



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

[REDACTED]
Waltraud R.,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Office of the Chief Financial Officer),
Agency.

Request No. 2021004595

Appeal No. 2020001535

Agency No. OCFO-2018-00378

DECISION ON REQUEST FOR RECONSIDERATION

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020001535 (July 13, 2021).² EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 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). For the following reasons, we DENY the Agency's request.

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.

² Although the Agency attempted to upload its request for reconsideration on the 30th day after it received the appellate decision on July 13, 2021, the Agency was unable to do so until after the filing period expired, due to technical difficulties with the Commission's Federal Sector EEO Portal. As the record clearly shows that the Agency made good faith efforts to timely file its request and contacted the Commission for assistance prior to the expiration of the filing period, we find good cause to excuse the Agency's untimely filing. See Document, "Emails between OFO and OGC...".

BACKGROUND

During the relevant time, Complainant worked as a Program Analyst, GS-0343-11/5, for the Agency's National Finance Center (NFC), Government Employee Services Division, in New Orleans, Louisiana. As a Program Analyst, Complainant's duties included, in relevant part, the following responsibilities: developing and issuing external procedures; initiating, coordinating, and conducting training sessions and discussions; leading office tours; and participating in other NFC representational activities. See Report of Investigation (ROI) at 156-59. Complainant was directly supervised by a GS-13, Supervisory Program Analyst, who, in turn, was supervised by the Acting Associate Director (AAD). Id. at 95.

In 2014, while working on a special project assignment, Complainant requested a reasonable accommodation of two days of telework a week for his respiratory conditions. ROI at 7 and 97. His chain of command, at that time, granted his request and also provided Complainant a workspace next to a window, which Complainant could open to help with his breathing. Id. at 11 and 143.

According to the AAD, Complainant subsequently filed an equal employment opportunity (EEO) complaint in 2016, after management denied his request for technical training to "enhance his abilities to function as a Program Analyst." ROI at 9 and 131. Ultimately, the parties resolved the complaint in October 2016, by way of a negotiated settlement agreement (NSA). Id. at 96. The NSA provided, in relevant part, that Complainant would be taken off the special projects assignment and given the requested Program Analyst training. Id. at 9 and 96. After attending the training, Complainant continued to telework two days a week until August 2017. Id. at 97. That month, Complainant's division moved to a building that had sealed windows. Id. at 108.

Following the move, the AAD terminated Complainant's reasonable accommodation. Complainant subsequently filed a new request for reasonable accommodation on November 9, 2017, again seeking two days of telework because he felt that the sealed windows and cramped working conditions made it difficult for him to breathe. ROI at 173. In support of his request, Complainant submitted a letter from his physician dated November 28, 2017, which stated, in relevant part:

[Complainant] is under my care at the [Department of Veterans Affairs] for severe persistent allergic asthma and allergic rhinitis. He is allergic to multiple mold spores as well as other allergens. Please provide him with a well ventilated, dehumidified environment in which to work as a mold or humid environment puts him at risk for an asthma exacerbation.

Id. at 175.

On January 4, 2018, the AAD issued Complainant a decision on his request for reasonable accommodation. ROI at 177. In his letter, the AAD informed Complainant that "[b]ased on the medical documentation presented, you may take breaks outside to get fresh air as necessary for

your medical needs. You may also request leave as a result of your medical needs.” Id. The AAD advised Complainant that “[i]f your medical condition changes, please notify me timely.” Id.

Thereafter, on March 9, 2018, Complainant emailed the Reasonable Accommodation Coordinator (RAC) regarding his request for telework as a reasonable accommodation. In his email Complainant noted that, despite his request having been approved in 2014, he was required to reapply after the move to a different building. Complainant explained that, since moving, his asthma had been exacerbated as the building does not have any open windows and the seating arrangement does not allow the air to flow. ROI at 106.

On March 20, 2018, the AAD issued Complainant another decision on his reasonable accommodation request. In his decision, the AAD informed Complainant that he could not grant his request to work near a window that opens because the building windows do not open. Additionally, the AAD stated that an air quality study had been conducted, which revealed no problems with the air and/or ventilation within the facility. ROI at 54-55.

Complainant requested an update from RAC, on April 11, 2018, who responded that she did not understand Complainant’s request and asked if he had other ideas besides sitting near an open window or additional telework. ROI at 108.

On April 12, 2018, Complainant filed an EEO complaint alleging, in relevant part, that the Agency discriminated against him on the basis of disability (chronic allergic rhinosinusitis with polyposis and allergic asthma), when on January 4, 2018, management denied Complainant’s request to telework two days per week as a reasonable accommodation. The Agency subsequently accepted Complainant’s denial of reasonable accommodation claim for investigation.

Days after filing his EEO complaint, on April 16, 2018, Complainant again requested the RAC’s assistance because he believed AAD’s recommendation to go outside would aggravate his condition. ROI at 108. Complainant noted that his coworkers had fans due to the inefficient air conditioning and restrictive air flow, and that his medical documentation stated that he needed to be in a well-ventilated area. Id. Two days later, RAC responded that AAD could not grant additional telework days because Complainant’s essential functions required his physical presence in the office. Id. at 107. The RAC noted that she wanted to discuss Complainant’s request further, and specifically asked Complainant if he had any alternative suggestions for an accommodation, such as a fan or an air purifier. Id. Complainant, however, reiterated his March 2018 request for reasonable accommodation. Id. Ultimately, Complainant did not receive his requested accommodation of two days of telework a week.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, the Agency found Complainant to be a qualified individual with a disability. However, it concluded that Complainant was not denied a reasonable accommodation, as the AAD had provided him with effective alternative accommodations in lieu of his requested accommodation. Complainant subsequently appealed the Agency's final decision to the Commission. The Commission reversed the Agency's decision. See EEOC Appeal No. 2020001535 (July 23, 2021).

In concluding that the Agency failed to reasonably accommodate Complainant, the appellate decision initially addressed whether Complainant was a qualified individual with a disability during the relevant period. Having reviewed the record, our prior decision agreed with the Agency's decision that Complainant was indeed a qualified individual with a disability. However, we found that the accommodations provided to Complainant were ineffective.

Specifically, with regard to AAD's offer to allow Complainant the opportunity to go outside whenever he needed, the appellate decision found that accommodation to be ineffective because Complainant stated that going outside did not help and could even trigger an asthma attack. Moreover, the prior decision noted that this accommodation was not individualized to Complainant, as even employees without reasonable accommodations could go outside.

As for the use of leave as an accommodation, our prior decision determined that the Agency failed to provide any evidence showing that this accommodation would be effective in enabling Complainant to perform the essential functions of his position. In so finding, the appellate decision emphasized that forcing an employee to take leave when another accommodation would permit an employee to continue working is not an effective accommodation.

Furthermore, the previous decision found no evidence that granting Complainant's requested accommodation would have resulted in an undue hardship to the Agency. While the appellate decision carefully considered the AAD's contention that Complainant's position required him to undergo in-office training and be available to assist others, we determined that the AAD did not adequately explain why Complainant's physical presence was necessary. Given that Complainant had previously teleworked two days a week from 2014 through August 2017, the appellate decision concluded that there was no evidence, aside from AAD's "generalized conclusion," to suggest that Complainant would be unable to perform his duties if allowed to resume his prior accommodation.

Lastly, in the prior decision we were unpersuaded by the Agency's argument that Complainant's medical documentation failed to support his request for additional telework. The record revealed that the two decisions issued by the AAD "did not inform Complainant that his telework requests were denied due to insufficient medical documentation." The appellate decision emphasized that the AAD did not communicate the need for additional medical documentation and "only noted that the Agency may periodically request updated medical information, and that Complainant should inform AAD if his medical condition changes." The appellate decision further found no evidence that, when Complainant reached out to the RAC for additional assistance, the RAC informed Complainant that his medical documentation was insufficient.

Based on the foregoing, the prior decision found that the Agency unlawfully denied Complainant's request for reasonable accommodation. In reversing the Agency's final decision, the appellate decision also determined that the Agency was liable for compensatory damages because the "Agency's grant of ineffective alternative accommodations and its failure to continue to engage in the interactive process do not demonstrate a good faith effort in providing Complainant with a reasonable accommodation." The Agency subsequently filed the instant request for reconsideration.

REQUEST FOR RECONSIDERATION

In requesting reconsideration, the Agency argues that the appellate decision erred in finding that the it failed to engage in good faith when it granted the exact accommodation recommended by Complainant's medical provider and more. Specifically, the Agency emphasizes that when the AAD received the letter from Complainant's medical provider, he immediately took "prompt affirmative steps to ensure that air quality was appropriate as outlined in the medical documentation and granted [Complainant] liberal leave and breaks."

Furthermore, the Agency disputes the appellate decision's finding that "if the Agency required additional medical documentation to support Complainant's telework request," the Agency should have "communicated this need to Complainant." To the contrary, the Agency contends that Complainant knew, or should have known, that the AAD's two decisions were based on the submitted medical documentation, as the AAD clearly emphasized to Complainant that the decisions were based on those documents and advised Complainant to inform him if his medical condition changed. The Agency maintains that "[a]ny reasonable person would be aware that for a different result to the telework request, supporting medical documentation would be warranted." Additionally, the Agency asserts that the appellate decision erred in finding that the Agency failed to engage in the interactive process, as the record clearly shows that the RAC "reached out to [Complainant] to determine what alternative accommodations [Complainant] would consider such as a fan or air purifier."

The Agency also urges the Commission not to view the matter through the lens of a post-pandemic world, as the alleged discriminatory events occurred between 2017 and 2018. In this regard, the Agency argues that the appellate decision, if left standing, would have a substantial impact on the policies, practices, or operations of the Agency, as the appellate decision "essentially determined that any employee regardless of essential duties is entitled to telework upon request even when [Complainant's] medical documentation is not supportive of the request in any way."

With respect to the appellate decision's finding that Complainant's requested accommodation would not have constituted an undue hardship because he had previously teleworked two days a week, the Agency argues that the decision "fails to acknowledge that [Complainant] was in a different position at the time." Given Complainant's move to a new position, contends the Agency, it was permitted to reassess the effectiveness of the provided accommodations. Further, the Agency disputes that it proffered only generalized conclusions regarding undue hardship.

To the contrary, the Agency maintains that the March accommodation letter from AAD clearly informed Complainant that he needed to be on site to perform essential functions, such as processing rejected time and attendance records; processing manual payments and adjustments; attending training; coordinating and managing internal agency agreements; and other special projects.

Finally, the Agency argues that the appellate decision erred as a matter of law in awarding compensatory damages. Citing to Hae T. v. Dep't of Interior, EEOC Appeal No. 2019003385 (Sept. 23, 2020) and Hiroko V. v. Dep't of Army, EEOC Appeal No. 2019002317 (May 24, 2021), the Agency contends that it exhibited good faith when it asked Complainant for suggested alternative accommodations. For these reasons, the Agency requests that the Commission grant its request for reconsideration.

Complainant did not file a statement in opposition to the Agency's request.

ANALYSIS

After reviewing the appellate decision and the entire record, the Commission finds that the Agency's request for reconsideration 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.

We first address the effectiveness of the alternate accommodations that the Agency provided to Complainant.³ In the appellate decision, we found no evidence that providing Complainant with breaks and liberal leave would have enabled him to perform the essential functions of his position. While we acknowledge the Agency's contention, on reconsideration, that it granted Complainant the accommodation requested by Complainant's medical provider (*i.e.*, by providing him with a well-ventilated workspace as verified by an air-quality study), as well as additional alternate accommodations, we ultimately agree with the appellate decision's reasoning that these accommodations did not effectively address Complainant's heightened respiratory sensitivities.

Under our regulations, "[i]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." Enforcement Guidance on Reasonable Accommodation at Q. 32. While the RAC asked Complainant whether he wanted other accommodations, such as a fan or air purifier, we note that Complainant remained steadfast in his request for two days of telework as an accommodation. As for the Agency's contention that the medical documentation submitted by Complainant did not justify the requested accommodation, it should have clearly requested additional relevant medical documentation from him.

³ As the Agency does not dispute the appellate decision's finding that Complainant was a qualified individual with a disability during the relevant period, we do not address that issue.

Instead, the appellate decision found no evidence that the Agency ever communicated such a need to Complainant. With respect to the Agency's contention that "[a]ny reasonable person would be aware that for a different result to the telework request, supporting medical documentation would be warranted," based on a review of the email communications between the AAD and RAC, we cannot say that the appellate decision was clearly erroneous in finding that the Agency failed to communicate its need for additional medical documentation to Complainant. The bottom line remains that neither the AAD nor the RAC expressly informed Complainant that additional medical documentation was needed.

As for the matter of undue hardship, the appellate decision found that providing Complainant with two days of telework did not constitute an undue hardship because it had previously provided him that accommodation from 2014 to August 2017. On reconsideration, the Agency argues that the appellate decision "fails to acknowledge that [Complainant] was in a different position at the time." However, we find that the Agency misstates the record. While it is true that Complainant attested that he began training as a Program Analyst in late 2016, we note that the AAD clarified that Complainant sought technical training to "*enhance* his abilities to function as a Program Analyst [emphasis added]." ROI at 9, 96 and 131. After Complainant's request for technical training was denied, he filed an EEO complaint, which was ultimately resolved by allowing Complainant to attend the requested training. Given that Complainant held the position of Program Analyst from 2014 to August 2017, we are unpersuaded by the Agency's argument that the appellate decision failed to consider that Complainant was in a different position.

Furthermore, we agree with the appellate decision that the Agency's claim of undue hardship is generalized and devoid of supporting evidence. Although the AAD clearly informed Complainant in his March accommodation letter that Complainant needed to be onsite in order to, for example, process rejected time and attendance records, the appellate decision concluded that the AAD failed to show *why* Complainant's onsite presence was necessary. On reconsideration, rather than provide reasons and evidentiary bases for the AAD conclusions, the Agency simply reiterates the same generalized conclusions. We emphasize that a request for reconsideration is not a second appeal to the Commission. See EEO MD-110, Ch. 9, § VII.A.

We turn now to the Agency's contention that the appellate decision erred as a matter of law in awarding compensatory damages. Citing to Hae T. v. Department of the Interior, EEOC Appeal No. 2019003385 and Hiroko V. v. Department of the Army, EEOC Appeal No. 2019002317, the Agency maintains that it acted in good faith. Ultimately, we find these cases to be distinguishable from the instant case. In Hae T., *supra*, the agency granted almost all of the accommodations contained in complainant's multi-part accommodation request, with the exception of situational telework for six to eight hours a month. Though complainant was unable to perform the essential functions of her position for six to eight hours a month due to the agency's failure to grant her request for situational telework, by granting her remaining accommodations the Agency enabled Complainant to perform her essential functions during the remaining workhours. Unlike Hae T., *supra*, we find that the accommodations offered by the Agency in this case were not effective. For this reason, we find the Agency's reliance on Hae T., *supra*, to be unpersuasive.

In Hiroko V., supra, the Commission agreed with the AJ that, while the agency improperly denied complainant's request for a telephonic interview as reasonable accommodation, the agency nevertheless acted in good faith by offering complainant an effective alternative accommodation, which complainant refused. Given the agency's good faith efforts to reasonably accommodate complainant, the Commission affirmed the AJ's finding that complainant was not entitled to compensatory damages. While we acknowledge that there are similarities between this case and Hiroko V., supra, we ultimately find the Agency's reliance on that case to be unpersuasive, as the record fails to persuasively show that, had Complainant accepted the Agency's alternate accommodations, including its offer of a fan or air purifier, he would have been effectively accommodated.

Finally, we are unpersuaded by the Agency's contention that the appellate decision would have a substantial impact on the policies, practices, or operations of the Agency, as the appellate decision "essentially determined that any employee regardless of essential duties is entitled to telework upon request even when [Complainant's] medical documentation is not supportive of the request in any way." As discussed above and in the appellate decision, if the Agency had concerns regarding the adequacy of Complainant's medical documentation, the Agency should have clearly requested additional medical documentation from Complainant to substantiate his claimed need to telework two days a week. Ultimately, we fail to see how the appellate decision would have a substantial impact on the policies, practices, or operations of the Agency, as the appellate decision merely reiterated the Agency's existing, pre-pandemic obligations.

CONCLUSION

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. 2020001535 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

The Agency is ordered to take the following remedial actions:

1. To the extent that it has not done so, the Agency shall grant Complainant's request to telework two days per week as a reasonable accommodation, within 30 days from the date this decision is issued;
2. Within 60 days of the date this decision is issued, the Agency shall restore or compensate Complainant for any leave that he has been forced to use due to the Agency's failure to provide him with a reasonable accommodation since January 4, 2018;
3. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory

damages, attorney's fees, and costs. The Agency shall allow Complainant to present evidence in support of his 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, attorney's fees, and costs no later than 30 days after the completion of the investigation;

4. Within 90 days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training to AAD,⁴ with an emphasis on the Agency's obligation to accommodate qualified individuals with disabilities;
5. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against AAD. 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 employment, then the Agency shall furnish documentation of their departure date(s); and
6. Within 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 National Finance Center, Government Employee Services Division in New Orleans, Louisiana, 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.

⁴ The AAD is identified on page 126 of the ROI.

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.

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

March 7, 2022

Date