



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

[REDACTED]
Carter R.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2021002814

Hearing No. 490-2017-00061X

Agency No. 200I-0626-2016101811

DECISION

On April 14, 2021, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 30, 2021 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Pharmacy Technician, GS-6, at the Agency's VA Medical Center in Nashville, Tennessee. The Pharmacy was open 24 hours a day and its employees worked day, evening, and night shifts. Complainant was hired into a position that required working all three shifts on a rotating basis.

On April 1, 2016, Complainant filed a formal complaint alleging that the Agency discriminated against him on the bases of national origin (Hispanic) and disability when:

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.

- A) on January 13, 2016, Complainant's request to remain in his position without rotating to the evening and midnight shifts as a reasonable accommodation was denied; and,
- B) on February 7, 2016, he was forced to accept "under duress" a reassignment to the position of Logistic Supply Clerk, GS-4.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for a decision without a hearing. The AJ subsequently issued a decision by summary judgment in favor of the Agency.

In his March 16, 2021 decision, the AJ reasoned that Complainant did not establish that he was a "individual with a disability" entitled to a reasonable accommodation because he failed to show how his condition limited a major life activity. Further, the AJ noted Complainant's diagnosis predated his employment with the Agency, and that since his hiring he has rotated shifts from "time to time". Therefore, stated the AJ, Complainant's impairment "did not prevent him from performing his essential job duties." Regarding his claim of national origin discrimination, the AJ found that the Agency provided a legitimate, non-discriminatory reason for the reassignment.

The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged. The instant appeal followed.

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, Complainant alleges that the Agency denied his request for reasonable accommodation and instead demoted him to a different position with a lower grade. The Agency, in stark contrast, maintains that it accommodated Complainant by reassigning him to the lower graded position. For the reasons discussed below, we find a genuine dispute of material fact exists as to whether the Agency reasonably accommodated Complainant.

Disability Claim

Under the Commission's regulations, 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. 29 C.F.R. §§ 1630.2(o) and (p). To establish the Agency denied Complainant a reasonable accommodation, Complainant must show that: (1) he was an individual with a disability; (2) he was a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Enforcement Guidance on Reasonable Accommodation), No. 915.002 (Oct. 17, 2002).

The threshold question is whether a complainant is an individual with a disability within the meaning of the regulations. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; and the operation of a major bodily function. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii).

Here, the AJ concluded that Complainant failed to prove he was an individual with a disability. The record shows that Complainant had been diagnosed with gastroesophageal reflux disease or GERD prior to his employment in May 2014 with the Agency. He stated that the “only way it's controlled . . . is by medicine and being on a . . . constant schedule with my meals, my medicine, and sleeping habits.” Report of Investigation at 92. Complainant further explained:

As a result of these backflows, I experience a burning sensation throughout my esophagus, which would cause my chest to hurt and have me gasping for air. This could last for days until the burning sensation disappears. In order to treat my GERD, I have to take my medication at the same time daily, wait for 20 to 30 minutes before eating my breakfast, and my other meals should be around the same time daily with my dinner meal occurring at least 2 hours or more before my bedtime. If I take a nap, I must do so on my recliner so my stomach content does not backflow into my esophagus. Going to sleep at the same time every day seems to help my condition . . . as my stomach doesn't hurt in the morning from gas. When my stress level increases, it also tends to increase my GERD; I have to

constantly burp myself to keep the gas from building in my esophagus, which then hurts my chest and I must take another dose of medication to get relief.

See Exhibit 4, Complainant's Appeal Brief, Discovery Responses, Interrog. #1.

Complainant stated working the rotating shifts interfered with the timing and effectiveness of his medication, causing him to experience chest pains and difficulty breathing. This prompted his November 2015 accommodation request to be excluded from rotating to the evening and night shifts. At the Agency's request, Complainant provided documentation from his personal physician in support of his accommodation request. The doctor's note stated that the "night shift is interfering with timing and effectiveness of medications," and that Complainant experiences "burning" and "constant pain when not on medication precisely timed." In response to a question regarding "activities the impairment limits", the physician wrote "breathing," and "75%" for the "extent or degree to which the impairment limits an activity". The doctor further explained the accommodation of a consistent schedule would allow for the proper "timing or dosing of Rx" for maximum benefits.

Based on this evidence, we find that Complainant has established that he is an individual with a disability within the meaning of the Rehabilitation Act.

Agency management denied the accommodation requested, asserting there were no available Pharmacy Technician positions that did not require working rotating shifts. Consequently, explained the Agency, Complainant was offered a reassignment to the GS-4 Logistic Supply Clerk position, which did not have a rotating schedule.

Complainant alleges that, at the time he made his accommodation request, three other technicians were not required to work rotating shifts as approved accommodations to their medical conditions.² During the EEO investigation, an email from the Chief of Pharmacy Services to a Human Resources Specialist processing Complainant's accommodation request appears to confirm this when she stated:

Currently, there are 7 tech vacancies out of a total 17.0 FTEE rotating pharmacy technicians at Nashville — soon to be 8 vacancies — so there are 9 technicians now rotating in Nashville — there are 3 out of those 9 rotating pharmacy tech positions in Nashville currently on RA [reasonable accommodation] (33%) — if this new one [Complainant's request] is approved, will be 4 of 9 not rotating as required (44%) —I think you can see from the numbers why the supervisors are unable to cover all the shifts of the inpatient and outpatient operational pharmacy currently — even if fully staffed, these are the operational positions that must rotate through all areas of the pharmacy so that we can keep the pharmacy operations running 24/7/365 - this is negatively affecting both patient care and

² These employees were identified by the Agency during the discovery process. See Complainant's Appeal Brief, Ex. 3, Agency Resp. to Complainant's Req. for Admissions, #11.

employee satisfaction in the area, not to mention directly leading to unnecessary employee turnover . . .

Report of Investigation at 156.

An employer does not have to provide a reasonable accommodation that would cause an “undue hardship” to the employer. However, generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. See EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice 915.002 (Oct. 17, 2002). Relevant here, the Enforcement Guidance directs that, absent undue hardship, an employer must provide a modified schedule when required as a reasonable accommodation, “even if it does not provide such schedules for other employees.” Id. at Question 22. The Enforcement Guidance also makes it clear that an employer cannot claim undue hardship “based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees.”

Here, there are genuine issues of material fact that remain unresolved, including whether the Agency engaged in the interactive process with Complainant. There is a significant dispute about whether or not providing Complainant’s requested accommodation would have caused an undue burden on the Agency, forcing it to reassign Complainant as the accommodation of last resort. See Mass v. Veterans Administration, EEOC Request No. 05880746 (November 7, 1988) where the Commission determined that the Agency had a burden of demonstrating anything less than a demotion would have proven an undue burden. See also Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983)(“Although the plaintiff initially has the burden of coming forward with evidence to make at least a facial showing that his handicap can be accommodated, the federal employer has the ultimate burden of persuasion in showing an inability to accommodate,” which is not satisfied by merely showing that it offered the Complainant a lower graded position). We note that Complainant alleged that three other technicians were approved for the same accommodation that he is seeking and there appears to be other evidence of record to support this contention. It is also unclear if the officials who considered Complainant’s reasonable accommodation request considered alternative accommodations, such as allowing regularly scheduled opportunities for him to take his medication and eat. Without resolution of these issues through a hearing, we are unable to assess the Agency’s undue hardship defense.

National Origin (Hispanic) Claim

A claim of disparate treatment is examined under the three-part analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this analysis, a complainant initially must establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, i.e., that a prohibited consideration was a factor in the adverse employment action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell

Douglas 411 U.S. at 802. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant has the responsibility to demonstrate by a preponderance of the evidence that the agency's action was based on prohibited considerations of discrimination, that is, its articulated reason for its action was not its true reason but a sham or pretext for discrimination. See Hicks, 509 U.S. at 511; Burdine, 450 U.S. at 252-53; McDonnell Douglas, 411 U.S. at 804.

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for its actions, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983).

We find that the AJ correctly determined that the Agency articulated legitimate non-discriminatory reasons for its action. The Pharmacy was open 24 hours a day and, the record establishes that at the time of Complainant's request, the Pharmacy was experiencing a staffing shortage. In particular, there were at least seven vacancies. There were no available positions without rotations to the evening/night shifts. For that reason, Complainant was offered reassignment to another position.

In an effort to establish pretext, Complainant asserted that the Agency changed a permanent day shift position, formerly occupied by a white technician, into a rotating one upon the incumbent's promotion to another position. However, Agency witnesses explained that the change was necessary because of the staffing shortages on the later shifts. While Complainant alleged that three other technicians (all African American) were treated more favorably, even if true, Complainant himself concedes this was because of their medical conditions rather than their ethnicity. Beyond his bare assertions, Complainant has failed to prove, by a preponderance of the evidence, that his national origin played any role in management's decision to deny his request to be exempt from working the evening and night shifts and instead offer him a reassignment to another available day shift position. Therefore, summary judgment in favor of the Agency was appropriate on Complainant's national origin claim.

CONCLUSION

Therefore, 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 decision with respect to Complainant's national origin claim. We REVERSE the Agency's final decision with regard to Complainant's disability claim and REMAND the matter for further processing accordance with the ORDER below.

ORDER

Within 30 calendar days from the date this decision is issued, the Agency is directed to resubmit a request for a hearing on Complainant's behalf to the Hearings Unit of the EEOC's Memphis District Office, along with the complete complaint file and a copy of this appellate decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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](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).

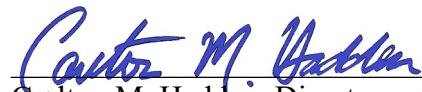
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

September 27, 2022
Date