



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

[REDACTED] Alonso T.,¹
Complainant,

v.

Janet Dhillon,²
Chair,
Equal Employment Opportunity Commission, Agency.

Appeal No. 0120162340
Agency No. 2013-0005

DECISION

Complainant timely filed an appeal³ with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 21, 2016, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age

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 In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent Agency and the adjudicatory authority. The Commission's adjudicatory function is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party in this action.

³ The record establishes that Complainant received the final agency decision on March 30, 2016. On April 28, 2016, he mailed his appeal to the Post Office Box listed on the appeal form that the Agency provided. The appeal form contained an inaccurate P.O. Box number, and the United States Postal Service returned the appeal to Complainant on May 18, 2016. Complainant sent a May 20, 2016, letter to the Director of the Agency's Office of Equal Opportunity (OEO) and requested the correct address for filing an appeal. According to the Agency, OEO received Complainant's letter on May 31, 2016, and the OEO Director told Complainant that she would notify the Office of Federal Operations that he filed his appeal in a timely manner. The Office of Federal Operations received the appeal on June 30, 2016. We deem the appeal timely filed.

Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission MODIFIES the Agency's final decision.

ISSUES PRESENTED

The issues presented are: (1) whether the Agency subjected Complainant to harassment and discrimination based on race, age, and reprisal for prior protected EEO activity when it denied his request for training and reassigned his duties as the Agency's Personnel Security Officer to a younger, less experienced White employee; and (2) whether the Agency subjected Complainant to discrimination based on disability and reprisal when, on February 8, 2013, it partially denied his reasonable-accommodation request to telework two days per week.

BACKGROUND

At the time of events giving rise to this complaint, Complainant lived in West Virginia but worked as a Human Resources Program Manager in the Agency's Office of the Chief Human Capital Officer (OCHCO) in Washington, D.C. According to the position description, Complainant's duties included reviewing personnel operations procedures and instructions, leading and/or participating in operational audits of human-resources functions, monitoring and reporting on the status and progress of projects, planning and conducting special projects, and providing advice to the Assistant Director of OCHCO. In addition, Complainant served as the Agency's Personnel Security Officer (PSO) and oversaw the Agency's personnel security and suitability program. Complainant has stated that, as PSO, he created and enforced policy, analyzed background investigations and made adjudications, and established the budget.

In a formal complaint filed on December 14, 2012, Complainant alleged that the Agency discriminated against him and subjected him to harassment on the bases of race (Black), age (50), and reprisal for prior protected EEO activity when he was denied training and his duties as the Agency's Personnel Security Officer were reassigned to a younger, less experienced White employee. He subsequently amended the complaint to allege that the Agency discriminated against him on the bases of disability (back and feet impairments) and reprisal when it partially denied his reasonable-accommodation request to telecommute two days per week.

Denial of Training

On February 3, 2012, Complainant submitted an Individual Development Plan (IDP) requesting six developmental activities, including "OPM Adjudication Determinations Course - OPM FISC." He listed September 10 and 21, 2012, as the target start and end dates for the course. He did not list the location of the course. The OCHCO Assistant Director (S1), who digitally signed the IDP on February 13, 2012, coded four activities as "Approved" and two, including the OPM Adjudication Determinations Course, as "Deferred."

An Agency Personnel Security Assistant (CW1) submitted a February 15, 2012, IDP requesting two courses: "Security Professionals Seminar/OPM" at Tyson's Corner, Virginia, and "Essentials of Suitability Adjudication/OPM" at Crystal City, Virginia. S1 approved both courses on February 17, 2012. The target start and end dates for the Essentials of Suitability Adjudication course were April 30 and May 11, 2012. It appears from the record that the Essentials of Suitability Adjudication course listed on CW1's IDP and the OPM Adjudication Determinations course listed on Complainant's IDP covered the same material but took place on different dates and at different locations. The training that CW1 requested took place in Northern Virginia; as noted below, S1 stated in her affidavit that the training that Complainant requested took place in Pennsylvania.

In a May 17, 2012, e-mail to Complainant, S1 noted that she and Complainant had discussed his request to take the training that CW1 had taken a week earlier. She stated that, due to budget constraints, she could not justify sending another employee to the training and asked whether Complainant needed the training for some type of required certification. Complainant replied the next day that everyone who adjudicates background investigations must attend the training, that he did not know when the cut-off date for certification was, and that he needed to attend the course. He noted, "The issue now is, I may have to go out [of] the area to do it." In addition, he asserted that CW1 should not have attended the training at this point in CW1's career. In response, S1 stated that she was the director of the team, that she made the decisions about the development of staff's careers, and that her research indicated that the Office of Personnel Management (OPM) had not yet made the training mandatory.

Reassignment of Duties of Personnel Security Officer

Several events occurred before complainant's duties as Personal Security Officer were reassigned. First, on September 6, 2012, Complainant sent a letter to an Agency employee about possible problems with the employee's background investigation. In the letter, Complainant stated that the employee had not provided accurate work telephone numbers for the employee and his supervisor and had inaccurately replied "no" to a question about being arrested, charged, or convicted of any offense. He asked for a justification as to why the employee had not provided correct telephone numbers and had replied "no" to the question about offenses. Complainant stated that he was "greatly concerned about the results of [the] background investigation" but that no action would be taken until the employee had an opportunity to provide mitigating information. He gave the employee 30 days to submit mitigating documentation. The employee's Office Director complained about the letter, and S1 and Complainant discussed the matter in September 14 and 17, 2012, e-mails.

Second, in a September 19, 2012, e-mail to S1, Complainant stated that his doctor believed that his commute from West Virginia to Washington, D.C. was contributing to stress on his back and feet and recommended that he not commute for the remaining three days of the week.

He noted that he had commuted to the office that day to retrieve his computer and some work. Complainant also noted that his doctor wanted him “to initiate a reasonable accommodation request in the future.” S1 replied that Complainant should fill out a telework-assignment sheet and let her know what he would be working on during the next two days. In addition, she stated, “I am sure you already know that you will need to work through [a named individual] on the reasonable accommodation.”

S1 and Complainant exchanged e-mails on September 20 and 21, 2012, about an upcoming meeting that Complainant and another employee were having with individuals from OPM. S1 asked why Complainant was not including CW1 in the meeting, and Complainant replied that the meeting was at the management level and the function was above CW1’s pay grade.

In a September 28, 2012, e-mail to all Agency employees, S1 informed them that she would assume the responsibilities of Security Officer effective October 1, 2012. She stated that matters that normally were brought to Complainant’s attention should be raised with CW1 and that CW1 would work with her to resolve the matters. She noted that Complainant had “made positive changes” to the Personnel Security and Suitability Program and that he would continue to work on matters related to “recruitment, leave, human capital management reviews, and wellness initiatives.”

Complainant filed an October 30, 2012, appeal with the Merit Systems Protection Board (MSPB) challenging the reassignment of his Personnel Security Officer duties. He alleged that the Agency reassigned the duties to a Personnel Security Specialist who was not qualified to perform the duties. He did not allege that the action was discriminatory. The MSPB dismissed the appeal for lack of jurisdiction on November 20, 2012. In the meantime, on November 14, 2012, Complainant contacted an EEO Counselor to allege that the Agency discriminated against him when it reassigned his PSO duties to CW1.

Reasonable Accommodation

Complainant submitted a reasonable-accommodation request to the Disability Program Manager (DPM) on December 12, 2012. In a December 10, 2012, note, Complainant’s doctor stated that Complainant experienced “chronic back, bone, and muscular conditions, as well as hypertension which can cause his blood pressure to spike”; that he “has been prescribed many medications to help him live a normal life considering his overall medical condition”; and that his work aggravated his conditions. She noted that he could perform sedentary duties but would need to take breaks. Complainant’s doctor stated that he should work from home three days per week.

The doctor reiterated that recommendation in a December 26, 2012, Medical Questionnaire that DPM asked her to complete. She diagnosed Complainant with “hypertension, severe degenerative disease of back [and] neck, [and] foot pain.” According to the doctor, Complainant’s condition was a “permanent long-term chronic

condition” that could become worse. She stated that medications cause Complainant to become drowsy and lose his balance that he had been told to stay off his feet because of his pain, and that not commuting would help to improve Complainant’s blood pressure and pain control.

In a February 1, 2013, e-mail to DPM, Complainant objected to DPM’s request for information about the type of work that Complainant would perform from home. He asserted that he and his supervisor, not DPM, should coordinate the work that he performed. He noted that his job involved updating programs, writing and typing policy for the programs, coordinating leave with employees and their managers, responding to inquiries, advising stakeholders via e-mail or telephone, and coordinating and implementing wellness events. Complainant stated that he would perform “regular and routine” work.

DPM replied that she had requested the information to help her decide about Complainant’s request. She recommended that he “meet with [his] supervisor to discuss teleworking 3 days per week” and that he “also discuss [his] work assignments and what day(s) are best to telework.” Complainant could then meet with DPM “to discuss the outcome.” In addition, DPM stated that Complainant’s “medical documentation does not show medical merit that 3 days of telework could be any (sic) beneficial to [his] condition as 1 or 2 days.”

Subsequently, in a February 5, 2013, e-mail to Complainant, DPM agreed that he and his supervisor should coordinate his assignments. She stated that she needed to work closely with his supervisor when responding to his request and that “the interactive process is integral to the reasonable accommodation process.” She asked Complainant to get back to her by February 8, 2013, “with a telework plan that [he] and [his] supervisor have discussed.”

Complainant sent an e-mail and telework forms to S1 and DPM on February 8, 2013. He stated that he was requesting two days of telework per week rather than the three days that his doctor had recommended. In the forms, Complainant asked to telework each Thursday and Friday, stated that he would perform routine duties such as preparing reports and responding to inquiries, and anticipated that his work products would include correspondence and reports.

Later that day, DPM sent Complainant a Resolution of Reasonable Accommodation Request form that granted him one day of telework per week and stated that the accommodation would be reviewed in 120 days. She stated in the form that three days of telework would affect business operations “due to limited human resources at this time and a number of critical programs he manages that . . . require on-site interaction, e.g. health unit operations and management of the agency delegated case examining authority, etc.” She also stated that the Agency denied the requested accommodation because of “[i]nsufficient medical evidence [and] no correlation between chronic pain issues and performing his job duties in/out [of the] office.” The Agency chose the alternative accommodation because Complainant’s “conditions can be controlled by medication and. . . staying off feet and reducing commuting helps to control the pain.” Further, the alternative

would reduce the time that Complainant spent commuting and on his feet, and would serve the office.

DPM asked Complainant to review the form and then meet with her to discuss it. They met on February 11, 2013. According to the form, which DPM signed, Complainant accepted the alternative accommodation.

Complainant sent February 13, 2013, e-mails to DPM disagreeing with statements in the Resolution of Reasonable Accommodation Request form. He asked where she obtained some of the information in the form, and she replied that she obtained it "through the interactive process with" S1. He asserted that he had interacted with only three people that week, that he did not "interact with anyone except those that need [his] advice," that the delegated examining unit (DEU) was inactive, that he previously had spent an entire week working from home on DEU matters, and that he visited the health unit only five times per year. He further asserted that his health was "declining" and that his doctor had not stated that medication controlled all his conditions.

Complainant also sent an e-mail to S1 stating that he accepted the reasonable-accommodation decision "in part" but planned to challenge it. He asserted, among other things, that the programs that he managed "are primarily regulatory with almost no interaction with anyone other than" S1. He also asserted that 90 percent of his communications with S1 were through e-mail and that he did not need to visit the health unit except for logistical reasons or to check on operations. He stated that he had worked from home "on many occasions." Claiming that all he needed was "an active telephone and a computer to manage the programs," he asked S1 to help him understand the conclusion that three days of telework would affect business operations. S1 replied that she would not respond to the e-mail, that she was available to discuss the matter with Complainant in her office, that Complainant had "not discussed this matter with [her] at all," and that all communications about the matter had been from DPM "or very recently by way of email from" Complainant.

In a February 19, 2013, e-mail to Complainant, DPM stated that she had scheduled a meeting with S1 and Complainant that day "to engage in the interactive process pertaining to the resolution of [his] reasonable accommodation request" and that Complainant had not attended the meeting. She further stated that, unless Complainant's medical condition changed, the February 11, 2013, reasonable-accommodation decision would be effective until June 11, 2013. Complainant and S1 have stated that Complainant never teleworked one day per week.

EEO Complaint and Investigation

Complainant filed a formal complaint on December 14, 2012, and the Agency investigated the complaint. Complainant, S1, and the DPM all submitted testimony.

With respect to his denial of training claim, Complainant asserted in an affidavit that, when S1 denied his request for training in May 2012, he was the only Agency employee who officially could adjudicate background investigations. He claimed that CW1 was not a personnel security adjudicator and did not request the training. Complainant further claimed that S1 reassigned all his Personnel Security Officer duties to CW1 in September 2012. According to Complainant, S1 and the Chief Human Capital Officer told him that an Office Director complained about a letter that he had sent to an Agency employee.

S1 responded in her affidavit that Complainant did not request "OPM Adjudication Determinations Course--OPM FISC" training and did not list the training in his IDP. She stated that he spoke with her about training, that their "discussion was centered on logistics," and that he wanted to attend the training in Pennsylvania even though it also was being offered in Crystal City, Virginia. The Pennsylvania location would have necessitated the payment of hotel and per diem expenses in addition to tuition. According to S1, Complainant's request "was not approved when he could have attended locally." S1 stated that she approved CW1's request for training because he was the Personnel Security Assistant, listed the training in his IDP, was willing to attend the training locally, and provides briefings when he returns from training.

With respect to his reassignment of duties claim, Complainant acknowledged in his February 26, 2015, deposition that S1 told him that she was removing the PSO duties from him to give him some relief from a heavy workload and because some employees complained that they felt threatened by the letters that he sent to them. He conceded that at least two named employees complained to the Agency's Chair that they felt threatened by the letters. He stated that S1 told him that the Chief Operating Officer told her to remove Complainant from the position because employees complained that they felt threatened. In her affidavit, S1 stated that she reassigned Complainant's PSO duties to herself "because of mistakes made in the program [and] complaints from union officials and management concerning his treatment of employees." In addition, noting that Complainant was responsible for "several programs," S1 stated that removing the PSO duties "would give him some relief" and allow him to concentrate on other matters. She acknowledged that she assigned some of the duties to CW1 but asserted that she exercised "very close supervision" and kept the complex duties for herself.

With respect to his reasonable accommodation claim, Complainant averred that he has partial paralysis in his back, neck, and feet; arthritis in his back, feet, and ankles; and high blood pressure. In addition, he has been diagnosed with Pes Plantar and Plantar Fasciitis. He stated that he experiences "severe chronic pain"; that his impairments limit his ability to sit, stand, and walk; that they affect his ability to type, communicate, and concentrate; that he cannot sit upright in office chairs; and that it sometimes is challenging to get out of a chair. When he worked from home, he could move to a comfortable location when necessary.

He stated that he never ended up teleworking one day per week because S1 never told him that she had authorized it. According to Complainant, only S1, not DPM, can authorize

telework. He stated that S1 did not approve his request, "nor did she request an additional discussion on the matter." But he did acknowledge in his deposition that he stopped communicating with S1 in person after she removed the PSO duties from him and did not speak with S1 about his reasonable-accommodation request for telework.

Complainant asserted that he did not attend the February 19, 2013, meeting that DPM arranged because he had a scheduling conflict and did not see the meeting notice until after the meeting had occurred.

Complainant alleged that S1 retaliated against him for filing an MSPB appeal and an EEO complaint. He asserted that, in the past, S1 never denied his requests to telework. He contended that "a hostile environment was created" after he filed his complaint. But Complainant also stated that S1 had not denied any of his telework requests since February 2013. When asked for an estimate of the number of times he had teleworked, and whether he had done so 20 times, Complainant responded, "Oh, no, not that many. I need to interact with people, so let's say five to seven."

S1 stated in her affidavit that Complainant sent her an e-mail concerning his request for reasonable accommodation but did not discuss the matter with her in person. She spoke with DPM, "who makes the decisions of whether reasonable accommodations are warranted." According to S1, she told DPM that Complainant "needed to improve in completing assignments timely and accurately." She also told DPM that a number of Complainant's assignments, including "his responsibilities with the Agency's delegated examining authority," required his presence in the office. She "was willing to start out with a one-day a week arrangement centered around the weekend so that we could see how his work habits would improve." In addition, she told DPM that telework required communication with one's supervisor and that Complainant had stopped communicating with her after he filed his EEO complaint. S1 stated that, although Complainant signed a document agreeing to the Agency's offer of one day of telework per week, he never took the telework day.

DPM stated in her affidavit that the doctor's statements that Complainant submitted indicated that his commute, rather than his job duties, exacerbated his medical conditions. She based the decision to provide an alternative accommodation on the nature of Complainant's work, which was sedentary. According to DPM, Complainant controlled the extent to which he was on his feet or took breaks while in the office; he could "take as many frequent breaks as he needed to mitigate any pain associated with sitting while performing his job." She asserted that granting Complainant's request for three days of telework per week would result in an undue hardship "based on several factors, including the impact of the accommodation on the operation of the department. Essentially, the business operations will be impacted by granting Complainant (3) three days of telework." DPM noted that

Complainant did not attend the February 19, 2013, meeting that she scheduled “to facilitate an interactive discussion concerning [her] decision.”⁴

Final Agency Decision

At the conclusion of 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 Administrative Judge. Complainant timely requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its decision, the Agency found that Complainant did not establish that the Agency discriminated against him on the bases of race, age, and reprisal when it denied his training request and reassigned his PSO duties. It concluded that Complainant’s reprisal claims failed as a matter of law because his protected EEO activity occurred after the actions at issue. The Agency further concluded that it articulated legitimate, nondiscriminatory reasons for its actions and that Complainant did not prove that the articulated reasons were a pretext for discrimination. In addition, the Agency found that Complainant did not establish that the Agency subjected him to unlawful harassment.

With respect to his reasonable-accommodation claim, the Agency found that Complainant did not establish that it partially denied his request for reasonable accommodation in retaliation for protected EEO activity. Assuming that Complainant was an individual with a disability, the Agency found that it provided Complainant with an effective accommodation when it granted him one day of telework per week. The Agency stated that Complainant accepted the proposed accommodation on February 8, 2013, but “inexplicably refused to meet with [DPM and S1] on February 19, 2013, to discuss [DPM’s] decision.” According to the Agency, “Complainant unilaterally ended the interactive process, thereby eliminating any further chance that the Agency would consider granting him an additional telework day.”

CONTENTIONS ON APPEAL

Complainant did not submit a brief on appeal. In his May 20, 2016, letter to the OEO Director, he argued that his “complaint was not given an objective review.”

The Agency argues that it articulated legitimate, nondiscriminatory reasons for denying Complainant’s training request and reassigning his PSO duties and that Complainant did not show that the articulated reasons were pretextual. It further argues that Complainant

⁴ DPM asserted in her affidavit that Complainant accepted the Agency’s offer to permit him to telework one day per week and signed the Resolution of Reasonable Accommodation Request form on February 11, 2013. Subsequently, in response to the EEO Investigator’s e-mail noting that Complainant’s signature was not on the form, DPM stated that she signed the form “in his presence with his concurrence.”

cannot prevail on his harassment claim because he has not shown that the Agency took the actions at issue because of his race, age, or protected EEO activity.

In addition, the Agency contends that it did not unlawfully deny Complainant's request for reasonable accommodation. The Agency argues that Complainant's "refusal to engage in the interactive process precludes him from prevailing on this claim." It notes that Complainant "submitted an extensive rebuttal statement" to the February 8, 2013, Resolution of Reasonable Accommodation Request but "refused to sit down and talk to [S1 and DPM] about his concerns or to explain why he was not taking the one day of telework for which he was approved." It argues that, to the extent that it did not grant Complainant's request for reasonable accommodation, it was his "own failure to cooperate in the interactive process that led to this result." Citing Koch v. Securities and Exchange Commission, EEOC Appeal No. 01A03888, (December 21, 2001), the Agency maintains that Complainant cannot "blame the Agency 'for this end result he himself effected.'" Further, the Agency contends that it provided Complainant with an effective accommodation and that he has produced no evidence to refute this. It also contends that Complainant produced no evidence that discriminatory or retaliatory animus motivated the Agency's actions. Finally, the Agency states that, "on August 1, 2016, the Agency's current Disability Program Manager confirmed that the Agency granted [Complainant's] request for three days of telework, and that this accommodation has been in place for several months."

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at 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").

ANALYSIS AND FINDINGS

Denial of Training and Reassignment of Duties

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). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Corp. v. Waters,

438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993). Complainant can do this by showing that the proffered explanations are unworthy of credence or that a discriminatory reason more likely motivated the Agency. Burdine, 450 U.S. at 256. A showing that the employer's articulated reasons are not credible permits, but does not compel, a finding of discrimination. Hicks, 509 U.S. at 511.

We assume, for purposes of analysis and without so finding, that Complainant has established prima facie cases of discrimination based on race, age, and reprisal.

The Agency has articulated legitimate, nondiscriminatory reasons for its actions. S1 stated that Complainant did not list the training in his IDP and wanted to attend training in Pennsylvania, which would have involved hotel and per diem expenses. CW1 was willing to attend training locally. S1 further stated that she reassigned Complainant's PSO duties because of mistakes made in the program, complaints about the way that Complainant treated employees, and his workload.

Complainant has not shown that the Agency's reasons are a pretext for discrimination. The record establishes that Complainant, who listed September 2012 adjudication training in his February 2012 IDP, did not list the May 2012 training that CW1 attended. He has not refuted S1's assertion that he wanted to attend training in Pennsylvania and that the training would have been more expensive than CW1's training because of hotel and per diem expenses.

Similarly, Complainant has not refuted S1's explanation for the reassignment of his PSO duties. He acknowledged that S1 told him that she was reassigning the duties because of his workload and employee complaints about the letters that he sent to them. Although the reassignment occurred shortly after Complainant's September 19, 2012, e-mail requesting permission to telework, it also occurred shortly after an Office Director complained about a letter that he sent to an employee concerning a background investigation. As Complainant acknowledged, other employees also had complained about letters that he sent to them. Having carefully considered the evidence of record, we find that the Office Director's and other employees' complaints, rather than Complainant's request for telework, motivated the reassignment.

The evidence does not establish that the Agency's reasons for its actions are unworthy of credence or that discriminatory reasons more likely motivated the Agency. We find, therefore, that Complainant has not shown that the Agency took the actions at issue because of his race, age, or protected EEO activity.

Hostile Work Environment

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is “sufficiently severe or pervasive to alter the conditions of [complainant’s] employment and create a hostile or abusive working environment.” The Court explained that an “objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive” and the complainant subjectively perceives it as such. Harris, 510 U.S. at 21-22. Whether the harassment is sufficiently severe to trigger a violation of Title VII must be determined by looking at all the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Id., at 23.

To establish a claim of harassment, Complainant must show that: (1) he is a member of a statutorily protected class; (2) he was subjected to unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the protected class; (4) the harassment had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. Humphrey v. U.S. Postal Serv., EEOC Appeal No. 01965238 (Oct. 16, 1998); 29 C.F.R. § 1604.11. The harasser’s conduct should be evaluated from the objective viewpoint of a reasonable person in the victim’s circumstances. Enforcement Guidance on Harris v. Forklift Systems, Inc., EEOC Notice No. 915.002 (Mar. 8, 1994). The evaluation “requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.” Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

In this case, the record does not support a finding that the Agency subjected Complainant to discriminatory harassment. As noted above, the evidence does not establish that the incidents alleged by Complainant occurred because of his race, age, or protected EEO activity. A finding of discriminatory harassment is precluded based on our determination that Complainant did not show that the Agency’s actions were motivated by discriminatory animus. See Oakley v. U.S. Postal Serv., EEOC Appeal No. 01982923 (Sept. 21, 2000). Accordingly, we find that Complainant has not demonstrated that the Agency subjected him to a hostile work environment based on race, age, or protected EEO activity.

Request for Reasonable Accommodation

Under the Commission’s regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a “qualified” individual with a disability pursuant to 29 C.F.R.

§ 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). An individual with a disability is “qualified” if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

A reasonable accommodation must be effective. See U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002) (“the word ‘accommodation’. . . conveys the need for effectiveness”). That is, a reasonable accommodation should provide the individual with a disability with “an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability.” 29 C.F.R. Part 6130 app. § 1630.9. If more than one accommodation will enable an individual to perform the essential functions of his or her position, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” Id.; see also Enforcement Guidance on Reasonable Accommodation at Question 9. “The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.” 29 C.F.R. Part 6130 app. § 1630.9.

Allowing an employee to telework is a form of a reasonable accommodation. “An employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.” An “undue hardship” is a significant difficulty or expense in light of the agency’s circumstances and resources. See 29 C.F.R. § 1630.2(p). The agency bears the burden of establishing, through case-specific evidence, that a reasonable accommodation would cause an undue hardship. U.S. Airways, Inc. v. Barnett, 535 U.S. at 402. “Generalized conclusions will not suffice to support a claim of undue hardship.” Enforcement Guidance on Reasonable Accommodation, “Undue Hardship Issues.” An employer may deny an employee’s request to telework if it can show that an alternative accommodation would be effective or that telework would cause an undue hardship. Enforcement Guidance on Reasonable Accommodation, at Question 34. The agency has a burden of production to show that there is an effective alternative accommodation.

In this case, we find that Complainant is a qualified individual with a disability. Complainant’s back and feet impairments substantially limit his ability to sit, stand, and walk. Further, the record establishes that he meets the skill, experience, education, and

other job- related requirements of his Human Resources Program Manager position and that he can perform the essential functions of his position.⁵

Complainant initially requested in December 2012 to work from home three days per week as a reasonable accommodation, based on a note from his doctor. The Agency requested additional medical information, which Complainant provided. Complainant and the Agency's DPM exchanged emails in early February to devise a telework plan. Complainant submitted a telework plan to the Agency's DPM on February 8, 2013, and modified his request, asking to work remotely for two days per week. The Agency denied Complainant's request for two days of telework per week and instead offered him one day. DPM stated in the Resolution of Reasonable Accommodation Request form that the Agency denied the requested accommodation because of "[i]nsufficient medical evidence."

DPM's statement that there was no correlation between Complainant's chronic pain and the performance of his job duties does not address his doctor's statement that not commuting would improve Complainant's blood pressure and pain control. To the extent that the Agency believed that it did not need to provide an accommodation related to commuting, the Agency was mistaken. The Commission has held that a request for telework or a shorter commuting time because of a disability is a request for reasonable accommodation and triggers an agency's responsibility under the Rehabilitation Act. See, e.g., Jody L. v. Dep't of the Air Force, EEOC Appeal No. 0120151351 (Jan. 17, 2018) (agency violated the Rehabilitation Act when it denied complainant's request for situational telework due to inclement weather); Doria R. v. Nat'l Sci. Found., EEOC Appeal 0120152916 (Nov. 9, 2017) (agency's ten-month delay in granting complainant's request for additional telework days violated the Rehabilitation Act); Hupka v. Dep't of Def., EEOC Appeal No. 02960003 (Aug. 13, 1997) (agency violated Rehabilitation Act when it refused to allow complainant whose long commute exacerbated his disability to work at home or at a local alternative work site).

The Agency asserts that it provided Complainant with an effective accommodation when it offered to allow him to telework one day per week. We disagree. Complainant submitted two doctor's statements – the December 10, 2012, note and the December 26, 2012, Medical Questionnaire – that expressly stated that Complainant should telework three days per week. Nothing in the medical documentation stated that only one day of telework per week would be sufficient, nor has the agency offered other evidence to support its contention that one day of telework would be an effective accommodation.

We note that, under the Rehabilitation Act, it is anticipated that, to the extent necessary, the employer will engage in the interactive process with the individual requesting accommodation to clarify the individual's needs and identify the appropriate reasonable accommodation. 29 C.F.R. § 1630.2(o)(3). However, failure to engage in the interactive process does not

⁵ The record establishes that Complainant performed the essential functions of his position satisfactorily. We note that on February 4, 2013, S1 gave Complainant a "Fully Successful" rating on his fiscal year 2012 performance appraisal.

constitute a violation of the Rehabilitation Act. Employer liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job. Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002) (although agency cannot be held liable solely for failure to engage in interactive process, it can be held liable where failure to engage in process resulted in failure to provide reasonable accommodation), request to recon. denied, EEOC Request No. 05A30114 (Jan. 9, 2003). Similarly, employer liability may be avoided where failure of the requesting individual to engage in the interactive process results in the parties being unable to identify an effective accommodation. See Estate of William K. Taylor, Jr. v. Dep't of Homeland Sec., EEOC Appeal No. 0120090482 (June 20, 2013) (complainant's failure to provide requested documentation caused failure to receive possible accommodation), request to recon. denied, EEOC Request No. 0520130591 (Jan. 16, 2014).

DPM stated that, on February 19, 2013, she arranged a meeting for that day to discuss with the Complainant and S1 the offer of one day of telework per week as an accommodation. Complainant did not attend, stating that he had a scheduling conflict and did not see the meeting notice until after the meeting had occurred. Neither DPM, nor S1, nor Complainant attempted further communication regarding Complainant's requested accommodation.

This is not a typical case where a party fails to engage in the interactive process, causing a lack of effective accommodation where one could have been found. Compare Melani F. v. Dep't of Homeland Sec., EEOC Appeal No. 0720150027 (Mar. 15, 2016) (agency, which failed to engage in interactive process, violated the Rehabilitation Act when it denied complainant's request for a reader), and Barnard v. U.S. Postal Serv., EEOC Appeal No. 07A10002 (Aug. 2, 2002) (although administrative judge incorrectly held agency liable for failing to engage in interactive process, finding of liability upheld where, had agency engaged in process, it could have identified suitable vacancies), with Bryan R. v. U.S. Postal Serv., EEOC Appeal No. 0120130020 (Mar. 20, 2015) (no violation found where, even if agency had engaged in interactive process, the parties would not have found an accommodation that would have enabled complainant to perform essential functions). Rather, the Agency here had information from Complainant's doctor identifying what was, in his opinion as a medical professional, the effective accommodation for Complainant's disability. The record reflects that the DPM did not inquire of the doctor, nor request Complainant to provide a note from the doctor addressing, whether one day of telework per week might provide an effective accommodation. We therefore conclude that the Agency's ability to provide accommodation was not hindered by Complainant's absence from the scheduled meeting, and turn to the matter of undue hardship.

The Agency has not shown that allowing Complainant to telework three days per week would have resulted in an undue hardship. DPM's mere assertion that the requested accommodation would have caused an undue hardship because of its impact on "the operation of the department" and "business operations" does not establish that the accommodation would have resulted in a significant difficulty or expense. DPM stated in the Resolution of Reasonable Accommodation Request form that Complainant's work on the DEU program and health-unit

operations required on-site interactions, but she has not explained why she believed that to be the case. Further, she has not refuted Complainant's assertions, in his February 13, 2013, e-mail, that the DEU program was inactive, that he had performed DEU work from home in the past, and that he visited the health unit only five times per year.

Similarly, S1 did not explain why she believed that Complainant's assignments required his physical presence in the office. There is no explanation why Complainant's work, to the extent that it involved interactions with others, required in-person rather than e-mail or telephonic communication. Complainant's deposition statement that he needs to interact with people likewise does not establish that he needed to be physically present in the office. Further, as the Agency acknowledges in its appellate brief, "it appears that [S1] improperly considered [Complainant's] job performance in her assessment of [Complainant's] accommodation request." S1's references to Complainant's alleged need to improve his work habits may be correct, but that is not the issue before us here, which is whether the requested accommodation, if implemented, would result in an undue hardship. An employee would still be required to meet all performance requirements even with the accommodation of telework. The issue before us is whether the Agency could have accommodated Complainant's disability without incurring an undue hardship, not whether Complainant's performance merited special privileges. Reasonable accommodation is a right, not a privilege.

The Agency argues that Complainant cannot prevail on his claim because he did not engage in the interactive process. The record, however, does not show that Complainant's actions were responsible for the Agency's decision to offer one day of telework instead of the requested two days. Complainant's nonattendance at the February 19, 2013, meeting could not have affected the decision; DPM scheduled the meeting *after* she issued the Resolution of Reasonable Accommodation Request form. DPM stated in the form that the Agency would review the accommodation in 120 days, but she gave no indication that the Agency would reconsider its decision before that date. Certainly, it would have been preferable for Complainant to follow DPM's February 1, 2013, suggestion that he meet with S1 to discuss his work assignments and telework request. It would also have been preferable if both Complainant and the Agency had sought to communicate after the process broke down. That Complainant did not do so, however, does not release the Agency from its obligation to provide Complainant with an effective, reasonable accommodation absent undue hardship. As discussed above, the Agency did not meet its obligation.

This is not a situation, like that in Koch, where "complainant refused to provide specific information about the precise nature of his medical condition and/or the exact accommodation it necessitated." Id., at 13. Complainant's doctor completed the Medical Questionnaire, identified Complainant's impairments, and recommended that Complainant telework three days per week. DPM stated in the Resolution of Reasonable Accommodation Request form that Complainant's medical evidence was insufficient, but she did not explain what was lacking. Moreover, there is no evidence that the Agency requested additional information about Complainant's disability or need for reasonable accommodation. Accordingly, we find that the Agency discriminated against Complainant on

the basis of disability when it denied his request for the reasonable accommodation of three days of telework per week.

We note that, on appeal, the Agency states that it ultimately granted Complainant's initial request for three days of telework. It is not clear when the Agency might have done so. The Agency's statement that it offered Complainant three days of telework per week is an admission, however, that this accommodation would not have entailed undue hardship. To ensure that Complainant receives the appropriate remedy, we will order the Agency to provide him with the reasonable accommodation of three days of telework per week.

Where a finding of discrimination involves a failure to provide reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the complainant with a reasonable accommodation. 42 U.S.C. § 1981a(a)(3); see also Jones v. Dep't of Agric., EEOC Appeal No. 0120080833 (July 18, 2012); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). Here, the Agency offered Complainant only one day of telework per week even though his doctor specifically recommended three days of telework, and Complainant requested two days per week. Although DPM encouraged Complainant to meet with S1 "to discuss teleworking 3 days per week," she did not indicate that the Agency had any questions about whether fewer telework days would meet Complainant's needs. There is no evidence that the Agency sought information from Complainant or his doctor to determine whether only one day of telework would be effective. Instead, DPM appears to have substituted her judgment for that of Complainant's doctor and determined that one day of telework would be sufficient to accommodate his disability. Under these circumstances, we find that the Agency did not engage in good-faith efforts to accommodate Complainant.⁶

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency violated the Rehabilitation Act when it did not provide Complainant with a reasonable accommodation. We further find that Complainant did not establish that the Agency subjected him to harassment and discrimination based on race, age, and reprisal for prior protected EEO activity when it denied his request for training and reassigned his duties as the Agency's Personnel Security Officer to a younger, less experienced White employee. Accordingly, the Commission **AFFIRMS** in part and **REVERSES** in part the Agency's final decision. The complaint is **REMANDED** for compliance with this decision and the Order below.

⁶ Having found that the Agency discriminated on the basis of disability, we need not determine whether its actions were also in reprisal for Complainant's protected EEO activity because it would not alter the relief to which Complainant is entitled.

ORDER

Within one hundred and twenty (120) calendar days of the date this decision is issued, and to the extent that it has not already done so, the Agency is ORDERED to take the following actions:

- (1) The Agency shall continue to provide Complainant with the option to telework three days per week.
- (2) The Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of the discriminatory denial of reasonable accommodation. The Agency shall afford Complainant an opportunity to establish a causal relationship between the Agency's violations of the Rehabilitation Act and any pecuniary or non-pecuniary losses. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages he may be entitled to and shall provide all relevant information requested by the Agency. The Agency shall issue a new Agency decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.
- (3) The Agency shall provide eight (8) hours of in-person or interactive training to S1 and DPM regarding their responsibilities under the Rehabilitation Act, with a special emphasis on the Agency's obligation to provide reasonable accommodation.
- (4) The Agency shall consider taking appropriate disciplinary action against S1 and DPM. The Agency shall report its decision to the Compliance Officer referenced herein. 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 the identified management officials have left the Agency's employment, the Agency shall furnish documentation of the 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 the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Headquarters 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 CFR § 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:

/s/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

January 15, 2020
Date