



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Jeremy C.,¹
Complainant,

v.

Janet L. Yellen,
Secretary,
Department of the Treasury,
Agency.

Appeal No. 2021001061

Hearing No. 451-2019-00110X

Agency No. IRS-18-0558-F

DECISION

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 November 3, 2020, final order concerning his 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. For the following reasons, the Agency's final order, which found that Complainant was not denied a reasonable accommodation, is REVERSED.

BACKGROUND

At the time of events, Complainant applied for the position of Seasonal Tax Examining Technician at the Agency's facility in Austin, Texas. When he applied through the USA Jobs website, he disclosed that he had a hearing impairment and uploaded a reasonable accommodation request form.

On February 15, 2018, Complainant received a tentative offer of employment via email. The email included instructions for how to request a reasonable accommodation should one be required.

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.

Specifically, the email stated, "If you're a person with a disability and need job accommodations to perform your duties and have not already made contact with the agency you should take action to contact the Human Resource Specialist listed at the bottom of this notice immediately." The letter was signed "Austin Employment Office" and did not include contact information for the Human Resource Specialist. In February 2018, Complainant reported to the Agency to be fingerprinted and asserts that he verbally informed Agency personnel of his need for a Sign Language interpreter.

On February 27, 2018, Complainant received a firm offer for employment, which included the same instructions for requesting a reasonable accommodation but again failed to include the contact information for the appropriate Human Resource Specialist.

Complainant's three-week orientation was scheduled to begin Monday, March 19, 2018. On Wednesday, March 14, 2018, Complainant emailed an Agency Human Resource Assistant (HR1) to confirm that an interpreter would be available for orientation. HR1 told him to contact the appropriate Human Resource Specialist (HR2) to address his request. The same day, HR2 replied that she had needed to know by March 2, 2018, of the need for an interpreter to schedule one in time for the three-week orientation. HR2 stated that she was in the process of requesting an interpreter if Complainant wanted to start on April 16, 2018. Complainant reluctantly agreed to the new start date.

On April 16, 2018, Complainant reported to the Agency for orientation to discover that there was no orientation. The same day, HR2 informed him via email that there were no more openings for the position and if another opening became available, the Agency would notify him with a new firm offer letter.

On April 18, 2018, Complainant emailed a Contractor that provides Sign Language interpreter services and asked how long it would take to secure an interpreter for an Agency orientation. On April 19, 2019, the Contractor responded, "Do you have an upcoming orientation? We take in same day requests all the time, so we can schedule an interpreter for your orientation today, if needed. If you let the [Agency] know to contact us, we can get to work on it..."

On June 27, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (deaf) when:

He was denied a reasonable accommodation for his new hire orientation, and subsequently, on April 16, 2018, his firm offer for Vacancy Announcement No. 17-CW7W1X0067-0592-4-5MN, Seasonal Tax Examining Technician, was revoked.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing. The AJ assigned to the case determined *sua sponte* that the complaint did not warrant a hearing and over Complainant's objections, issued a decision without a hearing on October 20, 2020.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the agency was motivated by discriminatory animus. Here, while we find the record was fully developed and that a decision by summary judgment was appropriate, we disagree with the AJ's finding of no discrimination.

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual on the basis of disability and is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2(o), (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" individual with a disability pursuant to 29 C.F.R. §1630.2(m); and (3) the Agency failed to provide him with 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 on Reasonable Accommodation). An individual with a disability is "qualified" if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

An Agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o) and (p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A modification or adjustment is “reasonable” if it appears to be “feasible” or “plausible.” Enforcement Guidance at 4. An accommodation also must be effective in meeting the needs of the individual and enable the employee to perform the essential functions of the position. Id. at 4-5.

Here, the Agency has not challenged Complainant’s assertion that he is a qualified individual with a disability (deaf). Complainant has proved by a preponderance of the evidence that the Agency failed to provide him with a reasonable accommodation. The record shows that Complainant submitted a reasonable accommodation request form with his application materials informing the Agency of his need for a Sign Language interpreter. Complainant also indicated that he later informed the Agency of his need for an interpreter when he reported for fingerprinting and once again when he emailed the Agency’s Human Resource personnel prior to the start of his orientation to confirm his reasonable accommodation request had been fulfilled.

Although the Agency asserts that Complainant did not follow the reasonable accommodation request procedure outlined in its firm offer letter, the language explicitly stated that the employee should email the Human Resource specialist *if* the employee had not already informed the Agency. Furthermore, the instructions provided by the Agency to Complainant to request an accommodation were deficient because the instructions failed to include the necessary contact information. Complainant has shown that he notified the Agency of his need for an accommodation at each step of the hiring process. As such, we find that the Agency failed to provide Complainant a reasonable accommodation with a sign language interpreter for the new hire orientation.

Under Section 102 of the Civil Rights Act of 1991 (CRA), compensatory damages may be awarded for pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. However, Section 102 of the CRA also provides that an agency is not liable for compensatory damages in cases of disability discrimination where it demonstrates that it made a good faith effort to accommodate a complainant's disability. We find that the Agency in instant matter made no attempt to provide a reasonable accommodation in a manner that would have allowed Complainant to start the orientation for his position on March 19, 2018. Therefore, we find that the Agency did not show that it made a good faith effort to accommodate Complainant’s disability. Complainant is entitled to proven compensatory damages and we shall order the Agency to give Complainant the opportunity to provide evidence of such damages. We note that Complainant has not requested, as a remedy, to be hired by the Agency. Furthermore, we note the position to which Complainant was offered was only seasonal. Complainant has simply requested monetary damages which we shall award as described in the Order herein.

CONCLUSION

The Agency's decision finding that Complainant was not denied a reasonable accommodation is REVERSED. We REMAND the matter to the Agency so it can take the actions listed in the Order herein.

ORDER

The Agency shall take the following actions:

1. Within 90 days from the date this decision is issued, the Agency shall provide at least eight hours of EEO training to HR2 and four hours of training to the Austin Employment Office. The training shall place special emphasis on the Agency's obligation to provide reasonable accommodation to qualified individuals with disabilities. The Commission does not consider training to be a disciplinary action.
2. Within 60 days from the date this decision is issued, the Agency shall consider taking disciplinary action against HR2 for the failure to provide a reasonable accommodation found to have occurred in this complaint. If the Agency decides to take disciplinary action, it shall identify the actions taken. If the Agency decides not to take disciplinary action, then it shall set forth the reason(s) with specificity for its decision not to impose discipline. If HR2 has left the Agency's employment, then the Agency shall furnish documentation of her departure date.
3. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Complainant v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) and request objective evidence from Complainant in support of his request for compensatory damages within 45 days of the date Complainant receives the Agency's notice. No later than 90 days after the date that this decision is issued, the Agency shall issue a decision addressing the issue of compensatory damages. The final decision shall contain appeal rights to the Commission.
4. The Agency shall pay Complainant back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. §1614.501 to compensate Complainant for the length of the seasonal position for which he was hired – beginning with when he would have received pay after the March 19, 2018 orientation to the scheduled end date of his seasonal appointment. Complainant shall cooperate with the Agency's efforts to compute the amount of back pay and benefits due, and he shall provide all relevant information requested by the Agency. The Agency shall, within 60 days from the date this decision is issued, determine the amount of back pay and, then, pay that amount within 60 days from the date of that determination.

POSTING ORDER (G0617)

The Agency is ordered to post at its Agency's Austin, Texas 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.

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).

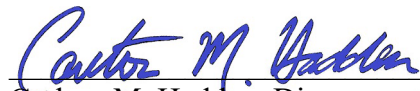
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

May 3, 2022
Date