



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

[REDACTED]
Buck S.,¹
Complainant,

v.

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

Appeal No. 0120180137

Agency No. 4E-840-0008-17

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 5, 2017, concerning his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier Assistant (CCA) at the Agency's Mt. Shadows Post Office in Orem, Utah. Complainant's first-line supervisor was the Postmaster (S1).

Complainant has a traumatic brain injury. According to Complainant, he is partially paralyzed, and his impairment limits his stamina and the mobility in his right leg. S1 stated that he was not aware of Complainant's disability until the mediation of Complainant's EEO complaint.

Complainant stated that at his August 2016, interview with S1 and another official, he presented S1 with a letter from Vocational Rehabilitation that discussed his disability. According to S1, this letter stated that Complainant was likely to succeed in the CCA position. S1 stated that Complainant did not indicate his need for accommodation during the interview.

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.

Complainant alleged that during training on August 18, 2016, he requested hand controls to be installed on an Agency vehicle as a reasonable accommodation. Complainant stated that he can drive without hand controls but that he could not operate the vehicle fast enough to meet the Agency's standards without them. Complainant averred that S1 told him that hand controls were out of the question and that S1 did not propose any alternative accommodations. S1 stated that he told Complainant that vehicles are assigned based on seniority and that, as a CCA, Complainant would not have an assigned vehicle. According to S1, Complainant responded that not having hand controls would not be an issue because he would not be required to drive for more than two hours at a time. S1 stated that Complainant said that driving for more than two hours straight made his leg numb.

Complainant emailed S1 on September 17, 2016, to request a fixed day off each week so he could rest. The record does not contain this email. According to S1, he made sure that Complainant had a day off every week, but he was unable to provide Complainant with a fixed day off because the CCAs are scheduled to work when regular carriers are unavailable, which is unpredictable. S1 stated that this email did not constitute a request for reasonable accommodation. According to Complainant, a non-disabled CCA with young children was given a fixed day off. S1 denied that a non-disabled CCA was given a requested fixed day off because she had children, but the record does not contain any documentation to corroborate his denial. Complainant stated that he emailed S1 again to request a reasonable accommodation on September 23, 2016. The record does not contain this email, and S1 did not discuss the September 23, 2016, email during the investigation. According to Complainant, S1 never responded to his emails, and no other attempt to accommodate him was made.

On October 21, 2016, S1 terminated Complainant during his probationary period for failing to meet the expectations for a CCA. According to S1, despite extensive training, Complainant was not working at a "sufficient speed." S1 stated that he was not aware of any reason that Complainant was not able to perform his job assignments in a satisfactory manner. According to Complainant, S1 told him that he was not fast enough on his delivery route. Complainant averred that he could have completed his route more quickly if he had been given a reasonable accommodation. Complainant alleged that he was not given a fair opportunity to succeed on the job because he was not accommodated.

The record contains Complainant's probationary employee evaluation. At both the 30-day and 60-day review, Complainant was rated satisfactory in four factors and unsatisfactory in two factors. Complainant received the unsatisfactory ratings in "Work Quantity," which assesses speed and productivity, and "Work Quality," which assesses the number of errors and whether the work performed meets the expectations of the position. According to the record, four non-disabled Orem employees were removed during their probationary period between March 31, 2016, and January 13, 2017.

On November 22, 2016, Complainant initiated contact with an EEO Counselor. On March 8, 2017, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of disability (traumatic brain injury) when:

1. Beginning August 18, 2016, his requests for reasonable accommodation were ignored and/or denied; and
2. On October 21, 2016, he was terminated during his probationary period.

The Agency accepted claim 2 for investigation. The Agency's partial acceptance letter stated that the denials of Complainant's August 18, September 17, and September 23, 2016, reasonable accommodation requests were "untimely, as they were not brought to a counselor's attention within 40 [sic] days." Report of Investigation (ROI) at 34. The Agency wrote that the reasonable accommodation denials would be considered background information in support of his termination claim.

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 EEOC Administrative Judge (AJ). Pursuant to Complainant's request, 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. The final decision found that its partial acceptance letter properly deemed Complainant's reasonable accommodation requests as background evidence. The Agency's final decision found that Complainant was a qualified individual with a disability but concluded that he failed to establish that the Agency's legitimate, nondiscriminatory reason for his removal was pretextual.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that the Agency conduct a supplemental investigation regarding his failure to accommodate claim. Complainant contends that this claim should not have been dismissed for untimely EEO Counselor contact and that the Agency did not fully investigate whether he was denied a reasonable accommodation. According to Complainant, the Agency's failure to accommodate him led to his removal.

In response to Complainant's appeal, the Agency contends that it properly accepted his reasonable accommodation claim as background evidence and that Complainant had an opportunity to address it during the investigation. The Agency requests that its final decision finding no discrimination be affirmed.

ANALYSIS AND FINDINGS

The Agency found that Complainant did not timely initiate contact with an EEO Counselor regarding his failure to accommodate claim. EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the

applicable time limits contained in 29 C.F.R. § 1614.105, § 1614.106 and § 1614.204(c), unless the Agency extends the time limits in accordance with 29 C.F.R. § 1614.604(c). EEOC Regulation 29 C.F.R. § 1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.² However, the Commission notes that the duty to reasonably accommodate is ongoing. As such, at the time Complainant contacted the EEO Counselor, he was alleging that, through the day of his removal, the Agency remained unwilling to provide him with the accommodations he still needed. Accordingly, we find that Complainant timely initiated contact with an EEO Counselor regarding his reasonable accommodation requests.

Next, we consider the Agency's contention on appeal that the record is sufficiently developed regarding Complainant's reasonable accommodation claim. EEOC Regulation 29 C.F.R. § 1614.108(b) requires, inter alia, that the agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the complaint. One purpose of an investigation is to gather facts upon which a reasonable fact finder may draw conclusions as to whether a violation of the discrimination statutes has occurred. Id.; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 6, § IV.B. An investigation must include "a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the Complainant's group as compared with the treatment of similarly situated employees...and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant." Id. at § IV.C. Also, an investigator must identify and obtain "all relevant evidence from all sources regardless of how it may affect the outcome." Id. at § VI.D.

Upon review, the Commission finds that the investigation was inadequate and that the record lacks the thoroughness required for the fact finder to address the ultimate issue of whether Complainant was denied a reasonable accommodation. The record does not contain the Vocational Rehabilitation letter or Complainant's September 2016 emails to S1. Furthermore, because the reasonable accommodation requests were considered background, the EEO Investigator only asked cursory questions about the requests for reasonable accommodation. We also note that, other than S1's denial that there was no comparator who was afforded a fixed day off because of her children, there are no time and attendance records or other documentary evidence in the record to assess whether another CCA without a disability was given a fixed day off. Accordingly, we will remand the matter to the Agency for a supplemental investigation. Because Complainant alleges that the denial of his request for reasonable accommodation led to his removal, we decline to address his removal in order to avoid the fragmentation of his claims.

² The Agency's partial acceptance letter, which was also cited in the Agency's final decision, erroneously stated that the limit was 40 days.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is VACATED. The complaint is hereby remanded to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

Within ninety (90) calendar days of the date that this decision is issued, the Agency shall undertake and complete a supplemental investigation of this complaint, which shall include the following:

1. The EEO Investigator shall fully investigate Complainant's reasonable accommodation claim, including any contention by the Agency that provision of a reasonable accommodation would impose an undue hardship. The Agency shall ensure that the Investigator obtains all pertinent evidence needed to address Complainant's reasonable accommodation claim including, but not limited to, sworn affidavits from Complainant and from responsible management officials and other documentary evidence regarding how management responded to Complainant's requests for accommodation. Documentary evidence should include, at a minimum, the Vocational Rehabilitation letter, Complainant's September 17 and September 23, 2016, emails to S1, and sufficient time and attendance records for CCAs to assess whether Complainant's alleged comparator was afforded a fixed day off.
2. Complainant shall have the opportunity to submit rebuttal affidavit(s).

Once the supplemental investigation is completed, the Agency shall issue Complainant a new notice of right to request a hearing before an EEOC AJ or an immediate final decision on the evidence gathered in both the original and supplemental investigations.

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). This report must include a copy of the supplemental investigative report and the notice of Complainant's rights.

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

April 3, 2019

Date