



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

[REDACTED]  
Bart M.,<sup>1</sup>  
Complainant,

v.

Marco Rubio,  
Secretary,  
Department of State,  
Agency.

Appeal No. 2023002860

Hearing No. 570-2021-01166X

Agency No. DOS-0027-20

**DECISION**

On April 13, 2023, 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 March 15, 2023, 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. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

During the relevant time, Complainant was an employee of the Department of Justice's Drug Enforcement Administration (DEA) from 1998 until his retirement in 2021. Complainant was never an employee of the Department of State (hereafter Agency). However, the Agency retained authority over housing and security of all government employees assigned to the Consulate in Curacao, where Complainant was assigned during the time of events giving rise to this complaint.

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<sup>1</sup> 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.

Prior to the instant appeal, Complainant appealed the Agency's dismissal of the instant complaint in Bart M. v. Dep't of State, EEOC Appeal No. 2021001832 (June 6, 2021). In that case, this Commission reversed the Agency's dismissal for failure to state a claim, finding while not his employer, the Agency was unilaterally responsible for Complainant's housing assignment and his request for alternative/modifications to his housing as a reasonable accommodation for his asthma.<sup>2</sup> Complainant's complaint was remanded for investigation and ultimately, is on appeal herein on the merits.

In May 2018, Complainant was assigned to the DEA's Curacao Country Office, based at the United States Consulate Curacao. Complainant's reporting date at the U.S. Consulate Curacao was August 3, 2019. As a part of his assignment, Complainant and his family were provided housing through the Agency.

Prior to his arrival at his post, Complainant submitted a housing questionnaire in which he did not indicate any special needs of him or his family. However, upon learning his assigned housing was abutting a heavily-travel two-lane road with occasional traffic congestion, he petitioned for alternative housing, stating that both he and his son suffered from asthma. Thereafter the landlord immediately undertook major upgrades, including a six-foot tall masonry wall at the rear and sides of the lot to provide both a sound and pollution barrier for the home. The Agency's Management Officer at the U.S. Consulate Curacao also proposed installing portable air cleaners in each room as well as monitoring by the Agency's medical bureau.

Complainant conceded that the modifications proposed to the house could have reasonably accommodated the medical conditions of Complainant and his son. Complainant never stated he would accept the modifications or move into the home. Complainant, rather, intended to refuse to move into the house at least until his formal appeal of his housing had been adjudicated.

Complainant and his wife met with the Agency's Consul General on September 11, 2019.

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<sup>2</sup> We note in that decision, the Commission advised that if Complainant alleged that he was also discriminated against by DEA, we could join DEA as a party in this case. However, given Complainant's explicit argument to the contrary on appeal, we declined to do so. See Bart M. v. Dep't of State, EEOC Appeal No. 2021001832 (June 6, 2021).

Consul General memorialized the meeting in writing to which Complainant conceded was accurate recollection of the meeting. Consul General stated Curacao generally has good air quality, but given Complainant and his son's asthma, he expressed his "concern with the overall health impact on [Complainant] and his son ... of living anywhere in Curacao, given the proximity of the office and [Complainant son's] school to busy roads." Consul General noted that "[c]ommutes at rush hour also expose drivers and passengers to bad air" and expressed concern whether "the medical care available locally would be capable of handling a serious emergency should one arise." Complainant's position with the DEA at times required him to work outside of his office.

On September 13, 2019, Complainant met with Consul General and DEA Country Attaché, who was Complainant's Supervisor. Supervisor determined Complainant's detail in Curacao would be curtailed, noting Supervisor found Complainant's filling out the housing paperwork was not "forthright" and the Agency did not have housing which could accommodate Complainant and his son's medical conditions. At that meeting, Complainant was informed that he was being curtailed from his assignment in Curacao. Consul General stated that the Agency could not "accommodate [Complainant] and [his] family here on the island."

On September 15, 2019, Complainant's wife with Complainant copied, emailed Consul General stating "we request a reasonable accommodation to be housed away from the congested major roadway of Caracasbaaiweg." Complainant departed from Curacao on September 25, 2019.

On January 6, 2020, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of disability (asthma and his son's asthma) and reprisal for prior protected EEO activity (requesting a reasonable accommodation) when:

1. Complainant was denied reasonable accommodation regarding his housing assignment in Curaçao; and,
2. Complainant's assignment to US Consulate Curaçao was terminated on September 13, 2019.

After an 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 timely requested a hearing and after discovery, on July 11, 2022, the Agency filed Motion for Summary Judgment. The Complainant filed his timely Response followed thereafter by the Agency's Reply.

Over Complainant's objections, the assigned AJ granted the Agency's July 11, 2022, motion for a decision without a hearing and issued a decision without a hearing finding no discrimination on February 6, 2023. The AJ found Complainant failed to establish the Agency did not accommodate Complainant in his housing assignment. Although Complainant failed to follow the proper procedures for requesting a reasonable accommodation, it is undisputed that the Agency nevertheless did offer an accommodation to him, by offering to make several significant modifications to his assigned house to address his concerns with traffic-related pollution. The Agency offered portable air cleaners for every room in the home as well as involving the medical bureau to monitor Complainant's medical condition while occupying the home. The record revealed Complainant failed to establish the Agency's actions were pretext for discrimination on the basis of disability or reprisal.

Additionally the decision found, as the Agency was not Complainant's employer, the Agency had no authority over curtailing Complainant's assignment. Moreover, the record clearly revealed curtailing Complainant's assignment was initiated by DEA as Complainant was "not forthright" in his medical paperwork. Specifically, internal communications turned over in discovery confirm that the request for Complainant's curtailment originated with the DEA, and the Agency simply concurred with the request.

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. Complainant, through her attorney, filed the instant appeal.

On appeal, Complainant reiterates her arguments in her response to summary judgment before the AJ. The Agency filed an opposition, seeking this Commission uphold the findings by the AJ.

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO 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*).

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. Here, however, Complainant has failed to establish such a dispute. To the contrary, Complainant agreed many of management's accounts of events were accurate as stated.

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o) and (p). In order to establish that he was denied 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 "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002). Assuming Complainant established he was a qualified individual with a disability, the record shows the Agency did not fail to provide reasonable accommodation.

Despite Complainant's claim to the contrary, we agree that Agency management engaged in a good faith effort to provide a reasonable accommodation. Complainant conceded the emails and meetings with Agency officials were a fair memorialization of the events as they occurred. The record establishes that Agency officials engaged in an interactive process with Complainant, emailing and meeting with Complainant to understand his and his son's medical needs.

The Agency contacted the landlord who immediately undertook major upgrades, including a six-foot-tall masonry wall at the rear and sides of the lot to provide both a sound and pollution barrier for the home. The Agency's Management Officer at the U.S. Consulate Curacao also offered Complainant with the option of installing portable air cleaners in each room as well as monitoring by the Agency's medical bureau of Complainant and his son upon moving into the home.

A review of the record revealed Complainant never submitted a request for reasonable accommodation until Complainant's wife emailing requesting one after his assignment was curtailed. Either way, the Agency treated Complainant's petition for alternative housing as a reasonable accommodation request. Complainant conceded that the modifications proposed to the house could have reasonably accommodated Complainant's and his son's medical conditions. Complainant never stated he would accept the modifications or move into the home

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor. As to Complainant's claim the Agency discriminatory curtailed his detail, as discussed above, Complainant is not an employee of the Agency and the Agency had no authority over his assignment. Even if Complainant had established a *prima facie* case of disability and/or reprisal discrimination, he has failed to rebut as a pretext for discrimination the Agency's non-discriminatory explanations to his claims. The evidence in the record clearly established the DEA curtailed Complainant's assignment after discovering his medical needs could not be accommodated in Curacao itself. Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency or the Agency failed to provide a reasonable accommodation as alleged.

Accordingly, we **AFFIRM** the Agency's final order implementing the AJ's decision.

**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 (S0124)

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 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. 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

March 5, 2025  
Date