



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

[REDACTED]  
Porter P.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 0120171893

Hearing No. 470-2016-00083X

Agency No. 1J461005315

**DECISION**

On May 3, 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 April 6, 2017 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. The Commission's review is de novo. For the following reasons, the Commission AFFIRMS in part and REVERSES in part the Agency's final order.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Tractor Trailer Operator (TTO), PS-08, at the Agency's Indianapolis Processing and Distribution Center in Indianapolis, Indiana. Complainant reported that he has medical conditions related to his neck and back, and attention deficit hyperactivity disorder (ADHD), which are maintained with medication. Complainant has no restrictions and can perform the duties of his job.

---

<sup>1</sup> 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 January 12, 2015, Complainant reported that he had chronic low back pain due to pinched nerves in his lower back during a medical examination and indicated that he was taking Flexeril, Tylenol, and Vicodin.

On May 27, 2015, an Occupational Health Nurse Administrator for the Agency emailed the Area Medical Director, a Labor Relations Specialist, an Injury Compensation Specialist, an Occupational Health Nurse, and management officials to advise them that she had received notice of a positive drug screen from Complainant on May 14, 2015. Complainant was taking an amphetamine, Vyvanse, pursuant to a physician's prescription, which he did not disclose in January 2015. As a result, Complainant was immediately removed from driving for two days. Complainant returned to driving after providing the Medical Review Officer (MRO) the name of his prescribing physician, the prescription number, and the name of his pharmacy. Complainant's physician confirmed that he had prescribed Vyvanse to Complainant and the MRO changed the drug screen to negative.

On August 13, 2015, management suspended Complainant's driving privileges again due to a statement from his physical examiner indicating that he was not aware of the medications Complainant was taking. Around the same time, the Agency's Associate Medical Director asserted that she had concerns about Complainant's use of Vicodin, which could impair Complainant's ability to drive. From August 13, 2015, through November 20, 2015, Complainant worked as a clerk-dispatcher performing truck dispatching work while off driving duties.

On October 13, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (neck, back, and ADHD) when:

1. On an unspecified date, Complainant's confidential medical information was disclosed to unauthorized individuals; and
2. In August 2015, Complainant's driving privilege was suspended.<sup>2</sup>

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's December 27, 2016 motion and issued a summary judgment decision on February 10, 2017.

In his decision, the AJ determined that the allegation that the Agency violated Complainant's confidentiality was not supported by law or fact. The AJ stated that Complainant did not factually establish that any of his medical information was viewed by anyone who was not entitled to see it during the relevant period pursuant to the Agency's own Management Instruction concerning the maintenance of such records.

---

<sup>2</sup> While the matter was before the AJ, Complainant withdrew reprisal as a basis of discrimination.

In addition, the AJ dismissed Complainant's GINA claim on the basis that Complainant had not identified what genetic information he believed was disclosed or had been used to discriminate against him. Further, the AJ noted that any matters concerning the Health Insurance Portability and Accountability Act (HIPAA) were not within the regulations enforced by the Commission.

In addition, the AJ found that the Agency did not violate the Rehabilitation Act. Complainant affirmed that he could perform the duties of a TTO and that he did not require an accommodation. The AJ noted that after Complainant was removed from driving, management conducted an individual assessment with Complainant, as required by the regulations, which resulted in his return to driving. Complainant was given other work until the individualized assessment process could be completed and he subsequently received compensation for missed out-of-schedule premium and overtime opportunities.

The AJ found that Complainant did not establish a prima facie case of discrimination because he failed to provide comparators or anyone who was treated better. Moreover, Complainant failed to establish that the treatment he complained of was due to his disability. As a result, the AJ found that Complainant had not been subjected to discrimination as alleged.

The Agency subsequently issued a final order fully adopting the AJ's decision. The instant appeal followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ's decision improperly weighed conflicting evidence against Complainant. Complainant argues that the decision failed to recognize changes made to the Americans with Disabilities Act (ADA) in recognizing what constitutes a disability and what constitutes a qualified individual with a disability. Complainant claims that the decision failed to recognize that the Agency is discriminating against persons with the condition of ADHD by requiring them to discontinue prescription medication to control such disability. Finally, Complainant asserts that the decision failed to recognize the confidentiality violations of the ADA that occurred with local management discussing Complainant's medical information with each other in violation of the ADA and collective bargaining agreements.

The Agency claims that Complainant failed to prove any of the bases upon which he appealed the final decision. With respect to the violation of confidentiality, the Agency argues that matters involving HIPAA, or the Privacy Act are outside of the Commission's purview. However, the Agency further contends that the list of medications that were maintained in Complainant's driver file did not trigger protection of the ADA because the list was not obtained through a medical examination or inquiry and it was voluntarily provided. As for removing Complainant from driving, the Agency maintains that Complainant was taken off driving due to management's belief that he was not forthcoming with his medication and he was taking opioids and amphetamines, which could impair his driving. The Agency claims that it did not violate the Rehabilitation Act because Complainant could perform the duties of a TTO and did not require an accommodation.

The Agency adds that it satisfied its obligations under the Rehabilitation Act and Complainant has no economic damages. Accordingly, the Agency requests that the Commission affirm the final decision.

### ANALYSIS AND FINDINGS

The Commission finds that the AJ appropriately granted summary judgment because Complainant did not proffer evidence to establish that a genuine issue of material fact existed or raise credibility issues indicating that a hearing on the merits was warranted. Moreover, we find that the record was adequately developed.

#### *Genetic Information Claim*

As an initial matter, we note that Complainant alleged discrimination based on genetic information in violation of Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff et seq., which prohibits employers from discriminating against any employee because of genetic information with respect to the employee. 29 C.F.R. § 1635.1. Genetic information means information about (i) an individual's genetic tests; (ii) the genetic tests of that individual's family members; and (iii) the manifestation of a disease or disorder in family members of such individual (family medical history). 29 C.F.R. § 1635.3(c). During the investigation, Complainant did not specify what genetic information he believes was used to discriminate against him. Complainant only claimed that management was aware of his "medical conditions report...along with a list of medications that [he] was taking or prescribed at that time." In addition, Complainant acknowledged that management was not in possession or had any knowledge of any genetic information for anyone in his family.

The Commission finds that Complainant's complaint is devoid of any allegations or facts regarding genetic tests, the genetic tests of his family members, or his family medical history. In the absence of contradicting evidence, we find that to the extent that the Agency had any knowledge or awareness of Complainant's genetic information, Complainant has not met his burden of proof to show that such information played a role in any of the incidents at issue herein.

#### *Disparate Treatment*

In analyzing a disparate treatment claim under the Rehabilitation Act, where the agency denies that its decisions were motivated by complainant's disability and there is no direct evidence of discrimination, we apply the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999); Swanks v. WMATA, 179 F.3d 929, 933-34 (D.C. Cir. 1999). Under this analysis, in order to establish a prima facie case, Complainant must demonstrate that: (1) he is an "individual with a disability"; (2) he is "qualified" for the position held or desired; (3) he was subjected to an adverse employment action; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001).

The burden of production then shifts to the agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. In order to satisfy his burden of proof, complainant must then demonstrate by a preponderance of the evidence that the agency's proffered reason is a pretext for disability discrimination. Id.

Even if we assume, arguendo, that Complainant established a prima facie case of discrimination, we find that the Agency provided legitimate, nondiscriminatory reasons for its actions. A review of the record does not support Complainant's assertion that his confidential medical information was disclosed to unauthorized individuals with discriminatory animus. Specifically, Agency officials denied releasing Complainant's medical information and averred that they only received information related to the medications that Complainant was taking following his positive drug screen. ROI, Vol. 1., at 98, 105, 117, 148, 159; ROI, Vol. 2., at 212, 224, 246, 256, 271. Further, the record evidence supports that the officials who received the information had a "need to know" about the matter.

Complainant contends that a May 27, 2015 email, in which the Associate Medical Director responded that an unredacted report of Complainant's positive drug screen should not have been released outside of Occupational Health Services, supports his claim that the Agency discriminated against him based on disability by improperly releasing his confidential information. However, the individuals contained in the email chain in question were all individuals authorized to receive the information and the information related to restrictions on Complainant's work duties. Moreover, the email in question did not disclose Complainant's medical condition. See Dozbush v. Sec. of Transp., EEOC Appeal No. 01983929 (Feb. 1, 2002) (finding that a general disclosure indicating that an employee is medically disqualified for a position does not constitute a disclosure of confidential medical information). An affidavit submitted by Complainant's union representative indicates that the union representative walked in on management officials discussing Complainant's drug screen, but his statement does not indicate that management officials discussed Complainant's medical conditions.

Regarding the suspension of Complainant's driving privileges on August 13, 2015, management officials affirmed that the suspension was related to a failed drug screen and the belief that Complainant failed to disclose all his prescribed medication. ROI, Vol. 2, at 174, 213, 218, 273. Complainant contends that he did not fail to disclose the medications he was taking, noting that he provided a medication list in March 2014. However, subsequent records reflect medication changes and Complainant failed to provide persuasive evidence showing that the Agency did not have a reasonable belief that Complainant did not disclose all his medications in 2015. In an email dated August 13, 2015, the Concentra Medical Director, the Agency's contractor for medical examinations, emailed the Agency's Associate Medical Director stating that in Complainant's Department of Transportation (DOT) certifying examination, Complainant failed to provide a complete list of his medications. ROI, Vol. 2, at 191. Specifically, the Concentra Medical Director stressed that he was unaware that Complainant was taking Vicodin, Vyvanse, or Clonazepam, and that the medications would have disqualified Complainant, pending additional information from Complainant's physician. Id.

He concluded that based on DOT law and National Registry of Certified Medical Examiners' requirements, Complainant should be removed from the road indefinitely. Id.

Construing the evidence in the light most favorable to Complainant, the Commission finds that Complainant has failed to establish by a preponderance of the evidence in the record that these legitimate, nondiscriminatory reasons are a pretext designed to mask discriminatory animus based on his disability.

#### *Confidentiality of Medical Records*

Title I of the ADA requires that all information obtained regarding the medical condition or history of an applicant or employee must be maintained on separate forms, in separate files, and treated as confidential medical records. 42 U.S.C. §§ 1212(d)(3)(B), (4)(C); 29 C.F.R. §1630.14. These requirements also extend to medical information that an individual voluntarily discloses to an employer. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000).

The Commission has previously held that an agency's failure to maintain a complainant's medical information in a separate medical file violates the Rehabilitation Act and constitutes disability discrimination. See Mayo v. Dep't of Justice, EEOC Appeal No. 0720120004 (Oct. 24, 2012)(medical information was placed in a non-medical adverse action file in the Human Resources Department), req. for recon. den'd, EEOC Request NO. 0520130124 (Apr. 25, 2014); Higgins v. Dept' of the Air Force, EEOC Appeal No. 01A13571 (May 27, 2003) (medical information was placed in a non-medical work file maintained by employee's supervisor); Brunnell v. U.S. Postal Serv., EEOC Appeal No. 07A10009 (July 5, 2001) (medical information was placed in the employee's personnel file). Here, the Assistant Manager of Transportation Operations (AM) asserted that management officials placed and maintained documentation listing Complainant's condition and prescribed medication in his driver's personnel file in the Postal Vehicle Services (PVS) unit. Id. at 113. She stressed that although the records were maintained in a file, the records were not shared with "whoever asked for them." Id. at 124. Nonetheless, the Agency's failure to maintain Complainant's medical information in separate medical files constitutes a violation of the Rehabilitation Act, even in the absence of unauthorized disclosure.

Accordingly, we find that the Agency violated the Rehabilitation Act when it placed Complainant's confidential medical information in his driver's personnel folder and that Complainant is entitled to relief. We note that the Agency is obligated to separate Complainant's medical information from other, non-medical information in the driver's personnel folder. Further, we caution the Agency that, to the extent that it is the Agency's practice to place medical information in driver personnel folders or other non-medical files, the Agency should revise its practices to ensure compliance with the Rehabilitation Act.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency violated the Rehabilitation Act when it failed to maintain Complainant's confidential medical information in a separate medical file. We further find that Complainant did not establish that the Agency subjected him to disability-based discrimination. Accordingly, the Commission AFFIRMS in part and REVERSES in part the Agency's final order. The Commission REMANDS this matter for further remedial action in accordance with this decision and the ORDER below.

### ORDER

The Agency is ordered to take the following remedial action:

1. Within thirty (30) days of the date this decision issued, the Agency shall expunge all medical information concerning Complainant from non-medical files, including personnel files, and shall ensure that Complainant's medical information is maintained in a separate and appropriate medical file.
2. Within ninety (90) days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages no later than thirty (30) days after the completion of the investigation.
3. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight (8) hours of training to the responsible management officials regarding their responsibilities under the Rehabilitation Act, with a special emphasis on the Agency's obligation to maintain employees' medical information in separate and appropriate medical files.
4. The Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary in action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

The Agency shall post a notice in accordance with the paragraph below entitled "Posting Order."

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

#### POSTING ORDER (G0617)

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

#### ATTORNEY'S FEES (H1016)

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

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (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 (T0610)

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

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

  
Carlton M. Hadden, Director  
Office of Federal Operations

March 27, 2019

Date