



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

[REDACTED]
Heidi E.,¹
Complainant,

v.

Andrew M. Saul,
Commissioner,
Social Security Administration,
Agency.

Request No. 2021002730

Appeal No. 2020002437

Hearing No. 550-2017-00399X

Agency No. SEA-16-0964-SSA

DECISION ON REQUEST FOR RECONSIDERATION

On March 31, 2021, via her attorney, Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020002437 (March 2, 2021). EEOC regulations state the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued per 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

At the time of events giving rise to this matter, Complainant worked for the Agency as an Administrative Law Judge in Seattle, Washington. In our previous decision, we affirmed the portion of the Agency's final order that did not adopt the findings by summary judgement of an EEOC Administrative Judge (AJ) that Complainant's supervisor ("Person B") discriminated against Complainant based on disability (restrictive cardiomyopathy) when he:

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.

- (a) Required her to schedule 45 hearings a month to be reasonably accommodated with three days of telework a week.
- (b) Disparately treated her when he required her to schedule more hearings to retain her reasonable accommodation, failed to count supplemental hearings as hearings, subjected her to heightened scrutiny in terms of her telework schedule and meeting number goals, spoke with her coworkers about her disability and his impressions of whether she had one, was laser-focused on Complainant and her disability, removed her telework accommodation, and spoke with her about her medical condition in areas where coworkers could overhear.
- (c) Subjected her to a hostile work environment based on disability when he told her she looked “fine” and healthy, discussed her medical condition with her while his door was open, repeatedly informed her he did not think her reasonable accommodation was necessary or justified and indicated he intended to revoke it, told one of her coworkers he never saw Complainant “panting” and questioned whether she had a disabling condition, remarked to attorneys that he did not find Complainant’s doctor’s note persuasive, and subjected her to a hostile work environment based on sex when in their first meeting he asked her whether she was a judge, presumed she previously worked at the Department of Justice as a clerk rather than an Assistant United States Attorney, and questioned her decision to work full-time while she had young children at home.
- (d) Violated confidentiality requirements under the Rehabilitation Act when he discussed her medical information with her predecessor supervisor (“Person A”). The previous decision found no discrimination on many of the above matters, and found the remaining were not properly before the AJ on the merits.

The previous decision reversed the portion of the Agency’s final order that did not adopt AJ2’s finding that the Agency violated the Rehabilitation Act medical information confidentiality requirements when an Agency Attorney Advisor gave Person B documentation on Complainant that discussed her medical diagnosis and history, and when Person B discussed Complainant’s medical information with the office union representative (“ALJ1”). The previous decision found these actions violated the Rehabilitation Act.

Complainant went on medical leave on August 20, 2018, and applied for medical retirement in September 2019. Following a hearing on remedies, the AJ found that because of harassment Complainant lost two years of earning capacity. As monetary and leave relief for the harm caused by the discrimination, the AJ directed the Agency to pay Complainant \$250,000 in nonpecuniary compensatory damages, pecuniary damages to compensate her for tax penalties resulting from being forced to withdraw Thrift Savings Plan funds early, \$3,750 in pecuniary damages for out of pocket medication costs to treat her mental health injuries, damages for loss of future earning capacity for a period of two years to the \$300,000 statutory cap, and to forgive her use of 240 of advanced leave.

Noting it was awarding damages only for two disclosures of Complainant's medical information in violation of the Rehabilitation Act, the previous decision reduced the relief awarded to her to \$3,000 in nonpecuniary damages.

On request for reconsideration, Complainant recounts that the Agency argued on appeal that there were genuine issues of material fact and requested her complaint be remanded to the EEOC hearings unit. She generally argues that the previous appellate decision weighed disputed evidence in rulings on the merits of her claims. In reply, the Agency generally argues that the AJ's granting summary judgment was not based on undisputed facts, and the previous decision did not make findings resolving whether disputed genuine issues of material fact occurred and instead interpreted the legal import of undisputed facts. We agree.

Complainant specifically argues that in deciding that Person B did not disclose medical information to Person A, the previous decision relied on a written statement by Person A that conflicted with Person B's deposition testimony that he spoke with Person A about Complainant's medical condition. In reply, the Agency argues that in his deposition Person B testified that he asked Person A about Complainant's transition to telework as a reasonable accommodation, but Person B responded he did not recall and the conversation ended. The Agency argues that Person B did not testify he shared Complainant's medical information with Person A. We agree. Complaint file, Person B's deposition, at 91, Bates No. 263.

Complainant argues that the previous decision erred when it summarily rejected her telework reasonable accommodation claim and did not discuss the prima facie elements or any legal standard. Essentially, this argument is based on Person B characterizing Complainant's first two telework days as being under the collective bargaining agreement (CBA), and the third as a reasonable accommodation, which Complainant suggests is a denial of accommodation since he did not characterize all three days as a reasonable accommodation. But as found in the previous decision and argued by the Agency in reply to Complainant, Person B never stopped allowing Complainant to telework three days a week. The labels Person B attached to Complainant's telework is not dispositive.

Complainant argues that the previous decision erred when it found the only disparate treatment claim she raised concerned a December 16, 2016 email Person B sent via blind copies to several ALJs that they either had a very large number of cases in ALPO (a judge-controlled status), a reasonably large number of cases in ALPO that have been there for 60 days or more, or a small number of fee petitions that have been in their offices without action for several months, or a combination of any of those. In reply, the Agency supports the previous decision. We agree, for the reason cited in the previous decision, with its finding in this regard, and add in any event that its determination on this was not clearly erroneous.

Complainant argues that the previous decision clearly erred when it found Complainant was not subjected to a hostile work environment based on her disability. In reply, the Agency supports the previous decision.

In large measure, Complainant disagrees with the previous decision's characterization of certain incidents of alleged harassment and assessments on their severity. We find Complainant has not shown the previous decision was clearly erroneous regarding the above and finding no hostile work environment.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2020002437 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER

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

1. Within 60 calendar days from the date this decision is issued, the Agency shall pay Complainant \$3,000 in nonpecuniary, compensatory damages.
2. Within 90 calendar days from the date this decision is issued, the Agency shall provide a minimum of eight hours of in-person or interactive training to the Attorney Advisor referred to in this decision on the Rehabilitation Act. The training shall emphasize the Rehabilitation Act's requirements with respect to maintaining the confidentiality of medical information/documentation.
3. Within 60 calendar days from the date this decision is issued, the Agency shall consider taking disciplinary action against the Attorney Advisor referred to in this decision. 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 the Attorney Advisor has left the Agency's employment, then the Agency shall furnish documentation of his departure date.

POSTING ORDER (G0617)²

The Agency is ordered to post at its Seattle Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

² This Order only applies to the extent the Agency has not already done so.

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)³

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.

³ Because Complainant did not prevail in the instant request for reconsideration as it has resulted in no additional findings of discrimination or relief, this ATTORNEY'S FEES paragraph does not apply to work connected to the instant request for reconsideration.

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.

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission’s decision. 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.

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 21, 2021

Date