



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

[REDACTED]
Malorie D.,¹
Complainant,

v.

William P. Barr,
Attorney General,
Department of Justice
(Drug Enforcement Administration),
Agency.

Appeal No. 2019003000

Hearing No. 540-2017-00068X

Agency No. DEA-2016-00339

DECISION

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 11, 2019, final decision 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. 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 an Intelligence Program Support Assistant, GS-0303-07, at the Agency's Phoenix Field Division, Tucson Office. During the relevant time, the Group Supervisor was Complainant's first level supervisor (S1).

In January 2012, the Tucson District Office moved into a new building and Complainant stated she verbally requested a reasonable accommodation of a parking space close to the building and her work station.

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.

Complainant stated she requested management assign her the only handicap parking space in the supervisor's parking lot which was a secure, gated area at the rear of the building (referred to as the west lot). Complainant stated this space was on a flat surface and was the closest handicap space to her office. Assistant Special Agent in Charge (ASAC) approved the request and she used that space until December 2015.

The record revealed that in 2015, two other individuals with handicap placards requested handicap parking. On November 25, 2015, the Supervisory Administrative Support Specialist (Administrative Officer) emailed the Tucson District Office stating that two spaces marked with orange cones closest to the south entrance were reserved for two specific employees and that no one else was to park in those spaces.

On December 11, 2015, the ASAC notified the Tucson Office by email that starting December 14, 2015, all handicapped personnel requiring designated parking must use the east parking lot only, at the front of the building; entry to the building would be through the secured entry point; and duty hours for those individuals would be from 8:30 a.m. to 5:00 p.m. and that they can use the reception door for access.

In a January 13, 2016 email, the ASAC to the Tucson Office, warned the special agents that if they parked their government vehicle in the handicap parking spaces (without a handicap placard), they would lose their government vehicle home to work authorization for 90 days. Employees were also informed that if anyone without a handicap placard parked their personal vehicle in the handicap spaces, their car would be towed at their expense. The ASAC also noted that, "[i]f a person had a placard NO ONE ha[d] the right to question the need for the placard."

The record contains an email exchange in response to the ASAC's January 13, 2016 email between the ASAC and Person C in which Person C asked what happened. The ASAC responded that a named person parked in a handicap spot in the south lot and yelled at the contractor who had the handicap placard. In a reply email, the ASAC said, "I guess it's important to park right next to the door. Avoid having to walk so far."²

In her affidavit, Complainant stated the change in her assigned parking was problematic because the handicap spaces in the east parking lot were further from her office than the space in the west parking lot and that the front door was often not attended to by duty personnel, forcing her to walk a long distance to the north entrance of the building. Complainant stated this was not acceptable since she has ambulation issues.

² While the Agency provided the January 13, 2016 email on appeal, it did not provide email of the subsequent exchange in response to the ASAC's January 13, 2016 email between the ASAC and Person C. Complainant provided this email with her appeal which she stated was part of the EEOC Initial Disclosure and Discovery items.

In her rebuttal affidavit, Complainant stated that on July 26, 28, and 29, 2016, she could not access the front door when she arrived in the morning, and on July 28 and 29, 2016, she could not access the front door when she returned from lunch. Complainant reiterated that the distance she had to walk with the new spot was further from her work area and stated the new terrain had curbs and ramps while the spot in the back of the building was a flat surface and had no curbs over which she could trip. Further, Complainant stated that on days where her back or knees are really bad she parks on the north end of the building next to the median so she can open her door far enough to get in and out of her vehicle.

The record contains an affidavit from Person A, ASAC Secretary, who had a handicap parking license and used handicap parking. Regarding the use of handicap parking after ASAC's December 11, 2015 email, Person A stated that someone is not always there when you ring the bell at 8:30 a.m. and as a result you have to walk around to the north side of the building. Person A stated, "the distance from the north door is a little further than Complainant used to walk, but the back (west side) is flat, whereas the front it's not level and the Complainant sometimes trips." Person A stated that she had seen Complainant trip in the east parking lot.

The report of investigation contains an April 21, 2016 email from the ASAC to the EEO Counselor stating that he cannot provide Complainant with "the only secured covered handicap parking spot in the Supervisors lot over the other handicap employees. I cannot be put in a position to decide which employee is more handicapped than another. Because of the problems associated with this particular handicap spot in the Supervisors parking area, the handicap designation is being removed from the spot."

In his affidavit, the SAC stated that the ASAC advised him "he did not want to be put in a situation where he was evaluating the seriousness of anyone's handicap and would prefer if all were offered the same accommodation. I agree with his decision."

Complainant supplied a copy of her Response to Agency's Discovery Requests dated July 9, 2018.³ In Interrogatory 8, Complainant was asked to describe each time she was unable to access the secured front entrance to the Tucson District Office after parking in the designated handicap parking spaces in the east parking lot. Complainant stated that, "From November 2015 to approximately Oct 2016 there was not a permanent receptionist so there were multiple times I had to either stand at the front door until someone attended the front desk or the duty agent arrived to access the building."

In Interrogatory 9, Complainant was asked to describe every time she was unable to park in any of the designated handicap parking spaces in the east parking lot of the Tucson District Office due to unavailability of an open parking space. Complainant responded that she did not have specific dates but noted two occasions she could not access the parking spaces in the east lot due to a shredding service truck blocking the access and another time ground maintenance blocking the way.

³ Complainant provided this document on appeal.

On May 2, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability when:

On December 11, 2015, management withdrew a previously provided reasonable accommodation of a reserved handicap parking space in the west parking and directed her to park in one of four unreserved handicap parking spaces in the east parking lot of the Tucson office.

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 Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing but subsequently withdrew her request. On October 26, 2018, the EEOC AJ issued an Order granting Complainant's request to withdraw her hearing request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, the Agency noted that Complainant stated she was a "100 percent service-connected disabled veteran" and that she suffered from back, knee, and foot "issues" that limited her ability to walk long distances. The Agency noted that the Special Agent in Charge (SAC) stated he believed the Agency recognized Complainant as a person with a disability. The Agency noted that the ASAC said he knew that Complainant had a disability because she had a handicap placard, but he did not know the details of her condition. The Agency noted that the AO stated he was not aware of Complainant's disability, although he knew that she had a handicap placard for her car. He stated that changes to the handicap parking at the office and reassignment of Complainant's parking spot was to stem employee complaints that previously granted reasonable accommodations were unfair, to ensure that all handicap personnel were given fair and equitable accommodations, and to increase parking available to supervisors.

The Agency stated that the SAC, the ASAC, and the AO were all aware that Complainant had a handicap placard and required a handicap parking space. The Agency noted that despite management's lack of knowledge about Complainant's specific conditions or limitations, they provided her with a reasonable accommodation. The Agency noted it was undisputed that there were four handicap parking spaces in the east parking lot available to Complainant. The Agency stated the record showed the parking spaces in the east parking were only slightly further away from Complainant's office than her previously assigned parking space in the west parking lot. The Agency stated the minor increase in distance did not render the accommodation in the east parking lot unreasonable. The Agency noted Complainant claimed that she was not able to access the east entrance readily on only five occasions in a six-month period. The Agency found the infrequent lack of immediate access does not render the accommodation in the east parking lot unreasonable. The Agency noted that S1 and the ASAC stated that Complainant frequently parked in the north lot and accessed the building at the north entrance, making the distance for her to walk from her parking space to her office even shorter than the distance from her old parking spot in the west lot to her office. The Agency found no evidence that Complainant was unable to use the handicap spaces in the east lot or a regular parking space in the north lot when she desired.

Further, the Agency stated that the record contained a January 21, 2016 email from S1 to the Field Intelligence Manager regarding Complainant's EEO claim. The Agency noted that S1 stated Complainant notified him that she intended to file an EEO complaint concerning the December 2015 handicap parking directive and the change to her previously assigned parking space. The Agency noted that according to the email, Complainant refused to meet with the Tucson Office or Phoenix Field Division management to "work out her concerns" and insisted her only recourse was to file an EEO claim. The Agency found this constituted a refusal by Complainant to engage in the interactive process. The Agency determined management provided Complainant with a reasonable accommodation, and was not required to provide Complainant with the accommodation of her choice, which was a reserved handicap parking space in the secure, covered west parking lot.

On appeal, Complainant noted that she filed her complaint because she was forced to park in the visitor's lot; to work set hours; and to use a specific entrance to the building which took away her accommodation. Complainant noted the main visitor's entrance was not consistently manned as verified by the affidavit of Person A.

Complainant submitted a supplemental statement in support of her appeal on October 8, 2019. Complainant stated that ASAC removed the handicap parking space she used in the west parking lot; however, it was now being used as "employee of the month" parking spot. Among other documentation, she submitted an October 4, 2019 email sent to the Tucson District Office recognizing an Investigative Assistant (IA) as Employee of the Month for October 2019. The email noted the IA is authorized to park in the designated Employee of the Month parking space in the west supervisor lot for the month of October.

In response to Complainant's appeal, the Agency notes that S1 stated that Complainant refused to engage in the interactive process with management to discuss her concerns about the change in her parking assignment, or how her disability might be impacted by the change. The Agency states it correctly determined that it provided Complainant with a reasonable accommodation. Moreover, the Agency states that on appeal, Complainant tried to offer new evidence into the record. The Agency notes that "While this non-record evidence was available to [Complainant], and her counsel, before she withdrew her request for a hearing" she failed to provide it to the Complaint Adjudication Office (CAO) for consideration. Thus, the Agency claims the Commission should ignore this new, non-record evidence on appeal. The Agency also argues that even if the Commission considers the additional information, the vast majority of the information is not material to her claim of disability discrimination.

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”).

At the outset, we address the Agency’s contention that the “non-record evidence” Complainant submitted on appeal should not be included. First, we note that the Agency has not specified which documents should not be considered by the Commission on appeal. We note that Complainant submitted over 600 pages of documents in support of her appeal, a number of which were already part of the record. Second, we note it is unclear whether these documents were submitted to the AJ prior to Complainant’s withdrawal of her hearing request. Third, we find the documents submitted on appeal to constitute further evidence supporting Complainant’s position that she was subjected to disability discrimination; however, even without those documents, the record supports a finding of discrimination. Moreover, we note that the October 4, 2019 email Complainant submitted in her supplemental brief was not in existence when her initial appeal was filed. As that evidence was not reasonably available previously, we will consider that evidence in our decision.

To establish an entitlement to a reasonable accommodation under the Rehabilitation Act, Complainant must first demonstrate that she is a “qualified individual with a disability” within the meaning of the Act. An individual with a disability is one who: 1) has a physical or mental impairment that substantially limits one or more of that person’s major life activities; 2) has a record of such impairment; or 3) is regarded as having such an impairment. 29 C.F.R. §1630.2(g).

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(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). A “qualified” individual with a disability is an “individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. §1630.2(m). A modification or adjustment is “reasonable” if it appears to be “feasible” or “plausible.” Enforcement Guidance at 4. An accommodation also must be effective in meeting the needs of the individual. Id. at 4-5.

The Agency does not dispute that Complainant is a qualified individual with a disability. Moreover, the record reveals that the Agency provided Complainant a reasonable accommodation of a designated parking space close to the building and her work station from January 2012, through December 11, 2015.

The record reveals that effective December 14, 2015, the Agency withdrew a previously provided reasonable accommodation of a reserved handicap parking space in the west parking lot and directed her to park in one of four unreserved handicap parking spaces in the east parking lot.

The record reveals the handicap spaces in the east parking lot were further from Complainant's office than the space in the west parking lot and that on multiple occasions the front door was not attended by duty personnel which resulted in Complainant having to wait for someone to attend the front desk, walk a long distance to the north entrance of the building, or try to find parking in another non-designated handicap space. Upon review, we find the Agency violated the Rehabilitation Act by failing to accommodate Complainant's disability, or prove that to do so would cause an undue hardship.

Despite the Agency's contention to the contrary, we find the record does not show that Complainant failed to engage in the interactive process. We note the Agency cites a single January 21, 2016 email from S1 to the Field Intelligence Manager regarding Complainant's EEO claim to support its position.

The January 21, 2016 email in question from S1 to the Field Intelligence Manager contained the subject "EEO complaint" and noted that afternoon S1 had learned Complainant intended to file an EEO complaint. In the email S1 stated Complainant had told him that she had been discussing the situation with an EEO Counselor and "felt that making a formal filing was her only fair option. She told me that she felt that she would not be treated fairly if she had the issue mediated at the Division level. I assured [Complainant] that she would be treated fairly to have a meeting locally to work out her concerns. [Complainant] disagreed and the conversation ended." We note the record does not contain an affidavit from S1. We find that the email appears to reference mediating Complainant's informal EEO claim rather than an attempt to engage in the interactive process regarding her request for reasonable accommodation. Moreover, we find no evidence that the Agency attempted to engage in the interactive process prior to removing the accommodation it had provided her for nearly four years

Where a finding of discrimination involves a failure to provide reasonable accommodation to a disability, damages are awarded if the Agency fails to demonstrate it made a good faith effort to provide the complainant with a reasonable accommodation. See Accommodation Guidance at 11, footnote 24, (Oct. 17, 2002). Complainant v. Dep't of Justice, EEOC Appeal No. 0120122924 (Sept. 11, 2015). We find the record devoid of evidence that the Agency engaged in the interactive process to resolve the accommodation issue. Accordingly, we find that compensatory damages are available to the extent that Complainant can prove such damages.

CONCLUSION

Accordingly, the Agency's final decision finding no discrimination is REVERSED and the matter is REMANDED to the Agency for further processing in accordance with this decision and the Order herein.

ORDER

To the extent it has not already done so, the Agency shall take the following remedial actions:

1. The Agency is directed to immediately provide Complainant with a reasonable accommodation for her disability. The Agency shall engage in the interactive process with Complainant and provide her with a reasonable accommodation so that she can perform the essential functions of her job.
2. Within 90 days from the date that this decision is issued, the Agency shall complete a supplemental investigation in order to determine Complainant's entitlement to compensatory damages. The Agency shall afford Complainant the opportunity to submit evidence in support of her claim for damages within the 90-day time frame, and Complainant shall cooperate with any additional evidentiary requests made by the Agency. Within 30 days of the date that the Agency determines the amount of compensatory damages owed Complainant, the Agency shall pay that amount;
3. Within 90 days from the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to the SAC, the ASAC, and the AO on the Rehabilitation Act. The training shall emphasize the Rehabilitation Act's requirements with respect to an Agency's duties to provide reasonable accommodations to individuals with disabilities.
4. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against the SAC, the ASAC, and the AO. 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).

POSTING ORDER (G0617)

The Agency is ordered to post at its Tucson Office 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 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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

September 15, 2020

Date