



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Salvatore K.,¹
Complainant,

v.

Merrick Garland,
Attorney General,
Department of Justice
(U.S. Marshals Service),
Agency.

Appeal No. 0120182095

Hearing No. 570-2014-00184X

Agency Nos. USM-2013-00379
USM-2015-01457

DECISION

Complainant timely 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 May 11, 2018, final order 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 REVERSES the Agency's final order.

ISSUES PRESENTED

The issues presented are whether the EEOC Administrative Judge (AJ) properly issued a decision without a hearing, and whether the AJ properly found that Complainant did not prove that he was improperly subjected to medical inquiries and examinations.

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.

BACKGROUND

The United States Marshals Service (Agency) is statutorily responsible for security in federal courthouses. 28 U.S.C. § 566(a). The Agency fulfills this responsibility by contracting with private companies to provide Court Security Officers (CSOs) for federal courthouses.

Complainant began working as a CSO in 2001. From 2012 until June 12, 2014, Complainant worked as a CSO pursuant to a contract between the Agency and federal contractor ABC Security, Inc. (ABC).² In this position, Complainant provided security to the federal court and its judicial officers, witnesses, defendants, and attorneys. According to the CSO position description, the duties and responsibilities of a CSO require frequent and prolonged walking, standing, running, sitting, and stooping. Report of Investigation (ROI), p. 93. Additionally, a CSO is sometimes required to subdue violent or potentially violent people. *Id.* Complainant usually worked at fixed posts near judges' chambers or at the entrance of the courthouse, where he screened members of the public seeking entry to court. At the time of events giving rise to this complaint, ABC assigned Complainant as a CSO in the Agency's Court Security Program at the federal courthouse in Greenbelt, Maryland.

Under the terms of the contract between ABC and the Agency, each CSO "shall undergo and pass an annual examination during the life of ABC the contract for qualification purposes." ROI, Exhibit 17, p. 4. As part of this annual process, all CSOs and CSO applicants complete a comprehensive medical form (CSO Form 229) entitled "Certification of Medical Examination for Court Security Officers," and undergo a medical examination by a contractor-designated examining physician. In this case, a Federal Occupational Health (FOH) physician served as the examining physician.

According to the contract between the Agency and ABC, if an FOH physician is unable to make a medical determination or it is necessary to clarify or prove that a disqualifying condition has been corrected or eliminated, the FOH physician will issue a 'deferred' determination and request additional information from the Contractor. Additionally, according to the contract, "the Contractor shall require CSOs to submit specific supplemental information within 60 days, unless otherwise specified by FOH or the Agency, for completion of a specific test, in order to medically qualify." The contract states that if the requested information is not received by the Agency's Occupational Health Nurse within the 60-day timeframe, or as required for the completion of a specific test, the individual must be disqualified to perform under the contract.

In or about 2005, Complainant was diagnosed with Borderline Type II Diabetes. On August 1, 2013, Complainant was examined by an ABC approved physician pursuant to the annual CSO exam. After the exam, a physician (Dr1) initially reported that Complainant was medically qualified for his CSO position. The report was then transmitted to the Agency.

² Pseudonym used for federal contractor since private sector complaint filed. See 42 U.S.C. § 2000e-5(b).

On October 27, 2013, a FOH physician (Dr2) reviewed the report and issued a medical review form (MRF) to Complainant. The MRF stated that “because there is a diagnosis of diabetes,” Complainant must have his treating physician provide a detailed report regarding “diabetes control” and his current medical status. ROI, Exhibit 11, pp. 1, 2. Additionally, Dr2 requested that Complainant provide the following information:

1. One month of glucose values performed at least four times per day, before breakfast as well as one to two hours after meals, and stored in a downloadable Glucometer;
2. Testing measuring Complainant’s cardiovascular, neurological, renal, and ocular health, including a Bruce protocol treadmill stress test;
3. Complainant’s current hemoglobin measures;
4. The number of hypoglycemic events in the previous year, and the number of such events that required assistance from others;
5. A copy of all laboratory results taken over the previous year and current hemoglobin A1C;
6. A copy of all outpatient clinic notes taken over the previous year;
7. The date of onset/diagnosis, history of Ketoacidosis, hospitalizations, and general statement of Complainant’s compliance with diabetic education, prescribed medications, dietary recommendations, and activity recommendations over the past year. Also, information regarding whether there is hypoglycemia awareness, and if there is, a description of the symptoms experienced and at what blood glucose level symptoms occur;
8. Orthostatic blood pressure measurements while in the supine position and three minutes after Complainant stands up;
9. Complainant’s current eye examination by an ophthalmologist documenting the presence or absence of eye disease based on specific testing (including diabetic retinopathy, macular edema, hemorrhages, lenticular opacities, etc.) which evaluates red/green and blue/yellow color vision; and
10. Complainant’s history of all medications, including type and dosage adjustments over the past year.

On January 8, 2014, Dr1 provided a letter in response to the MRF. In the letter, Dr1 stated the following:

On physical exam, [Complainant] has diet controlled Type II Diabetes Mellitus. He has had no symptoms of Diabetes. Recently, he was seen by his ophthalmologist, [Dr3], as well as his cardiologist, [Dr4], both of whom performed thorough evaluations and found no evidence of diabetic eye or cardiac disorders. He is not in need of blood sugar testing on a daily basis, and there is no need for medications at this point. He has been strongly urged to continue an aggressive weight loss and exercise regimen to improve his blood sugar findings. He will be rechecked for hemoglobin A1c today and again in three months following the above noted exercise and diet regimen. He does not require medication at this time and his borderline Type II Diabetes should not impair his ability to perform his job.

Dr2 subsequently issued a follow-up medical review (MRF) in which she again deferred making a medical determination, pending further examination. ROI, Exhibit 1, p. 16. Dr2 noted that Complainant had not provided requested information about the onset of Diabetes; compliance with treatment; evidence of neurological and renal complications; an eye doctor's report; or an exercise stress test.

In the second MRF, Dr2 did not repeat her earlier demand for the blood glucose log and for information about hypoglycemic events. However, Dr2 asked for the following:

1. A copy of Complainant's eye doctor's report and a "maximal, stress treadmill exercise test;"
2. A report setting forth the date of the onset of Complainant's diabetes;
3. Complainant's history of ketoacidosis and hospitalizations;
4. Complainant's compliance with treatment;
5. A report on whether Complainant had neurological or renal diabetic complications;
6. Complainant's "clinical course over the past 2 years."
7. A copy of "all labs" taken over the previous two years, including current C-peptide level and current Hemoglobin A1C;
8. A copy of all outpatient clinic records over the past two years;
9. Complainant's orthostatic blood pressure measurements while in the supine position and three minutes after standing up;
10. Complainant's current complete eye exam by an eye doctor documenting the presence or absence of eye disease; and

11. An assessment of the presence of cardiovascular, neurological, and renal disease.

ROI, Exhibit 12, pp. 1, 2.

On or about June 5, 2014, the ABC District Supervisor asked Complainant if he intended to submit any additional information to the Agency, and Complainant responded that he believed that he had already provided information addressing his ability to do the job in his physician's letter. Complainant also maintained that he did not comply with Dr2's request for additional medical examinations and information because sticking his fingers four times a day to test his glucose levels would interfere with his ability to hold a gun while working as a CSO. Exhibit 7, p. 4. In a letter dated June 11, 2014, ABC informed Complainant that he was terminated effective June 12, 2014, as "a direct result of your failure to provide all of the required medical follow-up documentation mandated by the [Agency] and the FOH necessary to make a determination of your medical qualification." ROI, Exhibit 1, p. 18.

On March 10, 2015, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against him on the basis of disability when from August 1, 2013, until June 11, 2014, the Agency subjected him to harassing, excessive, and unduly burdensome medical assessments and to requests for documentation while performing services as a CSO on an Agency contract. Additionally, Complainant alleged that he was unlawfully terminated from his employment with ABC Security on June 12, 2014.

AJ's Decision

After the investigation of Complainant's complaint, 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 timely requested a hearing. On October 6, 2016, the AJ issued a Case Management Order in which he stated that he did not believe that the Report of Investigation contained sufficient information to establish the Commission's jurisdiction over the complaint. The AJ required the parties to submit briefs on the topic of jurisdiction.

On October 17, 2016, the Agency submitted a brief conceding the Commission has jurisdiction over this matter. In an order dated October 17, 2016, the AJ found that the Commission has "sufficient jurisdiction" over this complaint and that the discovery period had been initiated. Additionally, the AJ granted Complainant's October 17, 2016 Motion to Amend his complaint to reframe the issue as the following:

Whether Complainant was discriminated against based on his disability (Borderline Diabetes) when, between August 1, 2013 and June 11, 2014, the [Agency] subjected him to harassing, excessive, and unduly burdensome medical assessments and requirements for documentation while he was performing services as a Court Security Officer on the Agency contract, and refused to make determination that he was medically qualified. Complainant further alleges that because the Agency never determined that he was medically qualified, he was

subsequently terminated from his employment with ABC Security on June 12, 2014.

On February 7, 2017, Complainant moved for summary judgment, which the Agency opposed on February 13, 2017. In a decision dated March 29, 2018, the AJ issued summary judgment in favor of the Agency. Specifically, the AJ first found that Complainant failed to timely contact an EEO Counselor to raise his allegations. The AJ further found that, even if the complaint was timely, the Agency's request for Complainant's medical information was job-related and a business necessity. The AJ reasoned that Dr2's requests were consistent with guidance from the American College of Occupational and Environmental Medicine (ACOEM), and Complainant did not show that Dr2's reliance on the guidance was used to discriminate against him because of his disability. The AJ further reasoned that Dr2 was charged with making final medical determinations, and her desire to rely on more than a single-page letter from Complainant's physician was reasonable.

Additionally, the AJ determined that ABC unilaterally issued the letter of termination without request or comment from the Agency while the Agency was still awaiting requested medical documentation from Complainant. Further, the AJ found that Complainant could not prevail on his termination claim because a legitimate, nondiscriminatory reason exists, namely, that Complainant stated that he would not comply with the Agency's requests, which the AJ characterized as reasonable. The Agency subsequently issued a final order fully adopting the AJ's findings.

Complainant's Private Sector Charge with the EEOC

Shortly after filing the instant federal sector complaint, on March 19, 2015, Complainant also filed a disability discrimination charge with EEOC's Baltimore Field Office against ABC (Respondent) challenging his termination. The matter was subsequently transferred to EEOC's Detroit Field Office. On May 24, 2018, the EEOC's Detroit Field Office issued a reasonable cause determination regarding Complainant's charge (Charge No. 531-2015-01124). The determination found, in relevant part, the following:

The Commission has determined that the evidence obtained during the investigation establishes that there is reasonable cause to believe that Respondent discriminated against Charging Party in violation of the ADA [Americans with Disabilities Act] when it discharged Charging Party due to his disability even though Charging Party could perform the essential functions of the job with or without accommodation. The investigation revealed that the Charging Party was able to work as a Court Security Officer, but that the U.S. Marshals Service informed Respondent that Charging Party was medically disqualified due to his inability to meet the medical standards established by the U.S. Marshals Service. Respondent did not object to the U.S. Marshals Service's direction that the Charging Party be removed from his job working as a Court Security Officer nor did Respondent provide the U.S. Marshals Service with supplemental medical information which would have established that Charging Party was medically

qualified to work. The investigation finds Respondent similarly discharged or placed on unpaid leave due to their disabilities a class of Court Security Officers nationwide who were qualified to do the job with or without accommodation from at least February 1, 2012 to present. In addition, Charging Party was subjected to unnecessary rigorous medical testing by the U.S. Marshals Service and/or Federal Occupational Health even though they had sufficient medical information to show Charging Party was qualified for the job.

The letter further invited the parties to engage in conciliation to resolve the matter and forwarded a proposed Conciliation Agreement for their review. On January 12, 2021, the EEOC entered into a conciliation agreement with ABC.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that the AJ erred in finding that his complaint was initiated by untimely EEO Counselor contact. Complainant contends that there is no evidence that the building where Complainant worked contained posters with the applicable time limits, or that he otherwise had constructive knowledge of the time limit for initiating Counselor contact. Complainant argues that because he was directly employed by a contractor instead of a federal agency, it is unreasonable to expect him to have known that within 45 days of his termination, he had the right to pursue a discrimination claim against the Agency. Complainant further contends that the AJ's decision is inconsistent with a May 24, 2018 reasonable cause determination by the EEOC's Detroit Field Office, which found reasonable cause to believe that ABC discriminated against Complainant in violation of the Americans with Disabilities Act (ADA) when it discharged him.

Additionally, Complainant maintains that the AJ improperly relied upon guidance from the American College of Occupational and Environmental Medicine (ACOEM) to conclude that there was no discrimination in this case. Complainant contends that ACOEM guidance was not applicable here because he only had "pre-diabetes," and the ACOEM guidance concerns law enforcement officers in general, not CSOs in particular. Complainant also contends that nothing in ACOEM guidance required the Agency to request all of the information it asked him to submit.

The Agency requests that we affirm its final order but does not raise additional arguments on appeal.

ANALYSIS AND FINDINGS

Federal Sector EEO Process Jurisdiction and EEO Counselor Contact

As an initial matter, we note that the Agency concedes and does not challenge the AJ's finding that Complainant's claim that the Agency violated the Rehabilitation Act falls within the jurisdiction of the federal sector EEO process. Therefore, we decline to review the AJ's determination on jurisdiction.

Regarding timeliness, EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. The Commission has adopted a “reasonable suspicion” standard (as opposed to a “supportive facts” standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

EEOC regulations provide that the agency or the Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. 29 C.F.R. § 1614.105(a)(2).

Here, the record reveals that Complainant was terminated by ABC on June 12, 2014. Complainant initiated EEO Counselor contact on February 4, 2015, which is well beyond the 45-day time limit. However, the Counselor’s Report states that Complainant maintained that he was unaware of the 45-day time limit and did not learn about it until the union told him to file a claim with the Agency’s EEO office.

The AJ noted that the Agency accepted Complainant’s claims because it had no information that he was aware of the time limits. The AJ also noted that it was unclear whether the building in which Complainant worked contained posters with the applicable time limits or if Complainant had other constructive knowledge of the time limits. Nevertheless, the AJ concluded that Complainant’s complaint was initiated by untimely EEO Counselor contact because he found that Complainant should have reasonably suspected discrimination at the time of his termination but failed to act with due diligence to pursue his legal rights.

Upon review, we note that the Agency concedes that the time limits should be extended here because there is no record that Complainant was previously apprised of the applicable time limits. The AJ determined that Complainant failed to exercise due diligence in pursuing his EEO rights, but we find no evidence that Complainant’s initial EEO Counselor contact was so late as to constitute an unreasonable delay in these circumstances. Consequently, we waive the time limits in this case, and find that the AJ improperly concluded that Complainant’s complaint was initiated by untimely EEO Counselor contact.

Summary Judgment

We now must determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g).

EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). In this case, we carefully reviewed the record and find that it is adequately developed for us to address the merits of this case. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, there is no evidence that such a dispute exists. As such, the AJ correctly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, we find that the AJ's issuance of a decision without a hearing was appropriate. However, we determine that summary judgment should have been issued in favor of Complainant, instead of in favor of the Agency.

Disability-Related Inquiries/Examination

Under the Rehabilitation Act, employers may make disability-related inquiries or require medical examinations of employees only if they are job related and consistent with business necessity. 29 C.F.R. §§ 1630.13(b), 1630.14(c). The Rehabilitation Act does not limit the prohibitions against improper medical inquiries to individuals with disabilities. 29 C.F.R. § 1630.14(c); Meeker v. U.S. Postal Serv., EEOC Appeal No. 01A12137 (Aug. 23, 2002). Moreover, generally, a disability-related inquiry or medical examination of an employee may be 'job related and consistent with business necessity' when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000) (Enforcement Guidance on Disability-Related Inquiries and Examinations) at Question 5.

"Objective evidence" is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with his ability to perform essential functions or will result in a direct threat. Id. at Question 7. "Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. § 1630.2(r); Candi R. v. Dep't of Defense, EEOC Appeal No. 0120172238 (Feb. 28, 2019).

“An employer is entitled only to the information necessary to determine whether the employee can do the essential functions of the job or work without posing a direct threat.” Enforcement Guidance on Employee Inquiries and Examinations at Question 13. The burden is on the Agency to show that one of the criteria justifying the inquiry or examination was met. Hampton v. U.S. Postal Serv., EEOC Appeal No. 01986308 (July 31, 2002).

The direct threat evaluation must be based on an individualized assessment of the person’s present ability to safely perform the essential functions of the job. Alonzo N. v. Dep’t of Homeland Security, EEOC Appeal No. 0120180739 (June 21, 2019). In determining whether an individual would pose a direct threat, the factors to be considered include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. Candi R. v. Dep’t of Defense, EEOC Appeal No. 0120172238.

In this case, we note that Complainant is not challenging the Agency’s annual medical examination of all CSOs. He is only challenging the Agency’s subsequent medical inquiries/examinations. After the annual medical examination, the Agency initially asked Complainant to provide it with at least ten different types of medical information and examinations, including one month of glucose values performed at least four times per day; cardiovascular, neurological, renal, and ocular tests, including a treadmill stress test; current hemoglobin measures; the number of hypoglycemic events in the previous years, and the number of such events that required assistance from others; a copy of all laboratory results taken over the previous year; a copy of all outpatient clinic notes taken over the previous year; the date of onset/diagnosis, history of Ketoacidosis, hospitalizations, and general statement of Complainant’s compliance with diabetic education, prescribed medications, dietary recommendations, and activity recommendations over the past year; orthostatic blood pressure measurements while in the supine position and three minutes after Complainant stands up; and Complainant’s current eye examination by an ophthalmologist.

After Complainant responded to the Agency’s initial medical inquiry, the Agency subsequently requested that he provide at least eleven types of medical information and examinations, including an eye doctor’s report and a “maximal, stress treadmill exercise test;” a report setting forth the date of the onset of Complainant’s diabetes; Complainant’s history of ketoacidosis and hospitalizations; Complainant’s compliance with treatment; a report on whether Complainant had neurological or renal diabetic complications; Complainant’s “clinical course over the past 2 years;” a copy of “all labs” taken over the previous two years, including current C-peptide level and current Hemoglobin A1C; a copy of all outpatient clinic records over the past two years; Complainant’s orthostatic blood pressure measurements while in the supine position and three minutes after standing up; Complainant’s current complete eye exam by an eye doctor documenting the presence or absence of eye disease; and an assessment of the presence of cardiovascular, neurological, and renal disease.

Upon review, we note that the Agency’s medical inquiry was precipitated by Complainant’s disclosure that he was diagnosed with Diabetes Mellitus or Borderline Diabetes.

However, a Diabetes Mellitus diagnosis does not automatically mean an employee is unable to perform the essential functions of a CSO position, which mostly consists of guarding fixed posts and screening entrants at courthouses. Therefore, the Agency must provide objective evidence that Complainant was unable to perform the essential functions of his position. This standard requires an individualized assessment based on observations about Complainant's work performance or conduct, not generalized conclusions, stereotypes, or perceptions about persons with Diabetes Mellitus.

The Agency relies upon ACOEM's guidance to justify Complainant's medical inquiries/examinations. We note that ACOEM guidance states that "diabetes mellitus may place LEO's [law enforcement officers] at risk for sudden incapacitation, thus jeopardizing their ability to perform critical job functions." ROI, Exhibit 18, p. 3. The guidance recommends that individual assessments of law enforcement officers with Diabetes Mellitus should be conducted to determine the employee's history of blood glucose control; knowledge of diabetes and its management; current stability of blood glucose; risk for significant hypoglycemia or hyperglycemia; and presence of diabetic complications.

However, by stating that law enforcement personnel with Diabetes Mellitus should be automatically subjected to medical inquiries/examinations, ACOEM's guidance relies on the type of generalized stereotypes forbidden by the Rehabilitation Act and contradicts the Rehabilitation Act's requirement that medical inquiries/examinations can only be based on individualized assessments/evidence of employees' inability to perform the essential functions of their position. As explained above, we reject the proposition that a mere diagnosis of Diabetes Mellitus automatically means that an agency has a job-related, business-necessity based reason for subjecting CSOs to medical inquiries. ACOEM's assertion that persons with Diabetes Mellitus may be at risk for sudden incapacitation that may jeopardize their ability to perform duties is not supported by any data or evidence showing to what extent all individuals with Diabetes Mellitus are prone to such episodes; how often they occur; and to what extent the risk can be reduced or eliminated through medical treatment and lifestyle. A generalized statement that individuals with Diabetes Mellitus "may be at risk" is certainly not the type of specific, individualized objective evidence that allows the Agency to conclude that Complainant was unable to perform the essential functions of his position, as the Rehabilitation Act requires. As such, ACOEM's guidance does not override the requirements and standards of the Rehabilitation Act and, in fact, conflicts with them. Therefore, the Agency's medical inquiries/examinations of Complainant cannot be justified by ACOEM guidance.

After a thorough review of the record, we find that there is simply no evidence that Complainant experienced or displayed any difficulty performing the essential job functions of his CSO position because of his medical condition. See Milford R. v. Dep't of Defense, EEOC Appeal No. 0120120081 (Dec. 3, 2015). Instead, it is undisputed that, after Complainant was diagnosed with Diabetes, ABC's physician informed the Agency that Complainant was medically qualified for his CSO position.

Moreover, after the Agency subjected Complainant to the initial medical inquiry, his physician also reported that Complainant's medical condition should not impair his ability to perform his job; he had no diabetic symptoms; displayed no evidence of diabetic eye or cardiac disorders; and required no medication. We find that the Agency has not presented any evidence from which it can be reasonably concluded that it possessed objective evidence that Complainant was unable to perform the essential functions of his position.

The other avenue for the Agency to prove that its medical inquiries/examinations were job-related and a business necessity is by showing that Complainant posed a threat to himself or others because of his Diabetes. To prove direct threat, the Agency must show more than that a person stands some elevated risk of future injury. See Alonzo N. v. Dep't of Homeland Security, EEOC Appeal No. 0120180739 (June 21, 2019). Rather, a person is a "direct threat" if he poses a "significant risk of substantial harm" to the health and safety of himself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r); Candi R. v. Dep't of Defense, EEOC Appeal No. 0120172238 (Feb. 28, 2019). The direct threat evaluation must be based on an individualized assessment of the person's present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. Id. The burden is on the Agency to prove direct threat. Massingill v. Dep't of Veterans Affairs, EEOC Appeal No. 01964890 (July 14, 2000).

Here, the mere fact that Complainant has Diabetes does not constitute evidence that he posed a direct threat. Moreover, there is simply no individualized evidence that Complainant posed a significant risk of substantial harm to the health and safety of himself or others which cannot be eliminated or reduced to an acceptable level.

We note that this case is distinguishable from cases wherein we have found that agencies properly subjected diabetic employees to medical inquiries and examinations when they displayed a medical inability to perform work duties. See Head v. U.S. Postal Serv., EEOC Appeal No. 01A12349 (Sep. 4, 2002) (medical inquiry proper when Complainant with Diabetes Mellitus and Post Traumatic Stress Disorder had an attack of low blood sugar resulting in his nearly fainting and being unable to perform his duties as a window clerk); Arroyo v. Dep't of Homeland Security, EEOC Appeal No. 01A21863 (June 16, 2003) (medical examination proper when employee with Diabetes who worked as Immigration Inspector at airport suffered many diabetic attacks at work and was found wandering the airport in an incoherent state). In this case, the Agency has not shown that there was any cause to reasonably believe that Complainant could not perform the essential functions of his position. The Agency's medical inquiry was not prompted by an on-the-job diabetic episode, but rather by a mere diagnosis. See Boike v. Akal Security, Inc., Case No. 2:17-cv-10109, 2019 WL 4747735 (E.D. Mich. 2019) (direct threat defense and medical examination analysis require an individualized assessment of the employee's current ability to perform the job and a study of reasonable medical knowledge or evidence).

Therefore, we find that the Agency subjected Complainant to medical inquiries/examinations that violated the Rehabilitation Act.

Moreover, the Agency's inquiries/examinations were clearly excessive under the Rehabilitation Act. Under EEOC Guidance, an employer is entitled only to the information necessary to determine whether the employee can perform the essential functions of the job or work without posing a direct threat. Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, Section B, Question 10 (July 27, 2000). Moreover, in most situations, an employer cannot request an employee's *complete* medical records, because they are likely to contain information unrelated to whether the employee can perform his/her essential functions or work without posing a direct threat. Id.

In this case, not only did the Agency ask for Complainant to undergo a battery of rigorous testing that included a treadmill exercise stress test and measuring his blood glucose levels four times per day, but it also asked for him to generally disclose his history of hospitalizations and for a copy of "all labs" taken over the previous two years. Additionally, the Agency asked for "all [of Complainant's] outpatient clinic records" over the previous two years, and Complainant's history of all medications, including type and dosage adjustments over the past year. These requests were sweeping, overbroad demands that Complainant disclose a wide array of medical information that is likely not related to his Diabetes Mellitus or ability to perform the essential functions of his position. The Agency failed to narrowly tailor its requests to ensure that its requests did not constitute fishing expeditions into Complainant's medical information and history. As such, we determine that the Agency's requests for medical information and examinations were clearly excessive, and therefore violated the Rehabilitation Act.

Termination

Complainant's refusal to provide medical information demanded by the Agency resulted in his termination from ABC because the Agency, through its FOH physician, would not clear Complainant to continue working as a CSO until he provided the requested medical information. Consequently, we find that the Agency's improper medical inquiry directly caused Complainant's termination. In so finding, we note that we have held that an employer cannot discipline an employee for failing to comply with an improper request for medical information. Watkins v. U.S. Postal Serv., EEOC Appeal No. 01981800 (Aug. 29, 2001).

We further note that, in its submissions to the AJ, the Agency argued that it should not be held liable here because the FOH physician subjected Complainant to the unlawful medical inquiries/examinations, and ABC made the decision to terminate him. However, the Agency and its contractor ABC chose to delegate the authority to medically clear contractor CSOs to the FOH physician. In fact, in its Reply to Complainant's Opposition to the Agency's Motion for Summary Judgment dated February 13, 2017, the Agency maintained that it made the decision to "reasonably rel[y] upon the law enforcement occupational medical expertise of FOH." Agency's Reply to Complainant's Opposition to Agency's Motion for Summary Judgment, p. 4.

Having purposefully relied on FOH's decision to subject CSOs to medical inquiries and examinations, the Agency cannot now disavow liability for these actions. FOH clearly acted as an agent of the Agency, and Complainant was terminated because of the unlawful medical examinations/inquiries of the Agency's agent. See Abe K. v. Dep't of Justice, EEOC Appeal Nos. 0120180724 and 0120181492 (May 14, 2018) (where complainant found not medically qualified for his position by Agency's agent FOH because he did not meet the Agency's color vision standard, and he was terminated from his position, Complainant has viable claims against both the United States Marshals Service and the Executive Office of the U.S. Attorneys). As such, we conclude that the Agency and ABC are liable for Complainant's termination and now must jointly collaborate to remedy this violation of the Rehabilitation Act. See Meeker v. U.S. Postal Serv., EEOC Appeal No. 01A12137 (Aug. 23, 2002) (to remedy wrongful removal for failure to comply with an improper request for medical information, complainant's immediate reinstatement together with appropriate additional relief was ordered). Finally, we note that in May 2018, the Commission's Detroit Field Office determined that ABC has "similarly discharged or placed on unpaid leave due to their disabilities a class of [U.S. Marshals Service] Court Security Officers nationwide who were qualified to do the job with or without accommodation from at least February 1, 2012 to present." Thus, in the orders below, we direct the Agency to undertake actions designed to ensure that CSOs throughout the nation are not subjected to unlawful medical inquiries and examinations.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final order finding no violation of the Rehabilitation Act. We REMAND this matter to the Agency to take actions consistent with this decision and the ORDERS set forth below.

ORDER

The Agency shall:

1. Within sixty (60) calendar days from the date this decision is issued, the Agency shall request that its contractor (ABC, or the current appropriate contractor) offer Complainant conditional reinstatement to his former position of Court Security Officer, or a substantially equivalent and agreeable position, retroactive to the date of his termination on or about on June 12, 2014. Complainant's reinstatement to a Court Security Officer position shall be dependent on his taking and passing of the annual medical examination given to all Court Security Officers, and on his eligibility for service in this position under applicable age-based mandatory retirement requirements, if any. The Agency shall evaluate Complainant's medical clearance for duty consistent with the standards set forth in the Rehabilitation Act, EEOC Guidance, and this decision. Complainant must either accept or reject the Agency's offer in writing within 15 calendar days of receipt of the offer.

Should Complainant reject the offer of reinstatement, his entitlement to any back pay attributed to the reinstatement shall terminate as of that date of refusal, unless mandatory retirement would have applied to Complainant after the date of his termination. If Complainant has already reached the age of mandatory retirement for this position, his entitlement to back pay shall terminate on the date he reached the age of mandatory retirement for his CSO position.

2. Within sixty (60) calendar days from the date this decision is issued, the Agency shall collaborate with ABC to determine the appropriate amount of back pay, with interest, and other benefits (such as retirement plans) due Complainant (if any), pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. The Agency shall pay the amount within sixty (60) calendar days from the date of its determination of the appropriate amount. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall pay Complainant the undisputed amount within 60 days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
3. Within thirty (30) calendar days from the date the back-pay amount is paid to Complainant, the Agency shall request that Complainant submit his claim for compensation for all additional income-tax liability associated with lump sum payments. The Agency shall afford Complainant sixty (60) calendar days to submit his claim and supporting documents. The burden of proof to establish the amount of additional tax liability, if any, is on Complainant. The calculation of additional tax liability must be based on the taxes Complainant would have paid had he received the back pay in the form of regular salary during the back pay period, versus the additional taxes he paid due to receiving the back-pay in a lump-sum award. Thereafter, the Agency shall issue a decision regarding claimed additional tax liability within sixty (60) calendar days after the time period expires for Complainant to submit his claim for additional tax liability.
4. Within one hundred and twenty (120) calendar days from the date this decision is issued, the Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between his termination and pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. The Agency shall issue a final decision on the issue of compensatory damages within thirty (30) calendar days of the completion of its supplemental investigation. 29 C.F.R. § 1614.110. The final

decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.

5. Within thirty (30) calendar days of the date of this decision, the Agency's EEO and Human Resources offices, in collaboration with FOH and ABC (or the current appropriate contractor), shall submit a written request for technical assistance from EEOC, Office of Federal Operations (OFO), Federal Sector Programs (FSP), on revising CSO medical inquiry and examination policies, procedures, and practices nationwide to comply with the standards set forth in the Rehabilitation Act, EEOC Guidance, and OFO case law. Thereafter, the Agency should ensure that its national policies, procedures, and practices for subjecting employees to medical inquiries and examinations comply with the standards set forth by the Rehabilitation Act and EEOC Guidance.
6. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to all its employees and FOH personnel who are involved in directing CSOs to undergo medical examinations and inquiries, with an emphasis on the requirements of the Rehabilitation Act and EEOC Guidance on this matter.
7. The Agency shall pay Complainant reasonable attorney's fees and costs as set forth in the paragraph below entitled "Attorney's Fees."
8. The Agency shall post the notice referenced in the paragraph below entitled, "Posting Order."

POSTING ORDER (G0617)

The Agency is ORDERED to post at its Greenbelt, Maryland area offices 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 (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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)

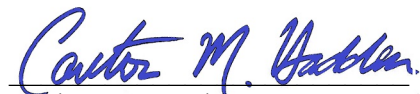
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within **ninety (90) calendar days** from the date that you receive this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

June 23, 2021
Date