



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

[REDACTED]
Pamala L.,¹
Complainant,

v.

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

Appeal No. 0120171070

Agency No. 4F-945-0051-16

DECISION

On January 8, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 12, 2016, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency discriminated against Complainant in reprisal for prior protected EEO activity when it reduced her work hours and forced her to relinquish her assigned rural route.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Rural Carrier, assigned to Rural Route 12, at the Agency's Vallejo Main Post Office in Vallejo, California.

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.

On July 13, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability and in reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:²

1. on February 19, 2016, and ongoing, she was denied reasonable accommodation when her work hours were reduced to 2.3 hours per day, and
2. on June 4, 2016, she was forced to relinquish her assigned rural route.

Complainant sustained an on-the-job injury to her ankle in October 2008. In an April 22, 2009, doctor's report, Complainant's treating physician stated that Complainant could work a modified schedule of no more than six hours per day. He reiterated the six-hour restriction in a September 29, 2010, Office of Workers' Compensation Programs (OWCP) Work Capacity Evaluation and stated that she could work "2 hours of delivery." According to an April 20, 2011, Progress Report, Complainant was to remain off work until June 2011. In an October 2, 2014, Work Capacity Evaluation, her physician stated that she could work six hours per day and noted that her restrictions were permanent.

On November 25, 2015, Complainant contacted an EEO Counselor to allege that the Agency discriminated against her on the basis of disability. Case Details for the complaint state that Complainant alleged that "management input her hours incorrectly" and "refused to submit CA-7" on October 30, 2015; she could "only give away 1 hour swing" and was "threatened to be removed from route" on November 25, 2015; and she was "[t]old not to case DPS" on December 1, 2015. Complainant and the Agency settled the complaint on January 21, 2016. According to the settlement agreement, the Postmaster agreed to conduct a "Route Count" of Complainant's route by March 31, 2016, and to meet with Complainant within 30 days of the completion of the Route Count. Complainant, her representative, the Postmaster, another management official, and a management representative signed the agreement.

In a February 11, 2016, Progress Report, Complainant's treating physician again stated that she could work no more than six hours per day. In an Offer of Modified Assignment (Limited Duty) (PS Form 2499) that is dated February 16, 2016, and that contains the Postmaster's name but not his signature, the Agency offered to provide Complainant a modified assignment to "deliver Rural Route 12" for an average time spent of 6.00 hours. Complainant, who signed the form on February 19, 2016, refused the modified assignment and wrote, "See work status form attached." In a February 18, 2016, Work Status report, Complainant's physician wrote that Complaint should not work more than six hours per day and should not be "delivering more than 3 hours on the street" per day.

² Complainant also raised six other allegations, which the Agency dismissed pursuant to 20 C.F.R. § 1614.107(a)(1) on the ground that they stated the same claims that Complainant raised in a previous complaint. Complainant has not appealed the dismissal of those claims.

In a PS Form 2499 that is dated February 12 and that the Postmaster signed on February 22, 2016, the Agency offered to provide Complainant a modified assignment to “case Rural Route 12” for an average time spent of 2.50 hours. The form does not contain Complainant’s signature. The Postmaster sent Complainant a March 4, 2016, letter stating that, based on the February 18, 2016, Work Status report, it appeared that Complainant could not perform the essential functions of her position. He told Complainant that, if she disagreed with his conclusion, then she should let him know and he would refer her to the District Regional Accommodation Committee (DRAC). In addition, he noted that he interpreted the restriction of “no delivering more than 3 hours on the street” to include driving time. In that regard, the Postmaster stated, “This is because delivering the mail on your bid assignment (RR12) includes deliveries to NDCBU's boxes (centrally located boxes for multiple customers), and so ‘delivering’ the mail means that you spend most of the time in your vehicle.” He asked Complainant to have her physician complete an OWCP Duty Status Report (Form CA-17) if she believed that he had misunderstood her medical restrictions.

In addition, the Postmaster noted that Complainant’s supervisor “recently accompanied [Complainant] on [her] route to determine how long it would take to deliver the mail.” He stated,

It took approximately 3 hours and 20 minutes, with an average amount of mail, excluding driving time to and from the delivery location. Since it would be operationally inefficient to allow you to drive 40 minutes to the delivery location, deliver 3 hours of mail, then drive 40 minutes back to the facility, and then send another driver out to deliver the remaining 1 hour of mail, I am only able to offer you 2 to 2 ½ hours of casing mail as part of your Limited Duty Job Offer. Until your medical is clarified as indicated above, I will not be able to offer you the opportunity to deliver the mail on your route on days when the mail volume is low and likely to take less than three hours to deliver.

The Postmaster further stated that the only available work within Complainant’s restrictions was two to two-and-one-half hours of casing mail. He asked her to let him know if she believed that there was other work at the facility that was within her restrictions. In addition, noting that the Agency would search within the facility and the surrounding 50 miles for the remaining four hours of work, the Postmaster asked Complainant to let him know if she was willing to commute more than 50 miles.

Also on March 4, 2016, the Agency issued a PS Form 2499 offering Complainant a modified assignment to “case Rural Route 12” for an average time spent of two to two-and-one-half hours. Complainant accepted the modified assignment.

In a March 9, 2016, Work Capacity Evaluation, Complainant’s physician again stated that Complainant could work six hours per day and should not be “delivering more than 3 hours on the street” per day. On the same day, he completed a Form CA-17 that also indicated that Complainant could work six hours per day.

The Postmaster sent Complainant a March 18, 2016, letter stating that, based on the March 9, 2016, medical documentation, it appeared that Complainant could not perform the essential functions of her position. He interpreted the reference to “no delivering more than 3 hours on the street” according to the Agency’s understanding of the “on the street.” In that respect, he stated that the phrase included any time that Complainant was “outside of the facility, whether in a vehicle, standing, . . . or walking.” He told Complainant to have her physician re-issue the Form CA-17, without the document that limited her time “on the street,” if she believed that a different interpretation of the phrase was appropriate.

Further, the Postmaster stated that Complainant’s assigned bid “requires the carrier to deliver mail (‘on the street’) for approximately 5 hours, with generally more time on Mondays and Tuesdays because of the higher mail volumes.” He also stated that Complainant was “not able to deliver this route,” that the Agency would keep her on the temporary, two-and-one-half-hour limited-duty assignment, and that the Agency would search for work within her medical restrictions.

Complainant signed a PS Form 2499 accepting the two-and-one-half-hour modified assignment on March 18, 2016. She subsequently refused to sign a March 23, 2016, PS Form 2499 that similarly offered her a two-and-one-half-hour modified assignment casing mail.

Complainant contacted an EEO Counselor regarding the instant complaint on April 4, 2016. By letter dated June 3, 2016, the Postmaster directed Complainant to relinquish her route (Rural Route 12) effective June 4, 2016, because of her “continued inability to perform the duties of the position for which [she was] hired for an extended period of time (in excess of six (6) years).” He stated that the Agency would permit Complainant to remain in her two-and-one-half-hour light-duty assignment casing mail for the route until the Agency assigned the bid to someone else. At that point, he would search for other available work within her restrictions. He asked Complainant to let him know if she believed there was available work at the facility that was within her restrictions.

In her affidavit, Complainant stated that she “followed [her] doctor’s restrictions” and worked six hours per day “for 8 plus years.” She also stated, “I cased my route for 2-3 hours a day and then carried my route for 2-3 hours each day.” She asserted that the Postmaster told her that it was financially advantageous to limit her work hours. In response to the EEO Investigator’s question about why she believed that her EEO activity was a factor in the Agency’s actions, Complainant alleged that the Postmaster told her, “You brought this on yourself” and that the Postmaster “allude[d] to the lawyer that was present by phone at mediation and state[d] that she is telling him what to do.” She further alleged that the Postmaster told her that, “because [she] brought attention to [herself,] he has been forced to deal with it.” In addition, Complainant asserted that the Postmaster wanted to remove her from her route to give a regular position to a Rural Carrier Assistant.

Complainant, who stated that she did not appear before DRAC, asserted that she always provided medical documentation when asked to do so. She also asserted that the Agency treated a Rural Carrier (C1) who worked at the Agency's Vallejo-Springtowne Station more favorably than it treated her. According to Complainant, the Postmaster allowed C1 to work six hours per day delivering a route.³ The Report of Investigation (ROI) includes copies of Rural Carrier Trip Reports which, as described by the EEO Investigator, show that C1 worked six hours per day and that "a regular relief carrier is assigned to complete any essential job duties [C1] has not completed in those 6 hours." C1 has no history of prior EEO activity.

In his affidavit,⁴ the Postmaster stated that the essential functions of Complainant's Rural Route 12 assignment were "approximately 8 hours of delivery time, with approximately 5 or more of those hours 'on the street,' that is out delivering mail." He also stated that he could not assign Complainant to work on the route because her physician did not clarify his use of the phrase "on the street" and the Postmaster could not risk having Complainant work outside of her medical restrictions.

With respect to the February 2016 reduction in Complainant's hours, the Postmaster noted that Complainant's medical restrictions limited her to six hours of work but only three hours on the street. He asserted that casing mail was the only available work and that he gave her as much work as was available. The Postmaster stated that he made the decision to reduce Complainant's hours to two and one-half per day "after discussing it with Labor Relations and the Law Department." According to the Postmaster, Complainant had been "delivering her route with the same restrictions, but there was a concern that the [Agency] was working her outside her medical restrictions, so she was taken off the route and asked to provide medical documentation to clarify her restriction of no more than 3 hours "on the street." He stated that "Complainant was not able to deliver her route" and that he was not aware of any accommodation that would have allowed Complainant to deliver her route.

The Postmaster further stated that he sent Complainant the June 3, 2016, letter requiring her to relinquish her route because she cannot perform the functions of the job. According to the Postmaster, the Agency required Complainant to relinquish the route "[b]ased on her limitation and no delivering more than 3 hours on the street." He stated that a named Labor Relations

³ The EEO Investigator asked Complainant to provide the name, title, work location, supervisor, medical condition, EEO activity, and circumstances of any similarly situated employees who were not required to relinquish their routes under similar circumstances. Complainant cited C1 and provided the name of C1's supervisor (C2). The EEO Investigator and the Agency interpreted Complainant's reference to C2 to be the identification of another comparator. Our review of the file establishes that Complainant cited C2 as C1's supervisor, not as a similarly situated employee.

⁴ The Postmaster signed each page of his affidavit individually, declaring under penalty of perjury that his responses were true and correct. He did not provide the EEO Investigator with a signed Certification page.

employee also was involved in the decision to issue the letter. The EEO Investigator did not interview that employee.

The EEO Investigator asked whether the Postmaster had completed an “essential functions review worksheet” and requested a copy of the worksheet. The Postmaster replied, “Yes.” The worksheet is not in the file.⁵ The EEO Investigator did not ask the Postmaster to respond to Complainant’s allegations that the Postmaster told her that she brought this on herself, that she brought attention to herself, and that an Agency lawyer was telling him what to do.

The Postmaster asserted that C1’s “medical is totally different” from Complainant’s situation. He stated that C1 was injured in April 2015, that she could not reach above her shoulder but could carry her route for six hours on the street, and that she was not “permanently and stationary.” According to the Postmaster, Complainant “has been permanently and stationary since being injured in 2008,” was off work for two years, and returned to work with limitations on June 24, 2010.

In response to the EEO Investigator’s question about whether he was aware of Complainant’s prior EEO activity, the Postmaster stated, “No.” In response to the question about when he became aware of the prior EEO activity, the Postmaster stated, “I received a call from the EEO coordinator informing me.” He stated that he became aware of the activity “around April.” The EEO Investigator asked the Postmaster if Complainant had named him as a Responsible Management Official or a witness in her prior complaint and what his involvement was. The Postmaster replied, “Responsible Manager.”

According to the Rural Carrier position description, the job involves casing, delivering, and collecting mail along a rural route while using a vehicle. The document lists 11 duties and responsibilities, including sorting, loading, and delivering mail; returning undeliverable mail; and preparing mail for forwarding. The position description does not distinguish between essential and marginal functions.

The record contains Rural Carrier Trip Reports for Complainant’s route for the period February 6 - September 16, 2016. As described by the EEO Investigator, the Reports show that, “prior to March 4, 2016, [Complainant] was scheduled to leave at 10:30 A.M. and return at 13:30 P.M. with a total of 3 hours on the street. They also show that, since March 4, 2016, “Complainant work[ed] a total of 2.5 total actual daily work hours (less lunch) time spent completing essential job duties prior to leaving the office to service her route and no time on the street.”

⁵ In the ROI, the EEO Investigator stated that the Postmaster “attached documents to his affidavit that are duplicates or not relevant to the accepted issues; therefore, they will not be summarized but will remain with their affidavit behind the appropriate tab.” There are no attachments to the Postmaster’s affidavit in the file.

On October 13, 2016, the Agency provided Complainant with a copy of the Report of Investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge or a final agency decision. By letter dated November 2, 2016, Complainant responded to some of the statements in the Postmaster's affidavit and requested a final agency decision. She asserted that the Postmaster mischaracterized C1's injury, that C1 had a foot injury and that the Postmaster provided C1 with six hours of work even though "her route is evaluated at over 8 hours a day."

By letter dated December 12, 2016, an EEO Services Analyst sent Complainant documents that were "submitted after the completion of the investigative file." The documents included copies of the agreement to mediate Complainant's prior EEO complaint and the settlement agreement. They also included a Memorandum of Understanding from the collective bargaining agreement covering Rural Carriers. It states in part,

It is agreed that when, as a result of a job-related illness or injury, a regular rural carrier, except when assigned work pursuant to the Memorandum of Understanding concerning Accommodation for Qualified Regular Rural Carriers with Disabilities, is unable to perform all the duties of his or her assigned rural route for a period of two years, or has submitted medical certification that he or she will be unable to perform all the duties of the assigned rural route for a period of two years, the employee must relinquish his or her route and such route will be posted for bid in accordance with Article 12.3. The Employer may choose not to have the regular carrier relinquish the route, if the Employer determines, after review of the medical documentation, that the carrier, with reasonable assistance, is able to case and deliver his or her entire route. If after providing such assistance, the Employer subsequently chooses to no longer provide the assistance to the carrier and the carrier is unable to perform all the duties of his or her assigned rural route, the carrier must relinquish his or her route. The Employer's decision to have the carrier relinquish or not relinquish his/her route is not a grievable matter under the National Agreement.

In its final decision, the Agency concluded that the evidence did not establish that the Agency discriminated against Complainant. The Agency found that Complainant was an individual with a disability. The Agency also found, however, that Complainant was not a qualified individual with a disability. In that regard, the Agency stated that Complainant's restrictions of working only six hours per day and no more than three hours on the street "would prohibit her from performing all of the essential duties of her Carrier position." The Agency also stated that "the only accommodation that would enable her to perform the duties of the position of a Carrier would be to eliminate those essential functions of the position, i.e. the remaining two hours of delivery on her route." The Agency found that Complainant did not establish a case of discrimination due to a failure to accommodate because there was no plausible accommodation that would have enabled Complainant to perform the essential functions of her position.

In addition, the Agency concluded that Complainant did not establish a case of disability-based disparate treatment because she did not show that the Agency treated similarly situated employees more favorably than it treated her. The Agency found that C1 and C2 were not similarly situated to Complainant. The Agency noted that they worked in a different station and that the Postmaster stated that C1's "medical is totally different" from Complainant's situation.

Finally, the Agency found that Complainant established a prima facie case of reprisal. It noted that, although the Postmaster stated that he was not aware of Complainant's prior EEO activity, the evidence established that the Postmaster was the management official involved in the prior complaint and agreed to the settlement. Although the Agency found that there was no direct evidence of reprisal discrimination because there was "no evidence of slurs, degrading comments, or even the mere mention of the complainant's EEO activity," it concluded that the temporal proximity between the protected activity and the actions at issue here was sufficient to raise an inference of discrimination.

The Agency further found, however, that it articulated legitimate, nondiscriminatory reasons for its actions and that Complainant did not show that the articulated reasons were pretextual. The Agency noted that the Postmaster stated that Complainant's assignment required approximately eight hours of delivery time but Complainant could spend only three hours on the street, that the Agency was concerned that she was working outside her limitations, and that she did not provide updated medical documentation clarifying the three-hour "on the street" restriction. In addition, the Agency quoted from the Memorandum of Understanding that was included with the documents that the EEO Services Analyst sent to Complainant on December 12, 2016. The Agency concluded that Complainant did not offer plausible evidence to show that the articulated reasons were factually baseless or were not the Agency's true motivation for its actions.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Postmaster reduced her hours and forced her to relinquish her route in reprisal for her prior EEO complaint. Complainant submits copies of a February 24, 2017, letter in which the Postmaster directed her to relinquish her rural route; her March 2, 2017, response to the Postmaster's letter; and an unsworn March 3, 2017, statement in which C1 asserts that she injured her ankle in November 2014, that her restrictions limited her to working six hours per day, and that the Postmaster allowed her to work for six hours.

The Agency argues that it presented legitimate, nondiscriminatory reasons for its actions and that Complainant did not show that the reasons were pretextual. The Agency also argues that the information in C1's statement was available at the time of the investigation and Complainant has not shown why she did not submit the information during the investigation into her complaint.

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 Chapter 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

1. New Evidence on Appeal

On appeal, Complainant submits an unsworn statement from C1. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation. EEO MD-110 at Ch. 9, § VI.A.3. Here, Complainant has provided no arguments to show that this information was not available to her during the investigation. She disputed the Postmaster’s description of C1’s injury in her November 2, 2016, response to the Agency, but she did not provide a statement from C1 at that time. Complainant has not explained why she did not do so. Accordingly, the Commission declines to consider C1’s statement on appeal.

2. Reprisal

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 she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. 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.

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp.). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff’d, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep’t of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), Complainant may establish a prima facie case of reprisal

by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. See Clay v. Dep't of the Treasury, EEOC Appeal No. 01A35231 (Jan. 25, 2005).

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); see also EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, at II.B. (Aug. 25, 2016) (Enforcement Guidance on Retaliation) (“Retaliation expansively reaches any action that is ‘materially adverse,’ meaning any action that might well deter a reasonable person from engaging in protected activity.”). A retaliation claim involves three elements: (1) protected activity, (2) materially adverse action taken by the employer, and (3) causal connection between the protected activity and the materially adverse action. Enforcement Guidance on Retaliation at II.A.

In this case, we find that Complainant established a prima facie case of reprisal. Complainant engaged in protected activity when she filed her prior EEO complaint, which she and the Agency settled on January 21, 2016. Although the Postmaster stated that he was not aware of Complainant’s prior EEO activity, the record establishes that he signed the settlement agreement and, therefore, clearly was aware of Complainant’s protected activity. The Agency subjected Complainant to materially adverse actions when it reduced her work hours to two-and-one-half hours per day and subsequently directed her to relinquish her route.⁶ The adverse treatment, which began approximately three weeks after Complainant and the Agency settled the prior EEO complaint, occurred in such close temporal proximity to the protected activity that a causal connection can be inferred.

The Agency articulated legitimate, nondiscriminatory reasons for its actions. The Postmaster stated that he reduced Complainant’s hours because her restrictions limited her to six hours of work and only three hours on the street. According to the Postmaster, casing mail was the only available work. He stated that, although Complainant had been delivering her route with restrictions, the Agency was concerned that she was working outside of her restrictions.

⁶ The route-relinquishment at issue in this complaint occurred on June 4, 2016. On appeal, Complainant submits a letter ordering her to relinquish her route effective February 24, 2017. It is not clear why the Postmaster directed her to relinquish a route that, according to the file before us, the Agency required Complainant to relinquish in June 2016. To the extent Complainant is attempting to raise new claims, we note that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004). Should Complainant wish to pursue new claims, she should contact an EEO Counselor to initiate the EEO process.

He further stated that the Agency required her to relinquish her route because of her limitations and inability to deliver for more than three hours on the street.

Having reviewed the evidence of record, we find that the evidence establishes that the articulated reasons are a pretext for reprisal. The record establishes that Complainant worked on modified duty for several years prior to the Agency's decisions to reduce her hours and require her to relinquish her route. In that regard, we note that the Postmaster stated that Complainant returned to work with limitations in June 2010. Complainant's unrefuted testimony is that she worked for six hours per day, casing her route for 2-3 hours and then carrying her route for 2-3 hours. The Rural Carrier Trip Reports confirm that Complainant was scheduled to spend three hours on the street. It was not until Complainant engaged in protected EEO activity that the Agency changed this arrangement. Less than one month after Complainant and the Agency settled her prior complaint, the Postmaster offered Complainant a limited-duty assignment that involved six hours of delivery. The record does not explain why the Postmaster made that particular offer at that particular time.

After Complainant rejected the offer and submitted a Work Status report stating that she should not be "delivering more than 3 hours on the street," the Postmaster offered her an assignment that involved 2.50 hours of casing mail. He stated in his affidavit that he gave her as much work as was available, but he did not explain why the Agency did not permit her to continue to deliver her route for three hours per day. The record does not support the Postmaster's assertion that the Agency was concerned that Complainant was working outside her restrictions. There is no evidence that the 2-3 hours that Complainant spent carrying her route exceeded her work limitations. To the extent that the Agency is arguing that it reduced Complainant's hours and required her to relinquish her route because she did not provide documentation clarifying her physician's reference to three hours "on the street," the Agency's argument fails. The Postmaster's March 4 and 18, 2016, letters explained that he interpreted the reference to include driving time. He asked Complainant to submit additional documentation (a Form CA-17) if she believed that he had misinterpreted the reference; he did not ask for additional documentation if she believed that his interpretation was correct.

Further, to the extent that the Agency, in its final decision, relied on the Memorandum of Understanding as part of the articulated reason, its reliance was misplaced. The Postmaster did not state that he took the actions at issue here because of the Memorandum of Understanding. In addition, nothing in the Memorandum explains why the Agency allowed Complainant to retain her route for several years while on modified duty but required her to relinquish the route after she participated in protected EEO activity.

Having considered the evidence of record, we find that the Agency's articulated reasons are not worthy of credence. We further find that a retaliatory reason more likely motivated the Agency's actions. Accordingly, we find that the Agency discriminated against Complainant in reprisal for her prior protected EEO activity when it reduced her work hours and forced her to relinquish her assigned rural route.

Having found that the Agency discriminated against Complainant in reprisal for engaging in protected EEO activity, we need not determine whether the Agency also discriminated against Complainant based on her disability.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the complaint for further processing in accordance with our Order below.

ORDER

The Agency is ordered to take the following remedial actions within 120 calendar days after this decision is issued:

1. The Agency shall return Complainant to her former route, Rural Route 12, or a substantially equivalent route, retroactive to the date that the Agency forced Complainant to relinquish the route. The Agency shall provide Complainant with six (6) hours of modified duty consistent with her current medical restrictions.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, for any loss earnings Complainant suffered as a result of the failure to provide her with six (6) hours of modified duty per day since February 19, 2016. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. The Agency shall also pay Complainant compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
4. The Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of the Agency's reprisal.

The Agency shall afford Complainant an opportunity to establish a causal relationship between the Agency's violation 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 she may be entitled to and shall provide all relevant information requested by the Agency. The Agency shall issue a new Agency decision determining Complainant's entitlement to compensatory damages within 120 calendar days after the date this decision is issued. 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.

5. The Agency shall provide eight (8) hours of training to the responsible management officials, including the Postmaster, regarding their responsibilities under the Rehabilitation Act. The training shall have a special emphasis on employees' responsibilities with respect to Section 501 of the Rehabilitation Act of 1973 and the prohibition against reprisal.
6. The Agency shall consider taking appropriate disciplinary action against the responsible management officials, including the Postmaster. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
7. The Agency shall post a notice in accordance with the paragraph below entitled "Posting Order."

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

POSTING ORDER (G0617)

The Agency is ordered to post at its Vallejo Main Post Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

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

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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

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

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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

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

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

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

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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.

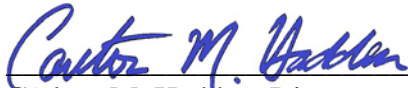
Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

November 9, 2018

Date