



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

[REDACTED]  
Matt A.,<sup>1</sup>  
Complainant,

v.

Louis DeJoy,  
Postmaster General,  
United States Postal Service  
(Field Areas and Regions),  
Agency.

Appeal No. 2022003153

Hearing No. 550-2020-00526X

Agency No. 4F-940-0029-20

**DECISION**

**JURISDICTION**

On May 18, 2022, 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 April 20, 2022 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a City Carrier at the Agency's Bryant St. Annex in San Francisco, California.

On February 21, 2020, Complainant contacted an EEO Counselor and filed a formal EEO complaint on March 31, 2020, alleging that the Agency discriminated against him on the bases of

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

disability and reprisal for protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:

1. On December 4, 2019, he was told he could not work as a carrier with medical restrictions.
2. On December 7, 2019, he was told he did not look disabled.
3. On December 7, 2019, he was told during a [reasonable accommodation] meeting that he was not needed because he had medical restrictions.
4. On December 14 and 30, 2019, he was given negative performance evaluations.
5. On January 12, 2020, he received a Letter of Separation during his probationary period.

The Agency accepted the complaint and conducted an investigation. Complainant then requested a hearing before an EEOC Administrative Judge (AJ). The Agency filed a motion for summary judgment

Complainant stated that he has post-traumatic stress disorder (PTSD), depression, generalized anxiety disorder, and panic disorder with agoraphobia, for which he has been prescribed medications. See Report of Investigation (ROI) at 80-81. He stated that prior to being hired, he disclosed his medical conditions to the Agency's certified occupational health nurse administrator. See ROI at 81.

He stated that he began working for the Agency on October 26, 2019, and at the end of the initial training period, was told by his supervisors that they were satisfied with his performance and believed he could handle a whole route. See Complainant's Response to Summary Judgment, Ex. A at 2. A few days later, after working full 12–14-hour shifts, he suffered an anxiety attack at work and told his Acting Supervisor (Supervisor 1) that he had a medical condition and would need to leave early. See Complainant's Response to Summary Judgment, Ex. A at 2. He stated that Supervisor 1 called him a “piece of shit” and said that Complainant looking healthier than Supervisor 1. See Complainant's Response to Summary Judgment, Ex. A at 2. Complainant further stated that on December 6, 2019, the District Manager talked to him about his medical condition and told Complainant he could work 8-hour shifts. See Complainant's Response to Summary Judgment, Ex. A at 3. Later, on December 7, 2017, Complainant's official Supervisor (Supervisor 2) told Complainant that he did not look disabled. See Complainant's Response to Summary Judgment, Ex. A at 3. Thereafter, on December 17, 2019, after a meeting with the Reasonable Accommodation Committee, the Agency granted Complainant an accommodation of working a maximum of eight hours a day and six days a week. See ROI at 383.

Supervisor 1 sent an email to Supervisor 2, the Station Manager A, and the Customer Services Supervisor (CSS) on December 4, 2019, informing them that Complainant had not finished his route that day, further stating “says he has medical documents on file. First time I’m hearing about this. I think he’s full [of] shit but I could be wrong. At least I man up about my mistakes. For such an Alpha male he’s such a pussy.” See Complainant's Response to Summary Judgment, Ex. E.

On December 6, 2019, in response to an inquiry into whether Complainant had medical documentation on file from the Bryant Station Manager, a Human Resources Manager (HR Manager) responded by stating, “We may want to approach this as just a performance issue and make sure we are doing accurate and timely 1750s to record the poor performance.” See Complainant’s Response to Summary Judgment, Ex. C.

Complainant stated that he should have received his first 30-day performance evaluation on November 26, 2019, but instead, he did not receive his first performance evaluation until December 14, 2019. His initial performance evaluation dated December 14, 2019, rated Complainant as “Satisfactory” in four (work quality, dependability, work relations and personal conduct) out of six categories, and “Unacceptable” in the remaining two categories (work quantity and work methods). See Report of Investigation (ROI) at 384. His second 60-day evaluation was dated December 30, 2019, and again rated Complainant as “Successful” in four out of six categories and “Unsatisfactory” in the remaining two categories (work quantity and work quality). See ROI at 384. On January 11, 2020, Complainant received a Letter of Separation, ending Complainant’s employment effective January 12, 2020, and citing as the reason “Unsatisfactory Job Performance.” See ROI at 385.

Based on this evidence, the AJ found that Complainant did not present evidence to create a dispute as to the Agency’s stated legitimate, nondiscriminatory reason for his removal (unsatisfactory work performance) and therefore granted the Agency’s motion for summary judgment. The Agency’s final action implemented the AJ’s decision.

The instant appeal from Complainant followed.

### STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ’s legal *and* factual conclusions, and the Agency’s final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a “decision on an appeal from an Agency’s final action shall be based on a de novo review . . .”); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge’s determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ’s, and Agency’s, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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”).

### 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). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. Id. at 255. 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). Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary. According to the Supreme Court, Rule 56 itself precludes summary judgment "where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition." Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." Redmand v. Warrenner, 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).

As a preliminary matter, we reject the Agency's contention that allegations 1 through 4 are untimely and may not be considered as discrete incidents.

We find that the Agency's argument improperly fragmented Complainant's complaint and that all of the matters raised are like or related to Complainant's claim that he was subjected to a hostile work environment due to his disability and reprisal for his protected activity in requesting a reasonable accommodation that culminated in his removal.

After a careful review of the record, we find that the AJ erred by not viewing the evidence in the light most favorable to Complainant as the non-moving party, as required at this stage. The AJ also failed to consider all the evidence submitted by Complainant which we find creates a dispute of fact and raises credibility issues with respect to the validity of the Agency's reason for removing Complainant, i.e., his poor performance. Complainant has presented evidence in the record to indicate that management officials at the Agency displayed a negative attitude towards Complainant upon being informed of his disability. Most significantly, Complainant stated that Supervisor 1 called him a "piece of shit" and said that he looked healthier than Supervisor 1 on first being informed that Complainant had a disability. See Complainant's Response to Summary Judgment, Ex A at 2. This is corroborated by the email which Supervisor 1 sent that same day to other supervisors which reiterates Supervisor 1's belief that Complainant is "full [of] shit" and expressing his disbelief that Complainant has a disability merely because it was not immediately visible. See Complainant's Response to Summary Judgment, Ex. E.

We further note that the HR Manager's response to an inquiry as to how to handle Complainant's request for a reasonable accommodation was to state, "We may want to approach this as just a performance issue..." See Complainant's Response to Summary Judgment, Ex C. We emphasize that this email was sent days before Complainant received his first 30-day performance evaluation and as such, indicates that the Agency may have already determined to evaluate Complainant poorly and base Complainant's removal on his performance.<sup>2</sup> We find that the evidence in the record casts doubt on the veracity of the Agency's explanation that Complainant was removed due to his poor performance. Moreover, we are highly troubled by the numerous statements made by various management officials indicating, at best, an ignorance of the Agency's requirements under the Rehabilitation Act and at worst, an outright hostility towards Complainant because of his disability. Considered together, we find that Complainant submitted enough evidence to create a dispute of fact as to whether the Agency's stated reason for removing Complainant was a pretext for discrimination.

We further note that there is no evidence in the record indicating that there had been issues concerning Complainant's performance prior to his informing Supervisor 1 that he had a disability.

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<sup>2</sup> We note that to the extent the HR Manager's email may indicate a question as to whether Complainant's performance merited his entitlement to a reasonable accommodation, we emphasize that the quality of an employee's performance is irrelevant to the issue of whether the employee is entitled to an accommodation. See *Alonso T. v. Equal Empl. Opp'y Comm'n*, EEOC Appeal No. 0120162340 (Jan. 15, 2020) ("Reasonable accommodation is a right, not a privilege.")

Moreover, the Agency did not provide an explanation for why it did not conduct Complainant's 30-day evaluation after Complainant had worked 30 days, as required by Agency policy, but did so two weeks late, on December 14, 2019. In addition, we note that the Agency did not explain why Complainant was not given the standard 30 days in between performance evaluations in order to improve his performance. See Karolyn E. v. Dep't of Health and Human Svcs., EEOC Appeal No. 2021003151 (Oct. 19, 2021) ("An Agency's departure from, or failure to apply its policies, without explanation, can be probative of pretext."). We also find that there is no explanation for why Complainant's supervisors assigned Complainant only 2-3 hours of work to complete in an 8-hour shift, especially in light of the evidence in the record that on numerous occasions, Complainant was able to complete his assigned work early and requested more work in order to fill up his shift. See Margorie L. v. Dep't of Homeland Sec'y, EEOC Appeal No. 2019005722 (July 19, 2021) (noting that evidence of pretext can take the form of discriminatory statements, deviations from standard procedures without explanation or justification, or inadequately explained inconsistencies in the evidentiary record).

We note that 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 [his] 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). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials and Complainant, himself. Therefore, judgment as a matter of law for the Agency should not have been granted as to Complainant's complaint. The case shall be remanded for a hearing.

### CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission reverses the Agency's final order and remands the matter to the Agency in accordance with this decision and the Order below.

### ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency shall submit to the EEOC's San Francisco Hearings Unit a renewed request for a hearing on Complainant's behalf, 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>

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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

November 28, 2022

Date