



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

[REDACTED]  
Jeramy C.,<sup>1</sup>  
Complainant,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Defense Logistics Agency),  
Agency.

Appeal No. 2021004849

Hearing No. 530-2019-00310X

Agency No. DLAN-18-0124

**DECISION**

Following its September 1, 2021, final order, the Agency filed an 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 does not specifically contest the AJ's remedial award. For the following reasons, the Commission REVERSES the Agency's final order.

**BACKGROUND**

Complainant filed a complaint alleging that he was subjected to discrimination because of his perceived disability (chronic lower back pain) when, by letter dated February 13, 2018, his conditional job-offer at the Agency's facility in New Cumberland, Pennsylvania was rescinded due to his medical condition. On November 29, 2017, Complainant applied for the position of Maintenance Worker, WG-4749-08. Complainant was interviewed for the position, and, on January 4, 2018, was notified that he was tentatively selected for the position, contingent upon the successful completion of a pre-employment physical.

---

<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.

Complainant accepted the Agency's offer, and, on January 17, 2018, he participated in a preemployment physical examination at the Agency's Filmore Clinic.

The exam was conducted by D1, a Physician Assistant, employed by the Agency. Complainant provided the Agency with medical documentation regarding his medical conditions of diabetes, chronic back pain, and obesity. The record indicates that Complainant injured his back and hip as a result of falling into a hole while running through a field of chest high grass while in training in the Marine Corps. As part of the examination, Complainant authorized the Agency to access his VA medical records. N1, a clinic RN nurse, stated that, during his medical exam, Complainant filled out Form-2807, a self-reporting form that the clinic used to seek in depth medical information.

On February 21, 2018, Complainant emailed A1, a Human Resources representative, to inquire about the status of his employment and was later, verbally, told by her that the offer was being rescinded. Four days later, Complainant received written notification when he received a memorandum, signed by A2, Deputy Director, Human Resources, rescinding his job offer. The memorandum stated that the job offer was rescinded because Complainant failed to meet the physical demands of the position.

The maintenance worker position description provides that 80% of the work consists of repairing and performing preventative maintenance work. The position description also indicates that 10% of the work involves loading and unloading items weighing 40 plus pounds but, the individual may use tools such as hand trucks or dollies. Finally, 10% of the work involves lifting heavy furniture and equipment.

D1 stated that he does not choose who is hired or not hired for a position. He only makes medical recommendations and management officials make decisions based upon his medical opinion. According to D1, his recommendation in this case was based solely on the Form-2807 Complainant filled out and his examination. He stated that he did not need to see Complainant's VA medical records. D1 maintained that Complainant would not be able to perform the essential duties of the position because of his pre-existing back pain and that he could aggravate the back pain further by performing the job. D1 acknowledged that he did not ask Complainant if he needed a reasonable accommodation to perform the essential functions of the maintenance worker position, nor did any other Agency official ask that question.

Complainant noted that, in his current employment, he never hurt himself or someone else because of his medical condition. He stated that he takes care to keep himself and others safe. At the time of his application, Complainant worked as a technician with a private sector company and performed similar duties as the ones required of an Agency maintenance worker. According to Complainant, he performed maintenance and was expected to lift between 50 to 100 pounds for periods ranging from frequently to occasionally.

D1 stated that while Complainant's current employer may have accepted liability for his medical condition, D1 could not recommend to the Agency an individual who had a risk of further injury in the position.

A1 stated that the denial was based upon a combination of co-morbidities, including Complainant's chronic back pain, the physical findings during the medical screening, and his current "physicality." A1 stated that she was unaware of any policy that states that management could not overrule a physician's decision, but she stated there was no policy indicating that they could do so either. A1 stated that she did not believe Complainant could perform the essential functions of the job with or without an accommodation because he was not medically qualified for the role. Finally, A1 stated that the Agency did not explore reasonable accommodation options because Complainant was found medically unfit.

A2 stated that the job offer was rescinded based upon D1's determination and stated that the Agency could not place a candidate into a position unless all of the conditions of pre-employment are met. A2 stated that he was unable to overrule the physician's determination. Although A2 felt that Complainant was qualified for the maintenance position, he could not meet the conditions of employment as specified in the job description because he did not pass the physical exam. A2 noted that Complainant never requested an accommodation and because he had never been placed in the role there was no assessment of whether he could have successfully performed the essential functions. A2 denied discriminating against Complainant based upon his disability because a dozen other applicants were denied for not meeting the conditions of employment.

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 and the AJ held a hearing and issued a decision finding that the Agency discriminated against Complainant based on his disability. The Agency issued a final order rejecting the AJ's final order, and simultaneously filed this appeal with the Commission.

The AJ found that the Agency regarded Complainant as being disabled. In this regard, the AJ noted D1's testimony that after Complainant participated in an Agency post offer of employment physical examination, he recommended that Complainant not be hired due to his chronic low back pain. In accepting this recommendation, the AJ noted that Complainant was not offered the opportunity to request reasonable accommodation or to engage in the interactive process to discuss the possibility of reasonable accommodation because, according to D1, Complainant was an individual who presented further risk of injury in the position.

The AJ also found that Complainant was qualified for the maintenance worker position. According to the AJ, the Agency reviewed Complainant's application materials, found him to be qualified, interviewed him, and offered him a job contingent upon him passing a physical exam. The AJ also noted that, at the time of his application, Complainant was working in a position with similar duties, responsibilities, and physical exertions.

Therefore, the AJ found no evidence that Complainant was not qualified to perform the physical aspects of the maintenance position. The Agency, she found, concluded that Complainant posed a “risk” of injury due to his chronic low back pain without any consideration of whether he was able to perform the essential functions of the maintenance position. Thus, the AJ found that Complainant’s job offer was rescinded for reasons that were not job related or consistent with business necessity because there was no evidence that the Agency conducted an individualized assessment of Complainant’s ability to perform the maintenance worker position. D1, the AJ found, conducted a brief medical exam and decided that Complainant presented an unsupported risk of further injury.

Upon finding discrimination, the AJ ordered the Agency to offer Complainant a position for which he is qualified with or without reasonable accommodation, retroactive to February 2018; to provide back pay with interest; and to calculate any impact and/or reduction to the pension benefits to which Complainant would have been entitled had he been hired in 2018. The AJ also found that Complainant did not provide testimony, either at the hearing or in his affidavit, regarding any emotional, psychiatric or medical harm, or damage he suffered as a result of the Agency’s discriminatory failure to hire Complainant. Consequently, there was no award for nonpecuniary compensatory damages.

As noted above, the Agency rejected the AJ’s finding of discrimination. The Agency “concede[d] that rescinding [Complainant’s] conditional employment offer was an adverse employment action, and that he suffered a back and hip injury as a result of falling into a hole while running through a field of chest high grass while in training in the Marine Corps.” Next, the Agency found that Complainant was not a qualified individual with a disability.

According to the Agency, the vacancy announcement as well as the tentative job offer noted the requirement of a physical examination. The physical examination, the Agency argued, was job related and consistent with the business necessity to ensure that the successful applicant was physically capable of performing the essential functions of the “difficult and often strenuous” maintenance worker position. According to the Agency, it performed an individualized assessment of Complainant on January 17, 2018, as required under 29 CFR § 1630.2(r). N1 performed the initial screening, including but not limited to taking Complainant’s vital signs and collecting his medical history. D1 performed a physical examination of Complainant which included palpating his back and going over his medical history. Although chronic lower back pain is not an automatic disqualifying factor for the maintenance worker position, the Agency argued that D1 had concerns with Complainant having to, “...lift, move, or carry very heavy objects such as heavy furniture, equipment, supplies, etc... to confined spaces.” The Agency also noted duties of the position included operating heavy hand tools and power equipment such as heavy walking type power motors and performing emergency snow or ice removal.

D1, the Agency noted, also indicated that he spoke with Complainant about the recommendation made by his medical providers that he consider an implantable neurostimulator device, which D1 saw as an indication of the daily back pain with which Complainant dealt.

D1, according to the Agency, made the recommendation that Complainant not be hired because, “[w]ith a preexisting condition with chronic daily pain and documented arthritis, the job that the patient, the applicant, is applying for is a rigorous job requiring heavy lifting unassisted in multiple functions to include outside work, inside work. And after observing as part of occupational health the workers who do these things, it’s very strenuous job and there is the chance of aggravating this and incurring worsening of the applicant’s already chronic lower back pain.”

The Agency maintained that it was D1’s “expert medical opinion,” after reviewing the maintenance worker position description and performing a thorough individualized medical assessment of Complainant that his back condition would be made worse by the function of the maintenance worker position. This determination, according to the Agency, was based upon the substantial information contained in Complainant’s medical history and the physical examination performed by D1. Therefore, the Agency argued that it appropriately determined that Complainant was not a qualified individual with a disability as he failed to successfully complete his pre-employment physical examination.

The Agency did not specifically challenge any of the remedies awarded by the AJ. In response, Complainant argued that the AJ’s decision should be upheld and did not challenge any of the remedies awarded or not awarded by the AJ.

### ANALYSIS AND FINDINGS

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.

Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VI.C (Aug. 5, 2015) provides that on appeal to the Commission, the burden is squarely on the party challenging the AJ’s decision to demonstrate that the AJ’s factual determinations are not supported by substantial evidence. See id. In this case, this means that the Agency has the burden of pointing out where and why the AJ’s findings are not supported by substantial evidence. Cf. id. (pointing out that “[t]he appeals statements of the parties, both supporting and opposing the [AJ’s] decision, are vital in focusing the inquiry on appeal so that it can be determined whether the [AJ’s] factual determinations are supported by substantial evidence”).

In order to establish a prima facie case of disability discrimination under the Rehabilitation Act, Complainant must demonstrate that: (1) he is an “individual with a disability”; (2) he is “qualified” for the position held or desired, i.e., can perform the essential functions of the

position with or without accommodation; (3) he was subjected to an adverse employment action because of his disability; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999); Swanks v. WMATA, 179 F.3d 929, 933-34 (D.C. Cir. 1999). Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001).

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). As noted above, the Agency conceded that Complainant was an individual with a disability and that he was subjected to an adverse employment action.<sup>2</sup>

Our review of the record indicates that there is also substantial evidence in support of the AJ's determinations that Complainant was qualified for the maintenance worker position, and that the circumstances surrounding the rescinding of the Agency's job offer give rise to an inference of discrimination.

Upon finding that Complainant is an individual with a disability, the next inquiry is whether Complainant is a "qualified individual with a disability." 29 C.F.R. § 1630.2(m). A "qualified individual with a disability" is one who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position and who, with or without reasonable accommodation, can perform the essential functions of such position. *Id.* The AJ found that the Agency reviewed Complainant's application materials, found him to be qualified, interviewed him, and offered him a job contingent upon him passing a physical exam. The AJ also noted that, at the time of his application, Complainant was already working in a position with similar duties, responsibilities, and physical exertions. We agree with the AJ's determination that there was no evidence that Complainant was not qualified to perform the physical aspects of the maintenance position with or without a reasonable accommodation.

The Rehabilitation Act prohibits a covered entity from engaging in discrimination against a qualified individual based on disability in hiring. 42 U.S.C. § 12112(a). Such discrimination includes "using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability ... unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. *Id.* § 12112(b)(6); see 29 C.F.R. §1630.10 (making unlawful a covered entity's use of qualification standards that screen out or tend to screen out an individual with a disability unless such standard is job related and consistent with business necessity).

---

<sup>2</sup> Notwithstanding the Agency's concession, we find that D1's attitude would indicate that the Agency regarded Complainant as being precluded from working in a class or broad range of jobs involving repetitive/prolonged lifting and moving items of varying weights. Thus, we find that D1 regarded Complainant as being substantially limited in the major life activity of working.

The Agency argued that its physical examination was job related and consistent with business necessity because it ensured that the successful applicant was physically capable of performing the essential functions of a difficult and often strenuous maintenance worker position. According to the Agency, D1's "expert medical opinion," after reviewing the maintenance worker position description and performing a thorough individualized medical assessment of Complainant, was that his back condition would be made worse by the functions of the maintenance worker position. As noted above, regarding safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement is job related and consistent with business necessity. The regulations provide that an Agency can meet this standard by showing that the requirement, as applied to the individual, satisfies the "direct threat" analysis set forth in 29 C.F.R. § 1630.2(r) and 29 C.F.R. 1630 App. § 1630.15(b) and (c).

A person is a "direct threat" if he or she poses a significant risk of substantial harm to the health or safety of him or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). The "direct threat" evaluation must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job. *Id.* If no such accommodation exists, the Agency may refuse to hire an applicant. *Id.* In the instant matter, the Agency had to demonstrate that its decision to discontinue the hiring process of Complainant, due to concerns that his back condition would be made worse by performing the essential functions of the maintenance worker position, satisfies the "direct threat" standard.

In order to exclude an individual because of possible future injury, the Agency bears the burden of showing there is a significant risk, for example, a high probability of substantial harm. A speculative or remote risk is insufficient. The Agency must show more than an individual with a disability seeking employment stands some slightly increased risk of harm. Selix v. U.S. Postal Service, EEOC Appeal No. 01970153 (Mar. 16, 2000). Such a finding must be based on an individualized assessment of the individual that takes into account: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r). See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of Rhode Island, Department of Mental Health Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993).

A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the Agency must gather information and base its decision on substantial information regarding the individual's work and medical history. Chevron U.S.A. Inc. v. Echazabal, *supra*; Harrison v. Department of Justice, EEOC Appeal No. 01A03948 (Jul. 30, 2003).

We find that substantial evidence supports the AJ's finding that the Agency did not perform an individualized assessment of whether Complainant could perform the essential functions of the position without posing a direct threat to himself or others.

Like the AJ, we find that there was no evidence that the Agency conducted a suitable individualized assessment of Complainant's ability to perform the maintenance worker position. D1 conducted a brief medical exam and concluded that Complainant presented a risk of further injury. We specifically note D1's statement that "[a]fter observing as part of occupational health the workers who do these things, it's very strenuous job and there is the chance of aggravating this and incurring worsening of the applicant's already chronic lower back pain." (emphasis added). The Agency must show that there is a significant risk based on an evaluation of the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Here, D1 merely indicated that there was a chance Complainant could aggravate or worsen his condition. He engaged in the type of speculation that the Rehabilitation Act prohibits.

Other than noting that Complainant's current employer may have accepted liability for his medical condition, D1 did not evaluate Complainant's ability to successfully perform a job that was similar to the one he was seeking. The evaluation of an applicant's unique abilities and disabilities is the crux of an individualized assessment. Nathan v. Dep't. of Justice, EEOC Appeal No. 0720070014 (Jul. 19, 2013). At the minimum, such an assessment should consider any special qualifications that might allow an applicant to successfully perform the essential functions of a position without posing a direct threat to himself or others. Id. Examples of special qualifications include prior successful experience in a similar position and adaptive or learned behaviors that compensate for physical limitations imposed by a condition. Id. An appropriate assessment would have closely evaluated Complainant's prior experience to determine if such experience indicated an ability to safely perform in the maintenance worker position or, if past experience was insufficient, provide Complainant an opportunity to demonstrate how he could safely perform the essential functions of the job because of compensatory skills that he might have developed.

Thus, we find that substantial evidence supports the AJ's finding of discrimination and we shall order the Agency to comply with the remedies ordered by the AJ (as slightly modified herein plus the addition of EEO training and consideration of discipline for the responsible Agency officials).

## CONCLUSION

We REVERSE the Agency's final order and REMAND the matter back to the Agency to take corrective action in accordance with this decision and the Order herein.

## ORDER

The Agency shall take the following remedial actions:

1. The Agency shall retroactively place Complainant in the Maintenance Worker, WG-4749-08 position as of February 13, 2018 (when his conditional job offer was rescinded) and shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 60 days after the date this decision was issued.



The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount within 60 days of the date the Agency determines the amount it believes to be due. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

3. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of in-person or interactive EEO training to D1 and A2 on the Rehabilitation Act and avoiding discrimination against individuals with disabilities.

4. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against D1 and A2. The Commission does not consider training to be disciplinary action. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If the responsible management officials have left the Agency's employment, the Agency shall furnish documentation of their departure dates.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Defense Logistics Agency facility in New Cumberland, Pennsylvania 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

October 11, 2022  
Date