



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, DC 20507**

[REDACTED]  
Lynette B.,<sup>1</sup>  
Complainant,

v.

Merrick B. Garland,  
Attorney General,  
Department of Justice  
(Bureau of Alcohol, Tobacco, Firearms & Explosives),  
Agency.

Appeal No. 2019003392  
Hearing No. 410-2016-00115X  
Agency No. ATF-2008-00095

**DECISION**

Following its April 29, 2019, final order, the Agency filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to 29 C.F.R. § 1614.403(a). On appeal, the Agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Agency also requests that the Commission affirm its rejection of the relief ordered by the AJ. Specifically, that the Agency did not fail to accommodate Complainant; and should the AJ's liability finding be upheld, the Agency requests that damages above \$10,000, and attorney's fees above \$52,573.00 be reduced drastically. For the following reasons, the Commission **AFFIRMS** the Agency's final order.

**BACKGROUND**

*Procedural History*

At the time of events giving rise to this complaint, Complainant worked in the Budget Branch of the Agency's ATF National Academy in Glynco, Georgia. Since 1999, Complainant worked as a Management Assistant, GS-344-07, in the Budget Branch, but in 2007, she was promoted to a Management Analyst, GS-9, position after she requested a desk audit of her position. Then, in

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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.

October 2007, she was reassigned to a GS-7 position in the Investigative Services Training Branch.

On November 16, 2007, Complainant contacted an EEO Counselor and filed a formal EEO complaint on January 2, 2008, alleging that the Agency discriminated against her on the bases of disability (depression and cardiac arrhythmias) and reprisal for prior protected EEO activity when:

1. on October 10, 2007, she was denied an accommodation of her disability when her supervisor (S1) forced her to accept a demotion to the position of Management Assistant, GS-344-07; and
2. on November 19, 2007, she received a less than outstanding performance evaluation.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing and after receiving motions for summary judgment from both parties, the first AJ assigned to the case (AJ1) ultimately did not schedule a hearing after several failed attempts to do so.

On November 16, 2011, AJ1 granted the Agency's Motion for Summary Judgment, in part, and Complainant's Motion for Summary Judgment, in part. AJ1 granted the Agency's Motion for Summary Judgment with respect to the reprisal claims. However, AJ1 granted Complainant's Motion for Summary Judgment as to the failure to accommodate claim and determined Complainant was not accommodated in her position.

The Agency appealed AJ1's decision regarding the Complainant's reasonable accommodation claim.<sup>2</sup> In its decision on that appeal, the Commission found that AJ1 had erred in granting summary judgment on the reasonable accommodation claim and remanded that claim for a hearing. Subsequently, AJ2 issued a decision finding that the Agency had failed to reasonably accommodate Complainant, as detailed further below. The Agency issued a final order declining to implement AJ2's decision, simultaneously appealing to the Commission. That is the appeal now before us.

### *Factual Background*

The following pertinent facts remain undisputed: Complainant has cardiac arrhythmias. Her physicians opined that Complainant's stress interfered with her ability to work, concentrate and make decisions. Complainant also asserted that stress causes an elevation in her heart rate which

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<sup>2</sup> Because the agency appealed only the reasonable accommodation claim, and Complainant did not cross-appeal from AJ1's decision, the prior appellate decision addressed only the reasonable accommodation claim. AJ1's determination of no discrimination in connection with the performance appraisal was therefore the final word on that claim.

increases her susceptibility to heart attack or blackout. Soon after Complainant's promotion to a GS-9 position in March 2007, she experienced an increase in stress.

In a May 29, 2007, letter, Complainant's physician noted that she was experiencing an upsurge in depressive symptoms, and recommended a review of her job duties, as well as an office with a window. Complainant's first and second-line supervisors (S2) met with her to discuss accommodation and gave her a DOJ Form 100A, Request for Reasonable Accommodation (RA). Following the meeting, the Agency provided Complainant a new office, reduced her responsibilities, and provided her a flexible work schedule. Complainant contested this, stating that she received no more flexibility than any other employee.

Complainant also requested that her duties be restructured, and her budget responsibilities removed due to stress she experienced in using the Agency's financial management system. She was however informed that any such restructuring would result in a downgrade. S1 explained that decreasing the performance or production standards of Complainant's position would have required the removal of essential job functions; and that fifty percent of Complainant's work was performed on the Financial management system.

During the interactive process to discuss her RA needs, S1 informed Complainant that she had only two choices: to take a leave of absence using her accrued leave or accept a transfer to the Investigative Services Training Branch and demotion to a Management Assistant, GS-344-07 position, which was Complainant's position prior to her promotion. Both S1 and S2 informed complainant at that time there were no GS-09 positions available for which she qualified. S1 considered the possibility of telework for Complainant but did not offer it as an RA due to her belief that telework was not available to all employees within the division. S1 was also aware that leave under the Family and Medical Leave Act (FMLA) was an option for Complainant but did not discuss it with her as a potential accommodation.

After waiting for potential new positions to become available in a possible reorganization, Complainant filed the DOJ Form 100A with the Agency. She used the form to request a different position, either a program area position or her previous position of Management Assistant, GS-7. Unable to find a vacant, local program area position, and without conducting a search for comparable GS-9 positions outside of Complainant's commuting area, (or even informing her that relocation was an RA option) the Agency gave her the Management Assistant, GS-7 position she requested in her Form 100A.

The Agency's RA Manual and Procedures provides that identifying the appropriate accommodation should involve "an interactive and flexible process between the employee and supervisor in order to identify an effective accommodation." In specifically addressing accommodations for individuals with a "mental or psychiatric illness such as major depression," the manual directs supervisors to consider providing flexible work schedules, telecommuting, and extended leave. Removing non-essential tasks or redefining job duties should be done where feasible.

The manual provides for reassignment as an RA with the following caveats: Supervisors should only consider reassignment “if no other accommodation is available,” and the Agency may only consider a lower grade position if there is no vacant equivalent position. The manual also provides that reassignment to a vacant position outside of employee's commuting area is a possibility if the employee is willing to relocate.

Complainant's position description states in pertinent part: The incumbent: (1) “conducts analyses... through the Bureau's Financial Resources Desktop (FReD) System;” (2) “utilizes the FReD System to perform comprehensive analysis of the Bureau's financial posture;” (3) “ensures that financial documents related to all Branch programs are accurately and timely entered into the FReD System;” (4) “reconciles purchases data and enters data in FReD,” etc.

Based on supporting medical documentation, AJ1 found that Complainant was a qualified individual with a disability, citing expert testimony which established that Complainant's impairments impacted her ability to “think, concentrate, and make decisions;” that Complainant could perform the essential functions of her job with or without an accommodation; and that the Agency failed to provide Complainant with an RA because the record is devoid of any indication that less severe alternatives to demotion were, in fact, seriously considered by the Agency or that an alternative to demotion would have presented an undue hardship.

After finding liability for the failure to accommodate, AJ1 then held a hearing on damages. Following the hearing, AJ1 awarded Complainant all the damages she sought: \$65,000 in compensatory damages, back pay, and attorney's fees in the amount of \$73,576.00. The Agency's final order rejected AJ1's decision and filed appeal No. 0720140010 to OFO.

In its December 3, 2015, decision, OFO affirmed in part and reversed in part the granting of summary judgment on complainant's failure to accommodate claim. OFO affirmed the determination that complainant was a qualified individual with a disability, because the issue was not disputed by the agency on summary judgment. OFO found that summary judgment was not appropriate on the issue of failure to accommodate, noting, *inter alia*, that the Agency contested that Complainant was a qualified individual with a disability. The Commission remanded the complaint in part so that a liability hearing could be held to resolve what it deemed to be unresolved credibility issues on whether the agency reasonably accommodated complainant; and stated that the Commission did not find, as a matter of law, that the Agency failed to accommodate Complainant because it required her to use up her accrued leave before granting her leave without pay. OFO also credited the Agency's testimony that “removing the financial management system, which caused stress for Complainant, was not appropriate because it would require the Agency to eliminate an essential function of the GS-9 position.” EEOC Appeal No. 0720140010 (Dec. 12, 2015).

AJ1 held a hearing on May 19 to 20, 2018, and drafted a decision prior to leaving the EEOC. AJ2 was then assigned to the case. Based on AJ1's draft, she issued a decision on March 19, 2019, finding that Complainant had presented evidence to establish a claim that the Agency failed to reasonably accommodate her disability; and that the Agency failed to provide sufficient

evidence to rebut Complainant's testimony. AJ2 again awarded Complainant all the compensatory damages and attorney's fees she sought, asserting that there is no precise formula for calculating non-pecuniary compensatory damages, and AJs are granted broad discretion in determining such damage awards. The Agency subsequently issued a final order rejecting the AJ's finding that Complainant proved that the Agency subjected her to discrimination as alleged, maintaining that it accommodated Complainant in the GS-9 position as much as it could, and transferred her to a GS-7 position at her request.

### CONTENTIONS ON APPEAL

In the instant appeal, among other things, the Agency reiterates the contentions in its previous appeal, asserting that even assuming Complainant was an individual with disability, a decision should not be issued against the Agency for a choice Complainant made. The Agency requests that damages and attorney's fees be drastically reduced should the liability finding be upheld.

In her Appeal Opposition, among other things, Complainant reiterates her allegations, requesting that AJ2's determination that the Agency unlawfully failed to accommodate her be affirmed; and that the determination that she be awarded non-pecuniary compensatory damages and attorney's fees which, she asserts are justified, be affirmed.

### STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held. An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

### ANALYSIS AND FINDINGS

After a careful review of the record, we find that the AJ incorrectly determined that Complainant was demoted from a GS-9 position to a GS-7 position for a discriminatory reason. We agree with the Agency that it offered what accommodations were available but could not remove the essential functions of Complainant's GS-09 position as a reasonable accommodation. We further find that the AJ erred in finding discrimination when the Agency did not explore other potential accommodations, as no evidence has been offered that alternative accommodations would have allowed Complainant to perform all the essential functions of her position. Accordingly, we affirm the Agency's final order and reverse the AJ's finding that the Agency failed to

accommodate Complainant by not sufficiently engaging in its interactive process. As a result, we also reverse the AJ's liability finding that resulted in the award of damages and attorney's fees to Complainant.

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 accommodations 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 she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a "qualified" individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See, e.g., Bill A. v. Dep't of the Army, EEOC Appeal No. 0120131989 (Oct. 26, 2016). 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). Reasonable accommodation includes modifications to the work environment or to manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential job functions. 29 C.F.R. § 1630.2(o)(ii).

Assuming that Complainant is an individual with a disability, we find that the AJ erred in finding Complainant was a qualified individual with a disability with respect to her ability to perform as a GS-09 Management Analyst position. In this case, the record shows that despite the accommodations provided to Complainant by the Agency based on her physician's recommendations,<sup>3</sup> Complainant's stress levels rose as a result of having to perform certain essential functions of her job such as budgeting responsibilities.

Complainant had requested that her financial management system functions, the sole source of her stress, be removed as an RA. However, S1 asserted that removing those functions would require the Agency to eliminate an essential function of the GS-9 position. An Agency is not required to accommodate an individual by eliminating the essential functions of her job. Turco v. Hoechst Celanese Corporation, 101 F.3d 1090, 1093-1094 (5th Cir. 1996); Shiring v. Postmaster General, 90 F.3d 827, 831-832 (3rd Cir. 1996); and Watson v. Lithonia Lighting

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<sup>3</sup> In fact, record evidence supports the Agency's position that it accommodated Complainant in the GS-9 position as much as it could based on her physician's letter, and then transferred her to a GS-7 position at her request. Record evidence reflects that Complainant was provided several accommodations, including a leave of absence, reduced workload, and an office with a window while in her GS-9 position.

and National Service Industries Inc., 304 F.3d 749 (7th Cir. 2002), cert. denied 123 S. Ct. 1286 (2003).

Arguably, Complainant was not aware of the full range of RA options because S1 considered but did not discuss the telework option with her; S1 was aware that FMLA was an option for Complainant but did not discuss it with her as a potential accommodation; and management did not conduct a search for comparable GS-9 positions outside of Complainant's commuting area before giving her the Management Assistant, GS-7 position. However, Complainant did not present any persuasive evidence to demonstrate a connection between her disability and the RA that was not offered to her; neither did she show how any of those RA alternatives would eliminate her stress since she would still be required to perform her financial management functions, regardless of her work location or leave status and use. An employee with a disability is not entitled to the reasonable accommodation which he or she prefers and must show a connection between the disabling condition and the requested accommodation. Gile v. United Airlines. Inc., 95 F.3d 492, 498 (7th Cir. 1996); Wiggins v. U.S. Postal Service, EEOC Appeal No. 01953715 (Apr. 22, 1997); and Metzenbaum v. Office of Personnel Management, EEOC Appeal No. 01986974 (Apr. 4, 2002).

S1 explained that fifty percent of her work was performed on the financial management system, and there was no way of removing Complainant's financial management system functions without a position downgrade. Complainant has not provided evidence that any alternative accommodations would have removed the stress of using the financial management system. For example, telework, even if provided, would only change where complainant performed the essential functions of her position, but it would not have eliminated the need to utilize the financial management system. Nor has Complainant identified an alternative available GS-09 position inside or outside the commuting area which would not have necessitated the performance of essential functions at a level that would not exacerbate her stress levels.

Nor do we find as a matter of law, as stated in our December 3, 2015, decision, that the Agency failed to accommodate Complainant because it required her to use up her accrued leave before granting her leave without pay. "Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability. Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave." EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 9 (revised October 17, 2002); see also, Complainant v. Dept. of Veterans Affairs, EEOC Appeal No. 0120112074 (April 18, 2004) (finding of no discrimination when Agency required the use of accrued leave prior to leave without pay as an accommodation). The Commission's position is that if more than one accommodation is effective, "the preference of the individual with a disability should be given primary consideration; however, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations." 29 C.F.R. § 1630.9; see also EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002, Question 9 (revised October 17, 2002); Polen v. Dep't of Defense, EEOC Appeal No. 01970984 (Jan. 16, 2001). Therefore, it is undisputed

that while Complainant may be entitled to an effective reasonable accommodation under the Rehabilitation Act, she is not entitled to the accommodation of her choice.

Even assuming, *arguendo*, that S1 did not go far enough in the interactive process when she failed to discuss telework and other alternatives provided for in the Agency's RA manual, the Commission has held that an agency's failure to "properly engage in the interactive process, does not, by itself, demand a finding that [Complainant] was denied a reasonable accommodation." Complainant v. Dep't of Homeland Security, E.E.O.C. Appeal No. 0720150027, 2016 WL 1296288 (Mar. 15, 2016); Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106, 2002 WL 31107280 (Sept. 13, 2002). "Rather, to establish a denial of a reasonable accommodation, [Complainant] must establish that the failure to engage in the interactive process resulted in the agency's failure to provide a reasonable accommodation." *Id.*, see also Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128, 1139 (9th Cir. 2001) (holding that when an employer fails "to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible.") In the instant complaint, we find that Complainant has failed to establish that the Agency's failure to consider alternative forms of accommodation resulted in a denial of RA; and that an RA without undue hardship to the Agency could have been possible had management discussed all available options with her. Therefore, liability is inappropriate.

AJ2 awarded \$65,000 in non-pecuniary compensatory damages to Complainant; and \$188,626.85 in attorney's fees, correctly asserting that there is no precise formula for calculating non-pecuniary compensatory damages, and AJs are granted broad discretion in determining such damage awards. However, since liability is inappropriate in this case, Complainant is not entitled to damages or attorney's fees.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order rejecting the AJ's decision.

### STATEMENT OF RIGHTS - ON APPEAL

#### RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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, 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 (S0610)

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. If you

file a request to reconsider and also file a civil action, **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:

/s/Shelley E. Kahn

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Shelley E. Kahn  
Executive Officer  
Executive Secretariat

August 25, 2022

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Date