



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

[REDACTED]

Bryce A.,<sup>1</sup>  
Complainant,

v.

Alejandro N. Mayorkas,  
Secretary,  
Department of Homeland Security  
(Immigration and Customs Enforcement),  
Agency.

Request Nos. 2021004683, 2021004817

Appeal Nos. 2020001712, 2021001457

EEOC Hearing No. 551-2020-00063X

Agency Nos. HS-CIS-00165-2018, HS-CIS-00606-2019

**DECISION ON REQUESTS FOR RECONSIDERATION**

Both complainant and the Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020001712 (July 29, 2021) and EEOC Appeal No. 2021001457 (July 29, 2021).<sup>2</sup> 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).

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<sup>1</sup> 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.

<sup>2</sup> The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. 29 C.F.R. § 1614.606. The Commission previously consolidated the two above-referenced appeals, however, Complainant submitted requests for reconsideration for the appeals individually. We exercise our discretion to consolidate the requests for reconsideration.

### BACKGROUND

At the time of events giving rise to the underlying complaint, Complainant worked as a Supervisory Immigration Services Officer (SISO), GS-13, at the Agency's Portland Field Office in Portland, Oregon.

Complainant filed two EEO complaints alleging discrimination in 11 incidents. His complaints included allegations of denial of his religious accommodation requests, discriminatory suspension and non-selection for a Section Chief position, and management's disclosure of his protected medical information. The Agency issued two final decisions concluding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant appealed the Agency's final decisions.

In our appellate decision in EEOC Appeal Nos. 2020001712 and 2021001457 which consolidated the two complaints, we reversed the Agency's findings on the claims related to a failure to provide a religious accommodation and disclosure of Complainant's medical information. The Commission affirmed the findings on the remaining claims.

Regarding the failure to accommodate claim, the record established that Complainant has a bona fide religious belief and that the practice of conducting five daily prayers limited his ability to work later in the day because he needed to go home to properly conduct his mandatory prayers. Complainant was able to work early in the day, and he was only limited by the Agency's policies, which set the employees' start time at 6:00 a.m., at the earliest. While Complainant requested the ability to work prior to 6:00 a.m., and on weekends and holidays, to earn religious compensatory time or credit hours as a religious accommodation, the Agency denied his requests.

The Agency stated that it granted an alternative accommodation of a flexible work schedule. However, the appellate decision found that this was not an effective accommodation because no schedule allowed for Complainant to work prior to 6:00 a.m. While Complainant could have possibly worked regular hours, without the need to earn and use religious compensatory time or credit hours, he would have only been able to do so if he could start work prior to 6:00 a.m.

The appellate decision found that the Agency had not met its burden to show an undue hardship. Complainant had been granted his requested accommodation from August to October 2018, and the Agency did not produce any evidence showing that during this time, there was any undue hardship.

For the medical disclosure claim, the record showed that Complainant volunteered his medical information in response to the proposed suspension, and the deciding official (District Director) shared Complainant's written response with the proposing official (Field Office Director). The appellate decision found that the Agency violated the Rehabilitation Act when Complainant's written response to the proposed suspension, which contained his medical information, was shared.

The appellate decision ordered the Agency to conduct a supplemental investigation regarding Complainant's entitlement to any compensatory damages for its failure to provide Complainant with a religious accommodation since October 19, 2018, and its inappropriate disclosure of Complainant's medical condition on August 20, 2019; and to attorney's fees and costs related to the processing of this matter.

#### *Agency's Request for Reconsideration*

In its request for reconsideration, the Agency argues that the previous decision involved a clearly erroneous interpretation of material fact when finding that the District Director disclosed Complainant's medical condition to the Field Office Director. In support, the Agency argues that the record reflects that a Labor and Employee Relations Specialist shared the response with the Field Office Director and the District Director had not. The Agency requests that the Commission reverse the finding against the District Director and reverse the remedies of training and discipline for the District Director.

#### *Complainant's Response and Request for Reconsideration*

In his request for reconsideration, Complainant contends that the prior decision erred in finding no discrimination related to his suspension and non-selection for a Section Chief position. Complainant asserts that the decision failed to address his claim that the Agency disclosed information related to his EEO activity concerning his non-selection to the Section Chief position. Complainant further asserts that the Commission failed to address his disparate treatment claims based on national origin and sex with respect to duty hours, a schedule change, and exemptions to credit and duty hour provisions. According to Complainant, with respect to his suspension claims, the previous decision did not consider that the proposed suspension was reprisal for his EEO activity. Complainant states his belief he did not have to show that the Agency's actions were pretextual because the policy he was accused of violating was not violated. Complainant asserts that he did not present new evidence or a new theory on appeal. He maintains that the information was in the record and not properly considered. Complainant adds that the appellate decision failed to address due process violations which led to his suspension; incorrectly addressed the Douglas Factors; and did not address errors contained in the proposed suspension. Additionally, Complainant contends that credibility issues remain, and the appellate decision did not analyze his non-selection properly under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant further argues that the Agency did not have authority to remand his case for a supplemental investigation.

### ANALYSIS AND FINDINGS

Title I of the ADA requires that all information obtained regarding the medical condition or history of an applicant or employee must be maintained on separate forms, in separate files, and treated as confidential medical records. 42 U.S.C. §§ 1212(d)(3)(B), (4)(C); 29 C.F.R. §1630.14. These requirements also extend to medical information that an individual voluntarily discloses to an employer. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical

Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4(July 26, 2000).

As noted in the prior decision, the Commission has previously held that an agency's failure to maintain a complainant's medical information in a separate medical file violates the Rehabilitation Act and constitutes disability discrimination. See Mayo v. Dep't of Justice, EEOC Appeal No. 0720120004 (Oct. 24, 2012) (medical information was placed in a non-medical adverse action file in the Human Resources Department), req. for recon. den'd, EEOC Request No. 0520130124 (Apr. 25, 2014); Higgins v. Dept' of the Air Force, EEOC Appeal No. 01A13571 (May 27, 2003) (medical information was placed in a non-medical work file maintained by employee's supervisor); Brunnell v. U.S. Postal Serv., EEOC Appeal No. 07A10009 (July 5, 2001) (medical information was placed in the employee's personnel file).

Here, it is undisputed that Complainant included medical information in his response to a suspension proposal that was submitted to the District Director. Despite the District Director's denial, that information was passed on to multiple individuals without redaction of Complainant's medical information. We reiterate that Complainant's medical condition was not a factor in the Agency's decisions to propose or uphold the suspension, and that this disclosure did not fall within a permissible exemption of the Agency's obligation to keep an employee's medical diagnosis confidential. While the Agency argues over the party that shared Complainant's medical information, it ignores the fact that failure to maintain Complainant's medical information in separate files constitutes a violation of the Rehabilitation Act, even in the absence of unauthorized disclosure. Porter P. v. U.S. Postal Serv., EEOC Appeal No. 0120171893 (Mar. 27, 2019). Accordingly, we find that the previous decision does not involve a clearly erroneous interpretation of material fact as the Agency alleges with respect to the District Director's role in the disclosure of Complainant's medical information.

We further decline to reverse the remedies and training for the District Director. A review of the record shows that the District Director testified that "even if she had" shared the information, it was her belief that sharing the information was not a violation. Report of Investigation at 1001. In these circumstances, we find that training is warranted.

As to Complainant's contentions, we have carefully reviewed Complainant's arguments and determine that the matters either were raised or could have been raised below. We emphasize that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Complainant has not done so here.

### CONCLUSION

After reviewing the previous decision and the entire record, the Commission finds that the requests fail to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the requests. The decision in EEOC Appeal Nos. 2020001712 and 2021001457 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request.

### ORDER

1. To the extent that it has not already done so, the Agency shall provide Complainant an effective religious accommodation, within thirty (30) days of the date this decision is issued.
2. Within thirty (30) days of the date this decision issued, the Agency shall expunge all medical information concerning Complainant from non-medical files, including personnel files, and shall ensure that Complainant's medical information is maintained in a separate and appropriate medical file.
3. Within ninety (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 related to the Agency's failure to provide a religious accommodation since October 19, 2018, and its improper disclosure of his confidential medical condition on August 20, 2019. 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 thirty (30) days after the completion of the investigation.
4. Within ninety (90) days of the date this decision is issued, the Agency shall provide eight (8) hours of interactive EEO training for the Field Director and the District Director<sup>3</sup>. The training shall emphasize the Agency's duties to appropriately respond to employees' requests for a religious accommodation and to maintain confidentiality of an employee's medical information, to ensure that similar violations do not occur.
5. Within sixty (60) days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the Field Director and the District Director. 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

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<sup>3</sup> In the previous decision, the District Director was referred to as DD and S2 was used to reference the Field Director.

decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s)

6. The Agency shall immediately post a notice in accordance with the paragraph below.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Portland Field Office facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

#### ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g).

Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

#### 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

February 22, 2022

Date