



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

██████████
Annalee D.,¹
Complainant,

v.

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

Appeal No. 0120180911

Agency No. 1F-901-00-9017

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 December 11, 2017, final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.* and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* For the following reasons, the Commission REVERSES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mail Handler, PS-04, at the Agency's International Service Center facility in Los Angeles, California. On July 21, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of her race (African-American), sex (female), disability, and age (60 at the relevant time) when beginning on or about March 11, 2017, she performed higher-level work but did not receive higher-level pay.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (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. On appeal, Complainant reiterates her contention that the Agency subjected her to unlawful discrimination.

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”).

With respect to Complainant’s claim that she was discriminated against on the basis of her disability, in order to establish a prima facie case of disability discrimination under the Rehabilitation Act, a complainant must demonstrate that: (1) she is an “individual with a disability,” (2) she is “qualified” for the position held or desired, i.e., can perform the essential functions of the position with or without accommodation; (3) she was subjected to an adverse action because of her disability; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F. 2d 68 (2nd Cir 1999); Swanks v. WMATA, 179 F. 3rd 929, 93-34 (D.C. Cir 1999); Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001).

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. See 29 C.F.R. § 1630.2(g) (1)-(3). Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. § 1630.2(i). The term “substantially limits” means: unable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j)(1).

The Agency acknowledges that Complainant is an individual with a disability. Furthermore, upon review, the record shows that Complainant provided the Agency with medical documentation stating that she was diagnosed with right and left epicondylitis with the restrictions of not lifting, carrying, pushing, or pulling more than 10 pounds. Complainant was also restricted from pushing

or pulling for more than 20 minutes. See Rochelle F. v. U.S. Postal Serv., EEOC Appeal No. 0120171406 (Mar 5, 2019); Gwendolyn G. v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013) (finding Complainant is individual with a disability where she was substantially limited in the major life activity of lifting and restricted to lifting no more than 10 pounds).

The next inquiry is whether Complainant is a “qualified individual with a disability.” 29 C.F.R. § 1630.2(m). A “qualified individual with a disability” is one who satisfies the requisite skill, experience, education and other job-related requirements of the employment position and who, with or without reasonable accommodation, can perform the essential functions of the position. Id. The record shows that on December 22, 2016, Complainant was offered and accepted a limited duty modified job offer commensurate with her medical restrictions. As the Agency could not find a limited duty position in the mail handler craft, Complainant was offered, and accepted, a clerk position. The Agency does not claim that Complainant could not perform the functions of this position. As such, we find that Complainant was a qualified individual with a disability.

We also find that the Agency’s decision to pay Complainant at the PS-04 level was directly related to her disability as it was the result of the limited duty job offer. In so finding, we note that in his affidavit, Complainant’s manager (M1) states that he was instructed by the plant manager (PM) to pay limited duty employees “the same level as their base [pay] because of their medical restrictions...and also that would [be] encouraging others to get hurt on the job to get more pay when injured on the job.” We find that this is more than sufficient to establish a prima facie case of disability discrimination.

The burden now shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Here, the record shows that prior to the events at issue, Complainant was assigned to a missing manifest project under the direction of, and funded by Headquarters, and was being paid at the PS-06 level. The Agency states that “when HQ ended the assignment, the level/pay ended.” The record shows, however, that the missing manifest project assignment ended on December 27, 2016, but Complainant continued to be paid as a PS-06 clerk until March 10, 2017. Complainant states that her duties did not change in March 2017, and the Agency does not dispute this statement. We also note that the PM states that management was instructed not to create “make shift work” for limited duty employees such as Complainant, but to instead “identify jobs or portions of jobs that [they] could do within their restrictions.” Additionally, she states that “limited duty employees who were not able to complete the full duties of a higher-level bid position were not to be paid higher level.” We find, however, that the Agency failed to identify the duties of the PS-06 clerk position they assert Complainant was not performing.

Specifically, when asked what duties of the level 6 clerk position Complainant was not performing, M1 states that Complainant isn’t “pulling or pushing and can’t lift anything > 10 lbs where the clerks have to lift up to 70 lbs and also need to do pulling and pushing up to 70 lbs.” We note, however, that these are not job duties but are, instead, physical requirements. Additionally, a review of the position description for the sales, service/distribution associate, PS-06, position provided by the Agency does not indicate any lifting requirements.

Nor has the Agency identified which, if any, of the duties listed in the position description were not being performed by Complainant at the relevant time. Without identifying the specific duties of the PS-06 clerk position the Agency claims that Complainant was not performing, we find that the Agency failed to rebut the inference of discrimination created when Complainant established a prima facie case of disability discrimination by articulating a legitimate, nondiscriminatory reason for its actions. Therefore, we find that the Agency discriminated against Complainant based on her disability when it paid her at a lower level.

Finally, as we have made a finding of disability discrimination, it is not necessary to address the bases of race, sex, or age, as Complainant would not be entitled to any additional relief.

CONCLUSION

We REVERSE the Agency's final decision and direct the Agency to comply with this decision and the Order herein.

ORDER

Unless otherwise indicated, the Agency is ordered to take the following remedial actions:

1. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages incurred as a result of the Agency's discriminatory actions. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC Appeal 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 90 days of the date this decision is issued. Within 30 days from the date of that determination, the Agency shall pay the awarded compensatory damages. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
2. Within 60 days from the date this decision is issued, the Agency shall determine the appropriate amount of back pay, if any, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. The Agency shall provide Complainant the back pay and benefits within 60 days of the date of that determination.
3. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount. Complainant may petition the Commission for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer referenced in the statement entitled "Implementation of the Commission's Decision."

4. Within 90 days of the date this decision is issued, the Agency shall provide at least eight hours of in-person training to the management officials at the International Service Center facility in Los Angeles, California, regarding their responsibilities under the Rehabilitation Act.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation-of their departure date(s).

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

POSTING ORDER (G0617)

The Agency is ordered to post at its International Service Center facility in Los Angeles, California 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

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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

October 30, 2019

Date