



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

[REDACTED]
Brittney B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2021002613

Hearing No. 410-2016-00367X

Agency No. DECA-00253-2015

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 22, 2021 final decision concerning an 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.

BACKGROUND

During the period at issue, Complainant worked as a Store Associate at the Agency's Fort Benning Commissary in Georgia.

On November 6, 2015, Complainant filed a formal EEO complaint, claiming that the Agency discriminated against her because of her disability (bilateral knee replacement). On November 19, 2015, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following claim:

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.

Was Complainant discriminated based on disability and subjected to disparate treatment when on November 20, 2014, [her] request for reasonable accommodation was not processed until September 13, 2015.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. On October 3, 2018, the AJ issued an Order of Dismissal denying Complainant's hearing request on the grounds that Complainant failed to timely file her Pre-Hearing Statement by September 7, 2018. The AJ remanded the formal complaint to the Agency to issue a final decision.

On August 12, 2019, Complainant filed an appeal with this Commission. In September 2019, Complainant filed her brief and noted that the Agency still did not issue its final decision. Complainant, on appeal, reiterates that the Agency failed to provide her with a reasonable accommodation for ten months. In addition, Complainant asserts that she was late in providing a pre-hearing statement to the EEOC AJ because she "lost" her original attorney.

On March 22, 2021, while this appeal was pending, the Agency issued its final decision finding no discrimination. In its final decision, the Agency found Complainant is a qualified individual with a disability. Final Agency Decision (FAD) at 9. The Agency further found that management was aware of her disability and need for accommodation. Id. Thus, the Agency found that Complainant established a prima facie case of entitlement to an accommodation. Id.

The Agency set forth that, "Complainant's accommodation request was inexplicably delayed for approximately [ten] months, between November 2014 and September 2015." Id. The Agency further found that, "Complainant did not provide any corroborative evidence that the delay was based on her disability. Consequently, the Agency determined that it had met its burden by demonstrating that reasonable actions, albeit slower than optimal, were taken to accommodate the disability. The Agency found that "[a named Agency Disability Program Manager] [hereinafter referred to as "D1"] operated in good faith when he engaged Complainant in the interactive process, and he assumed commissary management was handling Complainant's reasonable accommodation based on his February 2015 instructions to do so. [D1] acted promptly in September 2015 to accommodate Complainant when he learned that commissary managers had not carried out his previous instructions." FAD at 10.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the

parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

To establish that she was unlawfully denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) she is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation.

Complainant, in her affidavit, asserts that she was diagnosed with osteoporosis in 2007. Report of Investigation (ROI) at 109.² In addition, Complainant states that in 2011, she had a bilateral knee replacement. ROI at 109. Complainant states that in 2014, after being assigned to the meat department, she experienced pain in her knees due to the cold.³ ROI at 110. The record contains a copy of Complainant’s Reasonable Accommodation Form signed by her physician. ROI at 84. Therein, Complainant’s physician states that. “[Complainant] has a medical history for bilateral knee replacements and chronic pain and is unable to stand for prolonged periods [or] work well in an ambient temperatures below 50F...”. The physician requested, in pertinent part, that Complainant not be assigned to work in temperatures below 50°F. ROI at 84. As set forth above, the Agency, in its final decision, found Complainant was a qualified individual with a disability and established a prima facie case of an entitlement to a reasonable accommodation. Thus, we need not address these matters further herein. We now address whether the Agency’s delay in providing the Complainant’s requested accommodation violated the Rehabilitation Act.

The Commission has held that failure to respond to a request for accommodation in a timely manner may result in a finding of discrimination. See Denese G. v. Dep’t of the Treasury, EEOC Appeal No. 0120141118 (Dec. 29, 2016). In determining whether there was an unnecessary delay, we are to consider 1) the reason for the delay; 2) the length of the delay; 3) how much the individual with a disability and the employer contributed to the delay; 4) what the employer was doing during the delay, and 5) whether the required accommodation was simple or complex to provide. EEOC Enforcement Guidance at Question 10. n. 38 (Oct. 17, 2002).

The record contains a Reasonable Accommodation Request Form dated November 20, 2014. Report of Investigation (ROI) at 84, 115. Complainant states that she initially presented her reasonable accommodation request in November 2014 to two named managers (S1 and M1).

² When referencing the Report of Investigation herein, we cite to the page numbers located at the bottom center of the page.

³ Complainant asserts that in order to stock the meat case, an employee needs to enter the storage cooler which is 24°F and below. In addition, Complainant asserts that the wrapping and cutting room for the meat department is 41°F and below. ROI at 119.

ROI at 25. Complainant states that she followed up with S1, who resent Complainant's request to headquarters. ROI at 25. The record supports Complainant's assertion she followed up with S1. The record contains an email from S1 to D1 dated February 25, 2015. Therein, S1 states, "I was told by [Complainant] today that several months ago, she submitted paperwork requesting reasonable accommodation. Will you please check to see if you do have documentation and update me [on] the status?" ROI at 146. Complainant asserts that she also verbally asked M1 on several occasions regarding the status of her reasonable accommodation request but M1 "basically blew [her] off every time." ROI at 116. Complainant asserts that until September 2015, she did not receive any correspondence/documentation from management officials regarding her request. ROI at 116. Specifically, Complainant states "as days, weeks, months pass I would ask about my reasonable accommodation and management's response was 'just keep waiting.' This pattern went on for weeks and months. [S1] retired in February 2015.⁴ [M1] took over the meat department. I spoke to her directly about my reasonable accommodation and I received the same answer to my question which was to keep waiting and no relocation to another department. I asked for help with my reasonable accommodation so many times I lost count."⁵ ROI at 25.

The record also contains an affidavit from the Agency's Disability Program Manager (D1). Therein, D1 states that he was not aware of the Complainant's request until February 2015. ROI at 142. D1 states that he cannot provide any information regarding Complainant's request for the November 2014-February 2015 timeframe. D1 states that he sent an email to S1 in February 2015, recommending she take certain actions. ROI at 141. The record contains a copy of this email from D1 to S1 dated February 25, 2015. ROI at 145.

⁴ The record contains a Notification of Personnel Action form reflecting that S1 retired effective February 28, 2015. ROI at 105.

⁵ We are persuaded by Complainant's assertion that she verbally followed up with M1 several times regarding her accommodation request. Complainant consistently throughout the pre-complaint, investigation, and appeals process asserts that she continuously asked M1 about her request for accommodation. However, M1's account varied. During EEO counseling, M1 stated that Complainant never "informed anyone she had problems" until the new meat manager (M2) started. ROI at 24. Subsequently, however, in her affidavit for the EEO Investigation, M1 stated that Complainant approached her and attempted to give her a copy of a reasonable accommodation form and that she only referred Complainant to S1. ROI at 130. The record further reflects that Complainant made attempts to follow up with different managers (S1, M2) regarding her requests. Based on the foregoing, we credit Complainant's version of events over M1's account with respect to this matter.

Therein, D1 states, regarding Complainant's request to be moved out of the meat department due to the cold temperature, that the doctor does not explain the connection between Complainant's impairment and her inability to work in the cold and "I don't think you are required to exempt her from working in the meat department based on that statement."⁶ However, if you are able to move [Complainant] to a different department, the Agency can do that. Please let me know whether you are able to move her. Once I have that information, I'll write a recommended response for you."

D1, in his affidavit, states that he thought S1 had responded to Complainant following his recommendations. ROI at 141. However, the record does not reflect that S1 followed up with D1 regarding Complainant's request prior to S1's retirement on February 28, 2015. In addition, the record does not reflect that D1 followed up with S1 or Complainant's other managers prior to September 2015 regarding Complainant's request. The record reflects that D1 became involved with Complainant's request again in September 2015. D1 sent an email to the new meat department manager that he had worked with S1 regarding Complainant's request not to work in the meat department due to the temperature. ROI at 153. Specifically, he stated, "I'm not certain that there is much evidence to support her claim that the cold is causing her knee pain....Store Associates are supposed to rotate between departments and it seems [Complainant] has been working in the meat department for an extended period. I recommend that you rotate [Complainant] to another department for 30-90 days to see if that helps with her knee pain." ROI at 153.

D1, in his affidavit, acknowledges that there were delays in the processing of Complainant's reasonable accommodation request. Specifically, he states "it is likely that some mistakes were made in this case and there were clearly some delays in responding to Complainant. I ultimately recommended to management that they consider Complainant disabled and that they provide an accommodation by moving her to another department." ROI at 144.

The record reflects that Complainant was rotated out of the meat department in September 2015, approximately ten months after her November 2014 request for reasonable accommodation.

⁶ While D1 asserts that he was not sure if Complainant's medical documentation provided a justification for her not to work in the meat department, the record contains a Reasonable Accommodation Form signed by Complainant's physician. Therein, Complainant's physician states that "[Complainant] has a medical history for bilateral knee replacements and chronic pain and is unable to stand for prolonged periods [or] work well in ambient temperatures below 50F..." The physician requested, in pertinent part, that Complainant not be assigned to work in temperatures below 50°F. If D1 believed he needed additional or clarifying medical documentation regarding the request from Complainant's physician, he could have requested such information within the parameters of the Rehabilitation Act. However, the record is devoid of evidence that the Agency made any such requests from Complainant prior to September 2015, when Complainant was rotated out of the meat department.

While a memorandum from the Agency to Complainant dated September 13, 2015, provided that Complainant would be rotated outside of the meat department for 90-120 days, the record is devoid of evidence that Complainant was subsequently reassigned back to the meat department. ROI at 83.

Based on the foregoing, we find that the Agency failed to promptly provide Complainant a reasonable accommodation and failed to provide a reasonable justification for the ten-month delay.⁷ See Ria T. v. U.S. Postal Serv., EEOC Appeal No. 0120182257 (Jan. 14, 2020) (finding that the Agency violated the Rehabilitation Act when complainant was delayed in receiving a reasonable accommodation for two months); Susan B. v. Dep't of the Army, EEOC Appeal No. 2020001632 (June 16, 2021)(affirming AJ's decision that the Agency's four-month delay in providing Complainant an accommodation violated the Rehabilitation Act). The record reflects that Complainant was proactive in pursuing her reasonable accommodation request by following up with various managers and completing the reasonable accommodation form numerous times.⁸ ROI at 25, 114. Thus, we find that the delays were unnecessary, violated the Agency's responsibility to expeditiously respond to a request for reasonable accommodation, and demonstrated a lack of good faith in the Agency's accommodation efforts. Although the Agency found no discriminatory animus as a contributing factor to the Agency's delay, we note that a finding of discriminatory intent is not an element of a failure to timely accommodate. See Susan B. v. Dep't of the Army, EEOC Appeal No. 2020001632 (June 16, 2021).

When a discriminatory practice involves the provision of a reasonable accommodation, damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide Complainant with a reasonable accommodation for her disability. See Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). Here, we find that the Agency has failed to show that it made a good faith effort to timely respond to Complainant's request for an accommodation; and she is therefore entitled to present a claim for compensatory damages on the Agency's failure to timely accommodate her. See West v. Gibson, 527 U.S. 212 (1999); Complainant v. Dep't of Justice, EEOC Appeal No. 0120121339 (May 8, 2015) (complainant entitled to present a claim for compensatory damage when the Agency failed to establish good faith in accommodation attempt), req. for recons. den., EEOC Request No. 0520150404 (Nov. 12, 2015).

⁷ The Agency, in its final decision, described its delay in providing Complainant's reasonable accommodation as "inexplicabl[e]." FAD at 9.

⁸ The record contains an affidavit from the new meat department manager (M2) who started in the position in July 2015. He asserts that Complainant came to him about one month after he started in the position and informed him that she had requested and completed paperwork on multiple occasions to be reassigned from the meat market department due her knee replacements. ROI at 135-136.

Accordingly, we REVERSE the Agency's final decision finding no discrimination and we REMAND this matter to the Agency to take the following corrective action in accordance with the ORDER below.

ORDER

The Agency shall take the following remedial actions:

1. Within 60 calendar days from the date this decision is issued, the Agency shall restore any leave used by Complainant due to the Agency's delay in providing her with a reasonable accommodation.
2. The Agency shall pay reasonable attorney's fees and costs in accordance with the paragraph entitled "Attorney's Fees."
3. Within 90 calendar days from the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages within 30 days after the completion of the investigation.
4. Within 90 calendar days from the date this decision is issued, the Agency shall provide 8 hours of in-person or interactive training for the responsible officials (S1, M1, and D1) on the Rehabilitation Act.⁹ The training shall emphasize the Rehabilitation Act's requirement with respect to an Agency's duties to timely respond to employees' requests for a reasonable accommodation to ensure that similar violations do not occur.
5. Within 60 calendar days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary actions against the responsible management officials (S1, M1 and D1). If the Agency decides not to take disciplinary action, it shall set forth the reasons 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 the attached notice in accordance with the paragraph below entitled "Posting Order."

The Agency is directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision."

⁹ The record reflects that some of the involved management officials have since retired from the Agency.

The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Fort Benning Commissary 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).

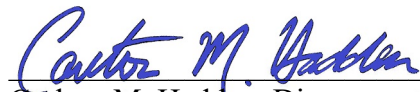
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

September 2, 2021

Date