



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

[REDACTED]
Clifford L.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Capital Metro Area),
Agency.

Appeal No. 0120181528

Hearing No. 430-2016-00098X

Agency No. 1K-281-0025-15

DECISION

On April 4, 2018, 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 March 6, 2018 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. For the following reasons, the Commission **AFFIRMS** the Agency's decision in part and **REVERSES** in part.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Clerk at the Agency's Charlotte Processing & Distribution Center in Charlotte, North Carolina.

On July 8, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (blindness) and in reprisal for prior protected EEO activity when:

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.

1. Since October 2018 and continuing, Complainant has not been provided a productive work assignment;
2. In February 2015, his requests for arrangements for his guide dog have still not been granted; and
3. On August 31, 2015, he was made aware that he would be charged Leave Without Pay (LWOP) for the time he took off to get his medical forms completed for leave.

Claim (1)

Complainant stated that he was hired in 1995 under the Agency's since-discontinued Severely Handicapped Program (SHP). Complainant affirmed that he is blind and uses hearing aids in both ears. Complainant also periodically utilizes the assistance of a guide dog. Complainant claimed that the Agency did not have him perform any work, and that he sat at a desk all day. Even though the Agency recently equipped his computer with Job Access With Speech (JAWS) software, he still did not answer telephone calls.

Complainant averred that he emailed a copy of his resume to the Manager of Human Resources (MHR) to ask what he could do. MHR did not respond. MHR said that Complainant never advised him or any of his staff that he had not been provided a productive work assignment or that he needed a reasonable accommodation.

The record indicates that Complainant went on administrative leave for several years, from 2001 to approximately 2010. In 2010, the MHR led a committee that assessed the viability and safety of various work assignments that would enable Complainant to return to the workplace. In October 2010, Complainant was assigned the duties of an Information Clerk in Charlotte. The essential function of an information clerk is to provide "oral information to patrons at a public window or over the telephone, regarding the [Agency] in general and regarding the services provided by the local post office in particular."

In February 2015, Complainant's current manager (M1) approached Complainant to determine what his duties were. Complainant was referred to the District Reasonable Accommodation Committee (DRAC), and they held a meeting on May 29, 2015. Following the meeting, Complainant stated that the Agency said they were "going to fix the problem," but Complainant claimed that he still was not provided a productive work assignment and that the Agency was making it difficult for him to remain employed and wanted him to quit.

M1 recalled that Complainant said he used to answer the telephone but was not able to provide customers with information because he never received training on how to use JAWS. M1 averred that Complainant while was "able to answer the telephone, he is generally not able to assist customer inquiries regarding mail disposition." M1 elaborated that Complainant "has no working knowledge of Windows 7. [Complainant] also has little to no understanding of how mail is processed in the facility for which he works."

M1 added that after the Agency obtained JAWS software, Complainant said that he was not familiar with it and required professional training to use it and to use Windows 7. M1 stated that “without having knowledge and demonstrated ability to answer customer questions, I do not have him answering phone calls.” Nonetheless, M1 averred that the Agency was actively trying to find Complainant work.

The District Manager (DM) added that the Agency has been trying to find productive work for Complainant since August 2014, but “Complainant does not seem to have too many ideas about what he can do.”

Claim (2)

Complainant claimed that he requested a safe place to take his guide dog to relieve himself. Before his request, Complainant had to take his dog across a parking lot and up a hill. Complainant expressed concern that he could be hit by a car in the parking lot. Despite requesting a safe area, Complainant stated the Agency did not offer any alternative arrangements. According to Complainant, they “talked about a suggestion to go right outside the door where there is a tree, but they withdrew the request and never finalized the suggestion.” Complainant noted that maintenance employees complained about having to clean up after his dog.

MHR averred that she became aware of issues with Complainant’s guide dog when the Safety Manager (SM) informed her that maintenance employees were lodging complaints about “the cleaning up of dog matter.” MHR concluded that Complainant needed to be responsible for cleaning up after his dog and identified a location for Complainant that did not require him to cross the parking lot. At the time of the investigation, Agency management was awaiting the installation of this project. In the meantime, the record indicates that management had speed bumps installed in the parking lot where Complainant crossed the street to make it safer.

Claim (3)

Complainant stated that on August 28, 2015, he fell at work while taking his guide dog out to relieve himself. Complainant affirmed that he landed face down and on his right shoulder and was unable to get up by himself. Complainant called the front desk for assistance and he was taken to the hospital by paramedics. On August 31, 2015, Complainant alleged that M1 informed him that he would be charged leave without pay (LWOP) for the time he took off to get his medical forms completed documenting his leave. Complainant noted that he had no available leave, but that he believed that the Agency should have give him workers’ compensation continuation of pay (COP) because it was an accident on the job. Complainant was out of work until October 1, 2015, and his COP for that time was subsequently adjusted.

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 (AJ). Complainant requested a hearing, but the AJ dismissed the hearing request on the grounds that Complainant failed to comply with his orders and participate in the hearing process.

The AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In the decision, the Agency found that the management articulated legitimate, non-discriminatory reasons for its actions, and that Complainant did not provide evidence tending to establish these reasons to be pretext for discriminatory or retaliatory animus. As a result, the Agency found that Complainant failed to prove that the Agency subjected him to discrimination or reprisal as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that he was not given productive work and he has nothing to do. Complainant states that he has no motivation for getting to work timely or regularly which leads to attendance issues. Complainant argues that the Agency is ultimately trying to ensure his failure and force him to leave voluntarily or involuntarily. According, Complainant requests that the Commission reverse the final decision.

ANALYSIS AND FINDINGS

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”).

Denial of Reasonable Accommodation – Claims (1) and (2)

The Commission notes that an agency is required to reasonably accommodate the known limitations of a qualified individual with a disability, unless it can show that doing so would cause an undue hardship to its operations. See 29 C.F.R. §§ 1630.2 (o) and (p); 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); Barney G. v. Dep’t of Agric., EEOC Appeal No. 0120120400 (Dec. 3, 2015). It is undisputed that Complainant is an individual with a disability.

Here, Complainant stated that he is totally blind and has hearing loss in both ears and wears hearing aids. Complainant claimed he can perform all the duties of an Information Clerk if he was given the proper equipment. The duties of an Information Clerk include providing oral information to patrons at a public window or over the telephone regarding the Postal Service and regarding services provided by the local post office. Complainant was assigned to an office with a telephone.

Complainant acknowledges that he was provided JAWS to connect to his computer and telephone in 2001 and again in 2008, but Complainant lost access after not logging into his computer for several years.

In May 2015, the Agency held a DRAC meeting with Complainant to identify reasonable accommodations for Complainant. Complainant identified three concerns: (1) that he be given tools and training to do meaningful work; (2) that he be given meaningful work to do; and (3) that he be given an area for his dog to relieve himself without having to walk across the parking area. Following the meeting, management and Complainant agreed on seven recommendations for accommodations. Complainant agreed to provide M1 with a list of his skills and abilities so that he could create assignments and tasks for him and management would look further into assistive technology to assist him in performing these tasks. In addition, M1 stated that he would work on getting Complainant's computer access re-established. Further, management agreed to look into procuring a safer place for Complainant to walk his guide dog to relieve himself. Complainant agreed to clean up after his dog.

The record indicates that Complainant provided management with a copy of his resume documenting his skills and abilities. ROI, at 182-83. Management subsequently reset Complainant's password to allow him to log in to his workstation. Id. at 293. After installing the newest version of JAWS, Complainant informed management that he needed training on both JAWS and the new Windows 7 software installed on his computer. Id. Despite his requests for such training, there is no evidence in the record indicating that management officials provided training for either. In addition, the record indicates that management contacted the Department of Health and Human Services to obtain an assessment of Complainant's needs and services for software and hardware at his workstation. ROI, at 377. While it appears the assessment was completed, there is no evidence regarding any accommodations that were recommended or instituted. In addition, Complainant notified management that he required additional training on post office operations to be able to provide information to customers during phone calls. There is no evidence in the record demonstrating that management sought or provided additional training to assist Complainant in this regard either.

With regard to his guide dog, the Senior Plant Manager stated management identified a location for a relief station and they were awaiting the project to be installed at the time of this investigation. ROI, at 276. In the meantime, the Agency installed speed bumps in the parking lot near the location where Complainant could take his dog. Id.

Commission regulations provide that "[i]n general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Appendix to Part 1630, at Section 1630.2(o): Reasonable Accommodation. Any reasonable accommodation "should provide the qualified individual with a disability with an equal employment opportunity" - meaning "an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability." Id. at Section 1630.9: Not Making Reasonable Accommodation.

Management specifically was informed of Complainant's need for accommodations during the May 2015 DRAC meeting and agreed to pursue ways to provide these accommodations. ROI, 174-75. The Agency provided Complainant a new log-in for his computer but provided him no assistance in utilizing the JAWS software or the new operating system installed on his computer. Further, the Agency had an assessment conducted regarding further software and hardware accommodations but has not indicated that any other recommendations from that assessment have been implemented. Finally, the Agency indicated that it had identified a safer location for Complainant's guide dog to relieve himself; however, the Agency has produced no evidence that this accommodation has been implemented. The Agency has proffered no evidence that any of these accommodations would cause an undue hardship. The Commission therefore finds that Complainant met his burden to establish that the Agency failed to provide him with a reasonable accommodation. Accordingly, we will reverse the Agency's final decision with respect to the denial of a reasonable accommodation, and the Agency shall comply with the Order below.

In addition, we find that Complainant is entitled to compensatory damages for the Agency's failure to accommodate him. Where a discriminatory practice involves the provision of a reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007).

Disparate Treatment – Claim (3)

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 802 n.13. 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).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether Complainant has shown by a preponderance of the evidence that the Agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Dep't of Transp., EEOC Request No. 05900159 (June 28, 1990); Peterson v. Dep't of Health and Human Servs., EEOC Request No. 05900467 (June 8, 1990); Washington v. Dep't of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Here, the Agency has articulated legitimate, nondiscriminatory reasons for charging Complainant with LWOP. M1 explained that prior to Complainant's fall on August 28, 2015, he had advised him that his leave balances were close to depletion. ROI, at 300. M1 affirmed that during his phone call with Complainant on August 31, 2015, Complainant notified him that he would be out of work for a week. *Id.* M1 stated that he then advised Complainant to provide documentation to support his incapacitation. *Id.* M1 further advised Complainant that his annual leave balance was depleted, that he had 12 hours of sick leave, and he would be in a LWOP status. *Id.* Complainant believed that he should be paid COP, and M1 explained that since Complainant had not contacted him or returned his calls after his fall on August 28, 2015, he was unsure if Complainant was claiming the incident was a work-related accident or an accident due to his medical condition. *Id.* Complainant informed M1 that he was filing a work-related accident. After Complainant clarified his request, M1 took appropriate steps to correct Complainant's leave and pay him COP. *Id.* at 301-02.

Complainant now bears the burden of establishing that the Agency's stated reasons are merely a pretext for discrimination. *Shapiro v. Soc. Sec. Admin.*, EEOC Request No. 05960403 (Dec. 6, 1996). Complainant can do this directly by showing that the Agency's proffered explanation is unworthy of credence. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

At all times, the ultimate burden remains with Complainant to demonstrate by a preponderance of the evidence that the Agency's reasons were not the real reasons and that the Agency acted on the basis of discriminatory or retaliatory animus. Complainant has not carried his burden here. After reviewing the record and considering the arguments on appeal, we find that Complainant failed to establish that the Agency's stated reasons for initially charging him with LWOP were pretext intended to hide discriminatory or retaliatory motivation. Accordingly, we find that Complainant was not subjected to discrimination or reprisal as to claim (3).

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 decision in part, and we REVERSE the Agency's decision that it did not fail to provide Complainant with a reasonable accommodation.

ORDER

The Agency shall take the following remedial actions:

1. To the extent that it has not done so already and to the extent that Complainant still requires it, the Agency shall immediately engage in the interactive process with Complainant and provide him with a reasonable accommodation to allow him an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.

2. Within ninety (90) calendar days of the date this decision is issued the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, attorney's fees, and costs no later than thirty (30) days after the completion of the investigation.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive training to MHR, M1, and DM regarding their responsibilities with respect to the Rehabilitation Act, with a special emphasis on reasonable accommodation.
4. Within sixty (60) calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the responsible management officials, including MHR, M1, and DM. The Commission does not consider training to constitute disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

POSTING ORDER (G0617)

The Agency is ordered to post at its Processing and Distribution Center in Charlotte, North Carolina copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. 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 19, 2020
Date