



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

[REDACTED]
Phoebe O.,¹
Complainant,

v.

John E. Whitley,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2020000674

Hearing No. 480-2019-00560X

Agency No. ARIRWIN18JAN00539

DECISION

On September 26, 2019, 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 August 28, 2019 final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

During the period at issue, Complainant worked as an Engineer Technician, Grade GS-11, in the Directorate of Public Works within the Agency's Installation Management Command (IMCOM) at Fort Irwin, California.

On March 14, 2018, Complainant filed a formal EEO complaint alleging that the Agency discriminated against her on the bases of disability (Post-Traumatic Stress Disorder, Acute Stress Disorder and Major Depression) and in reprisal for prior protected EEO activity when:

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

1. On December 5, 2017, supervisory officials denied Complainant's request for a reasonable accommodation;
2. On October 22, 2018, Complainant was denied her request for reasonable accommodation and was retroactively placed in an absent without leave (AWOL) status; and
3. On February 4, 2019, Complainant received a memorandum to report to duty, which also addressed a denial of her request for reasonable accommodation.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ assigned to the case granted the Agency's June 12, 2019 motion for a decision without a hearing and issued a decision by summary judgment in favor of the Agency on July 18, 2019, finding the evidence did not support a finding of discrimination or unlawful retaliation. The Agency subsequently issued a final order adopting the AJ's decision.

The instant appeal followed. On appeal, through counsel, Complainant asserts the AJ failed to draw inferences in Complainant's favor and made improper credibility findings. Complainant reiterates that the Agency improperly denied Complainant's request for a transfer as a reasonable accommodation. Complainant points to the fact that there was a suitable vacancy in another location outside of IMCOM, but the Agency chose to competitively fill it instead of automatically reassigning her to it.

ANALYSIS AND FINDINGS

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 AJ 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 AJ 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 AJ 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.

To successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law.

While Complainant has, in a very general sense, asserted that facts are in dispute, she has failed to point with any specificity to particular evidence in the investigative file or other evidence of record that indicates such a dispute. For the reasons discussed below, we find that, even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in her favor.

The record revealed a series of events from 2017 through 2019. Complainant stated that she had performed well until her relationship with her supervisor (“Supervisor 1”) became acrimonious. According to Complainant, Supervisor 1 made harassing phone calls to Complainant inappropriately after work hours. After Complainant reported the supervisor’s harassment to management, the Agency conducted an administrative investigation. Supervisor 1 continued to email her, so Complainant obtained a restraining order against him. Thereafter, the Agency relieved Supervisor 1 of his supervisory duties and assigned Complainant to a different supervisor (Supervisor 2”). Following these events, Complainant became medically incapacitated to the extent that her doctor advised the Agency that Complainant could not return to work until September 2017. Supervisor 2 authorized Complainant to telework two days per week. However, Complainant refused to return to her workplace, although she did do some telework.

In December 2017, Complainant requested “reassignment to a different duty location or reassignment outside of IMCOM [and] paid administrative leave until reassignment can be effectuated.” After she had exhausted all accrued leave, the Agency placed Complainant in a leave without pay status until October 2018. On October 30, 2018, Complainant notified the Agency that she was medically unable to return to work without accommodations. In February 2019, Supervisor 2 instructed her to return to work. Complainant refused. In March 2019, Supervisor 2 was replaced by a third supervisor (“Supervisor 3”). Supervisor 3 denied Complainant’s request for a reassignment. In April 2019, Complainant requested reconsideration of Supervisor 1’s denial. By this time, Supervisor 1, the harasser, had left the Agency. In support of reconsideration, Complainant insisted on reassignment because she was unable to work with those employees and managers who she associated with her harasser. The Agency requested Complainant provide additional medical documentation to support her position that certain co-workers were triggers for her mental conditions. Complainant declined to do so. In June 2019, Supervisor 3 again denied her request for a reassignment.

We carefully reviewed the record and find that it is adequately developed. We now turn toward the merits of the AJ’s decision and review the matter at hand *de novo*.

Denial of Reasonable Accommodation

To establish denial of reasonable accommodation, Complainant must show that: (1) she is an individual with a disability; (2) she is a qualified individual with a disability; and (3) the Agency failed to provide her 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).

The term qualified with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such 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). 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. 29 C.F.R. §§ 1630.2(o), (p).

After receiving a request for reasonable accommodation, the employer should engage in an informal process with the disabled individual to clarify what the individual needs and identify the appropriate reasonable accommodation. See Enforcement Guidance; Abeijon v. Dep't of Homeland Sec., EEOC Appeal No. 0120080156 (Aug. 8, 2012). An employer is permitted to seek documentation where it is necessary to determine that the individual currently has a covered disability for which a reasonable accommodation is necessary. Hoang v. U.S. Postal Serv., EEOC Appeal No. 0120130545 (Apr. 11, 2013) (employers are entitled to request periodic medical updates since medical conditions can change); Ross v. Dept. of the Treasury, EEOC Appeal No. 01982798 (Aug. 2, 2001).

Here, Complainant's medical documentation recommended accommodation to prevent contact with the supervisor who had harassed her. The Agency moved Complainant to another supervisor and authorized telework twice a week. However, Complainant refused to come into the workplace and was allowed to go on an extended leave of absence, first on paid leave and later on leave without pay. In December 2017, Complainant requested a reassignment to another duty location in order to avoid any contact with her former supervisor. Later, after the harasser was no longer employed by the Agency, Complainant changed her accommodation request in order to avoid nine individuals including co-workers, supervisors and managers at IMCOM. As a part of the interactive process, the Agency requested medical documentation verifying that the named employees at IMCOM posed dangers to Complainant's mental health as triggers. However, Complainant resubmitted the medical recommendations related only to former supervisor who had harassed her (and was no longer with the Agency) and her request for reassignment was denied. When, as here, an individual's disabilities or needs for reasonable accommodation are not obvious, and she fails to provide reasonable documentation requested by the employer, the employer cannot be held liable for failure to provide the requested accommodation. See EEOC Enforcement Guidance.

Although it may have been possible, as argued by Complainant, for the Agency to place Complainant in a different chain of command or permit her unlimited telework, this Commission has consistently held that protected individuals are entitled to reasonable accommodation not necessarily to their accommodation of choice. Castaneda v. U.S. Postal Serv., EEOC Appeal No. 01931005 (Feb. 17, 1994). The record establishes that the Agency provided Complainant with a number of reasonable accommodations to address her need to avoid contact with the harassing supervisor, including a change in supervisor, as well as partial telework and approving an extended leave. Complainant failed to produce medical documentation that she needed a further reassignment outside IMCOM once the harassing supervisor left the Agency.

As such, we affirm the AJ's decision that Complainant failed to establish the Agency denied her reasonable accommodation in violation of the Rehabilitation Act.

Reprisal

Finally, we examined Complainant's claims in the context of reprisal discrimination. We applied the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For Complainant to prevail, she must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of reprisal that her protected activity was illegally considered in the contested employment actions. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). The evidentiary burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the Agency has met its burden, Complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the Agency acted on the basis of a prohibited reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

Assuming Complainant established a prima facie case, Agency witnesses explained that there was consideration of placing Complainant in a vacancy that Complainant found desirable but ultimately made a business determination to fill that position through competitive hiring. Complainant presented no argument or evidence on appeal, that would indicate the Agency's action was motivated by animus toward her EEO-protected activities. We are not convinced that the Agency's actions were unreasonable. Complainant did not meet her burden to show pretext for retaliation.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the AJ's decision without a hearing and the Agency's final action implementing AJ's decision

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 (S0610)

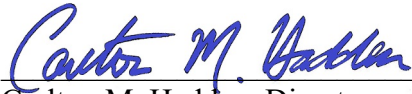
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

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

The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

April 5, 2021

Date