



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

Don T.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service,
Agency.

Appeal No. 2019001176

Agency No. 4E-800-0020-18

DECISION

On October 10, 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 September 12, 2018, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. Our review is de novo. For the following reasons, the Commission REVERSES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Full-Time City Carrier, 01/0, at the Agency's Cheyenne Mountain Station in Colorado Springs, Colorado. The record reveals that Complainant retired from the Agency, effective March 31, 2018.

On March 27, 2018, Complainant filed an EEO complaint wherein he claimed that the Agency discriminated against him on the basis of his religion (Jewish) when he was forced to use Leave Without Pay (LWOP) to observe the Sabbath.²

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.

² Complainant claimed that he was forced to use Leave Without Pay (LWOP) to observe the Sabbath from August 2015 through March 2018. The Agency determined that the starting date for

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). Based on Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

Complainant held a bid position, pursuant to the union-management contract, which provided that he had Sundays and one rotating day off per week. Complainant sought to work Monday through Friday or on Sundays to allow him to observe the Sabbath. Complainant had informed the Agency of his religious beliefs and the conflict. Complainant appeared before the District Reasonable Accommodation Committee (DRAC) on August 27, 2015. Based on the DRAC meeting, Complainant submitted his requests for LWOP on a weekly basis and management attempted to accommodate him based on seniority and operational needs. The DRAC Chairperson stated in a letter dated September 14, 2015, that an accommodation could not violate the collective bargaining agreement. To that end, the Chairperson indicated that Complainant could continue to submit leave slips for any holiday or Saturday that he was scheduled to work, and that management would evaluate his requests and make every effort to approve them, provided the requests did not violate the seniority rights of other carriers in the station concerning leave requests.

In the Agency's decision, the Agency concluded that Complainant established that he had a bona fide religious belief that conflicted with management's requirement that he work a rotating schedule which included Saturdays. Further, Complainant suffered an adverse employment action when he had to use Leave Without Pay in order to be able to have Saturdays off. The Agency determined, however, that Complainant's request for a Monday – Friday schedule or a schedule that allowed him to work on Sundays was not reasonable due to the requirements of his position, as well as established contractual provisions that the Agency was required to follow. Furthermore, the Agency maintained that it fully accommodated Complainant by allowing him to use leave or LWOP in order to observe the Sabbath. The Agency stated that from November 6, 2017 through March 27, 2018, Complainant was off on Saturdays via his rotating day off or use of Leave Without Pay, sick leave, or annual leave. As a result, the Agency concluded that Complainant had been accommodated for his religious practices.

The Agency next found that, to the extent that Complainant alleged disparate treatment, the Complainant failed to establish a prima facie case of religious discrimination. The Agency stated that Complainant failed to show that a similarly situated individual not in his protected group was treated more favorably than he under similar circumstances. Complainant had argued that a supervisor whose religion was Messianic was allowed to work Sundays instead of Saturdays without having to use LWOP. Complainant also claimed that three employees whose religions were unknown were allowed to have Saturdays off to attend school, due to a demotion, and because of health issues, respectively.

Complainant's claim was November 6, 2017, and that any dates prior would be considered untimely based on Complainant's EEO Counselor contact on December 21, 2017.

The Supervisor asserted that the supervisory employee referenced by Complainant had Saturdays off because the Cheyenne Mountain Station became a Sunday Amazon hub. According to the Agency, that supervisor had a different position title and job duties than Complainant and was not covered by the terms of the collective bargaining agreement. With respect to the three other employees cited by Complainant, the Agency stated that two of them retired prior to the relevant time period and therefore could not have been treated more favorably than Complainant because they were not working during the time period at issue. As for the remaining comparator, the Agency stated that he had a different work location than Complainant. The Agency acknowledged that Complainant's Supervisor supervised this employee for one month but stated there was no evidence that the employee had Saturdays off during that time. The Agency further stated that this employee either worked on Saturdays or used Leave Without Pay or sick leave.

Assuming *arguendo* Complainant had set forth a *prima facie* case of discrimination, the Agency determined that management articulated a legitimate, nondiscriminatory explanation for its actions. Complainant's Supervisor stated that all regular carriers had Sundays and a rotating day off and therefore having Saturday off violated Complainant's contractual bid position.

The Agency determined that Complainant failed to show that management's explanation for its actions was a pretext intended to hide discriminatory motivation. As a result, the Agency found that Complainant had not been subjected to discrimination. Thereafter, Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

Denial of Religious Accommodation

Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation is shown to impose an undue hardship. 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1). The traditional framework for establishing a *prima facie* case of failure to provide a religious accommodation requires an employee to demonstrate that: (1) he has a bona fide religious belief, the practice of which conflicted with their employment; (2) he informed the agency of this belief and conflict; and (3) the agency nevertheless enforced its requirement against the employee. Heller v. EBB Auto Co., 8 F.3rd 1433, 1438 (9th Cir. 1993); Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984).

We find that Complainant has established a *prima facie* case of denial of religious accommodation. Complainant is a Jewish individual who observes the Sabbath which he defined as from sunset on Friday until sunset on Saturday. Complainant sought a religious accommodation beginning in August 2015. Complainant had a schedule that included Sundays off and a rotating day off. Complainant stated that he should have been allowed to work Monday through Friday or on Sundays. In September 2015, Complainant was denied the schedule he sought and instead the DRAC advised him to submit his requests for Leave Without Pay on a weekly basis and that they would attempt to accommodate him based on seniority and operational needs.

Once an employee establishes a prima facie case, the Agency must show that it made a good faith effort to reasonably accommodate Complainant's religious beliefs and, if such proof fails, the Agency must show that the alternative means of accommodation proffered by the employee could not be granted without imposing an undue hardship on the Agency's operations. See Tiano v. Dillard Dept. Stores, Inc., 139 F.3rd 679, 681 (9th Cir. 1998); Redmond v. GAF Corp., 574 F.2d 897, 902(7th Cir. 1978); Complainant v. U.S. Postal Serv., EEOC Request No. 05890532 (Oct. 25, 1989). Pursuant to 29 C.F.R § 1605.2(a)-(e), the Commission's "Guidelines on Discrimination Because of Religion" (the Guidelines), alternatives for accommodating an employee's religious practices include, but are not limited to, voluntary substitutes and swaps, flexible scheduling, and lateral transfers and job changes. The employee should be accommodated in his or her current position if doing so does not pose an undue hardship. If no accommodation is possible, the Agency needs to consider whether lateral transfer is a possible accommodation. See also EEOC Compliance Manual Section 12, "Religious Discrimination," No. 915.003 (July 22, 2008) (Compliance Manual).

To show undue hardship, an employer must demonstrate that an accommodation would require more than a de minimis cost. Trans World Airlines v. Hardison, 432 U.S. 63, 74 (1977). To prove undue hardship, the employer needs to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious obligation that conflicts with schedule work, but rather should rely on objective information. See Compliance Manual.

After a thorough review of the record, we find that the Agency failed to meet its burden to demonstrate that it made a good faith effort to reasonably accommodate Complainant's religious beliefs, or that to do so would have imposed an undue hardship upon the Agency's operations. There is no evidence in the record that the Agency attempted to obtain voluntary substitutes or swaps for the Saturdays that Complainant was scheduled to work. The Agency has provided no evidence as to why Complainant could not have rotated schedules with other employees who had Saturday off. We find the evidence in the record insufficient to demonstrate undue hardship because it is mere speculation. The Agency has failed to present evidence of the impact to its operations if it had allowed Complainant to have Saturdays off without requiring him to utilize some form of leave.

We are not persuaded that the Agency made a sufficient effort to reasonably accommodate Complainant's religious beliefs or that affording Complainant an accommodation would have imposed an undue hardship upon the Agency's operations. Further, we find that the Agency erred in framing this complaint as only including the period beginning on November 6, 2017. The denial of religious accommodation was ongoing extending back to August 2015. The Agency's duty to accommodate was ongoing and therefore the Agency's denial of a religious accommodation was a continuing violation.

Based on the foregoing, we find that the Agency violated Title VII when it failed to provide Complainant with the religious accommodation of having the Sabbath as a regular day off.³

CONCLUSION

The Agency's determination that it did not discriminate against Complainant is REVERSED. We find that the Agency discriminated against Complainant when it denied his request for a reasonable accommodation and ORDER the Agency to take further action in accordance with the Order below.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 30 days from the date this decision is issued, the Agency shall provide Complainant a reasonable accommodation for his religious beliefs. The Agency may consider all possible methods of accommodating his religious beliefs, including, but not limited to, voluntary substitutions or swaps, lateral transfers, or changes in job assignments or crafts.
2. Within 60 days of the date this decision is issued, the Agency shall restore or compensate Complainant for any leave that Complainant has been forced to use from August 2015 to his retirement date of March 31, 2018, to avoid working on Saturdays. The Agency shall also compensate Complainant for the days he utilized Leave Without Pay from August 2015 to his retirement date of March 31, 2018, so that he would have Saturdays off.
3. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's entitlement to compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issue of compensatory damages no later than 30 days after the completion of the investigation.
4. Within 90 calendar days from the date that this decision is issued, the Agency shall provide EEO training to the management officials at the Cheyenne Mountain Station, including at least eight hours of in-person or interactive training on Title VII and an

³ Because we find that the Agency discriminated against Complainant when it failed to accommodate Complainant's religious observances, we need not decide whether this failure also constituted disparate treatment discrimination.

Agency's obligation to provide accommodations to its employees for religious observances. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

5. Within 60 days of the date this decision is issued, the Agency shall consider taking disciplinary action against the responsible management officials identified as the Supervisor and the DRAC Chairperson. The Commission does not consider training to be 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).

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Cheyenne Mountain Station facility 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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), 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 the date this decision was issued. 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 C.F.R. § 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 (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 (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests.

Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

January 30, 2020
Date