



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Orlando O.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Headquarters),
Agency.

Appeal No. 2020003910

Agency No. 6P-000-0014-19

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 27, 2020, 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 REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the Agency unnecessarily delayed in responding to Complainant's request for a reasonable accommodation for his disability in violation of the Rehabilitation Act.

BACKGROUND

During the relevant time, Complainant worked as a Real Estate Specialist at the Agency's Headquarters in Washington, D.C. Report of Investigation (ROI), at 112. Complainant attested that he has Chronic Inflammatory Bowel Disease (IBD), also known as Ulcerative Colitis, and must constantly plan activities understanding where the closest restroom is. ROI, at 294.

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.

Complainant became aware that the Metro subway system (yellow/blue line) (hereinafter "Metro") was scheduled to shut down for maintenance from May 28, 2019, through September 8, 2019. Id. at 285. In September 2018, Complainant verbally informed his first-level supervisor (S1) that the closing of the Metro would impede his normal commute due to his IBD, by adding shuttle buses with no access to a restroom. Id. at 249.

According to S1, he advised Complainant to contact the Agency's Reasonable Accommodation Committee (RAC) in September or October 2018. Id. S1 averred that Complainant's initial accommodation request was to work out of a Post Office facility near his home. Id. S1 attested that in April 2019, when Complainant explained to him that the Post Office facility near his home stated they did not have space for him, he took Complainant's update to mean that Complainant was working with the RAC to identify a reasonable accommodation. Id. Complainant, however, had not apparently contacted the RAC at that time.

Nevertheless, according to Complainant, on April 18, 2019, S1 explained to him how to request access to the Agency's Virtual Private Network (VPN). Complainant took this action by S1 as approval of his reasonable accommodation request to telework during the Metro shutdown. Id. at 222. Complainant also averred that on April 24, 2019, he informed S1 that he was unable to find office space at the Alexandria Post Offices close to his home and that he could continue looking, but S1 responded that it was pointless to continue to look for office space. Complainant believed that S1's response also indicated his approval for Complainant to telework. Id.

On May 28, 2019, after obtaining access to VPN, Complainant began working from home. S1, however, was reportedly unaware that Complainant had begun to telework and informed Complainant that his request had not been approved. In a June 10, 2019 email to Complainant, S1 explicitly stated that Complainant's request for an accommodation had not been approved and that he either needed to work in the office or take leave if he chose to remain out of the office. Id. at 260. Complainant chose to remain out of the office and was charged with sick leave from June 8, 2019, through September 9, 2019. Id. at 212. During this time, Complainant expended approximately 456 hours of sick leave. Id. at 6.

Meanwhile, on June 11, 2019, the Disability Programs Compliance Specialist, who served as the RAC Chair, contacted Complainant and asked him to submit a written request for an accommodation by completing Reasonable Accommodation RAC Form A. Days later, on June 13, 2019, Complainant completed the designated RAC form. Id. at 294-295. In his written request, Complainant noted in pertinent part:

I am ready willing and able to work. I have been working from home for the last 2 1/2 weeks performing all official duties. I have suddenly been placed on sick leave with protest, by my supervisor until the reasonable accommodation is approved even though I verbally requested the reasonable accommodation in September 2018, please refer to the Doctor's note dated September 2018, stating I cannot medically tolerate the long commute due to scheduled construction by the metro.

Id. at 295.

Complainant also attached a medical note from his doctor dated September 24, 2018, wherein his doctor noted that he had Ulcerative Colitis and that he would “not be able to medically tolerate a long commute and would benefit from being domiciled closer to his home during the [metro] construction.” Id. at 295.

On June 26, 2019, Complainant was directed to participate in a meeting with the RAC regarding his accommodation request. Id. at 286. Thereafter, on September 5, 2019, he received a decision from S1 denying his request to telework as a reasonable accommodation. Id. at 258. In the decision letter, S1 noted that, following an evaluation of Complainant’s medical documentation, the RAC determined that Complainant likely had a disability under the Rehabilitation Act and was therefore eligible for a reasonable accommodation. The RAC advised that, since the Alexandria train station was within 10 minutes of Complainant’s home, he could use the Virginia Railway Express (VRE) to commute to Agency Headquarters. Id. Specifically, S1 explained:

As an alternative to your proposed accommodation of full-time telework until construction on the DC Metro Yellow and Blue Lines is complete, the RAC identified the Virginia Railway Express (VRE) as a viable option to meet your transportation needs to and from work. The VRE is within walking distance of your residence (i.e., the VRE stop is next to the DC Metro King Street Station). The train is fully operational, makes frequent stops near L'Enfant Plaza, and has restrooms on board Once the VRE drops you near L'Enfant Plaza, you have access to the Southwest Shuttle or the District Work Shuttle, both of which are a three (3) to five (5) minute rides to L'Enfant Plaza or the front of the Postal Service Headquarters.

Id.

S1 concluded the letter by noting that Complainant’s use of the VRE was a reasonable alternative to teleworking and would accommodate his need to use the restroom during his commute. Id. S1 noted that he made the decision to deny Complainant’s request to telework in consultation with the RAC. Id.

Days later, the Metro re-opened on September 8, 2019, and Complainant returned to the office.

On October 24, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (IBD) when he was denied full-time telework as a reasonable accommodation.

Following an 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). In accordance with Complainant’s request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The Agency specifically found that Complainant did not establish that he denied a reasonable accommodation for his disability.² In so finding, the Agency noted that the VRE was a viable alternative to teleworking as there was restroom accessibility on board. The Agency noted that while Complainant was not provided the accommodation of his choice, the RAC's suggestion of the VRE was a viable alternative that would have effectively accommodated Complainant's condition.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains, in pertinent part, that the Alexandra station is more than a 10-minute walk from his home, which is beyond his medical limitations. Complainant argues that Agency management improperly found that he could not adequately perform his duties from home. He asserts that he was sufficiently performing his work functions at home, accessing the Agency's electronic files via VPN access and meeting with coworkers through video conference on his computer.

ANALYSIS AND FINDINGS

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").

Delayed Disability Accommodation

An agency is required to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability,³ unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. 29 C.F.R. § 1630.9.

² The Agency found that Complainant established that he is an individual with a disability within the meaning of the Rehabilitation Act.

³ As the Agency does not dispute Complainant's status as a qualified individual with a disability within the meaning of the Rehabilitation Act, the Commission shall not address this issue on appeal.

An accommodation must be effective in meeting the needs of the individual. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (Reasonable Accommodation Guidance), General Principles. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Id.

The agency should respond expeditiously to a request for reasonable accommodation. Id. at Question 10. Unnecessary delays can result in a violation of the Rehabilitation Act. Id. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay; (2) the length of the delay; (3) how much the individual with a disability and the agency each contributed to the delay; (4) what the agency was doing during the delay; and (5) whether the required accommodation was simple or complex to provide. Id. at n.38.

In the instant case, there is no dispute that Complainant first notified S1 in September or October 2018 of the upcoming Metro closing, scheduled to occur between May 28, 2019, through September 8, 2019, and that he would need an accommodation for his IBD. At that time, according to S1, he notified Complainant to contact the RAC to begin the reasonable accommodation process with the Agency. However, there is no evidence in the record that Complainant contacted the RAC at that time in accordance with S1's reported instructions. While the parties also do not dispute that Complainant and S1 discussed Complainant's request for an accommodation again in April 2019, there is no indication that Complainant had contacted the RAC since S1's earlier instruction or that he was initially given permission by S1 to telework during the metro shutdown.⁴ We therefore find that any initial delay by the Agency to engage in the reasonable accommodation interactive process with Complainant was in significant part due to Complainant's reported failure to initially contact the RAC.

We note that after Complainant began teleworking, seemingly without approval from S1 or the RAC, S1 emailed Complainant on June 10, 2019, writing that Complainant's request for an accommodation had not been approved and that he either needed to work in the office or take leave. The next day on June 11, 2019, the Disability Programs Compliance Specialist, who served as the RAC Chair, contacted Complainant and asked him to submit a written request for an accommodation by completing Reasonable Accommodation RAC Form A. Days later, on June 13, 2019, Complainant completed the designated RAC form and began to utilize sick leave as he was no longer allowed to telework.

⁴ To the extent that Complainant argues that S1 initially gave him permission to telework, we note that Complainant did not request a hearing before an EEOC AJ. Therefore, we do not have the benefit of an AJ's credibility determinations after a hearing or the further development of the record during the hearing stage.

The RAC, however, did not hold its meeting with Complainant until almost two weeks later, on June 26, 2019. No effective accommodation for Complainant was identified at the meeting.

The record reflects that Complainant was not contacted by either S1 or RAC regarding his accommodation request until September 5, 2019, wherein he was told that his request to telework was denied because the VRE was a viable option to meet his commuting needs. However, by the time RAC and S1 issued the September 5, 2019 accommodation decision letter, Complainant had already accumulated hundreds of hours of sick leave and no longer needed the requested accommodation as the Metro re-opened days later, on September 9, 2019. At that point, Complainant had returned to the office.

Therefore, upon review, we find that the Agency unnecessarily delayed responding to Complainant's request from June 13, 2019, through September 5, 2019, constituting a violation of the Rehabilitation Act. See Patricia W. v. Dep't of Homeland Sec., EEOC Appeal No. 0120172637 (Mar. 26, 2019) (agency caused an unnecessary delay where it took months to provide complainant with the necessary accommodations); Cruzan v. Dep't of Def., EEOC Appeal No. 0120071893 (Aug. 15, 2008) (finding that management's failure to advise the complainant of its decision on his accommodation request for four months constituted an unnecessary delay in violation of the Rehabilitation Act); Villanueva v. Dep't of Homeland Sec., EEOC Appeal No. 01A34968 (Aug. 10, 2006) (finding that the agency's six-month delay in processing complainant's accommodation request violated the Rehabilitation Act). Accordingly, we find that the Agency discriminated against Complainant based on his disability, in violation of the Rehabilitation Act, when it caused an unnecessary delay in providing him with an effective accommodation.

Further, Complainant is entitled to compensatory damages for the Agency's failure to timely accommodate him. Where 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 the individual with a reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). We find that the Agency did not act in good faith in this case. In so finding, the Agency does not dispute that Complainant was effectively performing his job functions from home after he was granted VPN access. Rather than allowing Complainant to continue working from home until the RAC reached a decision, S1 required Complainant to use hundreds of hours of sick leave. Further, by the time S1 apparently conferred with the RAC and issued the accommodation decision letter, months had passed, and Complainant no longer needed an accommodation because the Metro re-opened just days later. Moreover, S1 does not dispute that Complainant notified him of his need for an accommodation during the Metro closure as early as September or October 2018, and again in April 2019. While S1 may have advised Complainant to contact the RAC in 2018, S1 seemingly did not follow-up with the RAC until after the Metro closure began and Complainant's need for an accommodation was immediate. The Agency does not explain why it took nearly four months to consider Complainant's request and offer the alternative accommodation of the VRE. We find that Complainant is therefore entitled to present a claim for compensatory damages resulting from the Agency's failure to timely accommodate him.

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. The matter is **REMANDED** to the Agency in accordance with the Order below.

ORDER

The Agency is ordered to take the following remedial actions:

1. Within **ninety (90) calendar days** after this decision is issued, the Agency shall reimburse any sick leave, annual leave, or non-paid leave (if any) taken by Complainant from June 13, 2019, through September 5, 2019, because of its unnecessary delay in providing him with an effective reasonable accommodation.
2. 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 calendar (30) days** of determining the amount of compensatory damages, the Agency shall pay Complainant the compensatory damages.
3. Within **ninety (90) calendar days** of the date this decision is issued the Agency shall provide eight hours of in-person or online interactive EEO training to S1 regarding, in particular, his responsibilities under the Rehab Act in timely processing and providing reasonable accommodations.
4. Within **thirty (30) calendar days** of the date this decision is issued the Agency shall consider taking appropriate disciplinary action against S1. 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).
5. 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 Headquarters in Washington, D.C. 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).

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).

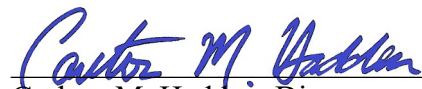
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

December 7, 2021
Date