



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

[REDACTED]
Frederick A.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Appeal No. 2019002604

Hearing No. 551-2016-00120X

Agency No. DLAN-15-0241

DECISION

Following its January 9, 2019, final order, the Agency filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. For the following reasons, the Commission REVERSES the Agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Transportation Assistant (Office Automation), GS-7, at the Agency's facility in Bremerton, Washington. On September 15, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of his race (African-American), sex (male), color (black), disability (vision impairment), age (52), and in reprisal for prior protected EEO activity under 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. Between August 2014 and September 2015, management denied him assistance on the job and subjected him to a hostile work environment;
2. From June 5, 2015, management failed to provide him with a reasonable accommodation and changed his job description in July 2015; and
3. On November 19, 2015, management issued him a notice of proposed removal for inability to perform the duties of his position.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and the AJ held a hearing on November 15-16, 2016, and issued a decision on December 4, 2018. In his decision, the AJ found that the Agency violated the Rehabilitation Act when it failed to provide Complainant with a reasonable accommodation and failed to engage in the interactive process in good faith and instead proposed his removal. The AJ also found, however, that Complainant failed to establish discrimination on any of the other bases or claims. By way of remedies, the AJ ordered the Agency to: (1) pay Complainant proven costs; (2) pay pecuniary damages for Complainant's moving expenses from Bremerton, Washington to his new place of employment in November 2015; (3) pay \$5,000.00 in non-pecuniary compensatory damages; (4) train all managers, supervisors, and employees at the facility at issue as to their rights and responsibilities under EEO law; and (5) post a Notice.

The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected him to discrimination as alleged. On appeal, the Agency contends that it did not unlawfully deny Complainant's request for reasonable accommodation. It argues that, to the extent that it did not grant Complainant's request for reasonable accommodation, it was his "own failure to cooperate in this process that rendered the agency unable to reasonably accommodate him." Citing Koch v. Securities and Exchange Commission, EEOC Appeal No. 01A03888, (December 21, 2001), the Agency maintains that Complainant cannot "blame the agency for this end result he himself effected." Finally, the Agency contends that the AJ "failed to identify a specific reasonable accommodation that could have been made here for the Complainant."

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

Initially, we note that that neither the Agency, nor Complainant, has appealed the AJ's conclusion that Complainant failed to prove discrimination on the bases of sex, race, color, age, or reprisal.

As such, this decision will solely address the AJ's finding that the Agency violated the Rehabilitation Act. We further note that the Agency does not appeal the AJ's finding that Complainant is a qualified individual with a disability under the Rehabilitation Act.

Here, we concur with the AJ's finding that the Agency violated the Rehabilitation Act when it failed to provide Complainant with a reasonable accommodation. Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). 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).

A reasonable accommodation must be effective. See U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002) ("the word 'accommodation' . . . conveys the need for effectiveness"). That is, a reasonable accommodation should provide the individual with a disability with "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." 29 C.F.R. Part 6130 app. § 1630.9. If more than one accommodation will enable an individual to perform the essential functions of his or her position, "the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide." Id.; see also Enforcement Guidance on Reasonable Accommodation at Question 9. "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability." 29 C.F.R. Part 6130 app. § 1630.9.

We note that, under the Rehabilitation Act, it is anticipated that, to the extent necessary, the employer will engage in the interactive process with the individual requesting accommodation to clarify the individual's needs and identify the appropriate reasonable accommodation. 29 C.F.R. § 1630.2(o)(3). However, failure to engage in the interactive process does not constitute a violation of the Rehabilitation Act. Employer liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job. Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002) (although agency cannot be held liable solely for failure to engage in interactive process, it can be held liable where failure to engage in process

resulted in failure to provide reasonable accommodation), request to recon. denied, EEOC Request No. 05A30114 (Jan. 9, 2003). Similarly, employer liability may be avoided where failure of the requesting individual to engage in the interactive process results in the parties being unable to identify an effective accommodation. See Estate of William K. Taylor, Jr. v. Dep't of Homeland Sec., EEOC Appeal No. 0120090482 (June 20, 2013) (complainant's failure to provide requested documentation caused failure to receive possible accommodation), request to recon. denied, EEOC Request No. 0520130591 (Jan. 16, 2014).

Here, the Agency argues that Complainant cannot prevail on his claim because he did not engage in the interactive process. However, we concur with the AJ's finding that the record does not show that Complainant's actions were responsible for the Agency's failure to accommodate. The record shows that Complainant has limited vision as the result of a damaged retina in one eye, a cataract in the other, and glaucoma. Complainant applied for and subsequently accepted the Transportation Assistant (Office Automation) position at issue in July 2014, because the vacancy announcement described the position as "sedentary" and, therefore, he believed his vision impairment would not be a factor. The record further shows that Complainant took, and passed the required physical before entering into the position, and was able to perform the essential functions of the positions through June 2015. The hearing testimony shows that, despite Complainant's first-line supervisor (S1) testifying that Complainant's position required daily use of a forklift, Complainant was not required to use a forklift or other material handling equipment (MHE) that required a license at any time during his first year in the position.

On June 4, 2015, management instructed Complainant to obtain a Washington state driver's license as a requirement of his position. Specifically, S1 and Complainant's manager (M1), informed him that he needed the driver's license in order to obtain an MHE license to drive a forklift, which they stated was a requirement of Complainant's position. Complainant initially requested a reasonable accommodation, but later withdrew the request as he did not believe that driving a forklift was an essential function of his position.² Thereafter, on July 1, 2015, Complainant submitted medical documentation from his ophthalmologist, identifying his limitations and visual field defects. Upon receipt of this medical documentation, S1 asked Complainant what reasonable accommodations would enable him to drive a forklift. Complainant again stated that the position did not require him to be able to drive a forklift.

On July 10, 2015, M1 rewrote the position description for Complainant's position, removing the words "sedentary" and "office automation", and adding the specification that 20% of the position would involve operation MHE and that "a valid driver's license is required as a prerequisite for MHE licensing." Complainant was not able to obtain a license and continued to contend to management that his position did not require using a forklift. In October 2015, management reassigned Complainant to another location "with little work to do."

² We note that at the end of 2014, Complainant requested a larger computer monitor as a reasonable accommodation, but there is no evidence that the Agency acted on this request.

On November 10, 2015, Complainant underwent an ordered fitness-for-duty examination that reaffirmed the medical documentation that he previously provided from his ophthalmologist. Namely, that Complainant's vision impairment prevented him from driving a forklift. On November 19, 2015, management issued him a Notice of Proposed Removal for inability to perform all the duties of his position. Complainant then submitted his two-week notice and accepted a position with the Navy.

Despite the Agency's arguments on appeal, we do not find that the instant case is like that in Koch, where "complainant refused to provide specific information about the precise nature of his medical condition and/or the exact accommodation it necessitated." Id., at 13. Here, the record shows that the Agency was made aware of Complainant's limitations and need for an accommodation as Complainant submitted medical documentation from his doctor detailing his vision impairment, and had previously asked for a larger computer monitor as an accommodation. Management also required Complainant to submit to a fitness-for-duty examination, after which, instead of assessing what reasonable accommodation was necessary or otherwise engaging in the interactive process, they instead issued him a proposed notice of removal. Accordingly, we conclude that substantial evidence supports the AJ's finding that the Agency discriminated against Complainant on the basis of his disability when it failed to provide him with a reasonable accommodation and instead proposed his removal.

Finally, where a finding of discrimination involves a failure to provide reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the complainant with a reasonable accommodation. 42 U.S.C. § 1981a(a)(3); see also Jones v. Dep't of Agric., EEOC Appeal No. 0120080833 (July 18, 2012); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). Here, we find that the Agency did not engage in good-faith efforts to accommodate Complainant. We, therefore, concur with the AJ's award of \$5,000.00 in compensatory damages. Specifically, the AJ found that Complainant established that he suffered mental anguish and loss of enjoyment of life as a result of the Agency's discrimination, as well as suffering a negative impact on his career advancement. Based upon a review of the totality of the evidence and in light of Commission precedent, we find that the award of \$5,000.00 is appropriate and is consistent with that awarded in similar cases. See Phillis W. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120180863 (June 5, 2019) (Commission awarded \$5,000.00 in compensatory damages where Agency's failed to engage in good faith efforts to reasonably accommodate); Ronnie R v. Dep't of Health & Human Serv., EEOC Appeal No. 2019001754 (May 7, 2019) (Award of \$5,000 where delay in providing Complainant with a reasonable accommodation resulted in stress, anxiety, and sleep disturbances).

CONCLUSION

We REVERSE the Agency's final order rejecting the AJ's finding of disability discrimination and ORDER the Agency to provide the remedies as specified in the Order herein.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency shall pay Complainant \$5,000.00 in non-pecuniary, compensatory damages.
2. Within 60 days of the date this decision is issued, the Agency shall pay Complainant proven costs connected to the instant complaint, including copying and travel expenses.
3. Within 60 days from the date this decision is issued, the Agency shall pay Complainant proven moving expenses from Bremerton, Washington, to the location of his new position in November/December 2015.
4. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training for all supervisors and management officials at the Bremerton, Washington facility. The training shall emphasize management officials' obligations under the Rehabilitation Act.
5. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against S1 and M1. 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 employment, then 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 Bremerton, Washington 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).

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)

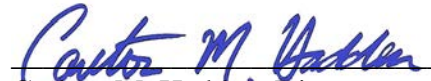
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

August 18, 2020
Date