



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

[REDACTED]
Sandra A.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Request Nos. 2022000231, 2022000276

Appeal Nos. 2020001588, 2021002131

Agency Nos. 18-00259-00130, 20-00259-01008

DECISION ON REQUEST FOR RECONSIDERATION

On October 18, 2021, the Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal Nos. 2020001588, 2021002131 (September 16, 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). For the following reasons, we DENY the Agency's request.

BACKGROUND

At the time of events giving rise to these complaints, Complainant worked as a GS-1083-12 Technical Editor in the Agency's Clinical Investigations Department (CID), at the Naval Medical Center, in San Diego, California.

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.

On October 24, 2018, Complainant filed an EEO complaint (Agency No. 18-00259-00130 (Complaint 1)) alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of disability (Irritable Bowel Syndrome (IBS)) and in reprisal for prior protected EEO activity as follows:

1. Complainant's first-line supervisor (S1) failed to provide timely and effective reasonable accommodation for her disability when:
 - a. On May 17, 2018, Complainant submitted a reasonable accommodation request to reinstate her work schedule of 100 percent telework to S1, but did not receive a timely response for approximately two months;
 - b. On July 17, 2018, Complainant received a response from S1 on her reasonable accommodation request where she approved "frequent and prolonged bathroom access as needed" rather than her requested accommodation for 100 percent telework;
 - c. On or about August 2, 2018, Complainant submitted a second reasonable accommodation request to S1 to adjust her Maxiflex work schedule to permit work outside of core hours and on the weekends in order to catch up on work and make up some time lost when she is sick during the week; and
 - d. On August 15, 2018, S1 responded to her second request approving one day of telework as needed for flare-ups. Also, Complainant was required to maintain core hours of 9:00 a.m. to 2:00 p.m. while on telework or on duty and complete any required forms and training before beginning telework.
2. Complainant was subjected to discrimination based on her disability and in reprisal when:
 - a. On May 22, 2018, S1 established a performance critical element requiring that Complainant maintain core work hours that is supportive to the CID mission and vision for customer service; and
 - b. On July 25, 2018, S1 issued Complainant a Letter of Requirement notifying her of her unsatisfactory attendance and restricting her leave usage with additional requirements for approval that were to remain in effect for one year.
3. Complainant was subjected to harassment, in addition to the events set forth in claims (1) and (2), when:
 - a. On September 10, 2018, S1 contacted Complainant with the Captain present about her inappropriate and unprofessional conduct at a recent staff meeting where she discussed her telework package, requested help from others with the Quality Improvement/Evidence Based Project (QI/EBP) process, and complained about the realignment of her duties and responsibilities. S1 cautioned Complainant that if it

happened again, she would have HR issue her a Letter of Reprimand for insubordination and disrespect. S1 also ordered Complainant not to format and submit manuscripts to journals and instead spend eight hours a week reviewing QI/EBP projects; and

- b. From May 16, 2018, to November 26, 2018, S1 continually questioned Complainant about timekeeping matters, including her work schedule, working outside of core hours, family and childcare issues, and use of approved sick leave or the reason for requesting sick leave during various counseling sessions with a third party present, but not her union representative.

On January 21, 2020, Complainant filed a second EEO complaint (Agency No. 20-00259-01008) (Complaint 2). Complainant referenced the allegations in Complaint 1 and further alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of race (Hispanic), national origin (Mexican), color (Brown), disability, and in reprisal for prior protected EEO activity, when:

4. On January 28, 2019, S1 threatened to contact the Human Resources and Legal offices when Complainant refused to move to the office associated with her approved accommodation;
5. She was subjected to a hostile work environment which culminated in her resignation on February 15, 2019 (constructive discharge);
6. On January 23, 2019, S1 provided Complainant a revised accommodation; and
7. She was subjected to discriminatory harassment by S1 after submitting requests for reasonable accommodation on May 17, 2018, and August 2, 2018.

Complainant appealed her constructive discharge to the Merit Systems Protection Board (MSPB), which dismissed the appeal for lack of jurisdiction over the matter. The Commission denied consideration of Complainant's petition for review and remanded the matter to the Agency for processing as a non-mixed case, with the date on which Complainant filed her appeal with MSPB to be deemed the date of initial EEO Counselor contact. See EEOC Petition No. 2020000658 (Nov. 6, 2019).

On remand, the Agency dismissed claim (6) pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact. The Agency dismissed claim (7) pursuant to 29 C.F.R. § 1614.107(a)(1) for stating the same claim as a claim previously decided by the Agency in Complaint 1.

The Agency issued final decisions on December 2, 2019, and January 19, 2021, finding no discrimination. Complainant appealed both final decisions, and the Commission consolidated the appeals pursuant to 29 C.F.R. § 1614.606. Because the appellate decision on the consolidated appeals addressed claims (6) and (7), the Commission did not consider the procedural dismissal of these claims. The Commission's appellate decision in EEOC Appeal Nos. 2020001588, 2021002131 affirmed in part and reversed in part the Agency's final decisions.

We found that the Agency denied Complainant a reasonable accommodation when it failed to consider telework as a reasonable accommodation and when it held Complainant to core hour requirements despite her request for flexibility. Regarding telework, we found that the preponderance of the evidence in the record established that telework would have been an effective accommodation. In terms of S1 adding the core hours requirements to Complainant's performance plan, we noted that Complainant's disability resulted in unpredictable and uncontrolled flare ups and that S1's explanation for why she held Complainant to the core hours requirements was not supported by the record. Regarding Complainant's disparate treatment claims, we found that the Agency subjected Complainant to disability discrimination when S1 instituted core hours for Complainant, but not for other employees, and when she issued Complainant a Letter of Requirement.

In our prior decision, we concluded that Complainant failed to establish she was subjected to a hostile work environment when S1 directed her to work on the QI/EBP packages or in relation to S1's communication with Complainant.

Finally, although we did not find that Complainant was subjected to a hostile work environment, we concluded that Complainant established she was constructively discharged. We reasoned that the Agency's failure to accommodate her was intolerable and discriminatory and that she resigned because of the Agency's decision regarding her request for reconsideration.

The Agency filed the instant request for reconsideration. Complainant requests that the Commission dismiss the Agency's request for reconsideration.²

In its request, the Agency contends that the appellate decision was based on clearly erroneous interpretations of material fact and of law. The Agency argues that the Commission erred in considering the January 23, 2019, reasonable accommodation claim because it properly dismissed the claim for untimely EEO Counselor contact. According to the Agency, the date Complainant filed her appeal with the MSPB, March 11, 2019, was deemed to be the date of initial contact with the EEO Counselor, and this was 47 days after January 23, 2019.

² Complainant argues that the Agency failed to timely file its request for reconsideration within 30 calendar days of receipt of the appellate decision. We disagree. Since the 30th day after September 16, 2021, was Saturday, October 16, 2021, the deadline was extended to the next business day. See 29 C.F.R. § 1614.604(d). Therefore, the Agency's October 18, 2021, request for reconsideration was timely filed.

The Agency further asserts that the Commission erred in finding that the alternative accommodations provided to Complainant would not be effective. The Agency suggests that this finding is based on a clearly erroneous interpretation of fact, arguing that it was clear that Complainant was offered a private bathroom for her exclusive use. The Agency asserts that, because Complainant was offered an effective accommodation, the private bathroom, the previous decision erred in finding that Complainant was constructively discharged. The Commission also erred, states the Agency, in concluding that Complainant was subjected to disparate treatment. The Agency requests that the Commission issue a new decision finding no discrimination.

ANALYSIS AND FINDINGS

The Agency's contends that the Commission erred in addressing claim (6), concerning the revised accommodation offered to Complainant on January 23, 2019, because the Agency properly dismissed it for untimely counselor contact. According to the Agency, Complainant's initial EEO Counselor contact date, March 11, 2019, was 47 days after January 23, 2019. EEOC Regulation 29 C.F.R. §1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105, §1614.106 and §1614.204(c), unless the Agency extends the time limits in accordance with §1614.604(c). EEOC Regulation 29 C.F.R. §1614.105(a)(1), in turn, provides that an aggrieved person must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. Therefore, based on the January 23, 2019 offer, the time limit ended on Saturday, March 9, 2019. Under 29 C.F.R. § 1614.604(d), when the deadline falls on a Saturday, Sunday, or federal holiday, the period is extended to include the next business day. Therefore, Complainant's EEO Counselor contact was timely.³

The Agency also contends that the Commission erred in finding that the alternative accommodations offered to Complainant would not be effective. According to the Agency, this finding was based on a clearly erroneous interpretation of fact, that the bathroom attached to the shared office would be shared with other employees. In support, the Agency cites a January 30, 2019, email from S1, stating that the bathroom was for Complainant's exclusive use and she could store clothes there. The Agency correctly noted that the appellate decision found that the employees in the shared office denied knowledge that Complainant was to have exclusive use of the attached bathroom.

³ Moreover, the Agency's duty to reasonably accommodate is ongoing. The Commission has stated that, because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it. See EEOC Compliance Manual, "Threshold Issues," No. 915.003, at 2-IV (July 21, 2005). As such, at the time Complainant contacted the EEO Counselor, she alleged that the Agency remained unwilling to provide her with the accommodations she needed through the date of her resignation.

However, we also found that the offered accommodation would not be effective because Complainant would be unable to work 40 hours per week if she could not telework, as she was required to request leave or extend her workday if she exceeded her allotted break time in the restroom. Moreover, Complainant's physician explained that stress in the office triggered flares of Complainant's symptoms. The physician from the Agency's Occupational Medical Department noted that Complainant's "functional limitations have resulted in situations that are easy to take care of if working from home but can be difficult and misunderstood in a professional environment." Therefore, the offered accommodation would not have been effective.

We do not find that the Agency has shown that the Commission's determination, that a reasonable person in Complainant's position would have found her working conditions intolerable, was clearly erroneous. Regarding the disparate treatment claims, the Agency reiterates arguments from its final decision and previously raised on appeal. We emphasize that a request for reconsideration is not a second appeal to the Commission. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9, § VII.A (Aug. 5, 2015). 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. 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.

CONCLUSION

The Agency's request for reconsideration is hereby DENIED. The decision in EEOC Appeal Nos. 2020001588, 2021002131 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:

1. Within 60 days of the date this decision is issued, the Agency shall offer Complainant reinstatement to her former Technical Editor, GS-1083-12 position, or a substantially equivalent position, at the grade and step where she would have been absent the discrimination, retroactive to the effective date of Complainant's resignation, February 15, 2019, with all the rights, benefits, and privileges of that position. The Agency's job offer of reinstatement shall include a notice that, if Complainant either does not respond or declines the job offer within 15 days of receipt, her right to receive further back pay and other benefits based on the job offer shall terminate as of that date. If the offer is accepted, the Agency shall place Complainant into the position no later than 30 days from that date of acceptance.

2. Upon reinstating Complainant to her position, the Agency shall immediately initiate the reasonable accommodation process with Complainant to assist her in identifying an accommodation she may need and effectively accommodate her accordingly.
3. Within 60 calendar days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant pursuant to 29 C.F.R. § 1614.501. 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 Complainant for the undisputed amount within 60 calendar days of the date the Agency determines the amount it believes to be due. 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."
4. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
5. Within 60 days of the date this decision is issued, the Agency shall expunge from all official Agency records the Letter of Requirement.
6. Within 60 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 due to the Agency's failure to provide her with a reasonable accommodation since May 17, 2018.
7. Within 90 calendar days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the 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)) and request objective evidence from Complainant in support of her request for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. No later than sixty (60) calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.

8. Within 90 calendar days from the date this decision is issued, the Agency shall provide eight hours of interactive or in-person training to the management official identified as S1 (Complainant's supervisor) regarding management's responsibilities under the Rehabilitation Act, with special emphasis on management's duties regarding the interactive process. The Agency shall provide proof of S1's attendance, as well as the contents of the in-person training provided.
9. The Agency shall consider taking disciplinary action against the management official identified as S1. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If S1 has left the Agency's employ, the Agency shall furnish documentation of their departure date.

POSTING ORDER (G0617)

The Agency is ordered to post at the Clinical Investigations Department at the Naval Medical Center in San Diego, California 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)

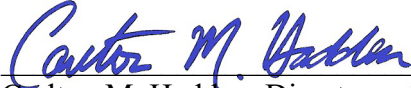
This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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

March 7, 2022

Date