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

[redacted],
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency.

Appeal No. 0120133021

Hearing No. 550-2011-00452X

Agency No. 4F-940-0180-10

DECISION

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts Complainant's appeal from the Agency's July 25, 2013 final order 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 Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The Commission's review is de novo. For the following reasons, the Commission AFFIRMS the final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier at the Agency's Post Office in Sausalito, California. On August 24, 2010, Complainant's supervisor (S1) requested that Complainant attend a Fitness for Duty Examination (FFDE). S1 cited four reasons for sending Complainant for the FFDE: 1) Complainant reported to work with globs of cream layered on his face and left to deliver his route that way; 2) Complainant reported to work with enough cotton sticking out of his ears to bandage a gunshot wound and left to deliver his route that way; 3) Complainant had a road rage incident in the parking lot and almost lost control of his car one evening; and 4) Complainant had another road rage incident in the parking lot one morning. In addition, S1 informed the Agency's Associate Area Medical Director that the police department had received and spoken to Complainant about complaints from local residents about his behavior. Further, S1 stated that Complainant has delivered his route covered in blood and his Postal vehicle has blood stains on the inside roof.

Carriers reported that Complainant delivered mail in a rage, constantly jamming mail unnecessarily into mailboxes to the point that he cut his hands up. Finally, S1 stated that all employees, including her, worked in fear because they did not know what Complainant would do next. Complainant had previously attended a FFDE in April 1998, and was found not fit for duty. Further, Complainant was involved in an incident with a customer in which the customer claimed that Complainant struck her vehicle twice forcing her off to the side of the road in March 1998.

On September 2, 2010, Complainant was issued a letter directing him to report for a FFDE on September 13, 2010. The letter stated that, based on Complainant's recent behavior, there was concern as to whether he could safely perform his duties. Complainant reported for the FFDE on September 13, 2010. On September 20, 2010, the FFDE Doctor issued a report to the Agency in which he found that, among other things, Complainant was not currently a danger to himself or others and that he could perform his regular job duties as a City Carrier. No action was taken against Complainant as a result of the FFDE.

On December 8, 2010, the Agency issued Complainant a Notice of Removal for unsatisfactory performance and improper conduct. The Notice cited Complainant's continuous usage of unauthorized overtime and two incidents in which Complainant drove his Postal vehicle at a high rate of speed. The Notice noted that local police had spoken to Complainant and management on several occasions concerning Complainant's failure to drive in a safe manner. Management had received numerous statements from Postal employees, local police officers, and information from customers about Complainant's dangerous and reckless driving. In addition, Complainant had previously been issued a Letter of Warning and a Seven-Day No Time-Off Suspension in May 2010. The Union filed a grievance, and an arbitrator subsequently upheld the issuance of the Notice of Removal.

On December 14, 2010, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), disability, age (56), and in reprisal for prior protected EEO activity when:

1. On September 2, 2010, Complainant was instructed to attend a Fitness for Duty Examination; and

2. On December 8, 2010, Complainant was issued a Notice of Removal.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing, but the AJ assigned to the case granted summary judgment in favor of the Agency and issued a decision on July 19, 2013.

In her decision, the AJ initially assumed arguendo that Complainant is a qualified individual with a disability. Next, the AJ found that the Agency provided clear and specific reasons for

ordering Complainant's FFDE, specifically relating to recent behavior which the supervisor outlined in an initial request and a memorandum to the Associate Area Medical Director. In addition, the AJ found that it was undisputed that no action was taken against Complainant as a consequence of the FFDE. The AJ determined that Complainant presented no evidence showing that the Agency's reasons for ordering Complainant to attend the FFDE were pretext for unlawful discrimination or reprisal.

With respect to the Notice of Removal, the AJ noted that the matter had been heard by an arbitrator and the arbitrator found that Complainant had committed the acts as charged in the Notice of Removal, i.e., a pattern of unauthorized overtime and reckless and unsafe driving practices. The AJ determined that the record showed that these actions were part of a long history of similar infractions. The AJ found that removal, rather than a lesser penalty, was warranted as the next step in progressive discipline. Thus, the AJ found that the Agency had articulate legitimate, nondiscriminatory reasons for issuing the Notice of Removal, and Complainant failed to show that the reasons were pretextual. As a result, the AJ found that Complainant had not been subjected to discrimination or reprisal as alleged.[1] The Agency subsequently issued a final order fully implementing the AJ's decision. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ erred in granting summary judgment in favor of the Agency. Complainant argues that the AJ relied on the arbitration decision's erroneous legal analysis and that his removal was based on pretextual allegations of misconduct. Complainant contends that the AJ erred in making factual findings which ignored the evidence that he was removed shortly after the FFDE concluded that he was fit to work. Further, Complainant argues that the Agency ignored the results of the FFDE which, according to him, stated that he should have been provided a reasonable accommodation. Accordingly, Complainant requests that the Commission reverse the final order.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-

[1] The AJ noted that Complainant raised several arguments for the first time in opposition to summary judgment, including claims of harassment and denial of reasonable accommodation. The AJ found that there was no evidence that Complainant ever asked for any accommodation in a manner that would have triggered a duty by the Agency to consider an accommodation or to engage in the interactive process. Likewise, the AJ found that Complainant failed to proffer any facts or meaningful evidence that any Agency action rose to the level of severe or pervasive harassing conduct, and, as discussed above, Complainant failed to show that any manager took any action based on discriminatory or retaliatory animus.

moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

Disparate Treatment

To prevail in a disparate treatment claim such, 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 Constr. 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. Tx. Dep't of Cmty. 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 Prods., Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

In the instant case, the Commission finds that the AJ properly issued summary judgment as the material facts are undisputed. The Commission agrees with the AJ that assuming arguendo that he established a prima facie case of discrimination and reprisal, Complainant failed to present evidence to rebut the Agency's legitimate, nondiscriminatory reasons for its actions. In particular, S1 requested that Complainant attend an FFDE based on Complainant's bizarre behavior and two reported road rage incidents. ROI, Exs. 6,7. Additionally, S1 issued Complainant the Notice of Removal based on numerous instances of unauthorized overtime and additional incidents of unsafe driving. ROI, Ex. 12. Complainant's prior disciplinary history was considered in arriving at the removal decision. Id.

Construing the evidence in the light most favorable to Complainant, the Commission finds no evidence that Complainant's protected classes were a factor in any of the Agency's actions. At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory or retaliatory animus. Complainant failed to carry this burden. As a result, the Commission finds that Complainant has not established that he was subjected to discrimination, reprisal, or harassment as alleged.

Fitness for Duty Examination

Next, the Commission will determine whether the Agency violated the Rehabilitation Act by sending Complainant for an FFDE. The Commission notes that the Rehabilitation Act places certain limitations an employer's ability to make disability-related inquiries or medical examinations of employees. The inquiry may be made or the examination ordered only if it is job-related and consistent with business necessity. See 29 C.F.R. §§ 1630.13(b), 1630.14(c).

This means that the employer must have a reasonable belief based on objective evidence that an employee will be unable to perform the essential functions of his job or pose a direct threat because of a medical condition. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, No. 915.002 (July 27, 2000). It is the burden of the employer to show that its disability-related inquiries and requests for medical examination are job-related and consistent with business necessity. See Cerge v. U.S. Dep't of Homeland Sec., EEOC Appeal No. 0120060363 (Oct. 9, 2007).

In the instant case, as discussed above, the record reveals that S1 requested that Complainant attend an FFDE based on her and others' observation of Complainant's behavior, including road rage incidents, an incident in which Complainant was discovered following his relief carrier on his day off, and fellow carriers witnessing Complainant unnecessarily jamming mail into mailboxes to the point that he cut his hands. ROI, Exs. 6, 7. The record contains numerous complaints about Complainant's unsafe behavior and history of reckless driving from co-workers, customers, and local police. ROI, Ex. 15. The Commission finds that there was nothing unlawful about the FFDE as the Agency has established that S1 ordered the FFDE based upon objective evidence that Complainant may have been unfit to operate a Postal vehicle and therefore unable to perform the essential functions of his job.

Finally, the Commission concurs with the AJ's finding that Complainant failed to show that he was denied reasonable accommodation. There is no evidence that Complainant requested an accommodation prior to the FFDE or his removal, nor is there any evidence that the FFDE resulted in any recommendation accommodations for Complainant. The FFDE only found that Complainant was fit for duty and encouraged Complainant to seek further care by a licensed specialist. There is no evidence that Complainant ever subsequently submitted any documentation from a healthcare provider indicating he had any impairments or that Complainant needed an accommodation to perform his duties. The Agency is only required to provide a reasonable accommodation to a *known* limitation. Accordingly, the Commission does not find that the Agency's purported failure to accommodate Complainant was a violation of the Rehabilitation Act.

CONCLUSION

After a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the Agency's final order, because the Administrative Judge's issuance of summary judgment was appropriate and a preponderance of the record evidence does not establish that discrimination occurred.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0610)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 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 (S0610)

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. 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 (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you

and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

April 15, 2015
Date