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

[redacted]
Elroy S.,[1]
Complainant,

v.

Michelle King,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2024001446

Agency No. SF-23-0237-SSA

DECISION

On December 15, 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 November 17, 2023, final decision 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

Whether the Agency correctly determined that Complainant was not subjected to discrimination on the bases of age, disability and/or prior EEO activity.

[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 an Administrative Law Judge (ALJ), Social Security Administration Region 9, Santa Barbara Hearing Office in Santa Barbara, California. On February 15, 2023, Complainant filed an EEO complaint alleging that the Agency discriminated against him, based on his disability (pulmonary, hematologic, and orthopedic medical conditions), age (71), and reprisal (prior protected EEO activity) when, since, August 24, 2022, the Agency denied Complainant a reasonable accommodation (fulltime telework).[2]

ALJs, whose positions are located in hearing offices, "hold hearings and make and issue decisions on appeals from determinations made in the course of administration of Titles II, VIII, and XVI of the [Social Security] Act in conformity with the Administrative Procedure Act." The Social Security claimants whose cases ALJs hear have a regulatory right to an in-person hearing, absent extraordinary circumstances. See 20 C.F.R. §§ 404.936, 416.1436. During the relevant timeframe, Complainant was 71 years old and had pulmonary, hematologic, and orthopedic disabilities. Complainant has previously filed and engaged in numerous other EEO complaints and reasonable accommodation requests beginning in March 2015.

The Agency provided all ALJs with full-time telework beginning in March 2020, due to the COVID-19 pandemic. Complainant initially requested a reasonable accommodation of fulltime telework on July 24, 2020, based on his pulmonary, hematologic, and orthopedic conditions. The Agency was under a mandatory evacuation order at the time, during which all ALJs including Complainant, were working remotely 100 percent of the time. Consequently, his accommodation request was held in abeyance.

Complainant submitted medical documentation in support of his accommodation request from a treating pulmonologist stating that due to his age, and medical conditions, Complainant:

> has a very high risk of developing significant and long-term consequences from COVID-19, including death. Because so much of the morbidity and mortality from COVID-19 is related to blood clotting disorders, [Complainant] is predisposed to potentially

[2] While the Agency identified his complaint as being comprised of two claims, we find the complaint is more accurately defined as one claim with multiple bases.

> lethal blood clotting disorders that place him at a much higher risk than others. Working in an office setting would place him in direct contact with members of the public and office staff. These individuals would expose him to possible infection of COVID-19, which can be transmitted even when COVID-19 is asymptomatic.

The pulmonologist further stated that he had reviewed the COVID-19 safety measures that were in place[3] in the Agency's hearing offices and found that they would not adequately protect Complainant from high risk of exposure and infection. He further stated that "[t]he best protection against COVID-19 is to permit [Complainant] to conduct his hearings from home through phone and video teleconference."

[3] The Agency's safety measures at the time included: (1) the requirement that all hearing participants wear appropriate face coverings; (2) the requirement that upon arrival to the hearing office, visitors must agree to self-screen and to attest that they have not experienced any possible COVID-19 symptoms; (3) security guards reminding visitors of self-screening requirements and of the requirement to wear face coverings prior to entering the office; (4) signs posted at the hearing office entrance, by the check-in windows, and in the waiting room, reminding all visitors to a hearing office that they are required to wear a mask at all times; (5) appropriate distance markings placed on chairs and on the floor, in order to clearly identify appropriate social distancing; (6) advising visitors to refrain from eating and drinking while in the hearing room, unless they have a medical need to do so; (7) visitors who do not wear masks or pass the self-screening, being instructed to leave the premises; (8) frequent disinfection of common and "high touch" areas; (9) use of portable high-efficiency particulate air (HEPA) fan/filtration system for reception, waiting areas and hearing rooms; (10) no visitors, other than the claimant/representatives permitted in the hearing room; (11) protective barriers such as splash screens made of plexiglass installed at the ALJ bench and at each participant area; (12) ALJs provided a protective plastic face shield to use during in-person hearings, upon request. In addition, if a claimant in a hearing room refuses to properly wear a mask despite reasonable warning from staff and/or the ALJ, then the ALJ has the right to postpone the remainder of the hearing and direct the claimant to leave the hearing office immediately. Also, any individual who displays any symptoms consistent with COVID-19 while in a hearing room must promptly leave the hearing office, and, if the individual is a claimant or other essential party to the hearing, the ALJ shall adjourn and/or postpone the hearing.

Complainant also submitted a note from a treating hematologist stating that he "should only work remotely while any COVID19 [sic] risk exists due to his personal and family history of blood clots, which make a possible COVID19 infection more serious and possibly fatal." Complainant submitted an email on December 23, 2021, requesting the following accommodations: to work virtually 100 percent of the time; to always avoid being physically present in the hearing office; and to relocate from his present location in Santa Barbara to anywhere in the United States.[4]

The Regional Chief Administrative Law Judge (Supervisor2) who was Complainant's second-line supervisor since March 2015 engaged in interactive discussions and meetings with Complainant regarding his reasonable accommodation request on numerous dates including on September 21, 2021, November 16, 2021, December 13, 2021, January 11, 2022, January 13, 2022, April 15, 2022, and July 26, 2022.

In or about April 2022, the Agency determined that all ALJs would be required to return to their offices to hold in-person hearings when requested by claimants beginning July 2022. Outside of the special circumstances surrounding the height of the COVID-19 pandemic (Spring 2020-2022) when the district offices were closed to the public, in-person hearings have been required by law, if a claimant so requests.

Sometime prior to July 28, 2022, during the interactive process Complainant had discussed the possible requirement: (1) that "individuals with whom [he] come[s] in contact to wear N95 masks; and (2) to have [his] hearing room door open to the hearing office secure space during [his] in-person-hearings. However, on July 28, 2022, Complainant's attorney advised Supervisor2 that Complainant's "treating doctor has advised that the latter two requests for accommodation (N95 masks and open hearing room door) are no longer viable, such that he is no longer requesting them as accommodations."

On September 30, 2022, Complainant's attorney emailed Supervisor2 reiterating Complainant's belief that he could be accommodated by full-time telework. Complainant's attorney attached a letter from an environment engineer (Engineer) who addressed the Agency's safety measures as set forth in the Memorandum of Understanding (MOU) concerning ALJ reentry to the workplace after the COVID-19 pandemic.

[4] Complainant's request to work anywhere in the United States is not at issue herein.

After explaining what he believed were inadequacies of the Agency's re-entry safety measures, Engineer stated as follows:

> The better option would likely be *in situ* installation of a separate enclosure for the judge in the courtroom. Such an enclosure would be airtight, with air supply going through an approved and adequate high efficiency particle arrester (HEPA) filter and ultraviolet (UV) light source (for disinfection) integrated into the HVAC at the supply side in the room, and with exhaust from the enclosure being at a slightly lower flow rate, to create a slight positive pressure inside the booth. Positive pressure would prevent infiltration of air from outside of the enclosure. Slight positive pressure inside would be maintained by use of a simple electronic micromanometer and dampers.
>
> A HEPA filter is defined as being, using, or containing a filter usually designed to remove 99.97% of airborne particles measuring 0.3 microns or greater in diameter passing through it. Such enclosures would be like small "clean rooms".
>
> A smoke detector or miniaturized and relatively inexpensive laser-based particle size class and mass sensor should be used for monitoring of indoor air quality. Either could be used to detect aerosols inside and outside of the enclosure as there would be no smoking allowed nearby and therefore, any aerosol detected could also be a means of transport of pathogens. The laser-based detector would also detect the presence of other respirable particles as well.
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> All design and fabrication materials are available "commercial off the shelf" (COTS) or could be fabricated using local expertise and components.[5]

During a November 2022 conversation, Complainant's then-representative asked Supervisor2 whether, as an alternative accommodation, Complainant

[5] While Engineer's August 2022 letter addresses potential on-site improvements, the record is devoid of evidence that prior to December 2023, Complainant had requested any accommodation which would enable him to conduct in-person hearings. In fact, every medical opinion provided to the Agency prior to January 2024, reiterated that the only accommodation for Complainant was full-time telework.

could be reassigned to the Agency's National Hearing Center (NHC) as a "virtual" ALJ holding only virtual hearings.

On March 8, 2023, the Acting Associate Commissioner of Office of Hearing Operations (OHO) Office of Executive Operations and Human Resources, in her capacity as Local Delegated Official, recommended that the National Reasonable Accommodation Coordinator (NRAC)[6] deny Complainant's request for fulltime telework, as well as his requests to relocate from the Santa Barbara Hearing Office to any other location, and for reassignment to an ALJ position requiring no in-person hearings.[7]

On June 6, 2023, Complainant's attorney sent a letter to the Agency asserting that a decision on Complainant's accommodation request was unduly delayed and reiterating his arguments for full-time telework.

On July 7, 2023, the NRAC issued an official decision and denied Complainant's accommodation request. The decision letter outlined the requests as follows:

> On December 23, 2021, you made a request for a reasonable accommodation (RA) via email to Hearing Office Chief Administrative Law Judge (HOCALJ), [Supervisor2], due to your blood clotting disease, limited pulmonary function, and decreased immunity. You requested: (1) to work virtually 100 percent of the time; (2) always avoid being physically present in the hearing office; and (3) to relocate from your present duty location in Santa Barbara to anywhere in the United States. Your requests were later clarified as requests for: (1) fulltime telework; (2) to relocate from your present location to anywhere in the United States; and (3) reassignment to an Administrative Law Judge (ALJ) position requiring no in-person hearings.

The July 7, 2023 decision explained that the Agency denied Complainant's request for fulltime telework because granting it would remove essential functions of his ALJ position and would create an undue hardship on the Santa Barbara hearing office's operations. NRAC also denied Complainant's request for reassignment to an ALJ position requiring no in-person hearings, such as to an NHC or other "virtual ALJ" position.

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[6] The NRAC is the only Agency official with delegated authority to deny accommodation requests.

[7] The recommendation does not indicate that there were any other pending accommodation requests from Complainant.

The Agency asserted that it does not have any "virtual ALJ" positions, as Complainant suggested. Management and the ALJs' bargaining unit collectively referred to video and telephonic hearings as "virtual," in comparison to in-person hearings, in the MOU. However, the Agency argues that no designated "virtual ALJ" position exists within OHO.

In a footnote, NRAC stated the following with respect to Engineer's August 2022 letter:

> Management did not explore alternative RAs with you as you indicated that no alternatives but telework would be effective. Further, the alternative suggested by the environmental engineer you consulted was unworkable. Specifically, management considered the recommendation to build a separate enclosure in the hearing room with its own air filtration system to protect you from exposure to COVID-19. However, management noted that the engineer was not a medical professional and therefore the recommendation was not based on medical expertise regarding the spread of COVID. Moreover, the engineer did not indicate that this recommendation was medically necessary; rather, the engineer stated only that it was the "better option." The recommendation was also inconsistent with [your medical provider's] recommendation that you work from home fulltime. Further, it would not be effective as it would only account for your presence in the hearing room and not elsewhere in the building or in the Santa Barbara hearing office generally, such as shared areas including the entrance of the building, which is shared with other tenants, the lobby, the bathrooms, and any hallways or access points to get to other parts of these facilities, such as your office.

In or about August 2023, the Agency advised Complainant that it would be scheduling him for in-person hearings as soon as November 2023. In November 2023, Complainant notified the Agency that he would not comply with this requirement. Complainant did not appear for his first scheduled in-person hearings on December 14, 2023, requiring the Chief ALJ to fill-in for him.

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 EEOC Administrative Judge.

When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the final decision, the Agency first determined that Complainant demonstrated that he is an individual with a disability. However, the Agency found that Complainant's requested accommodation – full-time telework – was not reasonable. The NRAC explained in the July 7, 2023 Decision letter that the request was being denied because it would remove essential functions from Complainant's job duties and create undue hardship for the Agency. The Agency determined that the record showed that although all ALJs teleworked from March 2020 to October 2022, it was in response to a global pandemic. Once the hearing offices reopened, the NRAC explained that "barring extraordinary circumstances, claimants have a regulatory right to an in-person hearing if requested; therefore, ALJs must be available to conduct in-person hearings in addition to being able to conduct hearings via video or telephonic methods." Further, Complainant's position description clearly stated that the position was located "'in a hearing office." Accordingly, the Agency determined that conducting in-person hearings was an essential function of the hearing office ALJ position.

Moreover, to alleviate Complainant's concerns about health safety while conducting in-person hearings, during the interactive process management discussed the health and safety measures that would be put in place for in-person hearings in the January 14, 2022 MOU between the ALJ union and the Agency. Finally, the NRAC noted that management did not explore alternative accommodations with Complainant because he indicated that no alternative but telework would be effective. Thus, the Agency concluded that Complainant failed to show that his request for full-time telework as an accommodation was reasonable. As a result, the Agency found that Complainant was not denied reasonable accommodation in violation of the Rehabilitation Act.

Finally, to the extent Complainant was alleging disparate treatment, the Agency found that Complainant failed to show that Agency management's reasons for its actions were pretextual. As a result, the Agency found that Complainant was not subjected to discrimination or reprisal as alleged.

The instant appeal followed.

CONTENTIONS ON APPEAL

Complainant asserts that the Agency improperly delayed and denied his accommodation request and improperly argued that in-person hearings are an essential function of his ALJ position. Complainant contends that conducting an in-person hearing is at most a marginal function for several reasons because over 90 percent of hearings conducted are virtual and each hearing takes a limited amount of time. Complainant also argues that providing 100 percent telework does not create an undue burden for the Agency. Complainant contends that the Agency erred in denying him assignment into the virtual judge cadre or reassignment to the NHC. Accordingly, Complainant requests that the Commission reverse the final decision.

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

As an initial matter, we note that on appeal Complainant raises arguments regarding potential new claims which are not properly included in this appeal. See Armand L. v. Dep't of Air Force, EEOC Appeal No. 2022000955 (May 25, 2023) (declining to admit evidence of agency actions post-dating the decision on appeal because "[t]his is a new claim, and the Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal"). The record indicates that subsequent to the Agency issuing its final decision underlying this appeal, Complainant filed two EEO complaints which are currently under investigation.

To the extent Complainant's newly-submitted evidence concerns those matters, the Commission's regulations permit him to amend them "at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint." 29 C.F.R. § 1614.106(d). Those complaints, not this pending appeal, are the appropriate avenue for Complainant to submit his new evidence for consideration in connection with any new claims he may raise based on their contents.

Denial of Reasonable Accommodation

Under the Commission's regulations, an Agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9. A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, Question 1 (Oct. 17, 2002) (Guidance). When an individual's disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. Id. at Question 6. The employer is entitled to know that the individual has a covered disability for which he needs a reasonable accommodation Id.

After receiving a request for reasonable accommodation, an agency "must make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. pt. 1614. app. § 1630.9. Thus, "it may be necessary for the [agency] to initiate an informal, interactive process with the individual with a disability . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3); see also 29 C.F.R. pt. 1630 app. § 1630.9; Guidance at Question 5. Reasonable accommodation includes such modifications or adjustments as job restructuring, the acquisition or modification of equipment or devices, and reassignment to a vacant position. 29 C.F.R. § 1630.2(o)(2)(ii); see also, Alan F. v U.S. Postal Ser'v., EEOC Appeal No. 0120162635 (Feb. 22, 2018).

An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g).

Major life activities include such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; and the operation of a major bodily function. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). The Agency does not dispute that Complainant is an individual with a disability within the meaning of the Rehabilitation Act.

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). "Essential functions" are the fundamental duties of a job, that is, the outcomes that must be achieved by someone in that position. Gwendolyn G. v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013).

An employer does not have to eliminate an essential function of a position to accommodate an individual with a disability. See Guidance. An accommodation that would eliminate an essential function is not considered to be a reasonable accommodation, and an individual who is unable to perform the essential functions of the job with or without an accommodation is not a "qualified individual with a disability" under the Rehabilitation Act. Gerald L. v. Dep't of Veterans Affairs, Appeal No. 0120130776 (Nov. 10, 2015). A function may be essential where 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; relevant evidence includes the employer's judgment as to which functions are essential, written job descriptions, the consequences of not requiring the employee to perform the function, and the amount of time spent on performing that function. 29 C.F.R. § 1630.2(n)(3); see also Sammy R. v. Dep't of Homeland Sec., Appeal No. 2023003263 (Jan. 29, 2024).

We find that the in-person hearing task to be an essential function of the ALJ position. While the ALJ job description does not mention "in-person hearings" or similar terms it does explicitly state that the ALJ position is located in an office setting. Most significantly, claimants have a regulatory right to an in-person hearing before an ALJ if requested and the right to object to a virtual hearing. Thus, the Agency generally cannot force an individual who is entitled to an administrative hearing to agree to hold it using any remote technology, except under extraordinary circumstances.

Based on the fact that nearly all hearings have the potential to be held in-person, the Agency reasonably determined that holding in-person hearings is an essential function of the ALJ position, in order to ensure that it has sufficient ALJs ready to meet the demand.

While Complainant argues that conducting in-person hearings is only a marginal function because post COVID-19 "over 90 percent of hearings conducted are virtual, either by phone or video," the record shows that in the six-month period between September 30, 2022, and March 31, 2023, approximately 78 in-person hearings could not be assigned to Complainant. This shows that, even if less than 10 percent of claimants were requesting in-person hearings in the Santa Barbara office, as Complainant claims, that still would connote a significant number of claimants who would be adversely impacted by his unavailability to conduct in-person hearings, not to mention the significant adverse impact on Complainant's two co-ALJs who would be required to take Complainant's in-person hearing caseload.[8] The Agency further reasonably argues that this number is only expected to rise as the public gets back to a pre COVID-19 comfort level.

Complainant also asserts that the fact that he has been teleworking 100 percent for approximately three and a half years (1.5 years longer than his coworkers),[9] should be sufficient proof that in-person hearings is not an essential function to his position. We disagree. The fact that during the COVID-19 pandemic, the work of ALJs was performed 100 percent virtually is not prima facie proof that such work can be performed effectively. A public emergency required mandatory telework over that period regardless as to whether all essential job tasks could be performed effectively. Similarly, the fact that Complainant's in-person hearing requirements were waived during the reasonable accommodation interactive process is not determinative as to whether such job requirement is an essential function of the ALJ position.

Since we find that the requested accommodation (100 percent telework) would eliminate an essential function of Complainant's position, such an accommodation is not reasonable or effective.

[8] The Santa Barbara Hearing Office has a total of three ALJs to handle all cases, including those scheduled for in-person hearings.

[9] After the ALJs went back into the office, the Agency permitted him to remain on full-time telework during the interactive process of his reasonable accommodation request.

We now turn to reassignment as a reasonable accommodation. Reassignment is the reasonable accommodation of last resort and is required only after it has been determined that there are no effective accommodations that will enable Complainant to perform the essential functions of his current position, or all other reasonable accommodations would impose an undue hardship. King W. v. U.S. Postal Serv., EEOC Appeal No. 2019001070 (Mar. 20, 2019); Zachary K. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130795 (Nov. 19, 2015). An employer is not required to create a job as a form of reasonable accommodation. Id. In addition, Complainant has the burden to show that there were vacant, funded positions during the relevant time period into which he could have been reassigned. Hollis B. v. Dep't of Homeland Sec., Appeal No. 2022003310 (Apr. 17, 2023), citing Hampton v. U.S. Postal Serv., Appeal No. 01986308 (July 31, 2002).

Complainant argues, without corroborating documentary or testimonial evidence, that approximately 48 judges in the NHC have always conducted 100 percent virtual hearings and many other judges receive assignments to hold virtual hearings remotely for claimants appearing elsewhere. Complainant further argues that the Agency refused to assign him to the NHC or assign him only virtual hearings as an accommodation, even though plenty of non-disabled judges work at the NHC or have virtual hearings assignments.

We agree with the Agency in concluding that Complainant failed to identify any vacant, funded positions for which he was qualified and into which the Agency could have reassigned him. The record shows that ALJs assigned to the NHC are supervisors and are subject to additional qualification requirements beyond those of nonsupervisory hearing office ALJs. The record is devoid of evidence that Complainant is qualified for an NHC ALJ position, or that any vacant, funded NHC positions existed. In fact, the NRAC's decision specifically noted that the Agency's hearings component was "not currently authorized to add additional individuals to NHC ALJ positions." Further, to the extent that a reassignment from a non-supervisory to a supervisory ALJ position is a promotion, see 5 C.F.R. § 930.205(g), the Agency is not required to provide it as a reasonable accommodation. "[R]eassignment does not include giving an employee a promotion ... An employee seeking reassignment must compete for any vacant position that would be considered a promotion." Complainant v. Dep't of Veterans Affairs, Appeal No. 0120120870 (Feb. 20, 2015) (citing Enforcement Guidance).

Complainant also argues that the Agency should have assigned him to "the virtual judge cadre." Aside from Complainant's bare, uncorroborated assertions, the record is devoid of evidence suggesting that ALJs are assigned to positions that hold only remote hearings on anything other than an *ad hoc* basis or that any such "cadre" exists. Also, while some hearing office ALJs have been asked to provide remote hearing coverage to other hearing offices due to workload considerations, it is undisputed that those assignments are temporary in nature; the assigned judges return to their normal hearing office duties and functions including holding in-person hearings when their virtual assignments end.

The Agency is not required to create a permanent remote ALJ position for the purpose of reassigning Complainant into it. Detra S. v. U.S. Postal Serv., Appeal No. 2022001329 (Jan. 31, 2023). Given that Complainant's disabilities are permanent, we find that NRAC reasonably determined that a temporary detail into an ALJ position holding only remote hearings would not be an effective accommodation. See Heard v. Dep't of Treas., Appeal No. 0120110751 (Apr. 19, 2016) (temporary accommodation insufficient to meet agency's duty to provide an effective accommodation to employee's permanent disability). If Complainant was given a temporary fully remote ALJ assignment, the Agency cannot guarantee that there would be any operational need for a subsequent similar assignment once it ended. Complainant has not rebutted the Agency's determination that these "virtual ALJ" assignments were workload-driven and temporary.

Accordingly, we find that Complainant failed to establish that a reasonable and effective accommodation existed which the Agency failed to provide to Complainant. Accordingly, we find that Complainant failed to prove that the Agency denied him reasonable accommodation in violation of the Rehabilitation Act.

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14.

The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

To establish a prima facie case of discrimination, a complainant must show that: (1) he is a member of a protected group; (2) he suffered an adverse employment action; and (3) the circumstances give rise to an inference of discrimination. We note that, although a complainant bears the burden of establishing a "prima facie" case, Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981), the requirements are "minimal," St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993), and complainant's burden is "not onerous." Burdine, 450 U.S. at 253.

Complainant may establish a prima facie case of reprisal by showing that he (1) engaged in a protected activity; (2) the Agency was aware of his protected activity; (3) Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse action. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2010).

The Commission has a policy of considering reprisal claims with a broad view of coverage. See Carroll v. Dep't of the Army, EEOC Request No. 05970939 (April 4, 2000). Under Commission policy, adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 § II.B(2) (August 25, 2016). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

We find the record devoid of evidence that he was treated differently than similarly situated employees outside his protected class, or there was some other evidentiary link between membership in the protected class and the adverse employment action. Accordingly, we find insufficient evidence of a prima facie case of discrimination or reprisal.

In addition, the record shows that the Agency articulated a legitimate, non-discriminatory/retaliatory explanation for requiring Complainant to perform in-person hearings (i.e., claimants were entitled to in-person hearings and such duties were essential functions of Complainant's ALJ position). We also find insufficient evidence of pretext and find the record devoid of evidence of discriminatory or retaliatory animus on the part of any responsible management official. Accordingly, we find that Complainant did not meet his burden to prove discrimination or reprisal as alleged.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFRM 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

February 10, 2025
Date