



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

[REDACTED]
Eleni M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Request No. 2021005193

Appeal No. 2020001903

Agency No. ARREDSTON17JUL02264

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2020001903 (September 7, 2021). 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).

In our previous decision, we modified the Agency's final decision, finding that Complainant established that she was denied reasonable accommodation for her disability (right hand and wrist condition) as alleged. We specifically found that the Agency improperly denied Complainant's multiple requests for reasonable accommodation between October 20, 2016, and December 20, 2016. In so finding, we noted that Complainant established that assistive technology, including Dragon software, was a plausible accommodation because of the nature of her disability, and she established the availability of the software through the Agency's Computer Accommodations Program (CAP). We concluded that Complainant's first-level supervisor (S1) improperly terminated the accommodation interactive process by sending

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

Complainant an email on November 30, 2016, writing that no further action would be taken with regard to her request for accommodation. Additionally, we determined that S1 improperly terminated the interactive process again on December 20, 2016, by informing Complainant that no additional action would be taken until she returned to work and provided updated medical documentation.

While the Agency explained that it did not provide Complainant with a reasonable accommodation upon her return to work because she never completed the appropriate documentation, our previous decision noted that S1 had just received medical documentation confirming that Complainant's post-surgery condition was chronic, as it involved flare-ups and ongoing treatment. We observed that when Complainant initially requested a reasonable accommodation on or about October 20, 2016, both her disability and the need for assistive technology were obvious. It was well documented throughout the record that the software she requested would have allowed her to type without using her right hand.

In our previous decision, we also concluded that the Agency did not act in good faith when responding to Complainant's requests for assistive technology as a reasonable accommodation. In so finding, we noted that the lack of good faith was demonstrated by S1's improper disability-related inquiries including her per se violation of the Rehabilitation Act and, in particular, S1's refusal to proceed with Complainant's request unless Complainant provided her with a completed AR 690-12 form. We found that it was not necessary for Complainant to submit this particular form, and it should not have been a barrier for her obtaining a reasonable accommodation. In the prior decision, the Agency was found to have created several months of unnecessary delays when S1 first notified Complainant that she would not act on her accommodation request until Complainant returned to work with updated documentation.

In its Request for Reconsideration, the Agency maintains that it made a good faith effort to provide Complainant with an effective, alternative accommodation. The Agency specifically asserts that it acted reasonably and in good faith by promptly providing Complainant with an intern to type and assist Complainant with her daily duties. The Agency notes that Complainant said she could not use her hand to type, carry items, and take notes, so they tasked an intern to complete these tasks on behalf of Complainant. The Agency contends that when Complainant returned to work, there was no showing that the intern was no longer available. According to the Agency, Complainant never requested the use of the intern upon her return to work, although she knew her supervisor had provided this accommodation previously. The Agency acknowledges that the purpose of the Dragon software was to eliminate typing, and that having a voice recorder would have assisted Complainant to capture notes. It argues, however, that having an intern complete these functions would have been just as effective, if not more effective than simply having the Dragon software.

The agency did not make these arguments in its Brief in Opposition to Complainant's appeal. We remind the Agency that a request for reconsideration is not a second appeal to the Commission.

Nevertheless, there is no dispute that the Agency did not provide Complainant with the Dragon speech software, even though its Agency Computer Accommodations Program (CAP) offered this assistive technology to its employees. We find that the Agency's arguments do not 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.

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. 2020001903 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 (D0617)

The Agency is ordered to take the following remedial action:

1. Back Pay. Complainant is entitled to a backpay award for days she was unable to work due to the Agency's unnecessary delay and/or denial of reasonable accommodation. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Complainant, pursuant to 29 C.F.R. § 1614.501, no later than **sixty (60) calendar days** after the date this decision was issued. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within **sixty (60) calendar days** of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."
2. Compensatory Damages. Within **thirty (30) calendar days** of the date of this Decision, the Agency shall notify Complainant that she has a right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of her claim for compensatory damages within **forty-five (45) calendar days** of receiving the Agency's notice. Within **thirty (30) calendar days** of receipt of Complainant's evidence (or when the 45-day limitation period has passed), the Agency shall complete the investigation on the claim for compensatory damages and issue a decision on the claim, with appeal rights to this Commission, in accordance with 29 C.F.R. § 1614.110.²

² Information on determining Compensatory Damages: EEOC MD-110, Ch. 11 § VII (Aug. 5, 2015) available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm, and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol.

3. Attorney's Fees and Costs. Complainant is entitled to attorney's fees as provided in the statement below this Order, entitled "Attorney's Fees".
4. Provide Training to S2. Within **thirty (30) calendar days** of the date of this Decision, S2 shall complete a minimum of **2 hours of live one-on-one training**. This single session training may be prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) explain *this decision* and what, if anything, S2 should do differently if she or another one of her subordinates is presented with a similar scenario in the future, (2) discuss the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations.
5. Provide the following training to S1.
 - a. Within **thirty (30) calendar days** of the date of this Decision, S1 shall complete a minimum of **4 hours of live one-on-one training**. This can be presented in one or two sessions, and prepared/provided by an Agency employee or contractor with subject matter expertise to: (1) explain *this decision* and what, if anything, S1 should do differently if presented with a similar scenario; and (2) explain the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations.
 - b. Within **sixty (60) calendar days** of the date of this Decision, S1 shall **give a 1-hour presentation** to the Agency's MER, Labor and Sustainment Division ("MSLD") at Redstone Arsenal addressing disability rights and the Agency's obligations under the Rehabilitation Act with respect to reasonable accommodations.
6. Consider appropriate Disciplinary Action for S1. Within **sixty (60) calendar days** of the date of this Decision, the Agency shall consider taking appropriate disciplinary action against S1. The Agency shall report its decision to the EEOC compliance officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. Training is not considered a disciplinary action.
7. Posting Order. As provided in the statement below, the Agency must post the Notice **within thirty (30) days** of the date this decision is issued, and the Notice shall remain posted for **sixty (60) consecutive days**.

8. Report of Compliance. The Agency is directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented. If S1 or S2 left the Agency prior to the implementation of this Decision, the Agency shall furnish documentation.

POSTING ORDER (G0617)

The Agency is ordered to post at its Civilian Human Resources Activity 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