests that the Agency's final decision be reversed.

In response to Complainant's appeal, the Agency contends that, in its final decision, it properly found that Complainant had failed to establish that he was subjected to discrimination. The Agency argues that Complainant failed to establish that he was a qualified individual with a disability. With respect to Complainant's allegation that HR1 contacted EEO1 regarding his appointment with her, the Agency states, "There is no evidence [HR1] inquired about the purpose of the meeting between Complainant and [EEO1]." Agency's Brief at 21. The Agency requests that the Commission affirm its final decision.⁴

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Denial of a Reasonable Accommodation

Although the Agency did not frame any of Complainant's claims as allegations that he was denied a reasonable accommodation, we find that allegations 3, 6, 12, 15, and 17, all of which allege that Complainant was assigned work outside of his medical restrictions, are more properly analyzed as

⁴ On June 7, 2018, the Agency sent a letter to the Commission, which states, in relevant part, that the Agency's representative was recently made aware of an allegation in an internal administrative matter that does not "directly pertain" to Complainant's appeal. According to the Agency, EEO1 made statements in the internal administrative matter that contradict S1 and HR1's assertions that HR1 did not ask EEO1 about the purpose of her meeting with Complainant. The Agency requests to remove the sentence from its brief that indicated that there was no evidence that HR1 inquired about the purpose of the meeting between Complainant and EEO1. According to the Agency, the remainder of its original brief remains accurate to the best of the Agency representative's knowledge and belief. This matter will be addressed in the text below.

reasonable accommodation claims. 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 (RA Enforcement Guidance), No. 915.002 (Oct. 17, 2002).

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

An individual with a disability is “qualified” if he 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). The term “position” is not limited to the position held by the employee, but also includes positions that the employee could have held. Van Horn v. U.S. Postal Serv., EEOC Appeal No. 01960159 (Oct. 23, 1998) (term “position” not limited to the position actually held by the employee but, also, includes positions that the employee could have held as a result of job restructuring or reassignment). Accordingly, in determining whether an employee is “qualified,” an agency must look beyond the position which the employee presently encumbers.

While the Rehabilitation Act does not require an employer to create a light-duty position as an accommodation, it does require an employer, absent undue hardship, to accommodate a qualified individual with a disability by restructuring a position through redistribution of marginal functions which he cannot perform because of disability, or by reassigning him to an equivalent existing vacancy for which he is qualified. Williams v. U.S. Postal Serv., EEOC Appeal No. 01973755 (Sept. 11, 2000); Flowers v. U.S. Postal Serv., EEOC Appeal No. 01984878 (Sept. 9, 1999); Lowery v. U.S. Postal Serv., EEOC Appeal No. 01961852 (Oct. 31, 1997). The Commission has also stated that “the employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.” See RA Enforcement Guidance at 11; see also Crider v. Dep’t of Veterans Affairs, EEOC Request No. 05960632 (Oct. 16, 1998).

In general, reassignment is the reasonable accommodation of last resort and should be considered only when: (1) there are no effective accommodations that would enable an employee to perform the essential functions of his or her current position; or (2) accommodating the employee in the current position would cause an undue hardship. 29 C.F.R. pt. 1630 app. § 1630.2(n); RA Enforcement Guidance, “Reassignment.”

An agency is in the best position to know which jobs are vacant or will become vacant within a reasonable time and, as part of the interactive process, should ask the employee about his qualifications and interests. Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016). Because it possesses the relevant information, an agency is obligated to inform an employee about vacant positions for which the employee may be eligible as a reassignment. Woodman v. Runyon, 132 F.3d 1330, 1344 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions); see also RA Enforcement Guidance at Q. 28. The employee should assist the agency in identifying vacancies to the extent that the employee has information about them. Further, if the agency is unsure whether the employee is qualified for a particular position, the agency can discuss with the employee his or her qualifications. Mengine v. Runyon, 114 F.3d 415, 419-20 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing)); see also RA Enforcement Guidance at Q. 28.

We emphasize that a federal agency's obligation under the Rehabilitation Act to offer reassignment is not limited to vacancies within a particular department, facility, or geographical area. Instead, the extent of the agency's search for a vacant position is an issue of undue hardship. RA Enforcement Guidance at Q. 27. Accordingly, absent undue hardship, the agency must conduct an agency-wide search for vacant, funded positions that the employee can perform with or without reasonable accommodation. See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017).

As a threshold matter, we agree with the Agency that Complainant was an individual with a disability, as he had multiple surgeries on the broken wrist over the course of three years and had permanent limitations on major life activities such as caring for himself. The Agency noted that neither the Agency nor Complainant disputed that he was able to perform the essential functions of his light-duty assignment. However, the Agency found that Complainant was not a qualified individual with a disability with respect to his Special Agent position because he was unable to maintain his firearm qualification and he could not perform field work.

The Agency attempted to accommodate Complainant's disability by providing him with light duty office work and by exempting him from conducting subject and witness interviews. However, we find that this was not an effective accommodation for Complainant's disability because his supervisors repeatedly assigned him work outside of his medical restrictions. Although S1 maintains that Complainant's medical documentation did not indicate that he could only perform office work until he received Complainant's October 24, 2013, doctor's note on October 25, 2013, the record reflects that Complainant's medical documentation clearly stated that he could not perform any field work as early as November 4, 2012. At no time was Complainant released to full duty, nor did his medical providers indicate that he could perform field work.

The Agency found that Complainant was not qualified to perform the essential functions of his Special Agent position, and we find that the record establishes that there were no effective means available to accommodate Complainant in the position he held, which raises the issue of reassignment. See Reita M. v. U.S. Postal Serv., EEOC Appeal No. 0120150260 (July 19, 2017).

We therefore turn to whether the Agency met its obligations under the Rehabilitation Act. As the Agency found that Complainant could not perform the essential functions of his current position with or without reasonable accommodation, we find that the Agency, absent undue hardship, was obligated to consider reassigning him to a different position, consistent with the Commission's regulations noted above. The Agency did not do so.

The burden now shifts to the Agency to provide case-specific evidence proving that providing reasonable accommodation would cause an undue hardship in the particular circumstances. A determination of undue hardship should be based on several factors, including: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility making the reasonable accommodation: the number of persons employed at this facility; the effect on expenses and resources of the facility; (3) the overall financial resources, size, number of employees, and type and location of facilities of the employer; (4) the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and (5) the impact of the accommodation on the operation of the facility. See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017); RA Enforcement Guidance.

Neither in its decision nor on appeal does the Agency argue that reassigning Complainant would have resulted in an undue hardship on its operations. Therefore, the Agency failed to reasonably accommodate Complainant when it failed to consider reassigning him, as well as when he was repeatedly assigned tasks that he could not perform because of his disability.

An Agency is not liable for compensatory damages under the Rehabilitation Act where it has consulted with Complainant and engaged in good faith efforts to provide a reasonable accommodation but has fallen short of what is legally required. See Teshima v. U.S. Postal Serv., EEOC Appeal No. 01961997 (May 5, 1998). Here, we find that the preponderance of the evidence in the record does not establish that the Agency consulted with Complainant and engaged in good faith efforts to reasonably accommodate him based on the repeated nature of the violations in spite of unambiguous medical documentation. Therefore, the Agency is liable for compensatory damages for its failure to provide Complainant with an effective reasonable accommodation.

Retaliation

Complainant alleged that he was retaliated against when HR1 contacted EEO1, who is an EEO Counselor, to ask why Complainant was meeting with her. The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). On the one hand, petty slights and trivial annoyances are not actionable. On the other, adverse actions or threats to take adverse actions such as reprimands, negative evaluations, and harassment are actionable. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 at II.B (Aug. 25, 2016).

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

In light of the Agency’s June 7, 2018, letter, we find that preponderant evidence in the record establishes that HR1 contacted EEO1 to ask about the purpose of her meeting with Complainant, as alleged in his EEO complaint. Under the circumstances of this case, we find that a Labor and Employee Relations Specialist asking an EEO Counselor about the purpose of a scheduled meeting with an employee is reasonably likely to deter a reasonable employee from engaging in protected activity. Accordingly, we find that Complainant was subjected to unlawful retaliation in the form of conduct reasonably likely to deter protected activity.

Disparate Treatment

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

Complainant alleged that he was subjected to discrimination when management revoked his use of a GOV for commuting purposes. The Agency’s legitimate, nondiscriminatory reason for revoking Complainant’s work to home GOV privilege was that medical documentation indicated that he could only perform office work, and work to home GOV use was reserved for Special Agents who could be unexpectedly called to complete field work. We find that the preponderance of the evidence in the record does not establish that this legitimate, nondiscriminatory reason is pretextual.

Complainant alleged discrimination with respect to S1 sending out an email that stated that personal vehicles could not be parked in the garage without permission. The Agency's legitimate, nondiscriminatory explanation was that garage parking space was limited and reserved for support staff and polygraph personnel. Here, Complainant has failed to establish that the Agency's proffered reason was a pretext designed to mask discriminatory or retaliatory animus.

Complainant alleged that he was subjected to discrimination when S2 suspended his authorization to carry a firearm or earn AUO. The Agency's legitimate, nondiscriminatory reason for its actions was that Complainant's medical restrictions indicated that he was unable to use a firearm or perform the duties associated with AUO. Complainant has failed to establish that this legitimate, nondiscriminatory reason was a pretext for discrimination based on national origin, disability, and/or reprisal.

Complainant alleged that he was discriminated against when S1 assigned him to be the VCO as a collateral duty assignment. The Agency's legitimate, nondiscriminatory reason for making the assignment was that Complainant could not perform subject or witness interviews because of his medical restrictions. Although Complainant noted that he already was performing 11 collateral duty assignments, we find that the preponderance of the evidence in the record does not establish that the Agency's legitimate, nondiscriminatory reason was pretextual.

Hostile Work Environment

To establish a claim of harassment a complainant must show that: (1) he belongs to 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 his statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

S2 told the EEO Investigator that Complainant was making up his EEO complaints to harass management. While this comment by S2 is troubling, particularly in light of his admission that he subjected Complainant to disability-related harassment in the form of jokes about his cast, we do not find that it rises to the level of retaliatory animus. There is no evident connection between the remaining instances of alleged harassment and Complainant's national origin or prior protected EEO activity.

However, the preponderance of the evidence in the record establishes that S1, S2, and S3 subjected Complainant to disability-related harassment when they made a variety of jokes about his cast looking like a bowling glove or asked if he was “still avoiding” his assigned duties, implying that Complainant was faking his disability to shirk his duties. We find that the preponderance of the evidence in the record does not establish that other incidents of alleged harassment, such as S1 allegedly complaining about Complainant’s gasoline expenditures, S1 allegedly stating that Complainant did not deserve a large GOV, or S1 and S2 complaining about the internet speed, were based on Complainant’s disability. We find that Complainant has not established by the preponderance of the evidence that other alleged incidents, such as S1 threatening him with a FFDE or telling a coworker that he would “fix” him, occurred in the manner in which Complainant alleged.

With respect to the disability-related harassment, we find that the preponderance of the evidence in the record does not establish that the alleged harassment was sufficiently severe or pervasive to constitute a hostile work environment. The record reflects that jokes were commonplace in the Field Office and that Complainant joked with his colleagues about other topics. Moreover, the record indicates that once Complainant told S1 that he did not like the jokes about his cast, S1, S2, and S3 stopped joking about Complainant’s injury. Accordingly, we find that Complainant has failed to establish that he was subjected to a hostile work environment.

Constructive Discharge

Complainant alleged that he was constructively discharged. An essential element of a constructive discharge claim is that the complainant actually resigned. See Cornell-White v. Dep’t of Transportation, EEOC Appeal No. 01982261 (March 27, 2001). Here, Complainant did not resign from his position, precluding a finding that he was constructively discharged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency’s final decision finding that Complainant failed to establish by the preponderance of the evidence that discrimination occurred and REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

The Agency shall take the following remedial actions:

1. To the extent that it has not done so already and to the extent that Complainant still requires it, the Agency shall immediately engage in the interactive process with Complainant and provide him with a reasonable accommodation for his disability.

2. Within ninety (90) calendar days of the date this decision is issued the Agency shall undertake a supplemental investigation into Complainant's entitlement to compensatory damages and issue a final decision with appeal rights to the Commission determining the amount of compensatory damages to be awarded to Complainant. Within thirty (30) calendar days of determining the amount of compensatory damages to be awarded, the Agency shall pay that amount to Complainant.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to the responsible management officials, including S1, S2, and HR1, with a special emphasis on retaliation and on the Agency's obligations under the Rehabilitation Act.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials, including S1, S2, and HR1. The Commission does not consider training to constitute 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
5. Within thirty (30) calendar days of the date this decision is issued, the Agency shall post a notice in accordance with the statement entitled "Posting Order."

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

POSTING ORDER (G0617)

The Agency is ordered to post at its Tucson, Arizona Field 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).

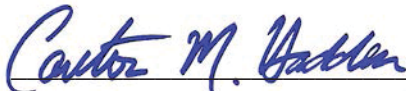
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

July 2, 2019

Date