



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

[REDACTED]
Clelia W.,¹
Complainant,

v.

Pete Hegseth,
Secretary,
Department of Defense
(Department of Defense Education Activity),
Agency.

Appeal No. 2023005027

Hearing No. 480-2023-00176X

Agency No. PE-FY22-257

DECISION

On September 8, 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 Agency correctly issued summary judgment finding that the Agency did not violate the Rehabilitation Act by denying her reassignment as a reasonable accommodation.

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 Social Studies Teacher at the Agency's Iwakuni Middle School facility in Marine Corps Air Station, Iwakuni, Japan.

On October 17, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (asthma, fragrance and chemical sensitivity) and reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:

1. the Agency failed to provide Complainant with a reasonable accommodation for her disability by not assigning her to a permanent position with the DoDEA Virtual High School (DVHS);
2. the Agency subjected Complainant to disparate treatment based on her disability and reprisal when in August 2022, the DMEO Chief, Disability, Diversion, and Inclusion Branch, allegedly interfered with the selection process for a permanent 0330 Secondary General Science/0331 Secondary Biology position with DVHS at Quantico, VA under vacancy announcement # DE-11589465-22-TAE, to which she was referred but not interviewed.²

Complainant described her disability as "fragrance and particulate matter hypersensitivity, multiple chemical allergy, upper airway cough syndrome, asthma, coughing." See Report of Investigation (ROI) at 620. She stated that she has to avoid volatile organic compound chemical and fragrance odors, or she gags and coughs uncontrollably. See ROI at 620. She asserted that she cannot perform the essential functions of her job when she cannot breathe properly but that with accommodations, she has managed to perform her job on days when they do not have episodes of PM 2.5 micro-dust pollution but that she has suffered when exposed to asthma triggers. See ROI at 621.

On July 30, 2022, Complainant emailed the Chief of the Disability, Diversity & Inclusion Branch (Branch Chief) seeking to be reassigned to a position at the DVHS as a reasonable accommodation for her disabilities. See ROI at 114.

² In her opposition to the Agency's motion for summary judgment and again on appeal, Complainant stated that she was withdrawing claim 2 and moving forward only with claim 1, her denial of reasonable accommodation claim. This decision will therefore only address claim 1.

In response, the Branch Chief told Complainant that in order to be considered for reassignment, she would need to submit updated medical documentation with a statement from her physician stating that Complainant was no longer capable of teaching in her brick-and-mortar school due to her disabilities. See ROI at 111. Complainant submitted medical documentation from her physician dated August 2, 2022, which stated that “working in a remote virtual setting and not being exposed to various triggers, noxious odors, aeroallergens not to mention viruses would allow her to be a more efficient and compliant employee.” See ROI at 144. The Branch Chief emailed Complainant on August 3, 2022, informing her that her updated medical documentation was not sufficient to support her request for a reassignment because it did not state that Complainant was unable to teach in the building as she had been until that point. See ROI at 127-28. The Branch Chief explained that because reassignment is an accommodation of last resort, they require a clear statement from a medical practitioner that the complainant is unable to perform the essential functions of her position and at the time, Complainant had been performing the essential functions of her position and meeting her performance objectives. See ROI at 633-34.

On November 3, 2022, Complainant again requested to be reassigned to a virtual teaching position and submitted updated medical documentation to that effect. See ROI at 361-62. Complainant’s medical documentation included a statement from a physician stating that it was the physician’s recommendation that Complainant “either be relocated back to the United States or be allowed to work in a 100% virtual environment in order to prevent any further degradation of her current physical condition.” Agency Motion for Summary Judgment, Ex. 4. Thereafter, the Agency began searching for an available position to which Complainant could be reassigned. See Agency Motion, Ex. 6. While the search was ongoing, Complainant submitted revised medical documentation on December 28, 2022, in which she requested permanent reassignment to a DVHS position at the Sembach, Germany or Quantico, Virginia hub along with a note from her physician stating that Complainant “must be placed in a virtual teaching position within the United States or Europe.” See Agency Motion, Ex. 8. On February 10, 2023, the Branch Chief offered Complainant an available position as a Teacher (Social Studies) in Fort Campbell, Kentucky but Complainant declined the position. See Agency Motion, Ex. 12. The Agency continued searching for a position within the DVHS but there were no vacancies for positions for which Complainant was qualified and as a result, Complainant’s request for a reassignment was denied on February 24, 2023. See Agency Motion, Exs. 13, 14, 15, 16.

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. Over Complainant's objections, the AJ assigned to the case granted the Agency's June 29, 2023, motion for a decision without a hearing and issued a decision without a hearing on August 7, 2023. The AJ found that the Agency's request for updated medical documentation did not violate the Rehabilitation Act and that Complainant's medical documentation prior to November 2022 did not clearly support her request for reassignment to a virtual position at the DVHS. The AJ further found that the Agency did not violate the Rehabilitation Act because it engaged in a good-faith interactive effort to reassign Complainant by offering her a Social Studies teaching position in Fort Campbell, Kentucky 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 insists that the Agency denied her a reasonable accommodation and caused her to suffer anxiety and additional physical health conditions due to the Agency's conduct.

In response, the Agency contends that the AJ correctly found that the Agency did not violate the Rehabilitation Act because Complainant medical documentation as initially submitted did not support her request for reassignment as an accommodation of last resort and further that Complainant has not established that any available vacancies at the DVHS for which she was qualified existed.

STANDARD OF REVIEW

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).

This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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

Issuance of Summary Judgment

We determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for 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 “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute.

Here, Complainant insists that the AJ erred in accepting the Agency's statement of facts without question. Complainant offered no evidence to support her assertions casting doubt on the Agency's statement of facts. It is well settled that mere assertions of a factual dispute without more are not sufficient to defeat a motion for summary judgment. See Darrell C. v. U.S. Postal Serv., EEOC Appeal No. 0120181833 (July 12, 2019); Quarterman v. U.S. Comm'n on Civil Rights, EEOC Appeal No. 0120112994 (May 21, 2013). Upon our review of the record, we find that the AJ correctly determined that Complainant failed to establish a dispute of material fact. Accordingly, we find that the AJ properly issued a decision without a hearing.

Denial of Reasonable Accommodation

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual based on disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). 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 EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) ("Enforcement Guidance on Reasonable Accommodation"). An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the 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).

When the need for accommodation is not obvious, an agency may require that the individual with a disability provide documentation of the need for accommodation. 29 C.F.R. pt. 1630 app. § 1630.9. The agency may require only the documentation that is needed to establish that the individual has a disability, and that the disability necessitates reasonable accommodation. Enforcement Guidance on Reasonable Accommodation at Question 6.

Reassignment to a vacant position is a form of reasonable accommodation. 29 C.F.R. 1630.2(o)(2)(ii). In general, reassignment is the reasonable accommodation of last resort and should be considered only when (1) there

are no effective accommodations that would enable an employee to perform the essential functions of his or her current position or (2) accommodating the employee in the current position would cause an undue hardship. 29 C.F.R. pt. 1630 app. § 1630.2(n); see also Enforcement Guidance on Reasonable Accommodation, "Reassignment." If both the agency and the employee voluntarily agree that reassignment is preferable to remaining in the current position with some form of accommodation, however, then the agency may transfer the employee. Enforcement Guidance on Reasonable Accommodation, "Reassignment." Further, "transferring an employee for the purposes of treatment or therapy may be a reasonable accommodation under the Rehabilitation Act." Sanchez v. Vilsack, 695 F.3d 1174, 1182 (10th Cir. 2012); see also Jacques v. Clean-up Grp., Inc., 96 F.3d 506, 515 n.9 (1st Cir. 1996) ("even when qualified employees are able to perform a job's essential functions, employers may not be relieved of their duty to accommodate where accommodations are required to allow equal enjoyment of employment privileges and benefits or to pursue therapy or treatment"); Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) (it is not per se unreasonable to transfer an employee to a location where he can receive better medical treatment for his disability).

Complainant first challenges the Agency's request for additional medical documentation, arguing that the Branch Chief told Complainant that he would contact Complainant's doctor but that the Branch Chief did not do so and further insisting that the Agency has not provided medical evidence to establish why her medical documentation was not sufficient. We reject Complainant's argument. Because Complainant's medical need for the reasonable accommodation of reassignment was not obvious, the Agency was entitled to request documentation in support of the request for reasonable accommodation. In addition, while Complainant appears to believe that it was the Agency's responsibility to contact her doctor to obtain the additional medical documentation, we disagree and note that it was Complainant's responsibility to obtain the information the Agency was lacking. See Helena E. v. Social Sec'y Admin., EEOC Appeal No. 2021002133 (Aug. 3, 2022). Moreover, the evidence indicates that the Branch Chief clearly explained to Complainant that her medical documentation needed to state that Complainant was no longer able to perform the essential duties of her position to make reassignment necessary because reassignment was the accommodation of last resort.

Finally, Complainant insists that the Agency should have been required to reassign her to a position within the DVHS. However, the record indicates that the Agency searched for approximately three months for a virtual

teaching position within the DVHS, but no vacant positions were available and Complainant was not qualified for the single position identified by Complainant as vacant. The evidence indicates that the Branch Chief offered Complainant a reassignment to an in-person teaching position in Fort Campbell, Kentucky which met Complainant's medical restrictions when she again submitted her request for a reassignment in November 2022, but Complainant declined the position. While Complainant is entitled to an effective reasonable accommodation, she is not entitled to the accommodation of her choice. Lynette B. v. Dep't of Justice, EEOC Appeal No. 0720140010 (Dec. 3, 2015). In reassignment cases, Complainant has the evidentiary burden "to present sufficient evidence to support a finding that, more likely than not, there [existed] a vacant funded position, for which she was qualified and to which she could have been reassigned." Laurence L. v. U.S. Postal Serv., EEOC Appeal No. 2019000894 (Apr. 19, 2019). Complainant presented no such evidence in this case. While we are not unsympathetic to Complainant's situation, in this case, we find that the Agency fulfilled its obligations under the Rehabilitation Act by engaging in a good-faith effort to find an available, vacant position for Complainant in the DVHS and the mere fact that the Agency's search was unsuccessful does not establish a violation of the Rehabilitation Act. See Sanjuanita A. v. Dep't of Veterans Affs., EEOC Appeal No. 2022004328 (Sept. 4, 2024).

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

February 26, 2025
Date