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

[redacted]
Sammy R.,[1]
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 2023003263

Hearing No. 450-2020-00288X

Agency No. HS-CBP-01459-2019

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 April 12, 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, we AFFIRM the Agency's final order.

BACKGROUND

During the relevant time, Complainant worked as a Border Patrol Agent (BPA) at the Agency's Rio Grande Station facility in Rio Grande City, Texas. As a BPA, Complainant's essential functions included conducting patrols, detaining migrants, transporting them to detention facilities, and processing them. See Report of Investigation (ROI) at 230.

On October 1, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (mental) and in reprisal for prior protected EEO activity when:

[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.

1. On April 2, 2019, the Watch Commander 2 assigned Complainant to work in detainee processing despite his previous reasonable accommodation;
2. From April 2, through August 16, 2019, after Complainant's request, management required him to submit a memorandum and requested medical records; failed to engage in the interactive process, discouraged him from seeking a reasonable accommodation, and verbally denied his request not to work in detainee processing; and
3. Management's actions: (a) created a chilling effect and constituted per se reprisal; and/or (b) constituted intimidation and/or interference with his right to seek a reasonable accommodation.

The investigation into the complaint revealed that Complainant had been diagnosed with posttraumatic stress disorder (PTSD), which according to Complainant, affected his ability to process detained migrants in a confined environment. Report of Investigation (ROI) at 19. After Complainant informed management that his PTSD affected his ability to process migrants in confined environments, Watch Commander 1, who was Complainant's second-level supervisor at the time, exempted Complainant from having to perform this essential function. ROI at 204. As Complainant had voiced concern that having to provide medical documentation to substantiate his PTSD claim would affect his suitability for the BPA position, Watch Commander 1 exempted Complainant without requiring Complainant to provide any medical documentation to establish the nature of his disability and the extent of his medical restrictions. ROI at 204 Complainant was able to perform his alternate duties without any problems. This informal arrangement continued until April 2, 2019.

On April 2, 2019, Supervisory BPA, who was Complainant's first level supervisor, assigned Complainant to detainee processing to assist the Agency with the huge surge in migrant apprehensions that year. ROI at 133 and 167. Citing his informal agreement with Watch Commander 1, Complainant disputed the assignment. ROI at 23. As Watch Commander 1 was no longer the watch commander, Supervisory BPA advised Complainant to discuss the matter with Watch Commander 2. ROI at 22.

Watch Commander 2 responded to Complainant's inquiry by asking him to submit a memorandum outlining his request for an exemption from detention processing and provide medical documentation in support of the request. ROI at 135. Watch Commander 2 specified to Complainant that the memorandum needed to explain why he needed an accommodation to exempt him from performing processing duties. ROI at 135. Watch Commander 2 explained to Complainant that, after the request was received, it would be forwarded to the Deputy Patrol Agent in Charge (DPAIC) or the Patrol Agent in Charge (PAIC), and there was the possibility that Complainant may need to submit medical documentation, such as a physician's note, in support of his reasonable accommodation request. ROI at 135.

As Complainant had concerns that Watch Commander 2 did not have a right to request his medical records, he submitted the requested memorandum to Watch Commander 2 on April 2, 2019, without any accompanying medical documentation and took leave for the remainder of the day to avoid having to perform detention processing duties. Watch Commander 2, however, emphasized that he made no such request and only told Complainant that he may need to provide medical documentation, such as a physician's note, at some point, to support his request. ROI at 136. Watch Commander 2 also recalled that after Complainant aggressively objected to having to provide medical documentation, he informed Complainant that as a management official, it was his responsibility to treat all bargaining unit members fairly and in the same manner so that there would be no accusations of preferential treatment in assignments. ROI at 140.

Watch Commander 2 averred that he then instructed supervisors to assign Complainant to conduct record checks or assign him to transportation duties in lieu of processing responsibilities until Watch Commander 2 received guidance from his superiors. ROI at 135. On April 11, 2019, during a meeting with management, Complainant, and his union representative, Complainant retracted his request and stated that he could perform any duties. ROI at 137. Watch Commander 2 stated that, even after Complainant rescinded his request, he instructed the supervisors under him to continue to assign Complainant to roles that supported processing duties, such as conducting record checks. ROI at 138.

On May 15, 2019, Complainant initiated EEO counseling and renewed his request for reasonable accommodation. ROI at 249. Thereafter, the Agency formally explained the reasonable accommodation process to him and provided him with a form to complete to facilitate the process. ROI at 244-250. On July 11, 2019, Complainant's attorney requested clarification as to what medical documentation was needed to process Complainant's request for reasonable accommodation. ROI at 253. On July 22, 2019, the Agency's EEO Specialist responded to the inquiry and provided Complainant's attorney with a document for Complainant's physician to complete. ROI at 253. While the Agency was awaiting receipt of Complainant's medical documentation, the Agency worked with Complainant to find ways to accommodate him, such a virtual processing, processing in a smaller room, or reassigning him to the McAllen Border Patrol Station, which had a thick barrier to separate Complainant from the detainees. ROI at 195-196.

On August 16, 2019, Complainant's attorney asked the Agency to place his request for reasonable accommodation on hold pending his transfer to the Brackettville Border Patrol Station. ROI at 256. Complainant transfer became effective on August 17, 2019.[2] ROI at 22. On August 26, 2019, the Agency informed Complainant's attorney that it was closing Complainant's request for reasonable accommodation due to Complainant's transfer and informed Complainant's attorney that Complainant could request reasonable accommodation at his new station if needed. ROI at 256. Complainant ultimately did not renew his request.

[2] It does not appear that Complainant's transfer was related to his request for reasonable accommodation.

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. Both parties then submitted motions for a decision without a hearing, and their respective oppositions. Over Complainant's objections, the AJ adopted the Agency's motion and issued a decision without a hearing in favor of the Agency on March 23, 2023.

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 then filed the instant appeal arguing, in relevant part, that: 1) the Agency violated the Rehabilitation Act when it rescinded Complainant's existing accommodation; 2) failed to properly process his requests for accommodations in 2019; and 3) threatened him for requesting accommodation.

ANALYSIS AND FINDINGS

Standard of Review

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*).

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. Here, however, Complainant has failed to establish such a dispute. Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable factfinder could not find in Complainant's favor.

Reasonable Accommodation - Claims 1 and 2[3]

An agency must make reasonable accommodation for the known physical and mental limitations of a qualified individual with a disability unless it can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), 1630.2(p).

[3] Regarding claim 2, we will discuss Complainant's allegation that he was discouraged from seeking a reasonable accommodation in the section on retaliatory harassment.

A qualified individual with a disability is an "individual with a disability" who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desires. 29 C.F.R. § 1630.2(n). A function may be essential, for example, because the reason the position exists is to perform that function or there are a limited number of employees available among whom the performance of that job function can be distributed. Id. at § 1630.2(n)(2). Evidence of whether a particular function is essential includes the employer's judgment as to which functions are essential; written job descriptions; and the amount of time spent on performing that function. Id. at § I630.2(n)(3).

The complainant has the initial responsibility of showing that a suggested accommodation is "reasonable" (i.e., that is generally plausible in the job being performed by the individual). See U.S. Airways. Inc. v. Barnett, 535 U.S. 391 (2002), EEOC Enforcement Guidance No. 915.002. While this is not a high burden for the complainant, it is an initial plausibility threshold that the complainant must meet.

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the disabled individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See EEOC Enforcement Guidance No. 915.002, see also, Abeijon v. Dep't of Homeland Sec., EEOC Appeal No. 0120080156 (Aug. 8, 2012). Protected individuals are entitled to reasonable accommodation, but they are not necessarily entitled to their accommodation of choice. Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994). Improper termination of the interactive process constitutes an improper denial of a reasonable accommodation. See Harvey G. v. Dep't of the Interior, EEOC Appeal Nos. 0120132052 & 0120150844 (Feb. 4, 2016).

Here, we find that Complainant was informally accommodated for a period time, but when the Agency requested medical documentation to substantiate his claimed need for accommodation, Complainant failed to provide the requested documentation. We find that the break down in the interactive process was caused by Complainant's failure to provide the requested medical documentation. As the breakdown in the interactive process was due to Complainant's failure, we find that he has not demonstrated that the Agency unlawfully failed to provide him with an accommodation. Furthermore, given that Complainant's disability was not obvious, we find that the Agency did not act in a discriminatory manner when it required him to submit a memorandum and informed him that medical documentation would likely be needed to substantiate his need for accommodation. See Martin v. U.S. Postal Serv., EEOC Appeal No. 0120100977 (July 29, 2011) (finding that when an individual's disability or need for reasonable accommodation is not obvious, and the individual fails to provide reasonable documentation requested by the employer, the employer will not be held liable for failure to provide the requested accommodation); see also Hollingsworth v. Dep't of Com., EEOC Appeal No. 0120100436 (Jan. 31, 2013) (finding that

agency did not act in discriminatory manner when it requested medical documentation to substantiate informal accommodations that had been previously given).

To the extent that Complainant alleges that the Agency improperly processed his May 15, 2019, request for reasonable accommodation,[4] we disagree, as the probative record shows that the Agency attempted to find ways to accommodate Complainant despite Complainant's failure to provide relevant medical documentation. Ultimately, the Agency's attempts to accommodate Complainant were thwarted by his voluntary transfer to another station. Considering the facts in this case, we find that the preponderance of the evidence fails to corroborate Complainant's allegations of discrimination under the Rehabilitation Act.

Disparate Treatment

A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). For Complainant to prevail, they must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the Agency to articulate a legitimate, non-discriminatory reason for its actions. See Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Even if we assume arguendo that Complainant established a prima facie case of disability and reprisal discrimination, the Agency articulated legitimate nondiscriminatory reasons for its actions, as discussed above. We find that Complainant failed to show that the Agency's articulated legitimate, nondiscriminatory reasons were pretext for discrimination. Moreover, we find that Complainant failed to show that discriminatory animus was involved in this case as the record persuasively shows that management took every step possible to accommodate Complainant in good faith but was ultimately thwarted by Complainant's transfer and repeated refusal to provide relevant medical documentation to substantiate his requests for reasonable accommodation.

Retaliatory Harassment - Claim 3

To prevail on his claim of retaliatory harassment, Complainant must show that they were subjected to conduct sufficient to dissuade a "reasonable person" from making or supporting a charge of discrimination.

[4] We note that the parties disagree as to whether Complainant properly raised this claim. For the purposes of our analysis, we find that even if Complainant had properly raised it, he still cannot prevail.

See Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, § II(B)(3) & n. 137 (Aug. 25, 2016). A claim of harassment on the basis of reprisal can be actionable "even if it is not severe or pervasive enough to alter the terms and conditions of employment. If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation." EEOC Enforcement Guidance on Retaliation and Related Issues, at § II-B-3. Nonetheless, Complainant must establish a nexus between the allegedly discriminatory action(s) and having engaged in protected activity for a claim to be actionable.

Here, we find that Complainant did not provide preponderant evidence that he was harassed because of his protected classes. While Complainant argues, on appeal, that the Agency intimidated him into recanting by threatening a fitness for duty evaluation, a review of evidence does not demonstrate Complainant proved such intimidation. Rather, the evidence demonstrates that Complainant was aware that his requested job function exclusion could lead to such a request. This is why he requested a verbal, undocumented modification prior to April 2019. Furthermore, we find no persuasive evidence that Complainant was, at any time, discouraged from filing a request for reasonable accommodation. At all times, the duty remains with Complainant to prove discrimination. We find that he has failed to do so here.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order.

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:

Carlton M. Hadden, Director
Office of Federal Operations

January 29, 2024
Date