



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

[REDACTED]
Elias M.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023003643

Agency No. 200H-608-2022-145406

DECISION

On June 9, 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 May 9, 2023, final decision concerning his 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 AFFIRMS the Agency's final decision.

ISSUE PRESENTED

The issue is whether the Agency properly issued a final decision (FAD) concluding that Complainant was not subjected to discrimination regarding disability accommodation and termination based on his race (African-American) and disability (physical).

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 worked as a Health Professional Trainee, Social Work Intern at the Agency's Social Work Service (SWS), Manchester VA Medical Center (VAMC) in Manchester, New Hampshire. Complainant is African-American. He has inflammatory arthritis (gout), which affects his ability to walk, stand, and carry out other unspecified activities of daily living (ADLs). Report of Investigation (ROI) at 62-5.

Complainant was a student at Simmons University, a neighboring university to the Agency, when he began working in his Social Work Intern position. The Agency paid Complainant a stipend for a certain number of hours worked after which he was converted to "without compensation" status during his internship. Complainant performed his internship duties at the Manchester VAMC, was supervised by Social Work Services employees there, and used government-furnished equipment to complete his duties during his internship. Therefore, although Complainant was not considered an "employee" of the Agency, he was a "de facto" employee because the Agency controlled the "means and manner" of his performance while he was a Social Work Intern.

Complainant's supervisor (Supervisor 1 [White/Caucasian]) was a Social Work Supervisor/Caregiver Support Program Manager. Complainant's second-line supervisor (Supervisor 2 [Non-Hispanic]) was a HUD-VASH (undefined acronyms) Case Manager. Supervisor 2 has no direct supervisory relationship with Complainant; however, she oversaw the recruitment, onboarding, training, and support of students at the facility. Both Supervisors 1 and 2 were aware of Complainant's protected bases. ROI at 208-11 and 239-41.

A named individual was the Chief of Social Work (Chief [Caucasian]). Chief had no supervisory relationship to Complainant; however, she was part of the interview panel that selected Complainant for his internship. Chief was unaware of Complainant's protected bases. She became aware of an issue with Complainant's foot in April of 2022. ROI at 226-29. The Director of Field Education/Associate Professor of Practice at Complainant's university (Director) is Complainant's identified witness. She was indirectly supervising Complainant's internship experience. She was aware of Complainant's protected bases. ROI at 195-96.

On April 11, 2022, Complainant initiated EEO contact. On July 19, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of race (African-American) and disability (physical) when:

1. From September 2021 through April 11, 2022, Complainant was told that the "Americans with Disability Act" (ADA) did not apply to him, and his requests for reasonable accommodation were "ignored" and, therefore, effectively "denied;" and
2. On April 11, 2022, Complainant was terminated from his social work internship/without compensation appointment.

The Agency conducted an investigation into the complaint. The investigation revealed that according to Complainant, he was not given the opportunity to discuss reasonable accommodations. He alleged that the reasonable accommodation process began and ended with a meeting with Supervisor 1. Complainant alleged that management refused to participate in the process, and they did not follow policy or procedure. Complainant alleged that during a ZOOM meeting with Supervisor 1, she reported that since Complainant was not considered an employee, accommodations under the ADA did not apply. According to Complainant, Supervisor 1 provided an example of the accommodation process if Complainant was considered an employee at the meeting. Complainant believed that his race was the reason for the alleged incident. ROI at 65-7. Director did not directly witness the alleged incident. Her department was informed by Supervisor 1 that Complainant did not qualify for any accommodations. ROI at 197.

According to Supervisor 1, Complainant did not, at any time, request a reasonable accommodation. She denied informing Complainant that ADA did not apply to him. Supervisor 1 stated that during a discussion on April 5, 2022, she offered options to support Complainant's completion of his internship via use of a first-floor office and elevating his foot at his desk. According to Supervisor 1, Complainant requested telework, at which time she informed Complainant that she would look into the option with Office of Academic Affiliations (OAA). Supervisor 1 stated that the OAA advised her that Complainant was not eligible to telework as a student intern. Supervisor 1 denied discriminating against Complainant based on his race or disability. ROI at 211-13.

On April 11, 2022, the Agency decided to terminate Complainant's internship. According to Complainant, he was informed that the reason for his termination was because he was unable to come to the medical center. This, he alleged, came after he was informed that the accommodation process did not apply to him. Complainant named another Social Work Intern (Coworker [White; disability status unavailable]) as a similarly situated individual who was allowed to work remotely.

Complainant stated that Coworker's laptop was shipped to him, and he was offered to forego the remaining hours of his internship to assist with a family emergency. Complainant believed that his race was the reason for the alleged incident because other white students in similar situations were treated differently. Complainant also believed that his disability was the reason for the incident because it was outlined in the termination letter. ROI at 67-8 and 153.

Complainant's witness, Director, asserted that Complainant was terminated because his request to work from home could not be accommodated as he did not qualify for accommodations. According to Director, when Complainant offered to come into the office against doctor advice, management still terminated him, then cited performance concerns. ROI at 198-99.

Supervisor 1 asserted that Complainant was dismissed from his internship after an in-depth, collective discussion between the OAA, Social Work Student Liaison, Chief, and Supervisor 2. According to Supervisor 1, she was involved in the conversation, but ultimately, she did not make the final decision. Supervisor 1 asserted that she was unaware of Coworker's situation. She also asserted that Complainant's race and disability were not factors in her actions, and that she did not discriminate against Complainant based on race or disability. ROI at 213-14.

Chief provided supporting statements, acknowledging that this was a challenging team decision. According to her, Complainant was dismissed from his internship based on performance issues with passive engagement in remediation of the behaviors. She alleged that Complainant also did not engage in identification of a means to complete his internship within an appropriate timeline after reporting an injury. She asserted that accommodations and alternative plans to complete his internship were offered, but Complainant only requested telework, which was not allowable in his situation. Chief stated that multiple meetings and discussions were had prior to the final dismissal decision. Chief also explained that Coworker and Complainant had different supervisors, were in different programs, and attended different academic institutions. According to her, Coworker was not authorized to work remotely during his internship, and the number of hours an intern must complete is determined and satisfied by the academic institution. Chief asserted that Complainant's race and disability were not factors in her actions, and she did not discriminate against Complainant based on race or disability. ROI at 229-30.

Supervisor 2 also provided supporting statements, asserting that when students are at risk for termination, a team discussion takes place with the OAA, the student's supervision, Graduate Education Coordinator, and Chief. She stated that a decision is rendered after careful deliberation with the affiliate school and in accordance with the facility's grievance and remediation policy. According to her, ongoing documented performance issues were the driving factor in Complainant's dismissal. She added that Complainant indicated that he was unable to come into the medical center to complete his internship, despite attempts to provide on-site accommodations. Supervisor 2 explained that per the Office of Academic Affiliations, students are not permitted to telework. Supervisor 2 also asserted that Coworker was not permitted to telework, did not have his laptop shipped to his location, and the forgiveness of hours is between a student and their educational institution. She stated that Complainant's race and disability were not factors in her actions, and she did not discriminate against Complainant based on race or disability. ROI at 241-42 and 248.

At the conclusion of the 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). In accordance with Complainant's request, on May 9, 2023, the Agency issued a final decision (FAD) pursuant to 29 C.F.R. § 1614.110(b). The Agency concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, among other things, Complainant contests the FAD, reiterating his allegations. The crux of his contention is that the Agency failed to properly process his reasonable accommodation request; that management demonstrated a lack of knowledge of his accommodation needs, and failed to engage in the interactive process in good faith. Without providing supporting evidence, Complainant also accuses the Agency of disclosing his medical conditions and accommodation-related details to parties unauthorized to access such information.

The Agency did not submit an appeal brief.

STANDARD OF REVIEW

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”).

ANALYSIS

Failure to Accommodate (Claim 1)

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 she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she 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).

The term “qualified,” with respect to an individual with a disability, means that the individual 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).

Once an employer becomes aware of the need for an accommodation of an employee’s disability, the employer may engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. See 29 C.F.R. § 1630.2(o)(3) (2019).

An Agency may choose among reasonable accommodations as long as the chosen accommodation is effective, and while the preference of the individual with a disability should be given primary consideration, an Agency has the ultimate discretion to choose between effective accommodations. See Enforcement Guidance, supra, at Q. 9.

Here, Complainant had inflammatory arthritis, a permanent physical disability of which Supervisors 1 and 2 were aware. Complainant was able to perform his job functions with or without accommodations. In sum, it appears Complainant is an individual with disability who is qualified for his Social Work Intern position. See ROI at 63-4, 209, 227, and 240.

The record is devoid of any evidence to corroborate Complainant's appeal allegations and assertions that the Agency demonstrated a lack of knowledge of his needs or that they failed to accommodate him. The record reflects that on September 22, 2021 Supervisor 1 encouraged Complainant to work with his school's office of accommodations as needed to support self-identified learning needs, as he had no official reasonable accommodation or accommodation plan in place per his report. Complainant never identified a need for an accommodation for work at the Agency. ROI at 295.

Complainant also reported "current barriers" related to delays from his medical provider to start official accommodations process with his school. Supervisor 1 inquired about what interventions would be supportive in the interim while waiting on school documents, and encouraged Complainant to keep open communication with Supervisor 1 regarding what was needed to support his learning style. Complainant did not identify interim accommodations he would like.

Yet, contrary to Complainant's appeal assertions, the record reflects that on April 5, 2022, following his injury, Complainant requested telework as a possible accommodation. In response, Supervisor 1 informed Complainant that management would review the request with the Office of Academic Affiliations (OAA). OAA advised that Complainant was not permitted to telework as a Social Work Intern per "program guidance." See ROI at 369 for OAA Telehealth Guidance specifically related to telework within the Office of Academic Affiliations policy.

Both Supervisor 1 and Chief also stated that the same day Complainant made his accommodation request, the Agency offered Complainant an alternate accommodation to telework, including assigning him to a first floor office to limit walking and allowing him to elevate the injured foot on his desk while working. Complainant himself asserted that after becoming aware of his foot injury, the Agency offered to provide him with "mobility aids," including a "scooter" or a wheelchair, in addition to relocating his office to the first floor. ROI at 146-47, 212, and 228-29. Even when Complainant informed management that the Dragon software he had unofficially installed his personal computer did not work well in the first floor office, Supervisor 1 offered to have the software appropriately installed on Computer's Agency-issued computer. ROI at 274 and 299.

Importantly, Complainant did not provide, and the record does not contain any evidence to support his appeal accusation that management disclosed his medical conditions and accommodation-related details to parties unauthorized to access such information. Nor did he identify any Agency policy that was applicable to him as a student intern with which the Agency inconsistently failed to comply. Supervisor 1 also denied informing Complainant that the ADA did not "apply to" him for any reason. Therefore, Complainant did not demonstrate that the Agency failed to accommodate him; and his claims fail.

Disparate treatment based on race and disability (Claim 2)

The Commission has adopted the burden-shifting framework for analyzing claims of discrimination outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To establish a prima facie case of disparate treatment, a complainant must show that: (1) they are a member of a protected class; (2) they were subjected to an adverse employment action concerning a term, condition, or privilege of employment; and (3) they were treated differently than similarly situated employees outside their protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. See Nanette T. v. U.S. Postal Serv., EEOC Appeal No. 0120180164 (March 20, 2019); McCreary v. Dep't of Def., EEOC Appeal No. 0120070257 (Apr. 14, 2008); Saenz v. Dep't of the Navy, EEOC Request No. 05950927 (Jan. 9, 1998).

The Commission applies the McDonnell Douglas analysis to complaints involving disability claims. Kenneth M. v. Dep't of Justice, EEOC Appeal No. 2022004767 (Nov. 17, 2022).

To establish a prima facie case of disparate treatment discrimination based on disability, a complainant generally must prove the following elements: (1) they are an individual with a disability as defined in 29 C.F.R. §§ 1614.203(a) and 1630.2(g); (2) they are "qualified" as defined in 29 C.F.R. §§1614.203(a) and 1630.2(m); (3) the agency took an adverse action against them; and (4) there was a causal relationship between their disability and the agency's actions. See Annamarie F. v. Department of the Air Force, EEOC Appeal No. 2021004539, (Aug. 17, 2023).

Once Complainant has established a prima facie case, the burden of production then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, the burden reverts back to Complainant to demonstrate by a preponderance of the evidence that the Agency's reason(s) for its action was a pretext for discrimination. At all times, Complainant retains the burden of persuasion, and it is her obligation to show by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Center v. Hicks. 509 U.S. 502 (1993).

For the following reasons, we find that Complainant failed to establish a prima facie case of discrimination based on race and disability.

Complainant established a prima facie case of discrimination to the extent that he is African-American. Complainant also established that he is an individual with disability because Complainant had permanent physical disability of which some management officials were aware. Complainant was able to perform his job functions with or without reasonable accommodation.

However, Complainant did not identify any other similarly situated employees outside of his protected classes who were treated more favorably. Therefore, Complainant has not established a prima facie case of disparate treatment based on his protected bases. The Agency has also provided legitimate nondiscriminatory reasons for the termination of Complainant's internship; and we find no persuasive proof of pretext.

Regarding Claim 2, Chief stated that Complainant was dismissed from his internship based on persistent performance issues, including the failure to complete numerous assignments related to his field work. According to Chief, Complainant also failed to explain how he planned to complete his internship within an appropriate timeline after refusing to report to work following his injury.

Instead of reporting to work, Complainant insisted on teleworking, which was neither allowed nor conducive to his status as a student intern. Chief noted that on multiple occasions, Complainant met with Supervisor 1 and the university affiliate to discuss ways to improve his performance through learning style, workload management, and training; however, Complainant's performance issues persisted. ROI at 213, 228-29, 242, 270, and 275-76.

The record includes Complainant's social work student internship agreements, documented hours, supervision feedback, dismissal letter, management concerns, and a grievance and remediation policy that support Chief's explanations. See ROI at 295-302 for the complete "supervision and feedback timeline." See also ROI at 296 reflecting that Supervisor 1 discussed issue with timeliness of process recordings with Complainant.

Supervisor 1 also provided hard copy of the Fall Evaluation and discussed the following topics: time management concerns, simplifying organization strategies, working in CPRS directly for note taking versus word docs, concern for timeliness of process recordings, and strengthening documentation. See ROI at 303 for Complainant's dismissal letter reflecting that his termination was due to his not going to the Medical Center to complete his internship hours.

We next turn to Complainant to show pretext. The Commission has stated that proof of pretext includes discriminatory statements or past personal treatment attributable to the named managers, unequal application of agency policy, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record. See Ricardo K . v. Dep't of Veterans Affairs, EEOC Appeal No. 2019004809 (date/year) (citing January B. v. Dep't of the Navy, EEOC Appeal No. 0120142872 (Dec. 18, 2015) (Citing Mellissa F. v. U.S. Postal Serv., EEOC Appeal No. 0120141697 (Nov. 12, 2015))).

Here, Complainant failed to show pretext because he failed to establish a link between the termination of his Social Work Intern position and either his race or his disability. Nor did he dispute management's explanations or demonstrate that their actions were motivated by discriminatory animus.

For example, Complainant argued that the Agency did not terminate the internship of his identified comparator, Coworker, who he alleged was allowed to telework. ROI at 67-8 and 153. However, Complainant did not dispute Chief's explanation that Complainant and Coworker had different supervisors, were assigned to different programs, and attended different universities.

Chief also explained that the fact that Complainant and Coworker attended different universities was significant because the academic institution a Social Work Intern attended determined the number of hours they must complete for the internship.

Therefore, Coworker is not a proper comparator because Complainant and Coworker were not similarly situated. For comparators to be proper, they must be similarly situated, meaning "a complainant must show that all relevant aspects of the comparator's work situation were nearly identical to [his] own." Rivero v. Donahoe, EEOC Doc. 0120082675 (Mar. 23, 2011). Moreover, contrary to Complainant's argument, Chief and Supervisor 2 also noted that Coworker was not allowed to telework during his internship. ROI at 235 and 248.

We also note Director's belief that Complainant's disability may have factored into the decision to terminate his internship because she was unaware of Complainant's performance issues. However, she provided no evidence to support her belief. Nor did Director dispute management's explanations for Complainant's unaddressed performance issues and his repeated failure to complete assignments despite meetings with Complainant, Supervisor 1, and Affiliate to address those issues. See ROI at 198, 270, 276, and 299.

We further note that Complainant failed to address performance issues of which he was made aware; and he did not go to the Medical Center to complete his internship.

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 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:



Carlton M. Hadden, Director
Office of Federal Operations

January 8, 2025
Date