



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

[REDACTED]
Roy E.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 2021002939

Hearing No. 570-2020-00800X

Agency No. FBI-2019-00189

DECISION

On April 22, 2021, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from an Agency 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. 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 was a contract employee with the Agency serving as an Explosive Ordinance Disposal Instructor at the Hazardous Devices School.

On May 21, 2019, he filed a formal complaint alleging that the Agency discriminated against him on the basis of disability when, on August 18, 2018, he received a letter stating he was not selected for the Physical Security Specialist-Bomb Technician (“Bomb Technician”) position.

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.

The Agency accepted the complaint and conducted an investigation which produced the following pertinent facts.

In December 2016, Complainant applied for the Bomb Technician position. On January 26, 2017, the Agency issued a conditional offer of employment to Complainant, based on a successful background check.

As part of the background investigation, Complainant submitted a detailed description of his medical history. Reviewing officials ("RO1" and "RO2") considered Complainant's medical history to determine if he met the Agency's clearance eligibility standards. RO1 and RO2 described Complainant's responses regarding his medical history as "honest", noting that it included untreated PTSD, depression, and insomnia with night terrors.

RO1, a Chief Psychiatry Officer explained that there was a heightened sense of awareness required of a Bomb Technician and Complainant's ability "to make rapid sound decisions would likely be impacted by his untreated PTSD, depression, and brain injuries." Because Complainant's "reliability to carry out the essential functions" of the Bomb Technician position would be "significantly affected" by the aforementioned conditions, reasoned RO1, Complainant would be "*endangering* [himself] and others." According to RO1, she consulted with RO2 regarding their individual assessments at a quality assurance team meeting, and they both recommended rescission of Complainant's job offer. None of the other psychologists on the team, stated RO1, opposed their recommendation.

RO2, a Mental Health Assessment Specialist, described that he assessed whether Complainant could perform Bomb Technician job duties "*safely*." RO2 believed that Complainant "disclosed things that were concerning," including his self-reported history of untreated PTSD, and insomnia with night terrors. RO2 stated the Bomb Technician position was very different from Complainant's current position because it involved "high stress" and "danger" confronting explosive devices directly in the field. Contrastingly, as an instructor, Complainant worked in a teaching environment with many controls.

RO1 and RO2 forwarded their recommendations to rescind Complainant's job offer to the Unit Chief who, in turn, made the final decision to rescind the offer. Unit Chief explained that Complainant's lack of candor was one of the reasons she decided to rescind his job offer. According to Unit Chief, on his FD-1065 form, Complainant indicated that he had been evaluated by a physician for his sleep difficulties and prescribed Ambien. However, on his Personnel Security Interview ("PSI") form Complainant answered the question, "Have you ever suffered from depression or received any type of psychological counseling or mental health treatment?" by stating "no." Unit Chief reasoned that, despite the form providing Complainant an opportunity to state if he was prescribed any medication and listed Ambien as an example, Complainant failed to disclose that he had been prescribed Ambien. In a letter dated August 14, 2018, the Agency notified Complainant that he "did not meet the suitable standards for FBI employment."

Complainant contends that the Agency withdrew the offer based on speculation about his condition, when the Agency should have had a mental health professional assess his ability to perform the job. He asserts that even though he did not seek counseling, he has found ways to manage his condition.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On January 22, 2021, the AJ issued a notice of intent to issue a decision without a hearing. Complainant submitted a brief in response, arguing that summary judgment was inappropriate because there were material facts in dispute. Specifically, Complainant argued that witnesses provided conflicting testimony on his alleged lack of candor. According to Complainant, one witness claimed that he lacked candor, while two other witnesses commended him for his honesty. Further, Complainant asserted there was insufficient evidence to demonstrate that he posed a “direct threat” to his own safety and the safety of others if he was selected for the position. The AJ, however, found that Complainant’s alleged lack of candor did not create a factual dispute that would preclude summary judgment. In addition, the AJ determined that the “direct threat” analysis did not apply because the Agency did not assert a “direct threat” defense. On February 25, 2021, the AJ issued a final decision without a hearing, finding that there was no indication that the Agency was unlawfully motivated by Complainant’s protected basis.

The record does not contain a final Agency order.² Therefore, pursuant to 29 C.F.R. 1614.109(i), the AJ’s decision became the Agency’s final action.

Complainant filed the instant appeal. Complainant, through his attorney, argues that the AJ’s summary judgment did not address genuine issues of material fact, including whether or not he lacked candor. Additionally, Complainant asserted that the AJ erred in failing to conduct a direct threat analysis in this case.

The Agency submitted a brief in response, arguing that the AJ’s final decision should be upheld.

² The Agency states that on March 30, 2021 it issued a final order adopting the AJ’s finding. However, the record does not contain a copy of the order.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing 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. If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). The courts have been clear that summary judgment is not to be used as a “trial by affidavit.” Redmand v. Warrener, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, “there is a need for strident cross-examination and summary judgment on such evidence is improper.” Pedersen v. Dep’t of Justice, EEOC Request No. 05940339 (February 24, 1995).

Here, we find that the AJ erred in granting summary judgment in the Agency’s favor. While the AJ determined the Agency was not asserting a direct threat defense,³ the record is clear that both Agency psychologists (RO1 and RO2), who recommended the rescission of the job offer to Complainant, testified they did so based on concerns that, due to his mental health conditions, Complainant would pose a danger to himself or others if given the position. RO1 stated Complainant’s ability to make rapid sound decisions would “likely” be impacted by his mental conditions and Complainant posed a danger to himself and others. RO2 was concerned that Complainant’s mental conditions would affect his ability to transition to the Bomb Technician position because it involved “danger.”

While concerns regarding Complainant’s ability to safely perform the Bomb Technician duties with his mental conditions may be valid and reasonable, both Agency RO1 and RO2’s statements given during the EEO investigation are insufficient to reasonably adjudicate whether or not he would pose a direct threat in the position. The EEO investigation does not contain sufficient information concerning the evaluation of Complainant’s unique abilities and disabilities which is the crux of an individualized assessment. At the minimum, such an assessment should take into account any factors that might allow an applicant to successfully perform the essential functions of a position without posing a direct threat to himself or others. Examples include prior successful experience in a similar position or adaptive or learned behaviors that compensate for physical limitations imposed by a condition. A hearing is needed to develop evidence from both parties relevant to whether or not Complainant would have posed a direct threat to himself or others if placed in the Bomb Technician position.

³ To exclude an individual on the basis of possible future injury due to a disabling condition, the Agency bears the burden of showing there is a significant risk of substantial harm. 29 C.F.R. § 1630(r). A speculative or remote risk is insufficient.

In addition, there was conflicting testimony regarding Complainant's lack of candor during the clearance process, the other reason proffered by the Agency for rescinding the job offer. RO1 and RO2 described that Complainant was honest about his medical history, whereas Unit Chief stated that Complainant's lack of candor was one of the reasons she decided to rescind his job offer. We find that his alleged lack of candor is a genuine issue of material fact and a decision without a hearing was, therefore, inappropriate.

The hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (March 26, 1998). See also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (October 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (April 25, 1995).

CONCLUSION

After a careful review of the record, including arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final action and REMANDS the matter to the Agency in accordance with this decision and 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 Washington Field 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 28, 2022

Date