



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

[REDACTED]
Tasia C.,¹
Complainant,

v.

Todd Hunter,
Acting Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023002878

Hearing No. 470-2023-00005X

Agency No. 200J-610A4-2022-1436

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 March 16, 2023, final order concerning her 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, 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was not subjected to unlawful discrimination when her tentative job offer for the position of Food Service Worker was rescinded.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 applicant for employment for a Food Service Worker, WG-4, position at the Agency's Northern Indiana VA Health Care System in Fort Wayne, Indiana.

On January 11, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (physical) when, on January 5, 2022, her tentative job offer was rescinded.

The investigation into the complaint revealed that the duties of Food Service Workers at the Agency included placing items on patient trays as they proceed down the tray assembly line, utilizing tally guides, food production worksheets, and computer printouts to determine the number of servings when portioning meals, and maintaining established food temperatures and sanitation standards.

On November 27, 2021, the Agency tentatively offered the Food Service Worker position to Complainant, subject to a physical examination. The physical included a vision requirement, which required applicants to meet the following vision standards: near vision correctable at 13" to 16" to Jaeger 1 to 4; far vision correctable in one eye to 20/20 and to 20/40 in the other; depth perception; and ability to distinguish basic colors.

Complainant is legally blind in her right eye and has low vision in her left eye. She also has no depth perception or peripheral vision and has difficulty reading small print. As a result, she did not pass the pre-employment physical examination. Due to Complainant's failure to pass the physical examination, the Agency rescinded the tentative offer.

Complainant challenged the Agency's decision to rescind her job offer. In her affidavit, Complainant explained that while her vision has become more focused to things directly in front of her, she has adapted to the changes in her vision by being more aware of her surroundings and looking in all directions. Complainant also added that her difficulties with stairs could be managed by walking slowly and using handrails. Furthermore, Complainant indicated that she used visual aids to help with reading very small print.

Complainant expressed her belief that she would have been physically capable of performing the essential functions of the Food Service Worker position, as the job description for the position did not indicate that the position required major food preparation duties.

According to Complainant, the job duties for the Food Service Worker position simply required her to be capable of order entry, order delivery, clean up, and salad preparation, which she could do even with her limited vision.

Complainant stated that she was surprised that the Agency rescinded her tentative offer without even considering whether reasonable accommodations could be provided to her. She noted that the vacancy announcement for the position clearly indicated that individuals with disabilities could apply for the position and nothing in the announcement indicated that individuals with vision impairments were precluded from applying. Complainant emphasized that she would not have applied for the position had there been a minimum vision requirement listed in the vacancy announcement.

The Human Resources Specialist who administered the vacancy announcement stated the announcement clearly stated that applicants were required to pass a physical examination. However, he conceded that the specifics of the vision portion of the physical examination were not explicitly referenced in the announcement. The Human Resources Specialist recalled that he told Complainant that her tentative offer would be rescinded due to her failure to pass the vision portion of the physical examination.

When asked by the EEO Investigator whether the Agency could have accommodated Complainant, the Food Service System Manager stated that her supervisor asked Occupational Health to determine whether the Agency could accommodate Complainant. However, her supervisor was told that the Agency would not change the requirements for Complainant.

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 AJ. Complainant timely requested a hearing.

Over Complainant's objections, the AJ granted the Agency's January 25, 2023, motion for a decision without a hearing and issued a decision without a hearing on March 1, 2023. In the decision, the AJ found that Complainant could not meet the essential functions of the position without an accommodation. The AJ explained that there was no dispute that the vision requirement, which Complainant did not satisfy, was job related and consistent with business necessity. The AJ noted that Complainant did not allege that she was qualified and did not identify a reasonable accommodation that would permit her to meet the essential function of vision for the position.

Additionally, the AJ found that Complainant never requested a reasonable accommodation and there was no basis to deem Complainant a qualified individual.

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

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the AJ failed to fully examine the report of investigation, which she alleges supports her position that she inquired about a reasonable accommodation. She points to the affidavit from the Human Resources Specialist and asserts that the Human Resources Specialist purportedly told her that he would talk to the Chief of Staff about accommodating Complainant. Complainant asserts that the Agency ultimately never accommodated her despite being aware that she had a visual disability.

The Agency opposes the appeal and maintains that Complainant is unable to establish a claim of disability discrimination because she did not show that she was qualified for the position that she sought. According to the Agency, Complainant misrepresents the facts regarding whether the Human Resources Specialist stated that he would speak to the Chief of Staff about reasonable accommodation. The Agency argues that contrary to Complainant's assertion, the Human Resources Specialist never stated during the EEO investigation that he would talk to the Chief of Staff about accommodating Complainant.

Furthermore, the Agency contends that even assuming that the Human Resources Specialist made the statement, the statement does not support the argument that Complainant explicitly requested a reasonable accommodation. Additionally, the Agency asserts that based on the position description, being able to see sufficiently to read tray tickets, food temperatures, and written instructions is necessary from both a patient and employee safety perspective. The Agency further argues that Complainant conceded that she could not perform the duties of the job as set forth in the job description. The Agency emphasizes that Complainant did not pass the pre-employment physical, and the tentative offer was rescinded.

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, 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 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*).

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 has imposed a vision requirement for the Food Service Worker position. Applicants for the position are required to meet the following vision standards: near vision correctable at 13” to 16” to Jaeger 1 to 4; far vision correctable in one eye to 20/20 and to 20/40 in the other; depth perception; and ability to distinguish basic colors.

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 there is an issue of material fact in dispute concerning whether the Agency conducted an individualized assessment and/or established that Complainant was a direct threat or applied a blanket medical qualification without examining the specific application to Complainant.

Here, the Agency argues that the ability to see sufficiently to read tray tickets, food temperatures, and written instructions is necessary from both a patient and employee safety perspective. While the Agency's concern is legitimate regarding Complainant's ability to safely perform in the position with her visual impairment, the Agency did not consider whether Complainant would be able to perform these duties with or without accommodation. Indeed, the record reflects that the Agency summarily rescinded Complainant's tentative offer based solely on her failure to pass the vision portion of the physical examination.

The Agency also asserts that Complainant acknowledged that she could not perform the essential functions of the position when she conceded that she would not have applied for the position if she had known that there was a vision requirement. However, we do not find this to be an admission that she could not perform the essential functions of the position.

Moreover, we disagree with the AJ's determination that the undisputed record showed that vision within the established parameters was an essential function of the position. We note that the duties of Food Service Workers at the Agency included placing items on patient trays as they proceed down the tray assembly line, utilizing tally guides, food production worksheets, and computer printouts to determine the number of servings when portioning meals, and maintaining established food temperatures and sanitation standards. While the Agency and AJ both concluded that Complainant would be unable to perform these duties given her low vision, Complainant has repeatedly emphasized that she could perform these duties despite her low vision.

As nothing in the record suggests that Complainant would be unable to perform these duties with or without accommodation, we find that summary judgment was not appropriate and a hearing is necessary to determine whether Complainant was qualified for the position that she sought, and whether the Agency violated the Rehabilitation Act by failing to conduct an individualized assessment as to whether Complainant's impairment constituted a direct threat.

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 Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO 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." 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); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995). In summary, there are unresolved issues which require an assessment as to the credibility of the various agency officials and Complainant, herself. Therefore, judgment as a matter of law for the Agency should not have been granted.

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 Detroit Field 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 3, 2025

Date