



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Valerie L.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Appeal No. 2021003877

Agency No. 4C-370-0155-20

DECISION

On June 24, 2021, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 24, 2021 final decision concerning her 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission REVERSES the Agency's final decision in part.

BACKGROUND

On December 3, 2020, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of disability (Systemic Lupus Erythematosus associated with arthritis), age (49), and reprisal (prior protected EEO activity) when: (1) on or around August 28, 2020, she applied for a Full-Time Rural Carrier position and she was informed she must submit medical documentation to be considered for the position, and subsequently, she was not accommodated per her medical restrictions when she was not awarded the position; (2) on dates to be specified since July 14, 2020, she was not scheduled to work; (3) on dates to be specified since July 14, 2020, her pay was incorrect; and (4) on January 12, 2021, she was not

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.

awarded Route 33 even though she had provided the supplemental medical documentation requested by management on January 6, 2021, in the timeframe they specified.²

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 EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). In the decision, the Agency concluded that Complainant failed to prove that Agency management subjected her to discrimination or reprisal as alleged.

SUMMARY OF ARGUMENTS

Complainant asserts that the Agency discriminated against her when the Agency disallowed her bid assignment. Complainant asserts that she is qualified for the letter carrier position at issue herein and the contract between the union and the Agency was incorrectly applied to her solely because of her protected classes and not because she could not perform the essential functions of the carrier position.

The Agency asserts that it correctly applied the terms of the contract and that it was Complainant's duty to provide medical evidence that she could perform the full duties of the position within six months of accepting the bid assignment. The Agency further asserts that Complainant was not qualified for the position at issue.

FACTUAL BACKGROUND

In 2018, Complainant worked as a Rural Carrier Associate (RCA) at the Cordova, Tennessee Post Office. An RCA is a type of mail carrier. All mail carriers whether they are RCAs, Part-Time Flexible (PTF) carriers or Full Time Regular Carriers (FTR) are required to gather mail and parcels every morning from various locations which may include lifting heavy items from low levels. They case the mail into delivery order and then pull it down into containers requiring them to stand for lengthy periods and lift their arms above shoulder level repetitively. Carriers remove parcels from hampers, which require repetitive bending while lifting, and place the parcels into the delivery vehicle along with containers of mail. Packages may weigh up to 70 pounds as this is the U.S. Postal Service's package weight limit. Carriers then begin delivery on the route which requires possible periods of prolonged sitting, repetitive bending of the elbow and lifting of parcels from the vehicle, carrying them to customers' doors for delivery and bending to place them on the porch. Delivery may involve climbing multiple flights of stairs if the route has apartments. Carriers are also required to pick up parcels from customers for mailing which may involve climbing stairs and repetitive bending/lifting/walking with heavy objects. The parcels would then be lifted from the vehicle again once back at the office. Carriers spend almost the entire day using fine (finger) motor manipulation.

² Complainant withdrew Claims 2 and 3 during the EEO investigation and does not raise these claims on appeal. Accordingly, we do not address those claims in our decision.

The carrier's day is finished when all the day's mail has been delivered regardless of the volume. Therefore, days with shortened daylight hours may require working after dark to complete the day's duties.

In 2018, Complainant was diagnosed with Systemic Lupus Erythematosus (Lupus).³ Complainant provided documentation to her supervisors including the Postmaster of the Cordova Post Office and held initial verbal discussions about her condition on or about October 9, 2018, November 28, 2018, December 4, 2018, and January 9, 2019. Complainant testified that when she experiences an unpredictable flare-up it can limit her ability to play with her grandchildren; standing; driving in the dark; and walking for extended periods of time. Complainant's flare ups are described as occurring "occasionally."

In or about October 2019, Complainant requested accommodations from management to mitigate difficulties arising from her occasional Lupus flare-ups. Complainant testified that she can perform all the duties of her current position, except when she has a Lupus flare-up, which causes her difficulty in climbing three or more flights of stairs consecutively. Complainant also previously documented difficulties lifting heavy objects and driving at night but has not pursued such restrictions. When the flare up is not too severe, she is still capable of climbing three or more flights of stairs consecutively.

The record shows that on November 21, 2019, the Agency's District Reasonable Accommodation Committee (DRAC) issued a decision in response to Complainant's October 2019 accommodation request and stated, in part:

The District Reasonable Accommodation Committee (DRAC) met with you on 11/6/19 to discuss whether you could be reasonably accommodated. The committee explored and discussed with you possible ways to accommodate you in your position.

The DRAC has determined that your restriction of climbing flights of stairs is already being accommodated with the primary, secondary, and tertiary routes that are in your matrix. These routes do not include flights of stairs that would violate your restrictions.

The DRAC denied Complainant's request for assistance with lifting heavy packages and driving after dark as it found those tasks to be essential functions of Complainant's position. As of the date of the November 2019 accommodation decision, the Agency was in possession of medical documentation to support the fact that Complainant was diagnosed with Lupus and that it was a permanent illness. In addition, the medical documentation on file indicated that it was difficult for Complainant to climb "particularly high stairs."

³ Lupus is a chronic autoimmune disease where the immune system mistakenly attacks the body's healthy tissues. Inflammation caused by Lupus can affect many different body systems, including joints, skin, kidneys, blood cells, brain, heart and lungs.

In April 2020, Complainant was awarded a PTF position (BID1). Complainant bid on BID1 and because she was the senior bidder, she was awarded the position. Complainant did not explicitly request the continuation of an accommodation and management did not require that Complainant provide medical documentation prior to being awarded BID1. The RCA and PTF job functions are the same. It is undisputed that Complainant's new route had apartment buildings.

Claim 1 – August 2020 Non-Selection (BID2)

Complainant bid on a Full Time Regular Carrier position in August 2020. Specifically, BID2 included the assignment of Route 33 (i.e., a route that included apartment buildings with three floors).⁴ The bidding process is automated, and “pre-awards” are determined by seniority through the Agency's Human Resources Shared Services Center in Greensboro, North Carolina as outlined in Article 12 of the Rural Union Agreement. The qualifying of employees during the “pre-award” is completed through District Operations.⁵ As in the case with BID1, Complainant automatically reached the pre-award phase of BID2 because she was the most senior bidder.

However, for some unknown reason, management did not follow the same process and automatically qualify Complainant for BID2 as it had done with BID1. Rather, the District Operations Program Specialist's (OPS,) believing she was following the terms of the collective bargaining agreement, required that Complainant submit documentation removing all medical restrictions and stating that she was physically fit to perform the full duties of the position.⁶ OPS stated that on August 26, 2020, she received a copy of the DRAC decision from 2019 which confirmed that Complainant had restrictions from climbing stairs above the second floor.⁷

OPS explained that in accordance with the collective bargaining agreement, specifically Memorandum of Understanding (MOU) No. 7 , Section 5 of the EL-902 (Rural Contract), Complainant must be able to meet the physical requirements of the position within six months.⁸

⁴ The record does not indicate how many buildings were on this route.

⁵ District Operations was not physically located within the Cordova Tennessee Post Office or considered part of such facility.

⁶ OPS did not work with anyone from the Cordova Tennessee Post Office in any compacity.

⁷ Although the 2019 DRAC decision contained other restrictions, the undisputed documentary and testimonial record shows that the most updated information in the Agency's possession established that the only restriction in place as of August 2020, was the stair-climbing restriction as described herein.

⁸ The record establishes that OPS' interpretation of MOU No. 7 is facially incorrect. MOU No. 7 carves out an exception in the case of an individual with a disability who is provided accommodations in accordance with the Rehabilitation Act, in its very first sentence stating:

It is agreed that the following procedure will be used in situations in which an employee, **who has not been provided an accommodation in accordance with**

Accordingly, OPS asked the acting Postmaster at the Cordova Post Office at the time (PM) to have Complainant provide medical documentation releasing her to full duty (without restrictions) or medical documentation that she will be released to full duty within six months. Complainant had a short window to provide such documentation. PM relayed the request to Complainant.

Complainant told management that the request for additional documents was unnecessary since the duties of the new position were no different from her current duties. She asserted that she was performing the same duties under the same restrictions and no additional documentation management requested would change that. Moreover, she advised management that she recently completed all deliveries on Route 33. Complainant explained that her medical restrictions were on file with the Agency and were permanent. Complainant further told PM that she could not provide a medical note removing all restrictions as PM requested. Further, Complainant told PM that the duties of her current job (BID1) were the same as the duties required for BID2.⁹ Complainant stated that she told management that she had worked on the exact route on occasion in the past and was able to perform the duties of the position without any problem. Complainant asserted that while Route 22 had an apartment building, she did not have to climb any stairs to deliver the mail to such location because the mail was delivered to the building manager's office on the first floor.

OPS testified that there *may* have been times that packages needed to be delivered to the door for a signature. However, it is unclear from the record how frequent such deliveries occurred. Management does not dispute Complainant's assertion that it provided her with assistance during the occasions when Complainant had a piece of mail that required delivery to a third or fourth floor apartment at the same time when she was also experiencing a flare up of her condition.

None of the managers who testified were able to confirm or deny Complainant's description of Route 22 or Complainant's regular assigned routes. Since Complainant did not provide PM or OPS the requested medical documentation, she was not granted the position. The position was awarded to the next senior bidder (C1) who did not have any medical restrictions.

Claim 4 – January 2021 Non-Selection (BID3)

Complainant bid on an FTR position (Route 33) again in December 2020/January 2021 (BID3) and was the senior bidder at the time. Complainant asserted that on January 4, 2021, PM left Complainant a voicemail advising her that OPS required medical documentation removing all of her restrictions and gave her two weeks (until January 18, 2021), to provide it.

the Rehabilitation Act, is temporarily unable to perform all of the duties of his or her normal rural carrier assignment.

(emphasis in the original).

⁹ Complainant told management that she had serviced Routes 8, 11, 15, 18, 20, 39, 48 and Route 33 previously. According to Complainant, all such routes are apartment routes.

Complainant affirmed that she emailed PM (copying several other managers and union representatives) asking PM to clarify what documentation she was requesting. Complainant explained that she sought this clarification because she had existing related documentation already on file, and PM was not sufficiently clear as to what documentation she needed. Complainant mentioned to PM that she could provide documentation concerning her disability limitations arising from her Lupus diagnosis quickly.

On January 6, 2021, PM left another message on Complainant's voice mail stating that OPS needed a copy of her DRAC application in order to move forward. OPS testified that she asked PM to ask Complainant if she had requested an accommodation. OPS testified that it was her hope that if Complainant had requested a reasonable accommodation, it would have allowed them to hold the route in abeyance pending the outcome of the DRAC application. However, OPS also testified that she learned shortly thereafter that MOU No. 7 *does not* make exceptions for reasonable accommodations.

Complainant understood the January 6, 2021 voicemail as a request for a copy of her DRAC application, presumably in response to Complainant's earlier emails. Complainant emailed PM (and copied her managers and union representatives) on January 8, 2021 stating:

Hello. I received your voicemail and I need more clarification on the requested medical documentation concerning me performing my job. However, if [you're] referring to my Lupus disability limitations on job. I can provide those documents soon as possible. Please respond with clarity of needed medical documentation. Thank you.

Complainant testified that PM did not respond to her email. On January 12, 2021, (six days prior to Complainant's understanding of the deadline), Complainant emailed PM (copying her managers and union representatives) with an attached note from her treating physician. The email from Complainant stated:

Hello. Here is the requested Documentation that you requested by voicemail Jan. 4, 2021. You gave a two-week deadline to submit, however I'm submitting 6 days Jan. 12, 2021 in advance. Thanks

The attached doctor's note stated:

[Complainant] is under my care and has been receiving treatment for Systemic Lupus Disease (SLE). She has a disability due to arthritis associated with Systemic Lupus Disease (SLE) during the flare up. [Complainant] can perform her job in spite of her disease. She may have flare ups that may affect her lower extremities Joints, muscles and tendons and may experience stiffness and swelling of the joints.

Complainant also submitted this same material via FedEx signature confirmation package, to both PM and another supervisor. Complainant received confirmation that the package with a hard copy was delivered on January 13, 2021 at 10:49 a.m. On January 12, 2021, PM awarded Route 33 to a PTF carrier with less seniority than Complainant.

When responding to Complainant's allegation that she emailed the requested medical documentation to PM on January 12, 2021, PM stated that she is not required to read/open external emails pursuant to Cybersafe Postal Policy. She stated she received the medical documentation on January 13, 2021. OPS testified that January 12, 2021, was the deadline for the final award, and she was informed on January 11, 2021, that they had not received anything from Complainant. OPS further stated that no one told her that Complainant had emailed additional medical documentation on January 12, 2021.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

Disparate Treatment

To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n.14. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency's explanation is a pretext for discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143 (2000); St. Mary's Honor Ctr v. Hicks, 509 U.S. 502, 519 (1993).

To meet her ultimate burden of proving that the Agency's actions were discriminatory, Complainant needs to demonstrate such “weaknesses, implausibility, inconsistencies, incoherencies, or contradictions in the [Agency's] proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence.” Evelyn S. v. Dep't of Labor, EEOC Appeal No. 0120160132 (Sept. 14, 2017).

We assume for the purpose of this decision that Complainant established a prima facie case of age discrimination and reprisal. Nevertheless, the record establishes that Complainant was denied the position at issue because she had physical limitations and failed to provide medical documentation. Moreover, we find the record devoid of age or retaliatory animus on the part of any responsible management official. Accordingly, we affirm the Agency's decision with respect to these two bases.

Disability Discrimination/Denial of Reasonable Accommodation

Under EEOC regulations implementing the ADAAA, 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 an impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. 29 C.F.R. § 1630.2(i)(1)(i). The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 29 C.F.R. § 1630.2(j)(1)(i). “Substantially limits” is not meant to be a demanding standard. *Id.* An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. *Id.*

In the instant case, it is undisputed that Complainant is an individual with a disability protected by the Rehabilitation Act under the expansive definition set forth in the ADAAA. The record shows that Complainant has a permanent physical impairment that causes her to suffer arthritic related difficulties in her lower extremities, including a difficulty in climbing multiple staircases beyond the second floor in a short period-of-time during occasions when she is having a flareup.

Under the Commission's regulations, an Agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9. A reasonable accommodation is an adjustment or change at work for a reason related to a medical condition. EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002, Question 1 (Oct. 17, 2002).

When an individual's disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. Id. at Question 6.

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). “Essential functions” are the fundamental duties of a job, that is, the outcomes that must be achieved by someone in that position. Gwendolyn G. v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013). The essential functions of a carrier are casing and delivering the mail. See Complainant v. U.S. Postal Serv., EEOC Appeal NO. 0720100031 (Apr. 5, 2012) (holding that the essential function of a carrier position is “casing and delivering the mail,” and that the ability to lift 70 pounds, walk, and bend are better characterized as skills or abilities that are useful (and may sometimes be necessary) in performing the essential function of delivering the mail). A proper way to determine whether an individual is qualified for a job is to ask whether that person can perform the essential functions of the job *when at work*. See Petitioner, v. Dep't of Homeland Sec., Agency., EEOC Petition No. 0320110053 (July 10, 2014) citing Cottrell v. U.S. Postal Serv., EEOC Appeal No. 07A0004 (Feb. 2, 2001); McCullough v. U.S. Postal Serv., EEOC Request No. 05950539 (Apr. 25, 1996); Ruiz v. U.S. Postal Serv., EEOC Request 05880859 (May 21, 1990). The record establishes that during the relevant time frame Complainant was performing all tasks required of a mail carrier, including routes with apartment buildings.

The Agency asserts in its final decision that OPS reported that Route 33 has “*three* flights of stairs at *an* apartment complex.” While the record is devoid of testimonial or documentary evidence providing a detailed description of Route 33, OPS’ statement implies that Route 33 contains only one apartment building with stories greater than two and that such apartment building has only three stories. Accordingly, during the relevant timeframe, Route 33 had one floor of apartments that Complainant could not deliver to when she was experiencing a flare up. The Agency concluded that Complainant was, therefore, not qualified to perform the essential duties of BID2.¹⁰

The Agency specifically argues that climbing stairs is an essential function of BID2 and BID3 and the failure to perform this function even during an occasional flare up renders Complainant not qualified for such positions. Climbing is a skill and ability to assist Complainant in performing the essential function of delivering mail.

¹⁰ We note that it was not reasonable for OPS to make assumptions that Complainant had lifting and driving restrictions based on the 2019 DRAC decision letter considering Complainant continued to successfully work in the RCA position without any accommodations pertaining to lifting or driving. Moreover, Complainant was awarded BID2 without any such accommodations.

The undisputed record establishes that during the relevant time frame Complainant had been successfully delivering mail on routes that contained multi-level apartment buildings and that she did in fact perform every task associated with the position of mail carrier, including carrying heavy parcels, driving after dark and climbing stairs above the 2nd floor. While OPS made assumptions based on the 2019 DRAC decision letter, the record shows otherwise. Specifically, while the 2019 DRAC decision letter indicates that the routes assigned to Complainant in her RCA position did not have apartments above the second floor, the documentary and testimonial evidence in the record shows that Complainant was assigned to Route 33 and other routes with apartment buildings in 2019 on occasion. The record also establishes that in April 2020, Complainant was awarded BID1 which had multi-level apartment buildings.

The record also shows that on occasion, during flare ups, management provided Complainant assistance with routes that would have required her to climb three or four consecutive flights of stairs. However, since delivering mail to apartment doors was not a daily requirement, Complainant did not need assistance often. Moreover, the record also supports the finding that Route 33 did not require the carrier to regularly climb any flights of stairs because the route count was predicated on delivering parcels to the apartment's management office, except in the instance when a signature was necessary. The undisputed record supports the conclusion that management was able to adjust Complainant's route in the unusual event that she was unable to make a delivery.¹¹ The undisputed record establishes that Complainant was regularly performing all the requirements of BID1 (i.e., a route with multi-level apartment buildings) at the time of BID2 and performing such tasks in a satisfactory manner. Accordingly, we find that Complainant established that she was a qualified individual with a disability within the meaning of the Rehabilitation Act.

¹¹ The record is devoid of documentary or testimonial evidence to discredit Complainant's testimony. In fact, not one management official testified to having knowledge as to whether Complainant's current or former routes required her to lift heavy packages, work after dark and climb stairs above the 2nd floor. OPS was guided solely as to what was in Complainant's 2018-2019 DRAC file. The former DRAC Chairperson's (DRACC) testimony was extremely limited since she left the Tennessee District in January 2020. No other DRAC representative testified. DRACC was *not* involved with requesting medical documentation in 2020 or 2021 and was *not* involved in BID1, BID2 or BID3. DRACC's testimony was simply a reiteration of the November 2019 DRAC decision letter which applied to Complainant's RCA position. The record is devoid of evidence to dispute Complainant's testimony with respect to daily tasks associated with BID1 (i.e., the position she held during the relevant time frame). The Agency also references an unsworn statement from a Manager, Customer Services at the DeSoto Post Office (M1) explaining that Route 33 at one time did require mail to be delivered to the apartment doors, which we do not find persuasive in discrediting Complainant's sworn testimony.

The record establishes that OPS asked local management at the Cordova Post Office to see if Complainant was able to provide medical documentation removing all medical restrictions, which PM and others did.¹² The record also shows that Complainant explained to local management that she was able to perform all duties of BID2 and BID3 (Route 33), based on her first-hand knowledge of the position and the fact that she has been performing such duties as noted above for quite some time. Complainant also advised management that she could not obtain medical documentation that would remove her medical restriction (i.e., climbing stairs above the 2nd floor during a flare up of her disability) because such limitation was permanent. According to OPS, that ended the conversation with Complainant. Since she failed to provide the medical documentation OPS requested, she was passed over for BID2 and BID3.

In general, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Appendix to 29 C.F.R. § 1630.9; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, No. 915.002 (10/17/02) at "General Principles" and Question 40. Complainant did not explicitly seek a continuation of her current accommodation or additional accommodations with respect to BID2 or BID3.

While the record is devoid of documentary evidence formalizing Complainant's then accommodations, the undisputed record establishes that Complainant had been receiving accommodations in BID1 where management would assist Complainant in delivering mail to 3rd and 4th floor apartments during the occasional flare up of her illness. Accordingly, the Agency was on notice that Complainant had medical restrictions due to a disability requiring occasional assistance. In addition, in August 2020 and January 2021, Complainant told OPS and PM that her current route (BID1) and Route 33 (BID2 and BID3) had the same duties.

If an employer knows both about the disability and the need for accommodation, it may have an obligation to engage in the interactive process -- *even without* an express request that a modification is needed because of a disability. For example in Cannon v. Jacobs Field Services North America, 813 F.3d 586 (5th Cir. 2016), the court held that "although a plaintiff must usually request an accommodation to commence an interactive process," he "is excused from doing so in a situation" where the employer knows of his disability and "had received a report from its own doctor recommending accommodations."

¹² Under the Agency's bidding scheme, as senior bidder, Complainant had what amounted to a conditional offer of employment at the time of the August 2020 and January 2021 inquiries. See EEOC's Enforcement Guidance on Pre-employment Disability-Related Questions and Medical Examinations, EEOC Notice No. 915.002 (Oct. 10, 1995) (any employer may ask disability-related questions after an applicant has been given a conditional job offer to the extent shown to be job-related and consistent with business necessity). The record establishes that for each senior pre-award bidder (SPB), OPS automatically inquired as to whether such SPB had any current medical restrictions. If the SPB turned out to have medical restrictions, OPS believed that she was required to obtain medical documentation removing all restrictions or stating that such restrictions would be removed within six months.

See also Porterfield v. Soc. Sec. Admin., No. 20-10538, 2021 WL 3856035, at *6 (11th Cir. Aug. 30, 2021) (the court noted that an employee “can be said to have made a request for accommodation” when the employer “has enough information to know of both the disability and desire for an accommodation”) citing Holly v. Clairson Indus., L.L.C., 492 F.3d 1247, 1262 (11th Cir. 2007); see also Ford v. Marion County Sheriff's Office, 942 F.3d 839 (7th Cir. 2019). The record is clear that management was aware of Complainant’s disability and need for accommodations, as she was already receiving accommodations due to medical restrictions in the same job.

OPS told PM that Complainant needed to submit a medical statement revealing she would be able to *return to full duty* within six months pursuant to the Agency’s contractual obligations with the union. OPS further testified that she told PM that clarification was not helpful. Rather, the only documentation OPS would accept was medical documentation removing *all* physical restrictions. It is clear from this statement and management’s actions, (including the failure of management to respond to Complainant’s January 8, 2021 email requesting clarification) that OPS and PM left no room for Complainant to pursue accommodations.

We find that not only did the Agency have an obligation to engage in the interactive process because OPS and PM were aware of Complainant’s disability, medical restrictions and need for an accommodation, OPM and PM’s actions clearly served to discourage Complainant from seeking clarifying information and pursuing what amounted to a continuation of the reasonable accommodation the Agency was already providing. See Davoll v. Web, 194 F.3d 1116 (10th Cir. 1999) (court applying the “futile gesture” doctrine to Americans with Disability claims and stating that if the individual knows that the accommodation request would be futile, he might not need to initiate the interactive process.); see also Koessel v. Sublette County Sheriff's Dept., 717 F.3d 736 (Cir. 2013) (employee’s request for an accommodation is not required if the “employer has ‘foreclosed the interactive process through its policies or explicit actions’”); Aldini v. Kroger Co. of Michigan, 2015 U.S. App. LEXIS 17748 (6th Cir. 2015) (unpublished) (“in limited circumstances,” an employee need not request accommodation “if such a request would be futile”).

The record establishes that Complainant told responsible management officials that she was able to perform the essential functions of the position. Complainant stated to management that Route 33 did not require deliveries beyond the first floor. If OPS or any management official was not convinced by Complainant explanation, the Agency was required to engage in an active dialogue to determine the actual essential functions of the position and whether an accommodation was necessary. The responsible management officials did not do this. In fact, it appears that OPS received faulty information that exploring a reasonable accommodation with any Senior Pre-Award Bidder (SPB) violated the contract with the union and that the only option was for OPS to obtain medical documentation releasing the SPB to full duty without any restrictions.

Under the facts herein, once OPS and local management officials became aware that Complainant had a disability, medical restrictions, and need for an accommodation, they were obligated to begin the interactive process in determining whether Complainant was an individual with a disability who could perform the essential functions of the position at issue with or without a reasonable accommodation. The record establishes that the Agency failed in this regard.

Failure to engage in the interactive process does not constitute a violation of the Rehabilitation Act. Employer liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job. See Broussard v. U.S. Postal Serv., EEOC Appeal No. 01997106 (Sept. 13, 2002) (although agency cannot be held liable solely for failure to engage in interactive process, it can be held liable where failure to engage in process resulted in failure to provide reasonable accommodation), request to recon. denied, EEOC Request No. 05A30114 (Jan. 9, 2003).

The documentary and testimonial evidence in the record supports the finding that had OPS and other responsible management officials engaged in the interactive process required under the Rehabilitation Act, they would have learned that Complainant could not climb above the 2nd floor of apartment buildings to deliver mail during flare up of her illness but that such flare ups did not occur regularly and the deliveries above the 2nd floor did not take place every day. We also find that during the interactive process, OPS and local responsible management officials would have quickly learned that multiple reasonable accommodations were available, since the Agency was already providing Complainant with an accommodation.

The Agency may choose among reasonable accommodations, if the chosen accommodation is effective. An “effective” accommodation either removes a workplace barrier, thereby providing an individual with an equal opportunity to apply for a position, to perform the essential functions of a position, or to gain equal access to a benefit or privilege of employment. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance on Reasonable Accommodation). While the “assistance” local management was already providing Complainant during the rare flare up was not identified in the record, it is easy to imagine several effective accommodations. Such possible accommodations could include on an “as needed” basis: (a) granting Complainant leave; (b) swapping routes with another carrier, (c) or having another carrier deliver the piece of mail that needed to be delivered above the 2nd floor. In addition, the undisputed record establishes that complainant was in fact performing all duties of BID1 in a satisfactory manner. Accordingly, whatever accommodation the Agency was providing to Complainant at the time was effective.

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). The record is devoid of evidence that providing Complainant a reasonable accommodation would cause an undue hardship. Rather, the undisputed record establishes that Complainant received an accommodation in the same job without incident. Accordingly, we find that the Agency violated the Rehabilitation Act when it failed to award Complainant BID2 and BID3 with an accommodation.

Where a finding of discrimination involves a failure to provide a reasonable accommodation, damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the complainant with a reasonable accommodation. 42 U.S.C. § 1981a(a)(3); see also Jones v. Dep't of Agric., EEOC Appeal No. 0120080833 (July 18, 2012); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007); see also Buboltz v. Residential Advantages, Inc., 523 F.3d 864 (8th Cir. 2008), (while noting that failure to engage in the interactive process is not actionable unless a reasonable accommodation actually existed, court stated that “[w]hen an employer fails to engage in an interactive process, that is prima facie evidence of bad faith”). We find the record devoid of good faith as OPS and local management failed to engage in the interactive process altogether. Accordingly, we find damages may be awarded herein.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the finding of no discrimination based on age or in reprisal for prior EEO activity and REVERSE the Agency’s final decision regarding disability discrimination, as set forth above.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 days of the date this decision is issued, the Agency shall identify all vacant, funded positions or assignments with equivalent pay and status to BID2 and BID3 and determine, with Complainant's input and per the requirements of the Rehabilitation Act, which of these positions she is able to perform, with or without accommodation. If such a vacant, funded position is identified, Complainant shall be placed in the position. The duty to reasonably accommodate Complainant is ongoing.
2. The Agency 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 Complainant is either placed in a position or declines any position offered.

3. 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 Complainant for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. 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;”
4. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) and request objective evidence from Complainant in support of her request for compensatory damages within 45 calendar days of the date Complainant receives the Agency's notice. No later than 60 calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.
5. Within 90 days of the date this decision is issued the Agency shall provide eight hours of in-person or interactive training to OPS and PM regarding their responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations under Section 501 of the Rehabilitation Act, particularly its duties regarding reasonable accommodation. The Agency shall provide proof of the officials’ attendance, as well as the contents of the in-person training provided.
6. The Agency shall consider taking appropriate disciplinary action against OPS and PM. The Commission does not consider training to be disciplinary. The Agency shall report its decision to the Compliance Officer. 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s);

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled “Implementation of the Commission's Decision.” The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its: (a) Cordova Tennessee Post Office; (b) the relevant District Operations office; and (c) the Human Resources Shared Services Center 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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:



Carlton M. Hadden, Director
Office of Federal Operations

November 16, 2022
Date