



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

[REDACTED]
Vickey S.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 2023005008

Hearing No. 480-2022-00410X

Agency No. PE-FY21-116

DECISION

On September 7, 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 August 9, 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, the Commission AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the AJ's decision that Complainant did not establish that she was denied a reasonable accommodation is supported by substantial evidence.

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 Secondary General Education Teacher at the Agency's Iwakuni Middle School facility in Iwakuni, Japan.

On October 20, 2021, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (physical) when:

1. The Agency failed to provide Complainant with a reasonable accommodation for her disability since July 15, 2021 by not assigning Complainant to the DoDEA Virtual School (DVS) for the school year 2021-2022.

Complainant described her disability as "multiple chemical/fragrance sensitivity induced Asthma/Allergy and Upper Airway Cough Syndrome (uncontrolled coughing)," which requires her to avoid chemical and fragrance odors. See Report of Investigation (ROI) at 319. In her Reasonable Accommodation request, she stated that she needed to avoid "noxious allergens from being exposed to fumes from sharpies, markers, adhesives, cleaning product fragrance, hand sanitizer fragrance, perfume, cologne, hair product fragrances, etc." See ROI at 434. Due to the Covid-19 pandemic, Complainant was temporarily detailed to the DoDEA Virtual School (DVS) from March 2020 through the end of the school year in June 2021. See ROI at 434.

On July 10, 2021, Complainant submitted a Reasonable Accommodation request seeking reassignment to a position at the DVS or the DoDEA Virtual High School (DVHS) for the upcoming 2021-2022 school year. See ROI at 49-51. Complainant's request was denied due to the fact that requests for placement at the DVS or the DVHS "far exceeded the available positions." See ROI at 696. Following the denial, the Agency engaged in the interactive process with Complainant to determine what accommodations could be made to permit Complainant to teach in the classroom. Ultimately, the Agency provided Complainant with a number of accommodations, including a larger classroom with three large windows next to Complainant's desk; control over ventilation and thermostat for Complainant; a dehumidifier; coordinating with base facilities to deal with sewer odors and to ensure that the Japanese-speaking staff was aware of the need for an alternate classroom cleaning and maintenance schedule (so they cleaned after Complainant's duty day when Complainant was no longer on site); fragrance-free cleaning supplies; establishment of a fragrance-free zone through posted signs and announcements; providing KN-95 masks for Complainant; and allowing

Complainant to attend regularly-scheduled staff meetings and parent meetings virtually via Microsoft Teams. See Hr'g Tr. at 79-83; 147-49; 169-71; 184-87; 196-201. Complainant testified, however, that in spite of these accommodations, she continued to struggle due to issues with micro dust or particulate matter in the air, explaining that when there are high concentrations of it, over 60 on the air quality index, she struggled to breathe and felt dizzy and uncoordinated. See Hr'g Tr. at 73. She stated that there were many days when she felt "overwhelmed with fragrances" because the accommodations provided were not effective, forcing her to take leave multiple times. See Hr'g Tr. at 75. She noted that the air quality in Japan is unpredictable and that on bad days, she is affected even when she is indoors. See Hr'g Tr. at 151-53. Complainant and two witnesses testified that the only way for Complainant to effectively avoid triggers to her condition was to leave the environment with the triggers. See Hr'g Tr. at 12-16; 20; 36-37; 49-50; 121-23.

The Branch Chief for Disability and Affirmative Employment (Branch Chief) testified that ultimately, the Agency offered to reassign Complainant as a reasonable accommodation of last resort because Complainant had reported that she was struggling in her position but that the Agency had "tried to do everything that [it] could think of to accommodate her in her school." See Hr'g Tr. at 175-76. He explained that reassignments can only go one way, i.e. that they can only assign people from wherever the person is located to the U.S. but that they cannot assign someone from Europe to Japan or vice versa. See Hr'g Tr. at 179-80. He further stated that the number of students at the virtual school shrank from year to year so the number of teaching positions also decreased from year to year and there were always more qualified individuals with a disability who wanted to be placed at the virtual school than there were openings so many people could not be placed at the virtual school. See Hr'g Tr. at 180. The Agency offered Complainant reassignment to an available position for which she was qualified in the United States but Complainant declined the reassignment. See Hr'g Tr. at 176; ROI at 480-81. After Complainant declined reassignment, the Agency continued to try to work with Complainant to accommodate her in the classroom.

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 Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on May 3 and 4, 2023, and issued a decision on July 31, 2023. The AJ concluded that Complainant was not a qualified individual with a disability because the evidence indicated that Complainant was not able to perform the essential

functions of her position and that the Agency fulfilled its obligations under the Rehabilitation Act by engaging in the interactive process in good faith and offering Complainant a reassignment as an accommodation of last resort, which Complainant declined. 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.

Complainant appealed.

CONTENTIONS ON APPEAL

On appeal, Complainant disagrees with the AJ's conclusions, insisting that the Agency unreasonably delayed in providing an accommodation and that the accommodations were ineffective and the Agency should have been required to provide her with reassignment.

In response, the Agency argues that the AJ correctly found that the Agency fulfilled its obligations under the Rehabilitation Act by engaging in the interactive process and attempting to accommodate Complainant in the classroom and then by offering Complainant reassignment as an accommodation of last resort but that Complainant effectively abandoned the interactive process when she declined the offer of reassignment.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

ANALYSIS

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 (2012) (as amended) requires that an Agency make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the Agency can demonstrate that doing so would impose an undue hardship. 29 C.F.R. § 1630.9(a) (2017); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance) (revised Oct. 17, 2002). 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.

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 a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See, e.g., Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016).

Complainant initially assigns error to the AJ for finding that the Agency did not unreasonably delay in providing her with her requested accommodations such as purchasing various equipment including an air purifier for Complainant's classroom. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay; (2) the length of the delay; (3) how much the individual with a disability and the agency each contributed to the delay; (4) what the agency was doing during the delay; and (5) whether the required accommodation was simple or complex to provide. See Yessenia H. v. Dep't of Vet. Affs., EEOC Appeal No. 0720070027 (Oct. 13, 2015).

The AJ found that the Administrative Officer at the Iwakuni complex testified credibly that the delay in purchasing the air purifier was due to a lack of funding because the school budget ran out of funds at the time. See Hr'g Tr. at 187-88.

The AJ concluded that the Agency provided adequate justification to explain any minor delays in the process, noting that any delays were due to things like a lack of funding or school not being in session. We find that the AJ's conclusion is supported by substantial evidence in the record and contrary to Complainant's argument on appeal, the mere fact that Complainant apparently disagrees with the conclusions the AJ drew from the evidence, that is not sufficient to establish that the AJ committed reversible error. See Genny L. v. Dep't of the Treasury, EEOC Appeal No. 2023000402 (June 13, 2024).

We agree with the AJ that the evidence in the record does not support Complainant's assertion that the Agency violated the Rehabilitation Act. The AJ concluded that Complainant was not a qualified individual with a disability because the evidence in the record indicated that Complainant could not perform the essential function of teaching in the classroom even with the provided accommodations because there were numerous occasions when her conditions would be triggered, requiring Complainant to leave the area. In so doing, the AJ noted that the Commission has held that a request for an entirely fragrance-free environment was not a reasonable request for an accommodation and would have imposed an undue hardship on an agency. See Roberts v. Dep't of Transp., EEOC Appeal No. 01970727 (Sept. 15, 2000) (request for reconsideration denied in EEOC Request No. 05A100663 (July 11, 2002)). We find that the AJ's conclusion is supported by the evidence in the record. In particular, we note that Complainant herself acknowledged that she has become increasingly sensitive to micro dust particles in the air in general and that on bad air-quality days, she is affected wherever she is. We further note that the air quality in Japan is not something within the Agency's control. In addition, Complainant admitted that her health has become so bad that she can no longer teach in the classroom setting at all. See Hr'g Tr. at 151-54.

Finally, we agree with the AJ that Complainant did not establish that the Agency violated the Rehabilitation Act because it offered her reassignment to positions back in the U.S. but Complainant declined the reassignment because such positions would not provide her with the overseas living allowance. While it is clear that Complainant would prefer only a position teaching at either the DVS or the DVHS, the AJ found that the Agency officials credibly testified that there were no available positions at the virtual school and that there are always many more applicants for such positions than there are openings. The fact that the Agency did not offer Complainant her preferred reassignment does not establish a violation of the Rehabilitation Act. It is well established that a complainant is not entitled to the accommodation of her choice.

See e.g., Lydia W. v. U.S. Postal Serv., EEOC Appeal No. 0120162131 (July 20, 2018) (stating that even if the complainant were a qualified individual with a disability, she would only be entitled to an effective accommodation, not the accommodation of her choice); Casteneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (1994) (stating complainants are not necessarily entitled to the accommodation of their choice, but to a reasonable accommodation). Under the circumstances presented herein, we find that the AJ's conclusion that Complainant did not establish that the Agency violated the Rehabilitation Act when it denied her a position at the virtual school for the 2021-2022 school year is reasonable and supported by substantial evidence in the record.

While it is clear that Complainant disagrees with the AJ's credibility findings and conclusions drawn from the evidence in the record, that is not sufficient grounds to overturn an AJ's decision. See Zetta B. v. Dep't of Agric., EEOC Appeal No. 2020003201 (Sept. 2, 2021) (noting that the substantial evidence standard is a low threshold). Upon our review of the record, we find that the AJ's conclusion that Complainant did not establish that the Agency violated the Rehabilitation Act is reasonable and supported by substantial evidence in the record and therefore must be affirmed.

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 finding that Complainant did not establish that she was subjected to discrimination as alleged.

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

November 25, 2024

Date