

BEFORE THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ATLANTA DISTRICT OFFICE

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In the matter of:

[REDACTED]

Complainant,

versus

[REDACTED]
DEPARTMENT OF T [REDACTED]

Responding Agency

EEO CASE NUMBER

[REDACTED]

AGENCY CASE NO.

[REDACTED]

BENCH DECISION

Pursuant to notice, the above-styled matter came
for hearing, before the Equal Employment
Opportunity Commission, Atlanta District Office,
on, September 15th 2010, LANA LAYTON, Administrative
Judge, presiding.

APPEARANCES:

For the Complainant:

[REDACTED]

For the Agency:

[REDACTED]

I. SUMMARY

For the reasons set forth below this decision finds the Complainant carried her burden of proof to show that she was subjected to discrimination in violation of the ADA/Section 501 of the Rehabilitation Act in regard to failure to accommodate. That the Complainant has shown that she was retaliated against in respect to her request for accommodation and engaging in protected activity. And that she has shown that she was subjected to a hostile work environment based on her disability and in regard to her request for accommodation because of that disability.

II. JURISDICTION

This case arises under Section 501 of the Rehabilitation Act. Authority to conduct the hearing and to issue the decision is found in the in the Employment Opportunity Commission Regulations for Employment with the Federal Government 29CFR, Section 1614.109(1999)

III. INTRODUCTION

Pursuant to Section 1614.109, I conducted a hearing on the case of [REDACTED] versus the Department of [REDACTED] [REDACTED] in the courtroom at [REDACTED] [REDACTED] [REDACTED] [REDACTED]

worker's compensation hearing. And I believe that there was one issue that dealt with her supervisor showing up at her worker's compensation hearing. And that is the only claim that I am going to find not to be accepted in the case.

V. ISSUES

Was Complainant subjected to discrimination and subjected to a hostile work environment based on disability and reprisal and denied a reasonable accommodation based on disability when her civilian rating record was lowered, her progress review worksheet was lowered, she was not allowed to perform her core duties with or without an accommodation, her requests for reassignment were denied, the Agency removed her computer, she was not accommodated in regard to her physical disabilities when she had to use a wrought iron door to enter and exit the building, she was offered the accommodation of supervising janitors, and was not provided with a keyboard or other assistive device to

allow her to perform the essential functions of her position.

VI. FINDINGS OF FACT

The relevant facts can be summarized as follows:

Complainant has the following disabilities; [REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED]
[REDACTED]. Her impairments started out with her right arm and then it transferred into the left arm, and now her left arm is impaired as well.

These impairments interfere with her daily life activities. For example, she cannot vacuum, she cannot fold clothes, she cannot carry groceries, she cannot wash her car, she has trouble using a can opener, she has difficulty showering, grooming and dressing.

Prior to her disability, Complainant was able to perform the essential functions of the job without an accommodation. At the time of the injury she was doing FX account monitoring. The job does not require extended

lifting, typing, or a lot of hand motions.

When she returned to work in [REDACTED] of [REDACTED] she was expecting to return to her job, despite her injury. In addition to her FX account monitor job, there were numerous other jobs that she found, applied for, and was qualified for, since returning in [REDACTED]. However, the Agency failed to offer her any of these vacant funded positions as an accommodation to her disability.

Particularly on [REDACTED] [REDACTED] [REDACTED] she specifically proposed to [REDACTED] [REDACTED] at least 10 vacancies. She demonstrated, that she had printed out from CAN, and showed to her, that she qualified for, and able to do the jobs, however the request to be transferred to such jobs was denied.

Instead of being accommodated or given another position, she was told to sit at a desk with essentially no duties. For close to two years Complainant sat at her desk with virtually no work being given to her other than to attend occasional training classes.

There were no inventory management specialist job duties given to her or inventory management specialist tasks that were given to her despite her repeatedly asking for work.

In addition to the failure to assign Complainant work, Complainant was also denied other accommodations. Complainant requested several reasonable accommodations under the ADA. First, she asked for voice activation so that she could avoid typing because of pain. So, she came up with a voice activation technology and she requested it in early [REDACTED]. The voice activation was purchased in [REDACTED] of [REDACTED]. It was not implemented until [REDACTED] of [REDACTED]. And when it was implemented, it did not work because it did not integrate with the systems on her computer.

There were no attempts made by the Agency to explore other options. The Agency made no other attempts to produce or provide any other technological solutions to Complainant's not being able to type with a conventional keyboard.

The Complainant also asked to be transferred

to another building with handicapped accessibility. The building that she was working in did not have a handicapped accessible entrance. It had heavy wrought iron gates at every entrance. When she opened the first door, there was a heavy wrought iron gate. She had to push or pull, when she entered the building, every time she went to the training, and every time she had to leave the building.

More than twice a day when she had the training, she had to push and pull that heavy wrought iron gate which caused her further injury on her left arm.

There were at least two other buildings where there were inventory specialists working. Namely, Building 301 and 300. And she specifically requested to be assigned to either of those buildings where there is a handicapped accessible entrance. The request was denied.

The other reasonable accommodation request was to be transferred to another position that she could perform. There were close to a hundred positions that she applied through the CAN system and she was deemed

qualified according to the CAN evaluation system. And yet every time she would present that to the management to be assigned to or to be selected to, she was denied.

More particularly, in [REDACTED] [REDACTED] she came up with approximately 10 vacancy positions and she presented in a hand-written letter with the first sentence saying, please provide reasonable accommodation under ADA and presented it to [REDACTED] [REDACTED] her second line supervisor. [REDACTED] [REDACTED] refused to accept the request and would only acknowledge receipt. That was the extent of the interactive process at the Agency. Human Resource officials confirmed that other than an employee seeking an accommodation through her supervisor, there was no other means by which an employee could seek an accommodation. Additionally, the Agency admitted that there was no recourse for an employee whose supervisor refused to discuss an accommodation. There is no reasonable accommodation committee nor anyone in human resources tasked with the responsibility of addressing accommodation concerns of employees.

There is no ADA committee at [REDACTED]

[REDACTED] There is no ADA procedure for providing reasonable accommodations. Several witnesses stated there was nothing else the Complainant could do other than go to her supervisor. If the employee's second line supervisor declines, then she is on her own. The only answer she received was, apply through the CAN system, just like any normal person would. There was no testimony from any agency witness nor other evidence that any of the requests by the Complainant created an undue hardship.

Additionally, the Agency was under the mistaken belief that since Complainant was going through worker's compensation in regard to an on the job injury, it did not have to accommodate her under the ADA.

As a comparator, Complainant provided testimony in regard to [REDACTED] giving a monitoring job to [REDACTED] [REDACTED] that he performs with a minimum operation of mouse clicking. She assigned the job to [REDACTED] but she did not assign [REDACTED] as she should have under the ADA.

Complainant also requested voice activated software or assistance in getting software or another electronic device that would allow her to perform her essential functions. However, all that she received was a CD that was not compatible with the Agency's system. She was given no assistance in installing or troubleshooting the CD. Complainant also requested a smartboard keyboard with a touchpad.

Next I will address the rating of [REDACTED]. The first line supervisor, [REDACTED], stated that she wanted to give the Complainant a total score of 78. However, this was vetoed by [REDACTED] [REDACTED]. The same supervisor who refused to accommodate Complainant's request for accommodation. Upon consultation with [REDACTED] [REDACTED], the first line supervisor lowered the rating 20 points to a 54. And nobody else under [REDACTED], 8 of them that she supervised, had a similar downgrade of their performance rating. And nobody else in her group has a disability, nobody in her group has prior EEO activity.

Complainant also alleges that she was subjected to a

hostile work environment based on her disability and request for an accommodation. She was required to sit all day long with no work assignment, looking at the wall in plain view of other co-workers.

Complainant stated she had been left to sit in the workplace and be humiliated with no accommodation and that it isolates her from her co-workers in the workplace.

Additionally, from [REDACTED] through [REDACTED] [REDACTED] her computer was taken away. She was so humiliated that she could not come to the office the day when they scheduled to take the computer. So, she had to take the day off. In addition, her supervisor would call her at home when she was taking sick leave. When the children's grandmother was sick in the hospital Complainant was there and the supervisor called her at the off hour on her cell phone badgering her for taking sick leave.

Complainant was denied her right to buy back her leave. And the Agency admitted that it was denied.

Complainant was offered a job that was humiliating and dangerous to her health. In April of 2009, she was offered what she characterizes as a potty monitoring job. She was offered a job where she would follow around the custodians who clean the bathrooms using chemicals. Complainant also has multiple chemical sensitivity which makes the job an unsuitable accommodation, as well as not being commensurate with her duties as an inventory management specialist.

None of the Agency witnesses could identify a process in place within [REDACTED] for reviewing, processing, or otherwise providing guidance to an employee requesting an accommodation, or a mechanism for engaging in the interactive process with employees under the Rehabilitation Act.

VII APPLICABLE LAW AND ANALYSIS

This case arises under Section 501 of the Rehabilitation Act, originally passed in 1973 and codified under 29CRR, Section 1614.203. The Commission's submitted

regulation provides: 1) That the federal government shall be considered employer of individuals with disabilities. Agency should give full consideration to the hiring, placement and advancement of qualified individuals with disabilities. And that the standards used to determine whether Section 501 of the Rehabilitation Act of 1973 had been violated and a complainant shall be of the same standards that apply under Title I and Title V of the American's with Disabilities Act of 1990.

Consistent with the goal of the Rehabilitation Act on July 26th, 2000, President Clinton issued Executive Order 13163, requiring each federal agency to submit a plan increasing employment opportunities for qualified individuals with disabilities.

In this case I find that the Complainant has made a claim that she was not accommodated in regard to her request for accommodation under the Rehabilitation Act. In the case of disability discrimination under a failure to accommodate theory, the Complainant must establish that she is an individual with a disability

within the meaning of the Rehabilitation Act. Barnett V. US Postal Service, EEOC0720060019 (May 14th, 2008), an individual with a disability is one who: 1) One who has physical or mental impairment that substantially limits one or major life activities. 2) Has a record of such impairment. 3) Is regarded as having such an impairment, 29CFR, Section 1630.2(G), major life activities include but are not limited to, caring for oneself, performing manual task, walking, seeing, hearing, speaking, breathing, learning and working. Sitting, standing, lifting and reaching are also recognized as major life activities.

An impairment is substantially limiting when it prevents an individual from performing a major life activity or when it significantly restricts the condition, manner or duration under which an individual can perform a major life activity compared to the average person in the general population, 29CFR, Section 1630.2(J), the following factors should be considered in determining whether an impairment is substantially limited: 1) The nature and severity of the impairment. 2) The duration or the

expected duration of the impairment. 3) The permanent or long term impact or the expected or long term impact of or resulting from the impairment, 29CFR Section 1630.2(J)(2), I find in this case that the Complainant has established that she is a person with a disability. She has documented both in the Report of Investigation as well as through the testimony that was provided during the hearing.

She has right-lateral epicondylitis and radial tunnel syndrome and left epicondylitis. The Complainant established through testimony the nature and severity of the impairment that impacts her ability to use her wrist. It affects her ability to do general caretaking for herself in regard to her own self care, shopping, and other major life activities. The duration has been established that it appears that at this point it is permanent and that it will permanently have a long term impact because of this disability. It has not provided evidence that it will be concluding in the near future. In fact, she has established that they are impairments

that she appears that she will have for the rest of her life.

Next, once the Complainant established that she has a disability that impacts a major life activity, the Complainant must establish that she is a qualified individual with a disability within the meaning 29CFR Section 1630.2(M), a qualified individual with a disability is an individual with a disability who satisfies the requirements with skill, experience, education and other job related requirements for the employment position. Such individual holds and desires and who, with or without reasonable accommodation can perform the essential functions of the position, 29CFR Section 1630.2(M), the term position is not limited to the position held by the employee but also includes positions that the employee could have held because of reassignment. Therefore, in order to determine whether Complainant is qualified, fact finding must assess whether, with or without, reasonable accommodation, Complainant could perform the essential function of any position that she could have

held because of job restructuring or reassignment, see Prioleau V US Postal Service, EEO Appeal Number 07A40021(May 9th, 2005); Hawkins V US Postal Service, EEOC Petition Numbers 03990006(February 11th, 1999), I find in this case that the Complainant has established that she was a qualified individual with a disability. I find that if the Agency had made the efforts that it should have and could have made to accommodate the Complainant, she could have performed the position that she was in with an accommodation. And, also, that the Complainant established that there were other vacant positions that were available at the time that she was requesting an accommodation within her position that also would have allowed her to have worked with or without an accommodation in another position.

Also, it should be noted that not only do I find the Complainant to actually have a disability under the ADA and Rehabilitation Act, I also consider her to have been regarded as having a disability based on the treatment that she received from her supervisor at the worksite. I

find that her supervisor regarded her as having a disability and unable to do the essential functions of her position even if she did not have a disability, which I do find that she did. Therefore, I find under two prongs that the Complainant could establish that she is a qualified individual with a disability.

The EEOC prescribes an interactive problem solving approach to identifying possible reasonable accommodations. This process recognizes that in most cases, the employee has a greater knowledge of his or her disability and the limitations that it imposes. But the Agency has the greater knowledge of his positions and operations and how those may be modified to accommodate the employees disability, C29CFR Section 1630.9, when a qualified individual with a disability has requested a reasonable accommodation, as the Complainant did so in this case, both verbally prior to [REDACTED] of [REDACTED] then in writing and continuing thereafter [REDACTED] of [REDACTED], the employer using a problem solving approach should: 1) Analyze the particular job involved and

determine its purpose and essential functions. 2) Consult with an individual with the disability to ascertain the precise job related job limitations imposed by the individuals disability and how those limitations can be overcome with reasonable accommodation. 3) Have a consultation with the individual to be accommodated, identify a potential accommodation and assess the effectiveness. Each would have an enabling individual to perform the essential functions of the position. 4) Consider the preference of the individual to be accommodated to select and implement the accommodation that is most appropriate for both the employee and the employer.

In identifying possible accommodations, the burden is on the Agency to inquire about the qualifications and limitations of the Complainant and if the Complainant cannot be accommodated in his or her present position, conduct a search for possible vacant positions the Complainant can perform. Corbett V General Services Administration 03A100717(2001). That case cites

that the employer is in the best position to know which jobs are vacant or become vacant within a reasonable period of time. Therefore, the employer is part of the interactive process and should ask the employee about his or her qualifications and interest. And based on the information, the employer is obligated to inform the employee about vacant positions which she or he may be eligible for and a reassignment.

If the employer does not engage in the interactive process it may not discover potential previously unknown accommodations and will be liable for failing to provide a reasonable accommodation. The Commission has also held that an employee must show a nexus between the disabling and their requesting accommodation, which I find the Complainant has done so in this case, *Wendt V Department of Veterans Affairs*, EEOC Appeal Number 01A14385; *Wiggins V US Postal Service*, EEOC Appeal Number 01953715 (April 22nd, 1997). See also, *Mengine V Runion*, 114F3rd415, 421(3rd Circuit 1997), citing to enforcement guide in question 6, failing to engage in an interactive process

may subject a federal employer to compensatory damages, enforcement guide, N.22.

The Commission's regulations contemplate the creation of accommodation through modifications or adjustments to the work environment or to the manner or circumstances under which the position held or desired is customarily performed that would enable qualified individual with a disability to perform essential functions of that position, 29CFR, Section 1630.2(O)(1). Even if Complainant was unable to perform the essential functions of his or her, then, current position, she would still be a qualified individual with a disability, if with or without accommodation she could perform the essential functions of any position which she could have held as a result of job restructuring or reassignment, Hawkins V US Postal Service, EEOC Petition Number 03990006 (February 11th, 1999).

I find that in this case that the Complainant did establish during the course of the hearing that there were vacant funded positions that were available that she was

qualified for and the Agency failed to take actions to assist her in accommodating her and placing her in one of those positions. It also should be noted that in regard to the interactive process an employer should respond expeditiously to request for a reasonable accommodation, see EEOC Enforcement Guide on reasonable accommodation and under hardship under the American's with Disabilities Act, at question 10, if the employer and the individual with the disability need to engage in an interactive process this to should proceed as quickly as possible. Similarly, the employer should act promptly to provide the reasonable accommodation, unnecessary delays can result in a violation of the ADA. In determining whether there has been an unnecessary delay in responding to a request for a reasonable accommodation, the relevant factors would include the reason for the delay, the length of the delay, how much the individual with the disability and employer each contributed to the delay, what the employer was doing during the delay, and whether the required accommodation was simple or complex to provide, Villanueva V Department

of Homeland Security, concluding that the Agency had failed to explain or justify a six month delay in providing accommodation constituted a violation of the ADA.

I find in this case that the Agency has failed in all of those respects to act in an expeditious manner to accommodate the Complainant. They have failed to come up with a reasonable reason for the delay, one reason that the Agency cites too is that they provided software to the Complainant, when that software didn't work, the Agency took no further actions to find out if there was other software available. The Agency failed through its own testimony to seek items from a rehabilitation counselor or any other person who may have knowledge in regard to other accommodations in regard to software or hardware that would have allowed the Complainant to continue with her job functions. I find that they violated in regard to the length of the delay and that the Complainant started requesting an accommodation in the Spring of 2009, at the latest, and put it in writing in September of 2009, and

for her supervisor to accept, although accepted the letter, refused to engage with the Complainant, a discussion, in regard for her request for accommodation. And I also note that during the course of the hearing, her supervisor still acted as if the Complainant's request for an accommodation was incredible hardship on the supervisor and that the supervisor should not have to be bothered with engaging in an interactive discussion with her employee regarding her request for accommodation.

I find that the Complainant did not at all contribute to the delay and that delay in regard to accommodating the Complainant was solely on the shoulders of the employer. That the employer did not act in good faith during the course of the delay, that it made, at best, minimal effort to accommodate her and even to appear at times thwart her ability to seek accommodation when she contacted them in regard to finding her a vacant funded position where she could perform the essential functions of her job, perhaps, without an accommodation.

I also find that the required accommodation was

simple and not complex to provide. Accommodating an employee by moving her to another position is a very simple solution to a request to accommodation. In regard to the complexity of providing software, it appears that the Agency provided one set of software and when that did not work, they made no further effort to see whether or not there was another accommodation that was available to the Complainant. And during that time cited to the Complainant that the expense of any additional software would be an undue hardship on them.

I find the Agency has cited as to authority in support of its argument that any delay should be excused because of financial constraints. This argument has been raised in the context of disability in the past. And it is well settled that an Agency may not establish undue hardship as a defense to providing reasonable accommodation based on the financial resources of one component of its operations, rather the Commission looks at the Agency's financial resources as a whole. Preston V US Postal Service, EEOC Appeal Number 0120054230 (August

9th, 2007). And as just stated, because the Agency did not reasonably accommodate the Complainant, the Agency bears the burden to demonstrate that it was not possible to accommodate her disability with out undue hardship on the operation of its program, 29CFR, Section1630.2(P). Undue hardship requires that the accommodation imposes significant difficulty or expense on the Agency considering the type of Agency operation, overall size of its program, the number of employees, number and type of facility and size of the budget.

The burden of persuasion in proving inability to accommodate always remains with the employer, *Mantolete V Bolger*, 767F2nd1416(9th Circuit, 1985), Generalized conclusions do not support a claim of undue hardship, Enforcement Guidance at Page 24.

I find that in this the Agency's failure to engage in good faith with the Complainant to find an accommodation that would allow her to perform the essential of her position with or without an accommodation, that the Agency has failed to show that this was an undue hardship on the

Agency and instead both in the testimony of it's witnesses in support of its case as well as even in Agency's closing continued the tone of the Agency's witnesses that Complainant's continuing press for accommodation somehow put it under an undue hardship. And that somehow the Complainant was at fault for continually requesting accommodations and complaining of being subjected to a hostile work environment based on her request for accommodations.

I find that the Agency has failed to provide any detailed data to support its contention that any accommodation requested by the Complainant would have constituted an undue hardship on the Agency. But instead, made generally conclusory statements in regard to the expense of the software and whether or not the software was compliant, was programmed to the Agency had.

The Agency cites to the fact that the Complainant was also engaged for worker's compensation. And the Agency's mistaken belief that because the Complainant was engaged in a claim for worker's compensation that it was somehow

barred or alleviated of its responsibilities under the ADA.

And the EEOC compliance language and case law is quite clear that worker's compensation does not bar an employee from pursuing a claim under the ADA. The courts upheld that the exclusive remedy provision for the state worker's compensation laws cannot bar claims arising under federal civil rights laws, even where a state worker's compensation law provides some relief for disability discrimination. Applying a state worker's compensation's laws exclusivity provisions to bar an individuals ADA would violate the supremacy clause in the US Constitution and seriously diminish the civil rights protection that Congress to persons with disabilities.

Witness after witness by the Agency seemed to have this concept that because the Complainant was going through worker's compensation and they were working on processing her worker's compensation claim that they had no duty and no responsibility to accommodate her request for an accommodation.

And it is quite clear that an employee's rights under the ADR are separate from his or her entitlement under a worker's compensation law. The ADA requires employers to accommodate employee in his or her current position through job restructuring or some other modification absent undue hardship.

I find that the Agency's witnesses who have testified as if their mistake as to the law somehow obviated their responsibility under the law to accommodate the Complainant based on her request for an accommodation under the Rehabilitation Act.

I also find that the Agency along with the issues raised by the Complainant's representative, that she was not accommodated. I also find that the Agency also violated her rights when they removed her computer from her in which, as she testified to, prohibited her from being able to have to access to information that was available to her that other employees had in regard to promotion opportunities, training opportunities and other information that the Complainant would need as part of her

job functions. The Commission has held that an employer must ensure that employees with disabilities have access to information that is provided to other similarly situated employees without disabilities regardless of whether they needed to perform their jobs, *Yost V US Postal Service*, EEOC Appeal Number 01A51457 (June 13th, 2006); *Reiley V US Postal Service*, EEOC Appeal Number 07A10019 (June 5th, 2002).

Therefore, I find in this case that the Agency has flagrantly violated the Rehabilitation Act requirement that they accommodate an employee with a known disability or an employee who is regarded as having a disability, that they fail to engage in the interactive process to access whether or not an accommodation was available and that they also establish that any of the accommodations requested by the Complainant would have presented an undue hardship on them in regard to those accommodations.

Next, I find that the Complainant also established that she was subjected to retaliatory treatment based on

her protective activity which was requesting accommodations under the Rehabilitation Act and the ADA.

With regard to reprisal discrimination the Commission has stated that the anti-reprisal provision of Title VII protects those who participate in the EEO process and also those who oppose discriminatory employment practices. Participation occurs when employee has made a charge testified assisted or participated in any manner in an investigation proceeding or hearing. Participation also occurs when an employee filed a later grievance if the employee raised issues of unlawful employment discrimination in the grievance. A variety of activities has been found to constitute opposition.

Because the enforcement of Title VII depends on the willingness to oppose unlawful employment practices or policies, Course of Interpretive, Section 704A of Title VII is intending to provide exceptionally broad protection to those who oppose such practices, Whipple V Department of Veteran's Affairs, EEOC Request Number 05910784 (February 21st, 1992).

In this case I find that the Complainant engaged in EEO activity when she requested an accommodation from her supervisor in writing in [REDACTED] and prior to that when she filed her first EEO complaint and continuing thereafter when she continued to amend her complaint to add additional claims of discriminatory and retaliatory treatment. There is, therefore, a nexus between her protected activity and the actions that she states occurred to her because of her engaging in protected activity.

I find that the Agency's actions were done, not just within a flagrant violation of the ADA process but also in an effort by her supervisor to retaliate against her for filing an EEO. And I find that the supervisor demonstrated this in her testimony during the course of the hearing when I, myself, questioned her as to her hostility in having to be at these proceedings and her hostility towards having to respond to the Complainant's request from an accommodation. And in that hostility established that the Complainant was subjected to

retaliatory treatment because of her engaging in the EEO process.

I find that any non-discriminatory reasons given by the Agency in regard to the Complainant's retaliation claim are a pretext to hide that retaliatory animus which was shown both in the Report of Investigation as well as in the testimony of her supervisor during the course of the hearing.

The Complainant's last claim is that she was subjected to hostile work environment because of her disability and in retaliation for her prior EEO activity. Complainant may establish hostile work environment by showing that she is member of protected class and that she was subjected to conduct so offensive that it altered the conditions of his or her employment from the perspective of reasonable person in his or her position. *Oncale V Sundowner Offshore Services, Inc.*, 523US75(1998). Complainant may establish a prima facie case of harassment by showing: 1) That she belonged to a statutorily protected class. 2) That she subjected to unwelcome

verbal or physical conduct involving the protected class. 3) The harassment complaint was based on the statutorily protected class. 4) The harassment had the purpose or effect of unreasonably interfering with her work performance and/or creating an intimidating hostile or offensive work environment. 5) A basis for imputing liability to the employer, *Reyes-Vanegas V Equal Employment Opportunity Commission*, EEOC Appeal Number 01A34154 (January 3rd, 2005). *Course of Applied Harassment peridimant Title VII Cases to Claims of Harassment arising under the ADA, Flowers V South Regional Physicians Services, Inc.*, 247F3rd229(5th Circuit, 2001).

In this case, I find that the Agency did subject the Complainant to a hostile work environment based on her disability. Her protected class is her disability and her having engaged in protected activity. That she was subjected to unwelcome verbal and physical conduct involving her protected class and that her supervisors treatment towards her and isolation of her was based on both her disability and on her having engaged in protected

activity in regards to her disability.

I find that the harassment did have a purpose or effect of unreasonably interfering with her work performance and creating an intimidating and hostile or offensive work environment. The Complainant testified and it's also shown in the Report of Investigation that her supervisor treated her poorly, would not respond to her when the Complainant requested an accommodation in writing, her supervisor would only sign that she received it, would not engage in discussions with her. The Complainant had her duties stripped from her. The Complainant was forced to sit in her work desk in front of her other co-workers that showed that she did not have anything to do and made her look like she was not a productive member of the team.

The Agency isolated her and ostracized her and lower her performance evaluation in an effort to subject her to hostile work environment based on her disability.

I find that there is a basis for imputing liability to the employer because the supervisor engaged in these

actions and had knowledge of these actions. And I find that the supervisor was the motivator for many of the actions that occurred to the Complainant. And that the supervisor took these actions because she was hostile towards the Complainant for engaging in EEO activity and requesting an accommodation under the ADA.

I also find that the harassing conduct of the supervisor and the Agency constituted tangible employment action towards the Complainant. A tangible employment action constitutes a significant change in employment status such as, hiring, firing, suspending, non-promotion, reassignment with significantly different responsibilities or significant changes of benefits, Burlington Industries Inc. V Eller, 524US742, 761(1998). I find in this case the actions taken by the supervisor did constitute a tangible employment action that, number one, the Complainant's scoring of her performance appraisal. The fact that all of her duties were taken away from her, at one point, her computer was taken away from her. She was isolated from engaging in work and was not given job

functions and all of this affected her employment status.
at the facility.

Even if the Complainant could not establish that there was a tangible employment action, I find that the Agency fails to meet its defense by establishing that it exercised reasonable care to prevent or correctly prompt any harassing behavior or that Complainant reasonably failed to take advantage of any preventative or corrective opportunities provided by the Agency to avoid harm otherwise, Burlington Industries Inc. V Ellers, 524US742(1998). However, as I stated, this defense is not available when the harassment resulted in a tangible employment action, which I find did take place in this case.

Therefore, I find that the Complainant established:

1)

That the Agency failed to accommodate the Complainant in regard to her known disabilities and also that the Agency regarded her as having disabilities and either way, failed to accommodate her, failed to engage in the interactive

process. That the Agency, also, retaliated against the Complainant because of her engaging in protected activity. And that the Agency subjected her to a hostile work environment because of her disability and her EEO activity.

VIII. CONCLUSION

I find that the Complainant has been subjected to discrimination as well as a hostile work environment based on her disability and her protected activity in regard to the Agency's failure to accommodate and subjecting her to a hostile work environment.

VIII. NOTICE

NOTICE TO THE PARTIES

TO THE AGENCY:

Within forty days of receiving this decision and the hearing record, you are required to issue a final order notifying the Complainant whether or not you will fully implement this decision. You should also send a copy of your final order to the Administrative Judge.

Your final order must contain a notice of the Complainant's right to appeal to the Office of Federal Operations, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit, the right to request appointment of counsel and waiver of court costs or fees, and the applicable time limits for such

appeal or lawsuit. A copy of EEOC Form 573 (Notice or Appeal/Petition) must be attached to your final order.

If your final order does not fully implement this decision, you must simultaneously file an appeal with the Office of Federal Operations in accordance with 29 C.F.R. §1614.403, and append a copy of your appeal to your final order. *See* EEO Management Directive 110 (EEO MD-110), November 9, 1999, Appendix O. You must also comply with the Interim Relief regulation set forth at 29 C.F.R. §1614.505.

TO THE COMPLAINANT:

You may file an appeal with the Equal Employment Opportunity Commission's Office of Federal Operations when you receive a final order from the Agency informing you whether the Agency will or will not fully implement this decision. 29 C.F.R. §1614.110(a). From the time you receive the Agency's final order, you will have thirty (30) days to file an appeal. If the Agency fails to issue a final order, you have the right to file your own appeal any time after the conclusion of the Agency's forty (40) day period for issuing a final order. *See* EEO MD-110, 9-3. In either case, please attach a copy of this decision to your appeal.

Do not send your appeal to the Administrative Judge. Your appeal must be filed with the Office of Federal Operations at the address set forth below, and you must send a copy of your appeal to the Agency at the same time that you file it with the Office of Federal Operations. In or attached to your appeal to the Office of Federal Operations, you must certify the date and method by which you sent a copy of your appeal to the Agency.

WHERE TO FILE AN APPEAL:

All appeals to the Commission must be filed by mail, hand delivery or facsimile.

BY MAIL:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

BY PERSONAL DELIVERY:

Director, Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE, Suite 5SW12G
Washington, D.C. 20507

BY FACSIMILE:

Fax No. (202) 663-7022

Facsimile transmissions of more than ten (10) pages will not be accepted.

COMPLIANCE WITH AN AGENCY FINAL ACTION

Pursuant to 29 C.F.R. §1614.504, a final action that has not been the subject of an appeal to the Commission or a civil action is binding on the Agency. If the complainant believes that the Agency has failed to comply with the terms of this decision, the complainant shall notify the Agency's EEO Director, in writing, of the alleged noncompliance within thirty (30) calendar days of when the complainant knew or should have known of the alleged noncompliance. The Agency shall resolve the matter and respond to the complainant in writing. If the Agency has not responded to the Complainant in writing, or if the complainant is not satisfied with the Agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination of whether the Agency has complied with the terms of its final action. The complainant may file such an appeal thirty-five (35) calendar days after serving the Agency with the allegations of noncompliance, but must file an appeal within thirty (30) calendar days of receiving the Agency's determination. A copy of the appeal must be served on the Agency, and the Agency may submit a response to the Commission within thirty (30) calendar days of receiving the notice of appeal.

This 1 day of July, 2010.


LANA LAYTON
ADMINISTRATIVE JUDGE