



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

[REDACTED]
Wade K.,¹
Complainant,

v.

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

Appeal No. 0120180367

Hearing No. 531-2015-00039X

Agency No. HHS-NIH-ORF-015-14

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission MODIFIES the Agency's final order.

ISSUE PRESENTED

The issues presented are: (1) whether substantial evidence in the record supports the EEOC Administrative Judge's (AJ's) decision that Complainant did not establish a prima facie case of discrimination based on his disability, and consequently did not establish that he was denied reasonable accommodation; and (2) whether substantial evidence in the record supports the AJ's decision that Complainant was not subjected to a hostile work environment based on his disability, as alleged.

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 Supervisory Maintenance Mechanic at the National Institutes of Health (NIH), Office of Research Facilities (ORF) in Bethesda, Maryland. Report of Investigation (ROI), at 84. In June 2012, Complainant was assigned to Team B and worked the 3:00 p.m. to 11:00 p.m. shift. In July 2012, Complainant sustained an injury to his back and took medical leave thereafter.

On October 24, 2012, after he returned from medical leave, Complainant met with a Doctor of the Agency's Occupational Medical Service (OMS). Hearing Transcript (Hr'g Trans.), at 229, 234-235, 535-538. Therein, Complainant discussed that he was suffering from anxiety, headaches, stress, had difficulty sleeping, and was experiencing elevated blood pressure, among other conditions due to his 3:00 p.m. to 11:00 p.m. shift. Id. Thereafter, on November 29, 2012, Complainant met with his previous supervisor and the Agency's Doctor, requesting a reasonable accommodation for his medical conditions. Id. at 524-525. Complainant specifically requested that he be assigned a set schedule from Monday through Friday 7:00 a.m. to 3:00 p.m. because working evenings caused him to experience anxiety which affected his health in a negative manner. On November 30, 2012, Complainant had a follow-up appointment with the Agency's Doctor wherein Complainant provided a note to the Agency's Doctor from his private doctor. ROI, at 166. The note presented to the Agency's Doctor requested a set schedule with no night work as an accommodation for Complainant's conditions. Id. On November 30, 2012, the Agency's Doctor submitted a Medical Evaluation form, recommending that Complainant only work a set schedule with no night shift work. Id. Complainant's previous supervisor thereafter approved Complainant's request for reasonable accommodation on November 30, 2012, providing Complainant with his requested set schedule, which restricted Complainant to the morning shift only. Id.

Complainant was subsequently assigned to a new first-level supervisor (S1). Id. at 85. However, according to Complainant, S1 would poke or punch him in the chest or arms during their conversations. Id. at 87. Complainant averred that he asked S1 to stop his behavior and reported his conduct to the Assistant Chief. Id. Complainant stated that after he reported S1's behavior, S1 ceased poking and punching him. Id. However, according to Complainant, S1 then began to squeeze his hand tightly when shaking it, which caused severe pain in his hand. Id. Complainant attested that when he asked S1 to stop the behavior, S1 would remark, "you can't take it," "you don't know what you're doing," and "don't know anything," while laughing at the same time. Id.

In June 2013, S1 was informed that the Agency was moving all Mechanics to a new 12-hour rotating shift schedule. As result, S1 asked Complainant to provide additional medical documentation to support his existing accommodation. Thereafter, Complainant's private doctor submitted documentation dated November 13, 2013, to the Agency's Doctor recommending that Complainant's accommodation be continued. Complainant's doctor specifically wrote that Complainant continued to experience anxiety, a headache, and nausea and/or vomiting, and again recommended that Complainant not work night shifts. Complainant's Brief on Appeal, Ex. 5. The Agency's Doctor then submitted another Medical Evaluation Form on November 15, 2013, again requesting that Complainant be restricted to the day shift with a set schedule. Id., Ex. 6.

Thereafter, on November 27, 2013, Complainant provided a Family and Medical Leave Act (FMLA) certification form wherein his doctor noted that he suffered from “generalized anxiety, acute stress reaction, panic disorder, and insomnia.” ROI, at 169.

S1 nevertheless found that Complainant’s additional medical documentation was insufficient and then sought to retract his accommodation due to the Agency’s implementation of the new 12-hour rotating shift schedule. According to S1, Complainant’s restrictions were reevaluated in the interest of the new schedule as there were no longer any set-schedules available. As such, on December 6, 2013, S1 sent Complainant a letter, noting that Complainant would be assigned to a new rotating schedule and would be required to work late on Sundays and late evenings. Id. at 228. S1, in the letter, however again requested that Complainant submit additional documentation if he wished to be exempt from the new schedule. Id. at 178.

On December 13, 2013, the Agency’s Doctor issued a memorandum to S1, regarding her review of Complainant’s medical documentation as it related to his request for leave under the FMLA. Therein, the Agency’s Doctor wrote that Complainant’s medical documentation “reveals that [Complainant] has a significant medical condition for which he has been in active treatment. . . .” Id. at 173-174. The Agency’s Doctor opined that Complainant’s medical documentation was sufficient to grant Complainant’s request for FMLA, but not sufficient to address S1’s concerns regarding Complainant’s request for accommodation. Id. Notwithstanding, Complainant’s doctor reportedly refused to provide any additional medical documentation. S1 then sent Complainant another letter on January 2, 2014, reiterating that Complainant must send additional medical documentation if he wished to be exempt from the new rotational schedule that was scheduled to be implemented on January 12, 2014. Id. at 178.

Complainant, however, continued to contest S1’s decision to place him on the rotating schedule and sought the advice of the Agency’s Labor Relations. Id. at 89. Complainant questioned why he needed to provide additional documentation and reiterated to the Agency’s Labor Relations that such a rotating schedule affected his sleep pattern and caused him to experience anxiety. Id., Hr’g Trans., at 475-477. Nonetheless, Complainant was assigned to his new rotational schedule, which only lasted for four months from January 12, 2014, though April 20, 2014. Id. at 16. Thereafter, the Agency canceled the new rotating shift policy due to intervention from the union, and Complainant was then assigned back to a set shift where he worked from 6:00 a.m. to 6:00 p.m. Id. at 267-268.

Meanwhile, S1 had approached Complainant on Tuesday, November 26, 2013, and informed him that he would be working on Thanksgiving Day. Id. at 377. S1 testified that he needed someone to cover the shift, so he asked Complainant and Complainant volunteered. Id. S1 stated that other supervisors had to work Thanksgiving Day also, but Complainant was nevertheless allowed to take off the Friday after Thanksgiving. Id. at 378-380.

Complainant also recalled that when he was at the loading dock a coworker (C1) placed S1 on the phone with him. Id. at 184-185. Therein, S1 proceeded to loudly question Complainant about his location and directed him to return to his office.

Complainant testified that when he returned to his office, S1 was standing at his desk where he belittled him in front of other coworkers over his whereabouts. Id. at 188. C1 attested, however, that earlier that day he complained to S1 that Complainant would report for duty, but then leave the office and go to other buildings. ROI, at 129-130. C1 stated that, as a result of Complainant's absence, he did not properly manage assigned employees and monitor systems. Id. C1 voiced to S1 that if he did not put an end to Complainant's behavior, he would report it to upper level management himself. Id.

On January 9, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment on the basis of disability when:

1. In June 2012, he was moved out of his office while on scheduled leave and was unable to retrieve his belongings upon his return.
2. Since the summer of 2012 and until recently, he has been subjected to name calling such as "buster and joker," comments made such as "look at him, he doesn't know anything," and "you don't know what you're doing." He has been punched in the chest and arms, and his hand held tightly to cause him pain.
3. On October 11, 2013, he was informed that he would begin working a 12-hour rotating shift, despite his medical documentation noting that his work restrictions limited him to the morning shift-set schedule with no shift work, and no night shifts.
4. On November 28, 2013, he was the only supervisor required to work on "Thanksgiving Day."² Thursday is usually his scheduled day off.
5. On December 7, 2013, S1 questioned his whereabouts to another supervisor.
6. In December 2013, S1 yelled at him for being away from his computer stating, "I want you to stay in the office," and "I want you here at all times." Complainant feels he was being disrespected as a supervisor.

On February 11, 2014, the Agency issued a Partial Acceptance/Partial Dismissal of Complainant's complaint. The Agency dismissed claim 1 for untimely EEO counselor contact and dismissed claim 5 for the failure to state a claim. The Agency accepted claims 2, 3, 4, and 6 for investigation.³

² Complainant later acknowledged that he was not the only supervisor who was required to work on Thanksgiving.

³ On appeal, Complainant does not specifically address the Agency's Partial Acceptance/Partial Dismissal of his complaint. Accordingly, this decision will not address the Agency's dismissal of claims 1 and 5.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a two-day hearing on April 20 and 21, 2016. The AJ issued a decision on August 8, 2017. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

The AJ found that although Complainant established that he was a "individual with a disability," he nevertheless did not establish a prima facie case of discrimination. The AJ specifically found that Complainant did not connect his disability with the actions of S1, and that similarly-situated employees were not treated differently than him as no one was given a reasonable accommodation for shift work at the time. The AJ also observed that assuming, arguendo, that Complainant established a prima facie case of discrimination, the Agency articulated legitimate, nondiscriminatory reasons for its actions. The AJ also found that Complainant did not establish a hostile work environment, as the record demonstrated that multiple employees participated in the jovial nature of the work atmosphere. The AJ observed that Complainant was not singled-out by S1's actions, as all employees generally joked around with each other. The AJ found that the Agency's actions towards Complainant did not rise to the level of a hostile work environment and found that Complainant did not establish that S1 was motivated by discriminatory animus.

CONTENTIONS ON APPEAL

Complainant's Brief on Appeal

On appeal, Complainant, through his attorney, asserts that the Agency's revocation of his existing accommodation for the four months constituted a violation of the Rehabilitation Act. Complainant maintains that while he was under the supervision of his previous supervisor his request for accommodation was approved beginning on November 30, 2012. Complainant maintains that his previous supervisor alerted S1 that he had been given accommodation and could not work nights. Complainant states that S1 testified that he was aware that Complainant was on work restrictions at the time he took over as his Supervisor.

Complainant maintains that on November 15, 2013, he had an appointment with the Agency's Doctor wherein he brought a note from his private doctor, requesting that his restrictions of November 30, 2012, be continued. Complainant asserts that based on his medical documentation, the Agency's Doctor again recommended that he only work a set schedule with no night shift work. Complainant states that the Agency's Doctor testified that he recommended that Complainant's accommodation be continued. Complainant moreover maintains that the Agency's Doctor had received an extensive amount of medical documentation to support his request for accommodation. He states that the Agency's Doctor specifically received his doctor's treatment notes from November 30, 2012, a medical report from his doctor dated November 13, 2013, and a FMLA Certification from his doctor on November 27, 2013, among other documentation. Complainant argues that it is clear that the Agency is not justified in refusing his request for accommodation on the basis of insufficient medical documentation.

Complainant therefore asserts that S1 improperly provided him with a letter dated December 6, 2013, requesting additional documentation, as he already provided a significant amount of documentation to the Agency. Complainant moreover maintains that being able to work the night shift is not an essential function of the Maintenance Mechanic Supervisor position. He contends that he clearly could perform the essential functions of the Maintenance Mechanic Supervisor position while he was at work, and therefore was clearly qualified for his position.

Complainant additionally argues that the AJ erred as a matter of law in his analysis with respect to his claim that he was denied accommodation. Complainant specifically argues that the AJ found that he did not establish a prima facie case of discrimination because he did not show he was treated different than similarly-situated employees. Complainant asserts that the proper prima facie analysis for disability discrimination does not involve evaluating whether a complainant was treated different than other similarly situated employees. Complainant moreover states that the AJ erred in finding that S1's actions did not connect with his disability, as S1 was clearly aware of his disability and the fact that he needed accommodation.

Complainant further maintains that the AJ erred in finding that he was not subjected to a hostile work environment by S1. He asserts that S1 has subjected him to name calling, such as saying he is a "buster and joker," and said to him "look at him, he doesn't know anything," and "you don't know what you're doing." Complainant also maintains that S1 has poked him in the chest and arms and has also squeezed his hand so tight to the point it would hurt and then he would laugh at him. He also asserts that the AJ improperly determined that all employees participated in similar jovial activities, as employees attested that they were not treated in the same manner by S1. Complainant therefore contends that the harassment towards him was certainly severe or pervasive enough to establish a hostile work environment, as S1 bullied him and assaulted him several times a day over an approximately seven-month period.

Complainant also asserts that requiring him to work the Thanksgiving holiday was part of S1's ongoing harassment of him. He states that while two other Supervisors also worked on Thanksgiving, they were already assigned to work on Thursdays due to their normal work schedule. Complainant lastly maintains, with regard to claim 6, that S1 yelling at him in front of his workers was not legitimate discipline, but rather a blatant example of disrespect, intimidation, harassment, and unprofessional conduct.

Agency's Response

In response, the Agency initially asserts that Complainant did not identify any appealable issues with respect to claims 3 and 4. The Agency also maintains that the AJ's finding that Complainant did not establish that he was subjected to a hostile work environment is supported by substantial evidence in the record. In specifically addressing Complainant's request for accommodation, the Agency contends that Complainant's back injury had healed, and he requested to be exempted from the new shift schedule due to a non-obvious psychiatric disability. The Agency asserts that it acted within its discretion in requesting medical documentation pertaining to Complainant's request for accommodation. The Agency moreover asserts that the AJ's finding that Complainant

did not submit requested documentation is supported by the evidence. The Agency asserts that its Doctor notified Complainant in writing that he had not submitted sufficient medical documentation in order for her to sufficiently evaluate his request for accommodation.

The Agency additionally maintains that Complainant's previous supervisor improperly granted Complainant's request for accommodation in November 2012, alleging that the supervisor had virtually no knowledge of Complainant's medical condition or the Agency reasonable accommodation procedures. The Agency argues that the previous supervisor's decision to accommodate Complainant was not due to his medical condition but due to his concerns about Complainant's ability to act as a supervisor, among other things.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS AND FINDINGS

Reasonable Accommodation

In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability; (2) he is a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance). "The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m). An agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p).

In the instant case, we find that the AJ erred in finding that Complainant did not establish that he was denied accommodation as alleged. In so finding, we note that the AJ committed an error of law when he employed the legal standard for disparate treatment with respect to Complainant's allegation that he was denied reasonable accommodation. Moreover, we find that substantial evidence in the record simply does not support the AJ's finding of no connection between S1's actions and Complainant's disability, as discussed below.

Qualified Individual with a disability

We note that on appeal, the Agency does not specifically contest the AJ's finding that Complainant was an individual with a disability. We therefore turn to whether Complainant established that he is a "qualified" individual with a disability.⁴

After a complainant has shown that he is an individual with a disability, the complainant must then establish that he is a "qualified individual with a disability," an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

Therefore, in order to determine whether complainant is "qualified," the fact finder must assess whether, with or without accommodation, complainant could perform the essential functions of his job or any position which he could have held as a result of job restructuring or reassignment. See Barnard v. U.S. Postal Serv., EEOC Appeal No. 07A10002 (Aug. 2, 2002); Hawkins v. U.S. States Postal Serv., EEOC Petition No. 03990006 (Feb. 11, 1999); Van Horn v. U.S. Postal Serv., EEOC Appeal No. 01960159 (Oct. 23, 1998).

Construing Complainant's accommodation request as one of requesting a modification, we find that Complainant has established that he is qualified for the job of Supervisory Maintenance Mechanic. There is no evidence that Complainant could not satisfactorily perform his duties while he was at work when the Agency previously accommodated him by restricting him to the day shift. Therefore, we find that Complainant is a qualified individual with a disability, who can perform the essential functions of his Supervisory Maintenance Mechanic position. See Gilberto S. v. Dep't of Homeland Sec., EEOC Petition No. 0320110053 (July 10, 2014) (complainant who could not work the graveyard shift found to be a qualified individual because he could perform the essential functions of his position *while at work*).

Denial of Reasonable Accommodation

In the instant case, there is no dispute that the Agency previously accommodated Complainant's disability by restricting him to the day shift on a set schedule. Complainant's previous supervisor granted Complainant's request for accommodation after the Agency's OMS submitted a Medical Evaluation Form dated November 30, 2012. The Evaluation specifically noted that both the OMS

⁴ The AJ did not address whether Complainant established that he is a "qualified" individual with a disability.

and Complainant's private doctor recommended to management that Complainant should only work a set schedule and not work the night shift. However, there is no dispute that S1 withdrew Complainant's accommodation from January 12, 2014, though April 20, 2014, contending that Complainant did not adequately respond to additional requests for medical documentation.

We note that when the need for accommodation is not obvious, an agency may require that the individual with a disability provide documentation of the need for accommodation. Enforcement Guidance, at Question 6. The agency may require only the documentation that is needed to establish that the individual has a disability and that the disability necessitates reasonable accommodation. Id.

Here, there is no dispute that the Agency previously determined a year earlier that Complainant's documentation showed that he needed accommodation. Additionally, after S1 requested additional documentation, the record reflects that Complainant's private doctor submitted documentation dated November 13, 2013, to the Agency's Doctor recommending that Complainant's accommodation be continued. Complainant's doctor specifically wrote that Complainant continued to experience anxiety, a headache, and nausea and/or vomiting, and again recommended that Complainant not work night shifts. Complainant's Brief on Appeal, Ex. 5. The Agency's Doctor then submitted another Medical Evaluation Form on November 15, 2013, again requesting that Complainant be restricted to the day shift with a set schedule. Id., Ex. 6.⁵ The Agency then received more medical documentation through Complainant's request for FMLA on November 27, 2013. ROI, at 169. The Agency's Doctor specifically testified that Complainant was medically diagnosed with generalized anxiety, acute stress, panic disorder, insomnia, among other conditions, at the time his accommodation was retracted. Hr'g Trans., at 542. As such, we find that Complainant's already submitted medical documentation clearly established that his disability necessitated accommodation. Moreover, we find that the Agency's granting of Complainant's accommodation a year earlier based on his previous medical documentation undercuts any argument that Complainant's medical documentation was insufficient.

We note that in response to Complainant's appeal, the Agency asserts that Complainant had previously been accommodated due to a back injury that had healed, and therefore it needed new documentation for Complainant's non-obvious psychiatric disability. However, the record reflects that neither Complainant's doctor nor the Agency's Doctor referred to a back condition when Complainant was accommodated the previous year and restricted to the day shift. As the Agency's Doctor testifies, the previous accommodation was related to Complainant's conditions related to anxiety, headaches, stress, insomnia, blood pressure, among other conditions due to his 3:00pm to 11:00pm shift. Hr'g Trans., at 535-538.

⁵ The Medical Evaluation Form dated November 15, 2013, was absent from the ROI, but was included in an exhibit with Complainant's brief on appeal.

Because we find that Complainant established that he was a qualified individual with a disability who was denied accommodation, we turn to whether the Agency established that modifying Complainant's work hours would have significantly disrupted the facility's operations, causing undue hardship.

Undue Hardship

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); Enforcement Guidance.

We note that the Agency had previously allowed Complainant to modify his work schedule without finding that it significantly disrupted the facility's operations. Moreover, the Agency has not argued that continuing his accommodation would have resulted in an undue hardship on its operations. Therefore, based on the record, we find that Complainant has established that the Agency violated the Rehabilitation Act when he was denied reasonable accommodation for his disability as alleged, from January 12, 2014, through April 20, 2014.

Hostile Work Environment (Claims 2, 4, and 6)

To establish a claim of hostile work environment, 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 Agency. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). 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). Further, the incidents must have been "sufficiently severe and 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); see also Oncale v. Sundowner Offshore Services, Inc., 23 U.S. 75 (1998).

In this case, Complainant alleges that S1 subjected him to verbal and physical abuse, which included being called a "buster and joker," being punched in the chest and arms, among other things. Complainant moreover claimed that S1 instructed him to work on Thanksgiving Day and yelled at him in front of his peers for being away from his computer.

Complainant maintained that these behaviors towards him were severe or pervasive enough to rise to the level of a hostile work environment. Even assuming that the alleged conduct was sufficiently severe or pervasive to create a hostile work environment, Complainant does not allege on appeal nor is there persuasive evidence in the record, that discriminatory animus played a role in S1's alleged conduct. There is simply no credible corroborating evidence that S1 harassed and assaulted Complainant based on his disability or request for accommodation. Also, there is no dispute that other Supervisors worked Thanksgiving as well and Complainant was allowed to take the Friday after Thanksgiving off. Further, we note that it was C1 who complained that Complainant was absent from his computer and requested that S1 take action against Complainant. Therefore, we find that substantial evidence in the record supports the AJ's determination that Complainant was not subjected to a discriminatory hostile work environment, as alleged.

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 order. We AFFIRM the Agency's decision with respect to claims 2, 4, and 6. We REVERSE the Agency's final order with respect to claim 3.

ORDER

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

1. The Agency shall give Complainant a notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claim for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice.⁶ The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45)

⁶ An agency that has failed to provide reasonable accommodation may avoid liability for compensatory damages if it can demonstrate that it acted in good faith. As explained in Guilbeaux v. U.S. Postal Serv., EEOC Appeal No. 0720050094 (Aug. 6, 2008), "a good faith effort can be demonstrated by proof that the agency, in consultation with the disabled individual, attempted to identify and make a reasonable accommodation [citation omitted]." Here, the Agency was aware that Complainant had submitted extensive medical documentation, showing that his disability necessitated continued accommodation. The Agency nevertheless withdrew Complainant's accommodation, improperly accusing Complainant of ignoring its requests for documentation. Accordingly, we find that compensatory damages are properly awarded here.

calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110.

2. The Agency shall provide a minimum of eight (8) hours of in-person or interactive training to the responsible management official identified as S1 in this case regarding his responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations under Section 501 of the Rehabilitation Act and in particular, its duties regarding reasonable accommodation.
3. The Agency shall consider taking appropriate disciplinary action against the responsible management official identified as S1 in this case. 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

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

POSTING ORDER (G0617)

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

ATTORNEY'S FEES (H1016)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition.

See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

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

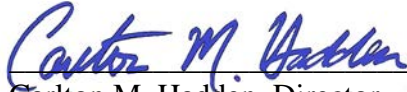
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 25, 2019

Date