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

[redacted]
Complainant,

v.

Ray H. LaHood,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 0120110858

Hearing No. 570-2010-00553X

Agency No. 200922760FAA02

DECISION

On November 16, 2010, Complainant filed an appeal from the Agency's October 13, 2010, 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. The Commission deems the appeal timely and accepts it pursuant to 29 C.F.R. § 1614.405(a). For the following reasons, the Commission VACATES the Agency's final order.

BACKGROUND

Complainant, who has monocular vision, applied for an Air Traffic Controller (ATC) position in the Fort Worth Air Traffic Center. On April 28, 2008, Complainant received a tentative offer for employment pending the results of her medical evaluation and background investigation.

On May 6, 2008, the Southwest Regional Flight Surgeon medically disqualified Complainant after it was determined that she did not meet the medical standards contained in FAA Medical Standards Order 3930.3a. This Medical Order requires that all ATCs possess 20/20 distant acuity vision and 20/30 near visual acuity in each eye as well as normal fields of vision in each eye, including visual field.

Complainant appealed her disqualification and requested a reasonable accommodation in the form of a waiver or exception from the vision requirements. The appeal was forwarded to the ATC Medical Appeals Coordinator at the Aerospace Medical Certification Division. The

Coordinator determined that qualifying a monocular ATC would increase the risk of operational errors and degrade public safety in the National Airspace System (NAS). The Coordinator noted that there were no accommodations that would eliminate the risk attributable to Complainant's medical condition. On March 12, 2009, a panel of six doctors sustained the medical disqualification. The Federal Air Surgeon ultimately issued a final decision sustaining Complainant's medical disqualification.

On September 14, 2009, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (monocular vision) when the Agency failed to provide her with a reasonable accommodation by denying her request for special consideration for an Air Traffic Controller (ATC) position in the Fort Worth Air Traffic Center.

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 EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ issued a Notice of Intent to Issue a Decision Without a Hearing, and over Complainant's objections, the AJ issued a decision without a hearing on September 30, 2010. In a brief analysis, the AJ found that "Complainant was not medically qualified to work as an ATC because she did not possess 20/20 distant acuity vision and 20/30 near visual acuity in each eye as well as normal fields of vision in each eye as required by the applicable FAA federal safety standard. Based upon this undisputed fact, I find that Complainant is not a 'qualified individual' with a disability within the meaning of the Rehabilitation Act and its implementing regulations."

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.

ANALYSIS AND FINDINGS

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, at Chapter 9, § VI.B. (November 9, 1999) (providing that both the Administrative Judge's determination to issue a decision without a hearing, and the decision itself, are subject to de novo review). 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").

We must first determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. 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, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an administrative judge could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

As discussed below, we find that genuine issues of material fact exist. As a result, the issuance of a decision without a hearing was not appropriate.

Reasonable Accommodation

Complainant alleged that the Agency violated the Rehabilitation Act when it did not provide her with a reasonable accommodation. As a reasonable accommodation, Complainant

requested that she be granted a waiver or an exception to the ATC Medical standards, which the Agency refers to as a "special consideration." Complainant also requested that she be put through ATC training so she could demonstrate to the Agency that her medical condition does not prohibit her from performing the essential functions of the position.

As an initial matter, we note that generally, an Agency shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criterion is shown to be job related for the position in question and is consistent with business necessity. 29 C.F.R. § 1630.10(b). We note that neither the Agency nor the AJ clearly articulated whether this medical qualification standard was job related for the ATC position and is consistent with business necessity. As a result, a genuine issue of material fact exists.

Additionally, we note that the AJ erred when he found that this complaint should not be analyzed as a failure to reasonably accommodate because Complainant did not meet the Agency's medical qualification standards. Even if we assume that the medical qualification standards are job-related and consistent with business necessity, if the standards screen out an individual on the basis of disability, an Agency must also demonstrate that the criterion cannot be met, and the job cannot be performed, with a reasonable accommodation. 29 C.F.R. §1630 (b) and (c); Strano v. Dep't of State, EEOC Appeal No. 0120101287 (Aug. 24, 2012). As a result, this complaint must be analyzed as an allegation of the Agency's failure to reasonably accommodate Complainant's disability.

In order to establish that Complainant 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 a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002). Under the Commission's regulations, an Agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(c) and (p).

Here, the Agency does not dispute that Complainant's impairment substantially limits a major life activity, and therefore Complainant is an individual with a disability. Next, Complainant must establish that she is a "qualified individual with a disability," which is defined as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the position held or desired. 29 C.F.R. § 1630.2(m). Essential functions are those fundamental job duties of the employment position the individual with a disability holds or desires.[1] 29 C.F.R. § 1630.2(n).

[1] A function may be essential, for example, because 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. 29 C.F.R. § 1630.2(n). Evidence of

In this regard, we observe that neither the Agency nor the AJ identified the essential functions of the position. Additionally, neither the AJ nor the Agency analyzed whether this specific Complainant could perform any of the essential functions or fundamental job duties of the position with or without a reasonable accommodation. Instead, the AJ erroneously found that Complainant was not a qualified individual with a disability simply because she did not meet the Agency's medical standards.

Instead of identifying the specific essential functions Complainant could not perform, the Agency stated that Complainant is not a qualified individual with a disability because her monocular vision does not meet the position's medical standards. In a memorandum dated March 12, 2009, the panel of Agency doctors stated that misperceptions of visual information are commonly attributed to operational errors. The panel generalized that medical conditions such as monocular vision increase the potential for visual misperception and have the potential to degrade ATC performance and lead to operational errors. As a result, the panel determined that because Complainant had monocular vision, she was medically disqualified for the position.

Complainant asserted that she can perform the essential functions of the position. Complainant stated that she has had monocular vision since she was two years old, and she learned to adapt and compensate to the point that her vision is equivalent to binocular vision. Complainant stated that she has good visual acuity despite her lack of vision in her left eye. Complainant provided documentation from numerous physicians who explained Complainant's condition and the minimum effects on her vision abilities. One physician noted that Complainant's field of vision and perception of depth orientation is excellent, another noted that because she lost vision in her eye at an early age she has been able to compensate and her vision is not impaired at all, and another stated that Complainant would be able to perform any visual task required of her in the field of air traffic control. Additionally, Complainant is a remote pilot operator, and an Air Traffic Controller and ATC Instructor stated, "In my opinion, [Complainant] is fully capable of fulfilling the physical visual requirements, which she has already completely demonstrated, and I have personally witnessed her skills as a remote pilot operator." Finally, Agency officials noted in the record that besides her monocular vision, Complainant was an excellent candidate, she was qualified for all of the job requirements, and she had the requisite knowledge, skills, and abilities for the position.

An employer may require, as a qualification standard, that an individual not pose a direct threat. A "direct threat" is defined as "a significant risk of substantial harm" which cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r). The Agency has the burden of proof regarding whether there is a significant risk of substantial harm. See

---

whether a particular function is essential includes the employer's judgment as to which functions are essential; written job descriptions; and the amount of time spent on performing that function. Id. at § 1630.2(n)(3).

Massingill v. Department of Veterans Affairs, EEOC Appeal No. 01964890 (July 14, 2000). A determination as to whether an individual poses such a risk cannot be based on an employer's subjective evaluation or, except in cases of the most apparent nature, merely on medical reports. See Selix v. United States Postal Service, EEOC Appeal No. 01970153 (March 16, 2000). Rather, after identifying the risk, the employer must conduct an individualized assessment that takes into account: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r). This assessment must be based on objective evidence, not subjective perceptions, irrational fears, patronizing attitudes or stereotypes about the nature or effect of a particular disability or of disability generally. Relevant evidence may include input from the individual with a disability, his work history or experiences in previous positions, and opinions of medical doctors who have expertise in the particular disability or direct knowledge of the individual with the disability. If it is determined that an individual does pose a direct threat because of a disability, the employer must determine whether a reasonable accommodation would eliminate the risk of harm or reduce it to an acceptable level.

After a review of the entire record, we find that there is a genuine issue of material fact as to whether Complainant would pose a direct threat, because it appears from the record before us that the Agency did not make an individualized assessment of the alleged risk posed by Complainant and, instead, applied a blanket medical qualification without examining the specific application to the Complainant. See Holmes v. U.S. Postal Service, EEOC Appeal No. 01977073 (October 20, 2000). There is a genuine issue of material fact as to whether the Agency's general statements and conclusions that individuals with monocular vision pose a direct threat as an ATC are sufficient to demonstrate that Complainant's employment in the position posed a direct threat to safety. Complainant's skills, abilities, and experience demonstrated that she was a suitable candidate for employment. It was therefore incumbent upon the Agency to explore Complainant's unique capabilities rather than summarily disqualifying her based on the belief that no individual with monocular vision can successfully carry out the duties of an ATC. The Agency could have done this by analyzing the documentation submitted by Complainant in support of her medical condition, and/or by discussing the matter directly with Complainant. Instead, it appears that Agency officials dismissed Complainant's supporting medical documentation by stating that her treating physicians' highly favorable statements should not be taken into consideration because the physicians are "advocating for [Complainant]", "lack knowledge of the ATC environment," "are not responsible for public safety decisions," and "are not liable for the consequences of their recommendations." See Memorandum to Federal Air Surgeon, March 12, 2009. The Agency similarly dismissed the highly favorable statements from Complainant's coworkers.

The Agency has the burden of proof regarding whether there is a significant risk of substantial harm, and in this case there remains a genuine issue of material fact on this issue. See Massingill v. Department of Veterans Affairs, EEOC Appeal No. 01964890 (July 14, 2000); Lovell v. Dep't of Justice, EEOC Appeal No. 01A41642 (May 26, 2006) (The Agency failed to conduct an individualized assessment of the risk posed by Complainant, and instead

erroneously made a generalization that individuals with monocular vision posed a direct threat and could not successfully carry out the duties of the Special Agent position).

As a result, we find that summary judgment was not appropriate and a hearing is necessary to determine whether Complainant is a qualified individual with a disability, and whether or not the Agency violated the Rehabilitation Act.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order, and REMAND the complaint for a hearing before an EEOC Administrative Judge, in accordance with this decision and the order below.

ORDER

The Agency shall submit to the Hearings Unit of the EEOC Washington Field Office the request for a hearing **within fifteen (15) calendar days** of the date this decision becomes final. The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit **within fifteen (15) calendar days** of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil

Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. 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 his or her 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. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden

Carlton M. Hadden, Director
Office of Federal Operations

DEC 20 2012
Date