



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Lonny C.,¹
Complainant,

v.

Joe Ritch,
Chair,
Tennessee Valley Authority,
Agency.

Appeal No. 2022005117

Hearing No. 490-2022-00083X

Agency No. TVA 2021-2022

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 September 8, 2022, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, we VACATE the Agency's final order.

ISSUE PRESENTED

Whether the EEOC Administrative Judge (AJ) properly found that Complainant was not subjected to unlawful discrimination based on disability (physical) and age (over 40) when his contingent job offer for the position of Nuclear Security Officer (NSO) Trainee was rescinded.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an external applicant for a NSO Trainee position at the Agency's Brown's Ferry Nuclear Plant in Athens, Alabama.

On October 25, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (physical) and age (over 40) when, on July 9, 2021, he received a letter from the Agency rescinding a job offer as a NSO Trainee at Brown's Ferry Nuclear Plant.

The investigation into the complaint revealed that individuals working in the NSO position must abide by the requirements set forth in 10 C.F.R. Part 73, Appendix B, General Requirements for Security Personnel. See Report of Investigation at 184-186. To meet the requirements under this section, NSOs must obtain a S-11 medical clearance, which could be obtained by passing the Agency's S-11 medical examination. ROI at 59, 184-186, 505, 513.

The S-11 medical examination consisted of physical and psychological examinations. ROI at 161, 184-186, 505. The physical examination required, among other things, applicants to have a blood pressure lower than 140/90. ROI at 186, 200-203. According to the Agency's examination standard operating procedure, when an individual's blood pressure exceeds 140/90, multiple readings are averaged to determine if the blood pressure is lower than 140/90, and if the average result remains above 140/90, the applicant is advised to contact a private doctor to schedule another appointment for a recheck. ROI at 186-187, 200-203. If an applicant's blood pressure remains higher than 140/90, they will be denied an S-11 clearance and deemed not suitable for a NSO Trainee position. ROI at 162, 186-188. Once an applicant is deemed not suitable for the NSO Trainee position, the contingent offer of employment is rescinded. ROI at 245-247.

Between April 20, 2021, and June 22, 2021, Complainant received multiple elevated blood pressure readings that were outside of the acceptable parameters. ROI at 161-163, 187, 198-203, 514, 516-517. Complainant also underwent a psychological examination. The Examiner alleged in his sworn declaration that he might have commented to Complainant during his examination that Complainant was the oldest person that he had examined for the position of NSO Trainee. ROI at 505. However, Complainant passed his psychological examination, and the Examiner approved Complainant psychologically for the NSO Trainee position. Id.

Nevertheless, because of his failure to pass the physical examination, Complainant did not obtain a S-11 medical clearance, and his contingent offer was consequently rescinded.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. When the Complainant did not object, the AJ granted the Agency's August 10, 2022, motion for a decision without a hearing and issued a decision without a hearing on August 30, 2022.

In the decision, the AJ adopted the Agency's motion for summary judgment. In its motion, the Agency argued that Complainant could not establish a prima facie case of age or disability discrimination because he did not present evidence demonstrating that a prohibited consideration was a factor in the rescission of the offer. Additionally, Complainant failed to show that he was disadvantaged in favor of any specific younger person or in favor of someone outside of his protected class. Rather, the Agency argued that the evidence established that all individuals were required to obtain a S-11 medical clearance for the NSO Trainee position and required to pass both a physical medical examination and a psychological examination. To the extent Complainant alleged that he was subjected to age discrimination during the psychological examination, the Agency argued that the comment from the Examiner was irrelevant because the Examiner played no role in Complainant's S-11 physical examination that caused the rescission.

The AJ ultimately concluded that there was no evidence that Complainant was treated differently than any other person who was contingently hired for the position. While the AJ found that the Examiner who conducted Complainant's psychological examination made an arguably ageist comment when he stated that Complainant was the oldest person he had examined, the AJ found the fact that Complainant passed the psychological examination undercut any notion that the Agency's separate determination regarding his physical examination was motivated by age-based animus.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant did not submit an argument with his appeal. The Agency requests affirmation of its final order.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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 (MD-110), 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").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review..."); see also MD-110, at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo).

ANALYSIS

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus.

In the instant case, we find that the AJ failed to view the evidence in the light most favorable to Complainant and improperly determined that there were no genuine issues of material fact that merited a hearing.

We note that the Rehabilitation Act prohibits a covered entity from engaging in discrimination against a qualified individual on the basis of disability in, among other things, hiring. 42 U.S.C. §12112(a). Such discrimination includes “using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability ... unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. Id. at § 12112(b)(6); see also 29 C.F.R. § 130.10 (making unlawful a covered entity’s use of qualification standards that screen out or tend to screen out an individual with a disability unless such standard is job related and consistent with business necessity).

The regulations define “qualification standard” as “the personal and professional attributes, including the skill, experience, education, physical, medical, safety, and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q).

As noted above, the Agency required applicants for the NSO Trainee position to undergo a medical examination. The medical examination, required, among other things, applicants to have a blood pressure of lower than 140/90. The record shows that the Agency rescinded Complainant’s contingent offer solely because his blood pressure readings were outside of the established parameters.

Regarding safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement is job related and consistent with business necessity. The regulations provide that an agency can meet this standard by showing that the requirement, as applied to the individual, satisfies the “direct threat” analysis set forth in 29 C.F.R. § 1630.2(r); 29 C.F.R. 1630 App. 1630.15(b) and (c); Shane L. v. Dep’t of Homeland Sec., EEOC Appeal No. 2022001140 (June 13, 2024), citing Nathan v. Dep’t of Justice, EEOC Appeal No. 0720070014 (July 19, 2013).

A person is a "direct threat" if they pose a significant risk of substantial harm to the health or safety of him or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). The "direct threat" evaluation must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job. Id. If no such accommodation exists, the agency may refuse to hire an applicant. Id.

Having reviewed the record, we find that the AJ, in finding in favor of the Agency, erred in failing to address whether the Agency's blood pressure requirement was a qualification standard that was job related and consistent with business necessity and whether Complainant's failure to meet that qualification standard posed a direct threat. As these issues are crucial to determining the outcome of the case, we find that there are genuine issues of material fact in dispute.

Additionally, we find insufficient evidence to establish that an adequate individualized assessment was conducted. We find that the results of the blood pressure testing alone are insufficient to establish that there would be a high probability of substantial harm to Complainant or others. The evaluation of an applicant's unique abilities and disabilities is the crux of an individual assessment. The AJ erred in applying a blanket medical qualification without examining the specific application to Complainant.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See MD-110, 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." See Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998); see also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); and Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are unresolved issues which require further development. Therefore, judgment as a matter of law for the Agency should not have been granted. As we are remanding the matter for further development, we need not determine, at this time, whether Complainant was subjected to 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 VACATE the Agency's final order and REMAND the complaint for a hearing before an EEOC AJ, in accordance with this decision and the order below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency is directed to submit a renewed request for a hearing on Complainant's behalf, a copy of the complaint file, and a copy of this appellate decision, to the Hearing Unit of the EEOC's Memphis District Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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 (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>. Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507.

In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0124)

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 their 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

February 6, 2025

Date