



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

[REDACTED]
Carter R.,¹
Complainant,

v.

Richard V. Spencer,
Secretary,
Department of the Navy,
Agency.

Appeal No. 0120173003

Hearing No. 530-2016-00081X

Agency No. DON-15-3790A-00895

DECISION

On September 6, 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 August 4, 2017, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Police Officer, GS-0083-05, at the Agency's Naval Inventory Control Point facility in Mechanicsburg, Pennsylvania.

Believing that he was subjected to discrimination, Complainant contacted the EEO Counselor. On April 20, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of age (63) when:

1. his request for a reasonable accommodation to perform the agency's Physical Agility Test (PAT) using a treadmill was denied; and

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.

2. he was scheduled and required to take the PAT on November 19, 2014 based on his position description (“AA657”) and policy CNIC 5530.14A, while his prior position description (“L8143-235117”) did not mention the PAT.

The evidence developed during the investigation of the complaint shows that on November 19, 2014, Complainant was scheduled by management to take the PAT based on his position description (AA657) and Agency policy (CNIC 5530.14A). A portion of the PAT requires an employee to either run one and a half miles in 17 minutes and 30 seconds. In the alternative, the employee can walk two miles in 32 minutes and 30 seconds. The test instructions indicated that the test is to be done on a flat surface or track/marked road course.

In response to the request, Complainant submitted a memorandum dated November 21, 2014, requesting three items: a request to use a treadmill to complete the run/walk portion of the test; a copy of his position description; and his rights under the Americans with Disabilities Act. Complainant indicated that he could pass the walking/running portion of the test. However, he was concerned with the principle of the test. He noted that he had been diagnosed with arthritis in his hips and back. As such, he would rather do the test on a treadmill, rather than a hard pavement. Complainant also asserted that he should not have been scheduled to or required to take the PAT.

The matter was referred by Complainant’s Supervisor (49 years old at the time) to the Security Director, and finally to the Deputy Director of Regional Security. The EEO Manager sent the Supervisor the reasonable accommodation forms to provide to Complainant. On December 3, 2014, the Supervisor provided the reasonable accommodation forms to Complainant. Complainant did not return the forms to the EEO Manager or any documentations as requested on the forms. When Complainant failed to provide the documentation, the EEO Manager forwarded to the Supervisor a letter denying Complainant’s request. The denial of reasonable accommodation was issued to Complainant on February 20, 2015.

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 requested a hearing.

Prior to the hearing, the Agency filed a motion to compel Complainant to comply with discovery. On April 21, 2017, the AJ issued an order granting the Agency’s motion and directing Complainant to respond to the Agency’s motion within 10 days of the date of the order. On April 28, 2017, Complainant provided his response to the Agency’s request for admissions. However, he refused to respond to the admission requests.

Subsequently, the Agency filed a motion for sanctions and summary judgment indicating that Complainant refused to respond to the request for admission citing the Fifth Amendment of the Constitution. In response, the AJ issued a June 1, 2017 Order to Show Cause. Complainant responded to the AJ’s Show Cause Order on June 6, 2017. He provided his responses to the

request for admissions. The AJ found Complainant's submission to the request for admissions to be untimely. Furthermore, the AJ noted that Complainant failed to respond to the AJ's Order explaining why he failed to respond to the AJ's order dated April 21, 2017. Based on Complainant's failure to respond to the AJ's Show Cause Order and the untimely response to the AJ's order dated April 21, 2017, the AJ dismissed Complainant's hearing request.

The AJ remanded the complaint to the Agency, and 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 him to discrimination as alleged.

This appeal followed. On appeal, Complainant asserted that the AJ erred in dismissing his hearing request. Complainant argued that he was timely in his filing of his admissions on June 2, 2017. Complainant claimed that the AJ failed to address his assertion of his 5th Amendment Rights. Complainant also indicated that he is pro se and has tried to comply with the AJ and to establish that the Agency's actions constituted discrimination based on age in violation of the ADEA. He argued that the Agency's policy does not accommodate individuals over the age of 40. Therefore, he asked that the Commission issue a ruling on his alleged claim of his 5th Amendment Rights.

The Agency asked that the Commission affirm its final decision finding no discrimination.

ANALYSIS AND FINDINGS

Standard for 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").

Sanction by the AJ

As an initial matter, we must determine whether the AJ abused his discretion in dismissing the hearing based on Complainant's failure to respond to the AJ's orders. In general, the Commission has held that sanctions, while corrective, also can prevent similar misconduct in the future and must be tailored to each situation, applying the least severe sanction necessary to respond to the party's failure to show good cause for its actions, as well as to equitably remedy the opposing party. See Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007); Rountree v. Dep't of the Treasury, EEOC Appeal No. 07A00015 (July 17, 2001); Hale v. Dep't

of Justice, EEOC Appeal No. 01A03341 (Dec. 8, 2000). The Commission's interest lies in deterring the underlying conduct of the non-complying party, and protecting its administrative process from abuse by either party to ensure that agencies, as well as complainants, abide by its regulations. See Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009).

Complainant asserted that he timely responded with his admissions which he filed on June 2, 2017. We disagree as that Complainant's June 2017 submission was in response to the AJ's order dated April 21, 2017. Complainant's initial submission did not adequately respond to the Agency's requests for admissions. Further, as to his June 2017 submission, it was unresponsive to the AJ's Order to Show Cause. Complainant did not provide any reason why he failed to comply with the AJ's Orders from April 2017 and June 2017. As such, we find that the AJ's dismissal of the hearing was an appropriate sanction based on Complainant's failure to comply with the AJ's Orders.

Reasonable Accommodation – Claim (1)

Under the Commission's regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o) and (p). Appropriate accommodations might include job restructuring, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustment or modification of examinations, training materials, or policies, the provision of qualified readers or interpreters, and/or part-time or modified work schedules. See 29 C.F.R. § 1630.2(o)(ii).

In order to establish that the Agency unlawfully denied him a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a qualified individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

In the instant case, Complainant alleged that he was denied a reasonable accommodation on the basis of age. Complainant stated that he has arthritis. The record indicated that the Agency asked that he provide forms and medical documentation to support his request for a reasonable accommodation. Complainant admitted that he failed to provide it. As here, if an individual's need for reasonable accommodation is not obvious, and the person refuses to provide reasonable documentation requested by an employer, then the individual is not entitled to the requested accommodation. See Scott v. U.S. Postal Serv., EEOC Request No. 0520130084 (April 16, 2013) (citing Hunter v. Social Security Admin., EEOC Appeal No. 0720070053 (Feb. 16, 2012)).

Further, he specifically stated that he should have been provided a reasonable accommodation under the ADEA. We note that the Agency is not obligated to provide a reasonable

accommodation under the ADEA. Therefore, we find that Complainant has not shown that the denial of the use of the treadmill constituted a violation of the law.

Disparate Treatment – Claims (1) and (2)

A claim of disparate treatment based on indirect evidence is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, he or she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't. of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't. of Health and Human Serv., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't. of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

As to claim (1), Complainant asserted that he was denied a reasonable accommodation. The Agency provided legitimate, nondiscriminatory reason for denying his request. Specifically, the Agency provided Complainant with forms to fill out to support his request for a reasonable accommodation. However, when Complainant failed to return the forms to the Agency, the Agency denied his request. We find that Complainant has not shown that the Agency's reason was pretext for discrimination based on age with respect to claim (1).

As to claim (2), Complainant asserted that he was subjected to disparate treatment when he scheduled and required to take the PAT exam. The Deputy Director averred that the Agency's policy, dated May 13, 2013, provides the requirements of the PAT. He noted that the PAT is important to show that the employee is physically fit to perform the rigorous activities required by the position to protect life and property of the installation. He noted that when Complainant was hired, the position description did not require the PAT. However, the Agency transferred the Security Department into the Commander, Navy Installations Command (CNIC), on October 7, 2012. In addition, in April 2012, the Agency had an agreement with another Agency that they would set the standards. As such, the position description for the position of Police Officer was

changed in September 2012 to include the PAT. He averred that the PAT is required of Complainant as it is with all Police Officers within the CNIC. Upon review, we find that the Agency has provided legitimate, nondiscriminatory reasons for its action. We find that Complainant has failed to establish that this legitimate, nondiscriminatory reason is pretext for discrimination based on age.

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 finding no discrimination.

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).

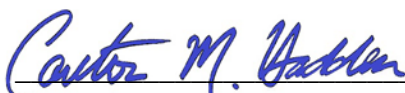
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (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 26, 2019

Date