



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Fernanda H.,¹
Complainant,

v.

Kilolo Kijakazi,
Acting Commissioner,
Social Security Administration,
Agency.

Appeal No. 2020004066

Agency No. BOS-19-0563-SSA

DECISION

On July 6, 2020, 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 June 17, 2020, final decision concerning her 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

At the time of events giving rise to this complaint, Complainant worked as a Senior Attorney Advisor, GS-13, at the Agency's New Haven Hearing Office facility in New Haven, Connecticut.

On May 2, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of disability (Chronic Refractory Migraine and Asthma) when:

1. Since August 1, 2018, the Agency has failed to provide a reasonable accommodation;
2. On February 5, 2019, Complainant's request for Occupational Medicine to evaluate occupational triggers in the workplace was denied; and
3. Since August 1, 2018, Complainant has been subjected to harassment.

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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her 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 Agency's final decision (FAD) concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. Specifically, the FAD found that Complainant failed to establish a prima facie case of denial of reasonable accommodation and instead found that the Agency provided Complainant with an effective accommodation. The FAD next found that Complainant failed to establish a prima facie case of disparate treatment when her request for an evaluation of occupational triggers in the workplace was denied because she failed to present facts that gave rise to an inference of discrimination. The FAD found that, assuming *arguendo* that Complainant established a prima facie case, management officials articulated legitimate nondiscriminatory reasons for their actions, namely that privacy considerations and the need to keep Agency space free from outside testing and recording instruments precluded such an evaluation by non-Agency personnel. The FAD further noted that management officials did engage other experts to assess the office environment, just not the experts selected by Complainant. The FAD concluded that Complainant failed to establish that the Agency's articulated reason was a pretext. Finally, the FAD found that Complainant failed to establish a claim of harassment because she failed to show that the Agency's actions were based on her protected basis nor did she show that the alleged harassment created an intimidating, hostile or offensive environment.

From this decision, Complainant appeals, but states that her appeal "is a limited appeal on claim 1, as identified in the FAD. Claim 1, as stated in the FAD is: Whether since August 1, 2018, the Social Security Administration (SSA or Agency) has delayed and failed to engage in the interactive process by not providing the complainant a reasonable accommodation based on disability (physical) when she requested a fifth telework day and/or the ability to split an 8 hour workday in the office." Accordingly, this decision will address claim 1 only.

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").

In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability; (2) she is a qualified individual with a disability; and (3) the Agency failed to provide 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).

We find that Complainant is an individual with a disability within the meaning of the Rehabilitation Act. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii). The Agency itself in its FAD has conceded that, "Complainant established she is an individual with an actual disability. Complainant has permanent medical conditions—migraines and asthma—which affect her daily life."

Complainant's medical documentation shows that she has:

[C]hronic intractable migraine without aura. Chronic migraine is an extremely debilitating neurological disease, which causes for [Complainant], in addition to severe head pain, nausea and sensitivity to light (during and in between episodes), dizziness, fatigue, mood changes, sensitivity to sounds, smells and other stimuli, visual disruption, and severe neck pain. Chronic migraine, by definition, is a neurological disease with 15 or more headache days per month, eight of which are migrainous in nature. [Complainant] was diagnosed with migraine disease in April 2009 and chronic migraine in September 2012. Since that time, her condition has worsened, such that she is no longer able to attend family or social events, drive more than locally, go to stores, restaurants, concerts, or movies, for example. If she does any of these things on a "good day," they are for a very short amount of time. She now relies on hired help for cleaning, transportation, and assistance, both in the home and outside of the home. Chronic migraine is a lifelong condition, which cannot be cured, but can be managed. [Complainant] has failed many preventative treatments and has not responded well to medication management.

In order to best manage her condition and reduce the frequency and severity of her migraine episodes, we try to reduce her exposure to triggers. Some triggers are not as easily avoided, such as weather changes, hormonal changes, and other medical conditions; however, some triggers are more easily avoidable. This include [sic] exposure to sounds, lights, including sunlight, temperature extremes, changes to diet and sleep, certain foods, and avoidance of extra stress.

In addition, Complainant averred that her asthma “is a chronic respiratory condition. My asthma attacks are triggered by heat, humidity, stress, odors, tobacco, perfume, and other scents. I do not wear perfume or scented soaps. I use air conditioning most of the year or low heat.” Complainant’s medical documentation states that she:

[H]as asthma that is made worse by her workplace air quality. When she went to the office 2 weeks ago where it was hot and humid, she got short of breath and had to leave. She is now under perfect control of her asthma because she is not at the office and is working at home.

After a complainant has shown that she is an individual with a disability, the complainant must then establish that she is a “qualified individual with a disability,” an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). Here, the record confirms, and the FAD found, that Complainant is capable of performing the essential functions of her position. As such, we find that Complainant is a qualified individual with a disability.

The term “reasonable accommodation” means, in pertinent part, modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enable a qualified individual with a disability to perform the essential functions of the position in question. See 29 C.F.R. §1630.2(o)(1)(ii). Reasonable accommodations may include but are not limited to the following: job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. Id.

Complainant asserts that her office moved into a new location on August 1, 2018, and in her formal complaint, she limits her claim to events occurring from this date on. Prior to this date, Complainant had requested and been granted accommodations that by March 2015 allowed her to work from home four days a week. As her condition worsened, Complainant repeatedly sought various accommodations, including one that would let her work from home an additional day per week, for a total of five days of telework per week, but these were denied. The most recent denial prior to the August 2018 office move is dated July 6, 2018, and was signed by the Agency’s National Reasonable Accommodation Coordinator (NRAC) in response to Complainant’s request for a reasonable accommodation in anticipation of the move to the new office. This denial letter states, in pertinent part:

The Agency has provided you with a private office and will continue to provide you with a private office for the one day each week that you report to your official duty station.

Local management stated the process of office selection for employees in the new space is a matter still under negotiation with the American Federation of Government Employees (AFGE). You shared with the NRAC Review Team Analyst that you feel that by moving to a different floor and choosing an office location, you will be exposed to additional noise. Local management has shared that the noise level is low because most decision writers telework three days per week. As a result, they do not anticipate the noise level to change when moving to another floor in your current building. Moreover, local management stated the days that employees come into the office will be taken into consideration when setting up office sharing, including the one day that you come into the office each week (Wednesday).

As mentioned above, local management is currently providing you an office free from fluorescent or LED lighting, and they will continue to grant this accommodation when the office moves to a different floor in your current building. Your medical documentation dated April 9, 2018, from [name omitted], M.D. states that you are being treated for keratoconus, extreme photophobia, and chronic intractable migraine without aura. The documentation states you have difficulty tolerating LED lights and fluorescent lights in any environment. [Your doctor] states, "[You] must have the ability to turn these lights off completely and use natural light or incandescent light bulbs. " Local management stated the light switches in the new office space will be compliant and meet the standards for the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) and do not turn on automatically upon sensing motion in the office. They stated the lights will turn on with a switch, and if turned on, there is a feature that will allow the lights to be shut off either manually or automatically after a period of not sensing any motion. You shared with the NRAC Review Team Analyst that currently, when there is a meeting in the training room, and the lights are not turned off, you are allowed to call in to the meeting from your office if the light begins to bother you. . . . Although the Agency is not providing you full-time telework, the Agency will continue to provide the effective alternative accommodations of a private office with the proper lighting. The Agency is committed to working with you so you are able to perform the essential functions of your position.

Following the move to the new office, Complainant wrote back to NRAC on August 14, 2018, stating:

We have officially moved into the new office space and I am now in the position to respond to your decision and to submit additional information. . . . I respectfully request full reconsideration of your earlier decision, especially in light of the misleading information conveyed to you by local management and on which you relied. . . . I was able to view the new office space for the first time on August 1, 2018. My office (which I share with another individual), is in the

middle of the row of judges and decision writers and across from cubicles of staff. Instead of being secluded, which I requested, it is one of, if not the most, trafficked office area. It has three giant windows and with the blinds down on a cloudy day, I had vision issues. I cannot imagine how bad it will be on a sunny day. In addition, it is very warm because of the sun hitting it, and does not have its own temperature control. In the winter, it will be impossible to tolerate when the heat comes on. My office mate was in the office yesterday and reported to management about the warm and stuffy environment. I cannot concentrate with all the action going on and cannot shut my door due to the temperature issue. The "multi-purpose" room does not have any windows and the lights cannot be turned off, as they are motion censored [sic], and turning the lights would result in a pitch-black room. Therefore, local management is not able to adjust the lights in that room. They also do not appear able to adjust the temperature for individual offices.

This new office space is simply not conducive to my medical situation and local management has not provided you with accurate information. I believe that you may have made a different decision had you known the actual set up of the office and the specifics. I was not able to stay a full day on Wednesday, August 1, 2018, and in fact, I ended up with a very severe migraine attack. It was one of the worst attacks to date, and that was with merely viewing the space and spending a half a day there. I contacted both of my doctors, who indicated that this was due to the over stimulation and hyper-excitability of the brain, coupled with the compounding triggers. It was an even more magnified issue than I was having at the prior office space. I had to be placed on steroid medication and was advised to go to the ER for treatment. I have not even fully recovered from that day and have not been back to the office. I am now severely anxious to return to the office for fear of having another severe migraine attack.

In your denial of my 5th telework day, you stated that Dr. [] proposed other effective accommodations. [My Doctor] has now amended her statement (enclosed) and states that there are no other effective accommodations besides allowing a 5th telework day due to the compounding triggers in this new space.
...

Further, you stated that "local management has shared that the noise level is low because most decision writers telework three days per week. As a result, they do not anticipate the noise level to change when moving to another floor in your current building." This again is not true. It is so much louder, with more commotion going on than in the old office. In addition to the writers, I now have staff and judges on my floor, and the office area is larger with more people walking around. There is more noise and more people in this new space.

Moreover, local management is not taking the temperature issue seriously (perhaps because there is nothing that they can do) and does not realize the effect on someone with a neurological disease. This office move has caused a material change in my working situation. . . . [With regard to your comment about lights being able to be turned off with a switch] this again is not true, and as there are no windows in this room, they cannot turn off the lights.

Complainant included letters from her neurologist and her psychiatrist, both of whom said that Complainant's medical condition and the new office space required that she be allowed to work from home five days a week.

On September 4, 2018, NRAC replied to Complainant's updated request, stating:

I am affirming my decision of July 6, 2018, for the reasons stated in the letter. In both of the medical documents you submitted, the physicians recommend that you telework a fifth day due to triggers in your new office. However, neither of the physicians identify what the triggers are in your office or what about the office is causing you to get migraines or emotional distress.

We note that this letter affirms the prior denial "for the reasons stated in [that] letter" but does not acknowledge Complainant's detailed explanation showing that those reasons were inapplicable. Nor do the July 6 or the September 4, 2018 letters explain why a fifth telework day was not reasonable. While NRAC argued that the Complainant's medical experts failed to identify the triggers in Complainant's office or what was causing her to get migraines, such an argument presupposes that Complainant or her medical experts would be in a position to know what triggers present in the office environment, besides bright lights and warm temperatures, caused Complainant's migraines. We note in this regard that the Agency denied Complainant's request to have an outside expert come in and evaluate occupational triggers in the office. We further note that the Agency was already in possession of sufficient information to grant Complainant four days of telework. Specifically, we note that the Agency has not explained why the same factors justifying four days of telework per week did not also justify a fifth.

During the investigation into her EEO complaint, Complainant averred that she filed a new request for a fifth telework day on November 17, 2018. Complainant further averred that:

Fluorescent lights and LED lighting is [sic] a trigger for my migraine attacks. In the prior office space, I was able to turn my own office lights off, as well as the communal lighting, such as the IVT room where meetings and trainings are held. In the new office space, all the communal lighting is automatic and cannot be turned off or adjusted. I asked for a more secluded writer's office free from staff cubicles and outside a high traffic area as noise is also a trigger. My previous office was a secluded space at the end of the hall, with few staff working on that floor at any given time.

As there was a material change in my work situation due to the pending office move, I requested a 5th telework day out of dire need due to the addition of multiple triggers that were not at the old office space. These included lights, sounds, and more people in one location. At the time, I was not aware of office sharing. I was also not aware of the pulmonary triggers at the time. However, the true circumstances of the office move have made the requested accommodation even more necessary.

In order to draft decisions, review cases, plan and administer trainings, and mentor, I need a conducive work environment that does not trigger a migraine or asthma attack. I cannot be exposed to LED lighting, fluorescent lighting, or bright sunlight. I need temperature and humidity levels that will not cause me to overheat. I also need a quiet environment, free from odors, smells, and noise. I need to be able to work and not worry about the changes in temperature and humidity that occur throughout the day in the new office space.

If I were granted a 5th telework day, I would be able to control my environment and adjust the temperature and humidity as needed, I would be able to control the lighting, the smells, the sounds, and other triggers. I would be able to concentrate and be productive. . . . I feel that the other requested accommodations (office modifications) have been deemed ineffective and that the only real effective accommodation at this point is full telework. Without these accommodations, I have not been able to complete a full day at the office without either having a migraine attack at the office or at night when I get home, triggered by the office. Without the accommodations, I am forced to take more leave and get more frequent and severe migraine attacks.

On July 19, 2019, NRAC provided a response to Complainant's November 2018 request, stating:

You requested a permanent workspace move to Storage Room 1, for management to work with Government Services Administration (GSA) and/or building management to assess temperature control and ventilation issues in Storage Room 1, and a portable air conditioning unit. You subsequently added requests for full-time telework (one additional day per week) or, alternatively, the ability to split your one day in the office between your alternate duty station (ADS) and official duty station (ODS). . . . [L]ocal management has granted you the use of a fan and building management has made adjustments to the vents in 'Storage Room 1, where you are currently working on your CDS days. You subsequently informed your supervisor that these accommodations were working, and to hold off on exploring other accommodations until the change of seasons. Since you have now been provided with effective alternative accommodations, and based on my review of all of the information and documentation, I am reaffirming my decisions of August 31, 2017 and July 6, 2018.

Additionally, since the Agency granted your request for a permanent workspace move to Storage Room 1 and the use of a fan and worked with building management to address temperature control and ventilation issues in your workspace, we are closing [your request].

In her affidavit provided during the investigation, when asked what measures were taken to determine whether Complainant's requested accommodations were possible, and whether or not Complainant was offered an alternative accommodation, NRAC responded "Please see the Agency decisions dated . . . July 6, 2018 and July 19, 2019." NRAC's testimony thus incorporates the claim from those decisions that Complainant was satisfied with the move to the storage room, the use of the fan, and the adjustments to the HVAC vents in the storage room and that she found them to be effective accommodations. We note in this regard that Complainant's 4th level Supervisor, (S4) who was responsible for deciding whether or not to grant additional telework, further averred that "on or around December 2018/January 2019, following the implementation of the fans in her office, Complainant told her supervisor that the accommodations were working fine. She did not need additional accommodations." S4 further indicated that the reasons he denied Complainant's request for a fifth day of telework was because alternative accommodations were effective.

Complainant, in her rebuttal affidavit, vehemently denied informing her supervisor that the move to the storage room, the fan, and the adjustments to the HVAC vents in the storage room, "were working fine," averring instead that "I have never told my supervisor that I did not need additional accommodations. That is untrue. In fact, I sent her multiple emails during that exact time period that the accommodations were not working." We note in this regard that the record contains a number of emails between Complainant and S1 in January 2019 wherein Complainant explains that the move to the storage room and the use of the fan were not effective accommodations. Furthermore, S1 averred that Complainant did not "accept the alternative accommodation" and that Complainant notified management that the alternative accommodation was unacceptable, although S1 did also aver that Complainant told her that the storage room "was much cooler" after building maintenance workers opened the air vents in that room.

Based on the evidence described above, we find that the Agency failed to reasonably accommodate Complainant when, on September 4, 2018, and on subsequent occasions, it denied Complainant's requests to telework an additional one day per week as a reasonable accommodation. Allowing an employee to telework is a form of a reasonable accommodation, which the Agency recognized when it previously granted Complainant four days of telework per week as an accommodation. "An 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." Enforcement Guidance, at Question 34. 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. 391 at 402.

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. See Enforcement Guidance, at Question 34. The Agency has a burden of production to show that there is an effective alternative accommodation.

Here, the Agency has not shown that the alternative accommodations it granted Complainant were effective. While NRAC and S4 stated that Complainant was allowed to move to the storage room and use a fan, and that adjustments were made to the air vents, Complainant denied that such accommodations were effective. With regard to the fan, Complainant averred that she purchased the fan herself, it was not provided by the Agency and that "[a] fan does not do anything but blow hot air around and the sensation of the air on my face and hair can trigger a migraine. It is not effective and was not provided by the agency."

Complainant further averred that:

In order to draft highly complex decisions, review cases, plan and administer trainings, and mentor, I need a conducive work environment that does not trigger a migraine or asthma attack. I cannot be exposed to LED lighting, fluorescent lighting, or bright sunlight. I need temperature and humidity levels that will not cause me to overheat. I also need a quiet environment, free from odors, smells and excessive noise. I need to be able to work and not worry about the changes in temperature and humidity that occur throughout the day in the new office space.

While working in the storage room allowed Complainant to control the light levels while she was in that room, Complainant has pointed out that she was unable to control the light levels when going to the bathroom, going to and from the storage room when arriving and leaving the office at the start and end of the work day, or when visiting other offices or conference rooms.

With regard to the temperature and humidity levels, S4 averred that:

[M]anagement had multiple discussions with her to determine how cold she needed her workspace. Ultimately the AC unit that she chose had a humidifier element. The Agency policy expressly prohibits the use of these devices absent a reasonable accommodation and approval from GSA and the lessor. So as part of this process, GSA requested an assessment from an expert to advise on the evaporating AC Unit because it would require too much moisture in the office space. Expert said do not include because it could cause mold. It would also exacerbate the feeling of being too hot. He recommended the fan, which we already had; and to make adjustments to HVAC if they could. So they did that. They gave her a fan and made adjustments to the HVAC and granted her the wristband and cooling jacket. She refused the cooling vest and the wrist coolers.

S4 further indicated that because management erroneously believed Complainant had told S1 that the fan and the vent adjustment were effective accommodations, the matter was dropped.

We note that the Agency did not provide any evidence showing that the use of a fan and the adjustment to the air vents would enable Complainant to perform the essential functions of her position, and we find that the Agency has not met its burden to show that the alternative accommodations were effective. With regard to the cooling vest and wrist coolers, Complainant denied ever receiving such items.

We also find that the Agency did not argue that granting Complainant's request for a fifth telework day would have been an undue hardship. S4 and NRAC only stated that alternative accommodations were effective but management did not explain why, having granted Complainant four days of telework, the granting a fifth was not reasonable or constituted an undue hardship. S4 simply averred that "teleworking 5 days is an exceptionally unusual accommodation. It is a highly unusual arrangement. She already received 4 days of telework." A showing of undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- the impact of the accommodation on the operation of the facility.

See Julius C. v. Dep't of the Air Force, EEOC Appeal No. 0120151295 (June 16, 2017); Enforcement Guidance, Undue Hardship Issues. Here, the record does not contain any supporting evidence that granting Complainant an additional day of telework per week would have been an undue hardship.

The Commission has recognized that an agency is not required to remove any of the essential functions of a position as a reasonable accommodation. See Enforcement Guidance Types of Reasonable Accommodations Related to Job Performance, General Principles. See also Lorraine S. v. Dep't of Agric., EEOC Appeal No. 0120180647 (Aug. 15, 2019); Carlton T. v. Dep't of the Navy, EEOC Appeal No. 0120151566 (Feb. 7, 2018); Timika O. v. Dep't of the Navy, EEOC Appeal No. 0220140008 (Mar. 9, 2017). The record is devoid of evidence showing that Complainant was unable to perform her duties during the remaining four days of the week when she was teleworking as a reasonable accommodation, or that providing Complainant with one additional telework day per week would remove any essential function from her position.

In opposition to Complainant's appeal, the Agency argued that while Complainant's medical documentation stated that "smells, commute, and stress have made it impossible for you to work in the office for the full eight hours, [Complainant's medical expert] does not specify what smells trigger your migraines." Given that the Agency denied Complainant's request to have an outside expert come in and evaluate occupational triggers in the office we find it disingenuous of the Agency to argue that Complainant was unable to provide medical evidence of specific triggering odors.

In this case, Complainant established that she was effectively accommodated prior to her move to the new office location on August 1, 2018, by granting four days of telework. However, on September 4, 2018, and various occasions thereafter, after Complainant's office space was changed, her repeated requests for a fifth day of telework were denied with the Agency maintaining it required additional medical documentation to support Complainant's telework request of an additional day. However, the Agency was already in possession of sufficient medical evidence to support the granting of four days of telework and the Agency has not shown that such evidence, while sufficient to justify granting four days, was somehow insufficient to grant one additional telework day per week. In sum, we conclude that the Agency discriminated against Complainant based on disability when on September 4, 2018, it denied her reasonable accommodation request for a fifth day of telework per week and failed to prove either undue hardship or that the alternative accommodations it claimed to have provided were effective. Accordingly, we REVERSE the Agency's final decision finding no discrimination and REMAND the complaint to the Agency for further action.

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 her disability. See 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). However, because Complainant has made no request for damages, we need not address the matter.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the FAD with regard to Claim 1 and REMAND the complaint to the Agency for further action in accordance with the Order below.

ORDER

The Agency is ordered to take the following remedial action:

1. To the extent that it has not done so, within sixty (60) days from the date this decision is issued, the Agency shall grant Complainant's request to telework an additional day per week as a reasonable accommodation, for a total of five days per week. This five-day per week telework period is not related to the nationwide full telework for all employees that began on March 19, 2020, and when such full telework for all employees comes to an end, such a general return to the workplace shall not apply to Complainant.
2. Within ninety (90) days of the date this decision is issued, the Agency shall restore or compensate Complainant for any leave that she has been forced to use to date due to the Agency's failure to provide her with a reasonable accommodation since August 1, 2018. The Agency shall request that Complainant submit a request for the restoration of this leave.
3. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to NRAC and S4 and with an emphasis on the Agency's obligation to accommodate qualified individuals with disabilities.
4. Within thirty (30) days of the date this decision is issued, the Agency shall post a notice in accordance with the paragraph below.

POSTING ORDER (G0617)

The Agency is ordered to post at its New Haven Hearing Office in New Haven, Connecticut, 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 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

December 21, 2021

Date