



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

[REDACTED]
Coralee H.,¹
Complainant,

v.

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

Appeal No. 0120172277

Agency No. 1K221005216

DECISION

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 May 15, 2017 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 AFFIRMS, in part, and REVERSES, in part the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Full-time General Clerk at the Agency's Northern Virginia Processing and Distribution Center in Merrifield, Virginia. Complainant stated that she has been deaf since birth. Complainant stated that prior to the relevant period, the Agency's District Reasonable Accommodation Committee granted her reasonable accommodation in the form of videophone, video remote interpreting (VRI), and a live interpreter.

Complainant alleged numerous incidents of discriminatory conduct occurred beginning on June 28, 2016. First, Complainant claimed that the Manager, Distribution Operations (M1) instructed her not to enter M1's office when she was not in the office. Complainant alleged that M1 had her

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.

personal belongings and confidential information in the office which is why Complainant could not go in the office without M1 present. Complainant disagreed with this reasoning because other employees were allowed in the office.

In addition, Complainant claimed that her request for an interpreter for the weekly safety and service talk was denied on that day. Further, Complainant alleged that she was not given any handouts regarding the talk.

Additionally, Complainant claimed that M1 eliminated several of her duties, including distributing paychecks, supervisor of the weekly schedule, and typing higher-level assignments. Complainant alleged that these duties had been performed by the General Clerk for many years, but M1 began performing these assignments herself. Complainant asserted that M1 told her that the reasons for the elimination of the work were because Complainant was not at work to perform the duties, and that she did not want Complainant to see the supervisor leave book and higher-level assignments. Further, Complainant claimed that M1 told her that paychecks needed to be kept in M1's office and Complainant was not allowed to go in there. Complainant disagreed because she believed other employees could perform these tasks.

Complainant alleged that she made several verbal requests and an email request to speak to the Manager, Human Resources (HRM) to address some issues. Complainant claimed that HRM acknowledged her request and simply provided a response without a meeting. Similarly, Complainant alleged that the Disability Coordinator(DC) failed to meet with her for the annual review of her communication accommodation needs. Complainant stated that she did not make a request to meet with him, but that it was required for him to do so under Agency guidelines.

Complainant claimed that M1 assigned her to perform work that management never used. More specifically, Complainant alleged that she was assigned the Safety/Service signup sheet and the Overtime Desired List sheet. Complainant asserted that these sheets were always on M1's desk and had never been used. Further, Complainant claimed that management assigned overtime by rotation without using the sheet.

On September 19, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (deafness) when:

1. On June 28, 2016, and ongoing, she has been instructed not to enter the Manager, Distribution Operations' (M1) office;
2. On June 28, 2016, her request for an interpreter was denied;
3. On June 28, 2016, her job assignments of distributing pay checks, supervising the weekly schedules, and higher level typing assignments were eliminated;
4. Since June 28, 2016, she has failed to receive a response to her request to speak with the Manager, Human Resources (HRM);

5. Since June 28, 2016, she has not been scheduled to meet with the Disability Coordinator (DC); and
6. Since June 28, 2016, she has been required to perform an assignment that management never uses.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged.

In its FAD, the Agency determined that with respect to claim (2), Complainant did not establish a failure to accommodate claim because the record was devoid of evidence that Complainant was denied an interpreter on June 28, 2016. As for disability discrimination, with respect to all claims, the Agency found that Complainant did not establish that the circumstances surrounding the adverse actions gave rise to an inference of adverse treatment. Specifically, the Agency stated that there was no showing of disparate treatment because Complainant failed to provide adequate comparators and therefore could not show evidence that employees outside of her protected class were treated more favorably. The Agency further determined that management provided legitimate, nondiscriminatory reasons for its actions. As for pretext, the Agency found that Complainant failed to refute management's testimony regarding each claim. Accordingly, the Agency found that Complainant had not been subjected to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that with respect to claim (1), M1's explanation was contradictory and therefore pretextual. Specifically, Complainant claims that because M1 indicated that other managers were missing money, her statement that no other management officials were involved in the claim was contradictory. Complainant further contends that M1 should have known that Complainant did not have an interpreter at their June 28, 2016 meeting. She alleges that management's acknowledgement in September 2016, that there was a plan to conduct service talks twice per week in a special functions room with accessible VRI is indicative of the fact that Complainant did not receive an interpreter on June 28, 2016. Complainant maintains that management officials made ongoing contradictory statements regarding the denial. Complainant contends that M1 provided three different statements regarding Complainant's claim that she was removed from paycheck distribution duties and M1's statements should not be considered because they are misleading. Complainant alleges that her claims should be considered as a failure to accommodate and maintains that management officials were untruthful in their responses.

ANALYSIS AND FINDINGS

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”).

Disparate Treatment

Where, as here, there is no direct evidence of discrimination, the adjudication of a complaint of discrimination alleging disparate treatment follows a three-step evidentiary analysis enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, the burden is on the complainant to establish a prima facie case. Second, the agency has the burden of production to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981). Third, in order to prevail once the agency has articulated a legitimate, nondiscriminatory reason for its actions, the complainant must establish by a preponderance of the evidence that the agency’s stated reason for its actions was pretext for discrimination. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis to the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the agency’s explanation is pretext for discrimination. Reeves, 530 U.S. at 143; St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Here, we find that the Agency articulated legitimate, nondiscriminatory reasons for the disputed actions. Regarding claim (1), M1 acknowledged that she instructed Complainant, along with other employees, not to enter her office without approval. ROI, at 144. M1 noted that in addressing Complainant’s concerns following her complaint, M1 explained to Complainant that her instruction was due to a security issue. Id. Likewise, M1 stressed that she kept personal property and classified information in her office, but she ultimately gave the instruction because there were allegations of missing money and property. Id. at 145. M1 affirmed that when she is not in her office, any access to other employees is provided verbally or in advance. Id. at 167.

As to claim (3), M1 averred that she eliminated paycheck distribution from Complainant’s responsibilities because an employee received a paycheck that did not belong to him. ROI, at 149. Paychecks were subsequently stored in a manager’s office. Id. M1 added that she eliminated Complainant’s tasks involving higher-level forms due to Complainant’s absenteeism. Id. at 150, 169, 170. She noted that during Complainant’s absences, she relied on assistance from three other

clerks to fulfill assignments. Id. at 150. According to M1, Complainant was given back many of those duties following her improved attendance. Id. at 160.

Regarding claim (4), the Human Resources Manager (HRM) affirmed that she did not receive a request to meet with Complainant. ROI, at 185. Likewise, with respect to claim (5), HRM attested that the District Disability Coordinator (DC) did not have a meeting request. Id. at 186. DC stated that he first learned that Complainant wanted to meet with him and was unable to do so when he was contacted to submit an affidavit. Id. at 196. DC acknowledged that he is required to meet with individuals who have been granted reasonable accommodations to determine the effectiveness of the accommodation and whether improvements are needed. Id. However, he did not recall Complainant requesting a meeting since June 2016. Id. DC averred that he spoke with Complainant about her availability for an annual meeting, and Complainant informed him that Thursdays worked best, but she was not available. Id. at 199, 206. DC stated that he followed up with Complainant via email and described repeated attempts to explain to Complainant that she could meet with him. Id.

Regarding claim (6), M1 affirmed that Complainant was required to prepare the overtime list, which supervisors refer to when calling overtime. ROI, at 158. M1 explained that in most instances, all the employees on the list are called and supervisors prefer to call overtime themselves sometimes. Id. M1 further testified that the purpose of the overtime list is to assure that overtime is offered in rotation order. Id.

As Complainant chose not to request a hearing before an EEOC AJ, the Commission does not have the benefit of an Administrative Judge's credibility determinations after a hearing. Therefore, the Commission can only evaluate the facts based on the weight of the evidence presented. The Commission finds no persuasive 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 animus. Complainant failed to carry this burden. As a result, the Commission finds that Complainant has not established that she was subjected to discrimination as alleged.

Denial of Reasonable Accommodation—Claim (2)

Complainant alleged that the Agency failed to provide her with an interpreter as an accommodation for the weekly safety and service talk on June 28, 2016. The Agency is required to provide a reasonable accommodation for the known physical and mental limitations of a qualified individual with a disability, absent undue hardship. 29 C.F.R. §1630.2(o); 29 C.F.R. § 1630.2(p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). It is undisputed that Complainant is a qualified individual with a disability under the Rehabilitation Act.

An employer must provide reasonable accommodation to enable an employee with a disability to have equal access to information communicated in the workplace. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (March 1, 1999) at question 14. We have previously held that “for a severely hearing impaired employee who can sign, reasonable accommodation, at a minimum, requires providing an interpreter for safety talks, discussions on work procedures, policies or assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his employment career, whether or not he asks for an interpreter.” Ferris v. Evtl. Prot. Agency, EEOC Appeal No. 01934828 (Aug. 10, 1995); see Funk v. U.S. Postal Serv., EEOC Appeal No. 01984772 (July 27, 2001); Thomas v. U.S. Postal Serv., EEOC Appeal No. 01982321 (Feb. 2, 2001). Moreover, we have found the Rehabilitation Act requires that an agency reasonably accommodate hearing-impaired employees by providing effective interpreter services during work-related activities where hearing-impaired employees are expected to be present. See Ortiz v. U.S. Postal Serv., EEOC Request No. 05960270 (Oct. 16, 1998).

M1 stated that she was not aware that Complainant was denied an interpreter on June 28, 2016. ROI, at 147. However, M1 explained that when or if Complainant needs an interpreter, she notifies her supervisor and Complainant’s supervisor schedules an interpreter or VRI. ROI, at 148. Complainant’s supervisor (S1) during the relevant period, stated that interpreter requests required at least 24 hours’ advance notice. Id. at 175. However, he denied knowledge of any dates in which Complainant was denied an interpreter and asserted that VRI was used for service and safety talks. Id. at 175, 176, 179. Nonetheless, S1 averred that he met with Complainant in June 2016, “in an effort not to bring all operations to a halt for service talks” and he agreed to provide Complainant handouts of the service and safety talks. Id. at 13. Complainant asserts on appeal that she was not provided an interpreter for this meeting. After meeting with Complainant, management established a plan to conduct service talks twice per week in the special functions room where VRI is accessible. Complainant contends that this meeting was not backed by action.

As discussed above, management officials denied that Complainant was denied an interpreter on any date during the relevant period. However, S1 stated that he provided handouts in lieu of an interpreter at some point in June 2016, which is consistent with Complainant’s allegations. Although M1 and DC reported that they used other methods to communicate with Complainant, including lipreading; handwritten materials; and texting, an agency is not excused from its obligation to provide a deaf employee with an interpreter because the employee can lipread, or otherwise understand simple, written instructions. Jackson v. U.S. Postal Serv., EEOC Request No. 05880750 (Apr. 18, 1989). Therefore, while Complainant did not request the presence of an interpreter at the safety talk meeting, Agency management was aware that she needed and was entitled to such a reasonable accommodation. As such, we find that the Agency failed to provide Complainant with a reasonable accommodation in violation of the Rehabilitation Act.

We note the Agency does not claim that providing Complainant an interpreter at safety talks would constitute an undue hardship. Moreover, we find no evidence in the record to support a finding that providing Complainant interpreter services would have been unduly costly or that it would have fundamentally altered the nature of the Agency’s operation. See 29 C.F.R. §1630.2(p).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision with respect to claims (1), (3), (4), (5), and (6) and REVERSE and REMAND the Agency's final decision with respect to claim (2).

ORDER

The Agency is ordered to take the following remedial action:

1. The Agency will immediately ensure that Complainant is provided with a qualified sign language interpreter when required during her employment, including at a minimum for safety talks, discussions on work procedures, policies or assignments, for performance evaluations and for every pre-disciplinary and disciplinary action so that the employee can understand what is occurring at any and every crucial time in the employee's career.
2. Within ninety (90) calendar days from the date this decision is issued, the Agency shall conduct a supplemental investigation of Complainant's entitlement to compensatory damages. The Agency is directed to inform Complainant about the legal standards associated with providing compensatory damages and give Complainant examples of the types of evidence used to support a claim for compensatory damages. Complainant shall be given 30 calendar days from the date she receives the Agency's notice to provide all supporting evidence of her claim for compensatory damages. Within thirty (30) calendar days of the date the Agency receives Complainant's submission, the Agency shall issue a new final decision determining Complainant's entitlement to compensatory damages, together with appropriate appeal rights.
3. Within ninety (90) calendar days from the date this decision is issued, the Agency shall provide eight (8) hours of in-person or interactive training to all managers and supervisors at its Northern Virginia Processing and Distribution Center regarding the Agency's obligation to provide reasonable accommodation under the Rehabilitation Act to qualified individuals with disabilities, and specifically with respect to the requirements for hearing-impaired employees as reviewed in this decision.
4. Within sixty (60) calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against M1 and S1. The Agency shall report its decision. 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.

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 Northern Virginia Processing and Distribution Center in Merrifield, Virginia 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).

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

February 15, 2019

Date