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

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

v.

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

Appeal No. 2023005046

Hearing No. 460-2022-00210X

Agency No. 200300202022144029

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 August 29, 2023, final order concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

ISSUE PRESENTED

Whether the EEOC Administrative Judge properly issued a decision by summary judgment finding no discriminatory harassment or failure to provide reasonable accommodation occurred as alleged.

BACKGROUND

During the period at issue, Complainant worked as a Loan Specialist, GS-11, at the Agency's Veterans Benefits Administration in Washington, D.C.

[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.

On April 20, 2022, Complainant filed a formal EEO complaint claiming that the Agency subjected her to a hostile work environment based on disability and age (born in 1968) when:

1. From December 2021 through January 28, 2022, the Assistant Director for Field Loan Administration (Assistant Director) emailed and telephoned complainant with bullying and intimidating correspondence after learning Complainant was moving to Florida.

2. From December 2021 through January 28, 2022, the Human Resources Specialist/DRAC (Human Resources Specialist), lost and/or misplaced Complainant's reasonable accommodation documentation. and requested that Complainant resubmit the supporting documents.

3. From December 2021 through January 28, 2022, the Assistant Director denied Complainant's reasonable accommodation request to work remotely from home and required Complainant to report to the office.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing. On July 7, 2023, the Agency submitted a motion for summary judgment. After receiving Complainant's opposition, the AJ, on August 24, 2023, issued a decision by summary judgment in favor of the Agency.[2]

On August 29, 2023, the Agency issued a final order implementing the AJ's finding of no unlawful discrimination.

The instant appeal followed.

STANDARD OF REVIEW

In rendering this appellate decision, as there has been no hearing, 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.

[2] Here, the AJ summarily adopted and incorporated by reference the Agency's July 7, 2023, Motion for Summary Judgement. The AJ indicated that she reviewed the record and the dispositive pleadings and found no genuine issues of material fact sufficient to require a hearing in this matter. As further discussed, we agree with the AJ's finding, as adopted from the Agency's Motion,

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 AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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. If a case can only be resolved by weighing conflicting evidence, summary judgment is not appropriate. In the context of an administrative proceeding, an AJ may properly consider summary judgment only upon a determination that the record has been adequately developed for summary disposition.

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. For the reasons discussed below, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in her favor. Therefore, we find that the AJ properly issued a decision here by summary judgment.

Reasonable Accommodation – Claim 3

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

(Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation.

The record reflects that Complainant is an individual with a disability within the meaning of the Rehabilitation Act. Complainant testified that she was diagnosed with PMDD, fibromyalgia, and mental health impairments. Because of these conditions, Complainant explained that she has difficulty concentrating, especially in an environment with distractions, due to chronic physical fatigue, emotional lability, nausea, headaches, pain, and discomfort. Complainant also indicated that she is unable to drive long distances alone and she makes frequent trips to the restroom. The Agency does not dispute that Complainant was qualified to perform in her position.

Complainant testified that she already had a reasonable accommodation for her medical conditions that was approved by Agency officials in 2014 and updated in 2016. However, the record supports that Complainant's prior reasonable accommodation request was not for full-time telework. Rather, Complainant's 2014 approved reasonable accommodation provided the following:

> You will be authorized to work from home two days a week, specifically Wednesday and Friday. We have agreed to make these WAH [work at home] days flexible. Additionally, you have been approved to wear relaxed fitting clothes when you are at work, if your conditions are symptomatic.

However, during the period covered by her current complaint (December 2021 through January 28, 2022), Complainant worked full-time telework. During this period, the entire Loan Guaranty division bargaining unit employees were on full-time telework due to the COVID-19 pandemic.

Relevant to her current complaint, it appears that in May 2022, management gave notice to all bargaining unit employees, including Complainant, that they would be expected to return to working in the office as of June 21, 2022. As a result, Complainant submitted a reasonable accommodation request to increase her prior accommodation from teleworking two days per week to full-time telework. She was asked by management to provide updated medical documentation to support her need to telework full-time. Ultimately, Complainant's updated reasonable accommodation request to telework full-time was approved on June 6, 2022. Between the COVID-19 related telework and the June 2022 approval of her full-time telework accommodation, there appears to be no period where Complainant was actually required to report to the office. Therefore, we find that Complainant failed to demonstrate any violation of the Rehabilitation Act given that Complainant's accommodation request was approved and given that the Agency allowed her to telework full-time during the interim period her request was pending.

Harassment – Claims 1 and 2

To prove her claim of hostile environment harassment, Complainant must establish that she was subjected to conduct that was either so severe or so pervasive that a "reasonable person" in Complainant's position would have found the conduct to be hostile or abusive. Complainant must also prove that the conduct was taken because of a protected basis – in this case her disability and/or age. Only if Complainant establishes both of those elements – hostility and motive – will the question of Agency liability present itself. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). See also, Enforcement Guidance on Harris v. Forklift Systems Inc., EEOC Notice No. 915.002 (March 8, 1994).

Complainant testified that the Assistant Director communicated with her in an "offensive" and "ignorant" manner. Complainant explained that the Assistant Director was not sensitive to Complainant's permanent disability and reasonable accommodation already in place at the time that the Assistant Director communicated with Complainant. Complainant stated that the Assistant Director's email to her caused Complainant "unnecessary fear" which caused her medical conditions to worsen.

Contrary to Complainant's assertions, the Assistant Director indicated that her communications with Complainant were informational and professional. Specifically, the Assistant Director explained that she was simply attempting to facilitate Complainant's reasonable accommodation request for full-time telework. The Assistant Director stated that Complainant informed her on December 1, 2021, that she was moving from Texas to Florida the following summer, and she planned to apply for a Loan Specialist, GS-11, position at the St. Petersburg, Florida VA Regional Office (Regional Office). The Assistant Director further stated that she learned on January 13, 2022, that Complainant would be offered the position and realized that Complainant's home in Florida was located six hours away from the Regional Office. As a result, the Assistant Director emailed Complainant on January 19, 2022, to ensure that Complainant was aware that she would have to report to the Regional Office twice a pay period after the maximum COVID-19 related telework policy ended unless Complainant had a reasonable accommodation for full-time telework.

The Assistant Director said she clarified that Complainant's pre-existing 2014-2016 reasonable accommodation approvals did not grant Complainant full-time telework, and therefore, Complainant would need to submit the new request. The Assistant Director emailed Complainant on May 2, 2022, to inform her that maximum telework was ending on June 19, 2022, at the Regional Office, and as a result, Complainant would need to complete an updated full-time telework request to avoid reporting to the Regional Office twice per pay period. The Assistant Director said she was informed by the HR Specialist that new medical documentation would be necessary to consider a reasonable accommodation request for full-time telework and she passed this information on to Complainant.

We find that considering these allegations, even if true, Complainant has not presented sufficient credible evidence demonstrating that unlawful considerations of her disability or age motivated management's actions toward Complainant. Contrary to Complainant's assertions, the record supports that Complainant's prior approved 2014 reasonable accommodation did not provide for full-time telework. Consequently, the Assistant Director sought to inform Complainant of this issue given that Complainant was in the process of relocating to a new position which was six hours away from the Regional Office and she was expected to report to duty twice a pay period after the maximum telework (pandemic) policy ended. As already noted, once Complainant obtained updated medical documentation, her request for full-time telework was approved.

CONCLUSION

We AFFIRM the Agency's final decision because the preponderance of the evidence of record does not establish that unlawful discrimination occurred 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(c).

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 22, 2024
Date