



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

[REDACTED]
Bryce A.,¹
Complainant,

v.

Kimberly A. Reed,
President and Chairman,
Export-Import Bank of the United States,
Agency.

Appeal No. 2019004342

Agency Nos. EODP-17-06 and EODP-17-06-S

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 22, 2019, final decision 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 AFFIRMS in part, and REVERSES in part, the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant has shown by a preponderance of the evidence that the Agency subjected him to discrimination based on his disability.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Loan Specialist, GS-1165-13, in the Agency's Trade Credit and Insurance (TCI) Division at the Agency's facility in Washington, D.C.

On September 29, 2017, Complainant filed a formal complaint alleging that the Agency discriminated against him based on his disability (Metastatic Prostate Cancer) 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 August 16, 2017, Complainant's appeal of the denial of his reasonable accommodation request was denied; and
2. on September 5, 2017, Complainant received an "unacceptable" evaluation rating for Fiscal Year (FY) 2017.

The investigative record reflects the following pertinent matters relating to the subject claims.

Claim 1

In 2006, Complainant was hired to work for the Agency in its Miami, Florida office. In August 2009, Complainant was diagnosed with Prostate Cancer. His condition does not substantially limit his ability to care for himself. However, his only treatment, Androgen Deprivation Therapy (ADT), has several side effects such as fatigue, weight gain, loose bowel, frequent urination, hot flashes, depression, mood swings, bone loss and fractures, and a loss of muscle mass and strength. Complainant's condition and treatments do not impact his ability to perform his job nor does he expect it to in the short term. Complainant stated that in late 2010 or early 2011 and while receiving ADT, he was granted an accommodation to telework 2-days per week.

In April 2015, the Director of TCI (RMO1²) stated that he researched Complainant's track record and noted that he had low productivity. RMO1 asserted that Complainant had a confrontational manner, lacked professionalism, and was resistant to accountability. RMO1 also had concerns with Complainant's telework schedule. RMO1 noted that on multiple occasions, Complainant was not available or had lengthy periods of unannounced disconnection that he would later attribute to computer problems. RMO1 stated that he discussed his concerns about Complainant with the Acting Chief Human Capital Officer³ (RMO2). RMO1 stated that they discussed the option of a management-directed reassignment to better supervise Complainant's work.

In early 2016, the Agency developed a plan to cross-train loan officers/underwriters and administrative staff to reduce silos and build skills that enabled staff to be detailed or support other areas as volume dictated. The Agency noted that it had been operating without a Board quorum and the goal of the cross-training program was to ensure that, once a Board quorum was established, all underwriters would be capable of reviewing and processing a variety of transactions to avoid a large backlog. Part of this plan required all staff of the TCI Division to relocate to the Washington, D.C. headquarters.

² Responsible Management Official (RMO).

³ The EEO Investigator noted that RMO2 testified to information she heard and did not provide her own firsthand knowledge of the claims.

On September 27, 2016, Complainant received a relocation order to transfer from Miami, Florida to Washington, D.C., effective February 6, 2017. The relocation order noted that those who chose not to relocate could lose employment with the Agency.

Complainant expressed his concerns and dissatisfaction regarding the relocation order, noting that his entire medical, personal, and familial networks were in Florida. Complainant requested reconsideration of the relocation order. The Senior Advisor (RMO3) states she made the decision to reassign Complainant to Washington D.C. RMO3 asserted that the Agency faced serious operating challenges in 2016 and 2017, and management made the decision to relocate all staff to Washington, D.C. as a result. On September 29, 2016, Complainant responded to management's relocation orders. He noted that it would have several negative effects on him and his family, such as his wife's loss of employment; loss of familial support system, both in terms of care he receives and care he provides; and loss of his medical network and treatment for his current cancer diagnosis.

On November 4, 2016, Complainant sent an email to the Senior Labor Management & Employee Relations Advisor (RMO4) stating that he would like reconsideration for the relocation order. He noted that his previous email was seemingly ignored, and no one appeared to be concerned for his wellbeing. Complainant suggested a temporary position in Miami to which he thought he could be reassigned. Specifically, Complainant explained that there was another Federal agency that had a Trade Promotion Cooperation Committee (TPCC). Complainant noted that he was TPCC-trained and thought that the Agency might be able to temporarily assign him to work with this agency, noting that the other agency would of course, have to accept him. He acknowledged that it was unconventional as it was with another agency but noted that he felt best if he could remain in Florida. Complainant also noted that, barring reassignment to another agency, perhaps the Agency could locate any other position for him in the Miami area.

On November 9, 2016, management responded that the details for the transfer were previously provided, and Complainant was expected to report for duty on February 6, 2017 as part of a permanent transfer. There was no response to Complainant's suggestion of a reassignment to a temporary position in Miami at another agency, or consideration for reassignment to any other Agency positions remaining, if any, in Miami. That same day, Complainant responded. Complainant noted that no one had addressed his concerns or provided any consideration to possible alternative solutions besides a permanent transfer to Washington, D.C. Complainant asserted that someone was making the decision to permanently transfer him despite knowing how detrimental it would be to him, or was doing so to force him into resigning.

On January 17, 2017, Complainant requested as a reasonable accommodation to postpone the change of his permanent duty station for at least 90 days to receive ADT treatment for his cancer. On January 24, 2017, the Vice President and Chief Human Capital Officer (RMO5) responded to Complainant's postponement request. The letter noted that Complainant was initially informed on September 27, 2016, and that he had had approximately five months to prepare for relocation. The Agency noted that the effective relocation date was supposed to be February 6, 2017 but allowed for an extension to February 20, 2017.

On January 31, 2017, Complainant responded to RMO5, and submitted a Reasonable Accommodation (RA-3) form. Complainant requested to remain in the Miami Regional Office. Complainant stated that he is able to perform all of the essential functions of his position, and that it was not necessary for him to be physically located in Washington, D.C. Complainant asserted that his suggested accommodation, to remain in Florida, would allow him to perform the essential functions of his position while allowing him to stay within his medical and familial networks; continue his ADT treatments; and minimize the negative effects of his diagnosis. Complainant asserted that living alone in the Washington, D.C. area would have deleterious health effects. Complainant's request to remain was denied.

On or about February 20, 2017, Complainant relocated to Washington, D.C. On March 31, 2017, and at the suggestion of RMO4, Complainant submitted a formal request for a medical evaluation by Federal Occupational Health Service (FOHS) to return to his former duty station in Miami, Florida.

On April 17, 2017, the FOHS Doctor, who reviewed Complainant's medical records and communicated with his doctors in Florida, mistakenly believed that Complainant was still residing in Florida. With this belief, the FOHS doctor stated:

If moving him to Washington is administratively imperative, I would recommend waiting at least six months to see if his medical condition stabilizes. If he is less symptomatic at that time a transfer would be possible. If it is impossible for him to perform the essential functions of his position from Florida, a readjustment of his duties, a change in position, or a medical disability retirement could all be considered.

On April 18, 2017, the FOHS Doctor updated his response, noting that he mistakenly believed Complainant was still in Florida at the time. He stated that because Complainant was already in D.C., he could "continue working here with the two-day teleworking accommodation. He should transfer his care to a local urologist and FOH will be happy to review his case again if there is any change in his condition." Complainant noted the marked tone changes and felt that RMO4 had pressured the FOHS Doctor to change his review.

On June 22, 2017, RMO5 denied Complainant's reasonable accommodation request to relocate to Florida. The denial stated that the accommodation would be ineffective and require the removal of an essential function. The denial noted that once FOHS was corrected about Complainant's residence, the medical team found that Complainant could transfer his care and continue working in D.C. with the approval of some telework days. The denial provided that the maximum telework days were two per week. The Vice President of the Finance Division (RMO6)⁴ stated that the Agency denied the request.

⁴ By the time the investigation began, RMO6 had retired. The EEO Investigator noted that she did not attempt to contact RMO6 as her expected testimony was likely duplicative of testimony provided by other named responsible management officials. However, in August 2018, the

RMO6 testified that Complainant's request was denied because management was not able to relocate the essential functions of the Loan Specialist to Miami, FL. Instead, management offered Complainant a telework agreement for a maximum of two days per week, but this was not accepted by Complainant. Regarding Complainant's earlier reassignment suggestion, management determined that the two day telework offer was sufficient as any kind of reassignment was not feasible. The Agency noted that the two days telework would have allowed Complainant to continue to perform the essential functions of his position.

On June 30, 2017, Complainant submitted a request for reconsideration of the June 22, 2017 denial of his reasonable accommodation request. Complainant argued that the two-day telework schedule was an ineffective accommodation. On July 21, 2017, the Agency denied Complainant's request for reconsideration of the denial of his reasonable accommodation request. The denial stated that the Agency stood by its previous determinations to deny Complainant's request to relocate to Florida.

On August 4, 2017, Complainant emailed the Chief Human Capital Officer (RMO7), RMO4 and RMO5, and submitted an appeal for the denial of his reconsideration of his reasonable accommodation request.

On August 16, 2017, Complainant was informed that the appeal of his denied reasonable accommodation request also was denied. Complainant maintained that RMO4 and RMO7 denied the appeal of his reasonable accommodation request because they asserted that Complainant could not perform the essential job functions of his position if he were not at the Washington, D.C. office. The denial also noted that since Complainant was already living and working in Washington, D.C., he could continue working with the two-day teleworking accommodation. The Agency asserted that Complainant could also transfer his care to D.C. and establish a new medical network.

RMO4 asserted that Complainant's reasonable accommodation request, to relocate to his original duty station in Miami, Florida, would have allowed Complainant to perform some but not all essential functions of his position. RMO4 asserted that some functions required Complainant to be present at Agency headquarters. RMO4 asserted that the Agency *did* make an individual assessment of Complainant. The record indicates that the assessment referred to may have been the independent medical assessment conducted by the FOHS. After reviewing his position description and his reasonable accommodation application, management determined Complainant was able to perform the essential functions of his position with a reasonable accommodation of allowing Complainant to telework up to two days per week, but not an accommodation of full time telework. RMO4 noted that Complainant's request was *not* denied

due to undue hardship⁵. Thus, during the investigation, RMO4 chose not to delineate the additional factors necessary to justify a denial pursuant to an undue hardship analysis.

Instead, both RMO4 and RMO5 testified that due to the realignment and relocation of Complainant's position, Complainant would be unable to perform seven of the nineteen essential functions of his position from Florida. Both officials detailed the following essential functions that could not be performed from a residence or office in Florida:

7. Under management guidance and supervision, conducts user acceptance testing and validates system functionality and usability upgrades on the online system.

8. Conducts site visits to assist exporters in understanding their insurance policy and to assess the exporter's industry, receivables portfolio, and ability to make credit decisions.

11. Assists the division Director or Senior Portfolio Manager in preparing briefings for Senior Management of relevant case, industry and country developments and status of impaired assets. Portfolio Manager coordinates with the Credit Policy Division, Country Risk and Economic Analysis Division (CREA), Policy and Planning and other divisions as necessary in the preparation of briefing memos on specific transactions or country developments.

12. Participates in internal work groups that evaluate and make recommendations regarding improvements in [Agency] programs, policies or processes, as required.

13. Represent the [Agency] at interagency meetings to discuss and coordinate government policy and issues. Speak at public conferences on [Agency] programs, as well as on geographic or sector-specific topics. Such conferences may include participants from U.S. and foreign companies, multilateral institutions, foreign governments, other export credit agencies, and exporter or bank industry groups. Accompany Business Development Officers on new business meetings with external customers.

14. May travel to foreign countries in order to perform due diligence on specific cases, monitor loan portfolio, gain market knowledge and promote [Agency] programs.

⁵ In his prior affidavit dated December 11, 2017, RMO4 indicated that Complainant's requested reasonable accommodation, of relocating back to Miami, Florida would have imposed an undue hardship on the Agency's operations. During the supplemental investigation, RMO4 stated that the denial was *not* due to undue hardship and determined that an undue hardship analysis was not necessary.

18. Assists in the cross-training of junior specialists and colleagues on division products, underwriting principles and the online system. Reviews the work of program management assistants and other staff.

While these functions were listed as essential to Complainant's position, there is no indication that these were newly added to Complainant's role when he relocated. During the investigation, RMO6 stated that Complainant's position description did not change with the relocation or the Agency's realignment plan. The only aspect that changed was that management now determined he could not perform those seven essential functions from Florida. However, prior to the relocation, it appeared that Complainant was successfully performing such functions while he lived and worked in Florida.

Complainant also refuted management's response. Complainant noted that he had no issues performing his position in the past, noting that he also had a two-day telework schedule while in Florida. Complainant asserted that the two-day telework could have that could easily expanded to a full week as an accommodation.

Claim 2

The record contained a copy of Complainant's Fiscal Year (FY) 2013 performance evaluation. In FY 2013, Complainant was under a different chain of supervision. His then-first-line supervisor (S1) detailed that Complainant was "very thorough in his analysis and strives to conduct a review that is free of unknown risk factors." S1 also noted that Complainant frequently worked on very complex and high-level credit experience reviews. S1 further noted that "[w]orking remotely on a daily basis⁶ can pose challenges, but [Complainant] has made a conscientious effort to remain in communication with headquarters⁷ via phone and email dialogue." On November 18, 2013, S1 rated Complainant as "Excellent Performer" for FY 2013.

In FY 2014, S1 stated that Complainant was "Fully Effective." In her evaluation of Complainant, S1 stated:

As has been the case on prior reviews, [Complainant's] analytical skills are highly comprehensive and detail-orientated. He is adept at rectifying participant information that requires correction and/or updating and often leaves no issue unresolved, almost to a fault at times. The [Southeast Florida] territory, although very challenging, is also plagued by very high volume and often times requires

⁶ The record indicates that Complainant had an approved two-day telework arrangement while working for the Agency's Miami office. It is unclear if he had, at some point, shifted to a full-time telework schedule while living in Miami.

⁷ It is unclear from the record if S1's references of "headquarters" refers to the Washington, D.C. Agency headquarters or the Agency's Miami regional headquarters.

the greatest of skill in balancing how much time and review to devote to each individual credit in order to determine a reasonable assurance of repayment while still meeting the constant demands of transaction flow and customer service....This continued to be a challenge during the recent evaluation period, although [Complainant] was more conscientious of this issue and thus some improvement was noted.

S1 stated that Complainant worked well within the Southeast Florida Team; always accepted new assignments willingly; always properly documented his work; and, provided well-supported arguments for his recommendations. The FY 2014 evaluation was signed on October 21, 2015 by S1. Complainant's second line supervisor (S2) signed off on the review on November 2, 2015. At the time, S1 supervised the Southeast (SE) Florida Region from November 2014 to May 2015. S1 noted that during the FY 2014, she was realigned to a new territory, while Complainant remained in the SE area reporting to a new manager. It is indicated that S1 also provided the FY 2015 evaluation, but the record does not contain a copy.

The FY 2016 evaluation noted that there had not been a mid-year review for that year, but that management discussed concerns with Complainant through the year. At the time of the evaluation, Complainant was still based in Miami, Florida, but S1 was no longer his supervisor. Instead, RMO1 was the rating official, with the Deputy Vice President (RMO8) as the second line supervisor. RMO1 noted that Complainant's productivity was the "lowest of any full-time employee in the TCI group." RMO1 noted that efficiency was a recurring issue for Complainant, but this was not mentioned in the FY 2013 or 2014 evaluation. On November 16, 2016, RMO1 signed the evaluation, assigning Complainant a "Needs Improvement" rating. That same day, RMO8 also concurred.

On May 15, 2017, Complainant was provided a mid-year review. On May 30, 2017, Complainant received an email from RMO1 that detailed the mid-year review. RMO1 noted that while Complainant had improved in some areas, he still struggled in many areas.

On October 5, 2017, Complainant received an "Unacceptable" evaluation rating for FY 2017. At the time, Complainant had relocated to Washington, D.C., but still worked on files for the Florida territory. The FY 2017 evaluation noted that because Complainant was given a "Needs Improvement" rating for FY 2016, he was placed on a Performance Improvement Plan (PIP). It noted that Complainant had improved in some areas and failed to improve in several other areas. RMO1 was the rating official for FY 2017 and detailed several areas where he asserted that Complainant struggled with. Ultimately, RMO1 determined that Complainant's work was "Unacceptable" and signed the evaluation on October 5, 2017, with RMO8 concurring on October 21, 2017.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). On February 23, 2018, Complainant requested a Final Agency Decision (FAD). However, the Agency determined that the record (EODP-17-06) did not include pertinent witness testimony and decided to conduct a

supplemental investigation (EODP-17-06-S). Following the supplemental investigation, the Agency issued its FAD. The Agency concluded that Complainant failed to prove that the Agency had subjected him to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal,⁸ Complainant contends that the Agency erred finding no discrimination. Complainant notes that he was hired by the Agency in 2006 to work in the Agency's Miami, Florida regional office. He notes that he worked in Miami, Florida, for well over a decade without major performance issues. Additionally, he also participated in the telework program without issue. Complainant asserts that the Agency is aware of his disability but refused to make an accommodation and forced him to relocate to the Washington, D.C. headquarters. Complainant asserts that the Agency failed to consider his disability in his request, noting that he was forced to leave his familial, personal, and medical networks due to the relocation. Complainant argues that the Agency could have made an exception for him, and the argument that the relocation was necessary for Agency reorganization appeared to be pretext. Complainant argues that given his circumstances, he should have been granted a reasonable accommodation to either remain or relocate back to Florida. Additionally, after more than a decade of exemplary service, but not long after filing a reasonable accommodation request, Complainant asserts that he was provided with his lowest performance evaluation. Complainant also notes that he was issued a Notice of Removal by the Agency in January 2018.

The Agency did not submit an appellate brief.

STANDARD OF REVIEW

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”).

⁸ On appeal, Complainant, through his attorney, noted the Agency Case Number as EODP-17-16. This appears to be a typographical error as no such Agency case number exist. We also note that the appeal references events and claims that are not part of his current appeal. Instead, the referenced events and claims appear to respond to Agency Case Number EODP-18-07, which is not before the Commission. These claims include retaliation and age-based discrimination. As they were not raised in the current complaint, we will not address them on appeal.

ANALYSIS AND FINDINGS

New Bases Raised for the First Time on Appeal

We note that for the first time on appeal, Complainant addresses bases that were not raised in his informal counseling or formal complaint. Specifically, that Complainant raised age-based discrimination and retaliation for protected EEO activity in connection to the relocation and poor performance evaluation. Absent a compelling reason, a complainant may not add a new basis on appeal. See Valdez v. U.S. Postal Serv., EEOC Appeal No. 01A00196 (May 11, 2000) (citing Wodjak v. Dep't of the Treasury, EEOC Appeal No. 01952240 (Mar. 27, 1997)); see also Jeanie P. v. U.S. Postal Serv., EEOC Appeal No. 2019004085 (Jan. 16, 2020). Because these bases were raised for the first time on appeal, we will not consider them.

Disparate Treatment

Complainant alleges that he was subjected to disparate treatment based on his disability. A claim of disparate treatment is examined under the three-part analysis first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For a complainant to prevail, he must first establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802, n. 13; Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the 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).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

Complainant established a prima facie case of disability discrimination. However, we find that the Agency has articulated legitimate, nondiscriminatory reasons for its actions. Here, RMO1 stated that Complainant's performance needed improvement and detailed the areas in which he felt Complainant needed to work on. The record has two evaluations from FY16 and FY17 where RMO1 noted Complainant's strengths and areas of needed improvement. We note that on appeal, Complainant asserted that the evaluation was lowered in retaliation for his repeated requests for reasonable accommodation.

However, the basis of retaliation was first raised on appeal, and as such we cannot consider nor address it now. See Valdez v. U.S. Postal Serv., EEOC Appeal No. 01A00196 (May 11, 2000) (citing Wodjak v. Dep't of the Treasury, EEOC Appeal No. 01952240 (Mar. 27, 1997)). See also Jeanie P. v. U.S. Postal Serv., EEOC Appeal No. 2019004085 (Jan. 16, 2020).

We note that the evaluations from FY13 and FY14, while under S1, were markedly different from the FY16 and FY17 evaluations provided by RMO1. Given the circumstances and Complainant's ongoing reasonable accommodation requests, RMO1's evaluations are somewhat suspect. However, we are limited to the record before us, and Complainant has offered no evidence beyond his own assertions that RMO1, or any other management official, acted with discriminatory animus, based on his disability, with regard to his FY16 and FY17 evaluations.

Request for Reasonable Accommodation

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

The record demonstrates that Complainant was diagnosed with cancer in 2009. While his diagnosis substantially impacted his life, he successfully performed the essential functions of his position leading up to and after the 2017 relocation. There was demonstrated need for improvement following the relocation, but Complainant was still performing the essential functions. Based on the circumstances, the Agency determined that Complainant is a qualified individual with a disability, and we concur in this determination.

Once Complainant received the relocation order, he repeatedly requested reasonable accommodation. First, Complainant requested an accommodation to remain in Miami, Florida. In the same request, Complainant also suggested that he could be reassigned to another position within the Agency and remain in Florida. The record demonstrates that Complainant's first reasonable accommodation was denied, and his reassignment request was seemingly ignored. Complainant then requested a ninety-day postponement while he received his ADT treatment.

That request was partially approved. While he awaited ADT treatment, Complainant again requested a reasonable accommodation to remain in Florida. That request was also denied.

Once Complainant transferred to Washington, D.C., he again made another reasonable accommodation request to relocate back to Florida, noting the toll the move was taking on his physical and mental health. The record here demonstrates that Complainant has clearly and repeatedly sought reasonable accommodations from the Agency.

Once Complainant requested a reasonable accommodation, the Agency had to make a reasonable effort to determine an appropriate and effective accommodation. A reasonable accommodation must be effective. See U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002) (“the word ‘accommodation’ . . . conveys the need for effectiveness”). That is, a reasonable accommodation should provide the individual with a disability with “an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability.” 29 C.F.R. Part 6130 app. § 1630.9. If more than one accommodation will enable an individual to perform the essential functions of his or her position, “the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” Id.; see also Enforcement Guidance on Reasonable Accommodation at Question 9. “The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the individual with a disability.” 29 C.F.R. Part 6130 app. § 1630.9.

We note that the Commission has held that a request for telework because of a disability is a request for reasonable accommodation and triggers an agency’s responsibility under the Rehabilitation Act. See, e.g., Jody L. v. Dep’t of the Air Force, EEOC Appeal No. 0120151351 (Jan. 17, 2018) (agency violated the Rehabilitation Act when it denied complainant’s request for situational telework due to inclement weather); Doria R. v. Nat’l Sci. Found., EEOC Appeal 0120152916 (Nov. 9, 2017) (agency’s ten-month delay in granting complainant’s request for additional telework days violated the Rehabilitation Act); Hupka v. Dep’t of Def., EEOC Appeal No. 02960003 (Aug. 13, 1997) (agency violated Rehabilitation Act when it refused to allow complainant whose long commute exacerbated his disability to work at home or at a local alternative work site).

Furthermore, the Commission has held that “[a] employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, but only if this accommodation would be effective and would not cause an undue hardship.” An “undue hardship” is a significant difficulty or expense in light of the agency’s circumstances and resources. See 29 C.F.R. § 1630.2(p). The Agency bears the burden of establishing, through case-specific evidence, that a reasonable accommodation would cause an undue hardship. U.S. Airways, Inc. v. Barnett, 535 U.S. at 402. “Generalized conclusions will not suffice to support a claim of undue hardship.” Enforcement Guidance on Reasonable Accommodation, “Undue Hardship Issues.” An employer may deny an employee’s request to telework if it can show that

an alternative accommodation would be effective or that telework would cause an undue hardship. Enforcement Guidance on Reasonable Accommodation, at Question 34.

The agency has a burden of production to show that there is an effective alternative accommodation.

Here, the Agency asserted that it thoroughly reviewed Complainant's reasonable accommodation requests. While the Agency denied Complainant's requested and preferred accommodation, it asserted that it provided an effective alternative accommodation; specifically, offering Complainant a two-day telework schedule in Washington, D.C. In determining that the two-day telework accommodation would be effective, the Agency noted that given the essential functions of Complainant's position, Complainant would not be able to perform them from afar. Yet, the Agency also acknowledged that Complainant's job description and position had not changed with the relocation. Furthermore, RMO6 attested to this in the affidavit submitted in the investigation. The only aspect that changed was that management now determined he could not perform the essential functions of his position from Florida. This is despite Complainant's prior work history where he was clearly performing the same functions.

Still, during the investigation, RMO4 and RMO5 both testified that Complainant could not execute seven out of nineteen essential functions from Florida, as detailed above. In listing these functions, neither official detailed how those functions were connected directly to being in Washington, D.C. Nor did either official explain why such functions were suddenly only capable of being performed in Washington, D.C. Aside from the above general statement, management did not demonstrate that Complainant was unable to perform the essential functions if he were located outside of Washington, D.C. Complainant also repeatedly refuted management's arguments and asserted that he had been and continued to perform the essential functions of his position whether in Florida, while teleworking in Florida, or Washington, D.C.

Aside from mere speculation, there is no indication that Complainant could not have performed the listed essential functions outside of the Washington, D.C. office. Based on a review of the seven essential functions, several duties reasonably could be completed while remote; such as, "12. Participates in internal work groups that evaluate and make recommendations regarding improvements in [Agency] programs, policies or processes, as required." Other duties, such as traveling to foreign countries or speaking at conferences, appear to be tasks where the originating departure state would not matter. In sum, the Agency has not shown that such functions were inherently connected to the Washington, D.C. office and that being physically located in Washington, D.C. office was required as an essential function of the position.

In addition to arguing that Complaint would be unable to perform the essential functions outside of the Washington D.C. office, the Agency also noted that due to the relocation goals, it had ended or was in the processing of ending any full-time telework situations. To the extent that providing accommodations to disabled employees would implicate the Agency's need to maintain consistency, in this instance, ending any long distance telework agreements and requiring all employees to work in the Washington, D.C. office, we find that contention to be meritless.

Our guidance clearly states that an employer must modify its policy concerning where work is performed if such a change is needed as a reasonable accommodation, *as long as* this accommodation would be effective and would not cause an undue hardship. Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Reasonable Accommodation Guidance), EEOC Notice No. 915.002 (as revised, Oct. 17, 2002).

We also note that the Commission has previously held that providing fulltime telework due to a medical condition, absent a showing of undue hardship by the employer, is a reasonable accommodation. Retha W., v. Dep't. of Agric., EEOC Appeal No. 0120161254 (June 21, 2018) (agency facility had mold and other conditions that made employees sick, including complainant. The Commission found that because exposure to the office building precipitated and exacerbated Complainant's medical conditions so that fulltime telework was the only appropriate accommodation. The Commission also noted that the agency failed to demonstrate that it would be an undue hardship to allow fulltime telework); Tricia B., v. Dep't. of Health and Human Serv., EEOC Appeal No. 2019000539 (Jan. 22, 2020) (full-time telework to be the only appropriate accommodation considering complainant's medical condition).

Notably, the Agency chose not to conduct an individualized undue hardship analysis. The Agency seemingly relied on the FOHS Doctor's altered assessment that since Complainant was already residing in Washington D.C. that a two-day telework schedule would be efficient. However, this was a dramatically different assessment than the one the FOHS Doctor had provided just *one* day earlier when he had mistakenly believed Complainant still resided in Florida. It stands to reason that more research and additional medical documentation may have been necessary to gauge an effective accommodation for Complainant, and whether fulltime telework would have been the effective reasonable accommodation considering Complainant's medical condition.

Aside from one questionable medical assessment, the Agency offered no other evidence to support its contention that the two-day telework schedule would be an effective accommodation *as compared to* Complainant's requested accommodation of fulltime telework from his Miami residence. Because there was no evidence that demonstrated that the seven listed essential functions were connected to Complainant being physically located in Washington, D.C., or that the two-day telework schedule would be an effective alternative, the Agency should have demonstrated that providing Complainant a full-time telework schedule would have created an undue hardship, which management chose not to do. Hae T. v. Dep't of Interior, EEOC Appeal No. 2019003385 (Sept. 23, 2020).

Reassignment

Complainant also requested early in the process that the Agency consider a possible reassignment to another position within the Agency that was located in the Miami area. Complainant suggested a unique alternative reassignment where he might work with another agency with the assistance of officials at the Agency. Complainant acknowledged that the suggestion was unconventional and requested that the Agency consider reassigning him within Agency to a position in Miami. Instead of responding to these requests, Agency officials ignored Complainant and continued to state that he was expected to transfer to the Washington, D.C. location. There is no obligation for an agency to consider reassigning an employee to another agency. However, the Agency here also ignored Complainant's request to consider a reassignment *within* Agency.

An agency is in the best position to know which jobs are vacant or will become vacant within a reasonable time and, as part of the interactive process, should ask the employee about his or her qualifications and interests. Because it possesses the relevant information, an agency is obligated to inform an employee about vacant positions for which the employee may be eligible as a reassignment. Woodman v. Runyon, 132 F.3d 1330, 1344 (10th Cir. 1997) (federal employers are far better placed than employees to investigate in good faith the availability of vacant positions); see also Enforcement Guidance on Reasonable Accommodation at Question 28. The employee should assist the agency in identifying vacancies to the extent that the employee has information about them. Further, if the agency is unsure whether the employee is qualified for a particular position, the agency can discuss with the employee his or her qualifications. Mengine v. Runyon, 114 F.3d 415, 419-20 (3d Cir. 1997) (once an employer has identified possible vacancies, an employee has a duty to identify which one he is capable of performing); see also Enforcement Guidance on Reasonable Accommodation at Q. 28. Lamar D., v. Dep't. of Veterans Affairs, EEOC Appeal No. 0120182540 (Feb. 11, 2020)

We note that while reassignment is the reasonable accommodation of last resort and is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his current position; or (2) all other reasonable accommodations would impose an undue hardship, we find that instead of engaging in the interactive process, Complainant's request was simply ignored by Agency officials. See Enforcement Guidance on Reasonable Accommodation, EEOC No. 915.002 at Question 24 (Oct. 17, 2002). Ruben P., v. Soc. Sec. Admin., EEOC Appeal No. 0720130013 (Aug. 14, 2014).

Good Faith Efforts

In reasonable accommodation matters, employer liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job. Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002) (although agency cannot be held liable solely for failure to engage in interactive process, it can be held liable

where failure to engage in process resulted in failure to provide reasonable accommodation), request to recon. denied, EEOC Request No. 05A30114 (Jan. 9, 2003). If the agency fails to demonstrate that it made a good faith effort to provide the complainant with a reasonable accommodation, then damages may be awarded. 42 U.S.C. § 1981a(a)(3); see also Jones v. Dep't of Agric., EEOC Appeal No. 0120080833 (July 18, 2012); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007).

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency violated the Rehabilitation Act when it failed to engage in good faith efforts to provide Complainant with an effective reasonable accommodation. We note for example, that Complainant requested the Agency to consider reassigning him to another position within Agency, if management would not consider allowing him to maintain his position while in Miami. Instead of engaging in a conversation about this request, management ignored Complainant's request and repeatedly asserted that he was expected to transfer to the Washington, D.C., office. This was just one example of the Agency failing to engage in good faith efforts with Complainant.

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 decision regarding claim 1, and AFFIRM the Agency's final decision regarding claim 2. We REMAND the matter regarding claim 1 in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to take the following remedial actions regarding claim 1.

1. If Complainant is still employed by the Agency, then the Agency shall immediately take all steps necessary to provide Complainant with effective reasonable accommodation, to include allowing fulltime telework barring the demonstration that it would pose an undue hardship.
2. Within **ninety (90) calendar days** after this decision is issued, the Agency shall reimburse any annual leave or non-paid leave (if any) taken by Complainant because of its failure to provide him with a reasonable accommodation during the relevant time period.
3. The Agency shall conduct a supplemental investigation on compensatory damages, including providing Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. Thereafter, within **ninety (90) calendar days** of the date this decision is issued, the Agency shall determine the amount of compensatory damages to be awarded. Within thirty (30) days of determining the amount of compensatory damages, the Agency shall pay Complainant the compensatory damages.

4. Within **ninety (90) calendar days** of the date this decision is issued the Agency shall provide eight hours of in-person or online interactive training to RMO1, RMO2, RMO3, RMO4, RMO5, RMO6, RMO7, and RMO8 regarding their responsibilities with respect to eliminating discrimination in the federal workplace.
5. Within **thirty (30) calendar days** of the date this decision is issued the Agency shall consider taking appropriate disciplinary action against RMO1, RMO2, RMO3, RMO4, RMO5, RMO6, RMO7, and RMO8. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
6. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, District of Columbia 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 C.F.R. § 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).

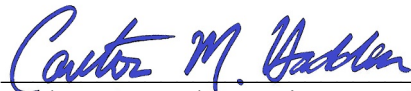
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

September 23, 2021

Date