



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

[REDACTED]  
Joanna G.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021004968

Hearing No. 540-2018-00155X

Agency No. 4E-852-0039-11

**DECISION**

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 August 2, 2021 final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Clerk at the Agency’s Tempe Main Post Office in Tempe, Arizona.

Complainant began her career in 1988 as a casual employee. In 1990, the Agency documented Complainant’s noncompetitive conversion to a Mail Handler position based on a disability code “91,” for “mental or emotional illness” (“1990 Certification”).

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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.

Agency Motion for Summary Judgment, Exhibits 1, 2. In 2009, Complainant won her bid for a Clerk position at the Tempe Main Post Office, but the Agency abolished the position within a couple of weeks, and she became an Unassigned Regular. Complainant Deposition at 16-17.

On April 27, 2010, the Agency informed Complainant that she would be assigned to a Sales/Service Distribution Associate position, which included a “scheme”.<sup>2</sup> This assignment required Complainant receive further training and pass a scheme qualification test. If Complainant failed to successfully qualify, she risked being separated from the Agency. The scheme qualification required a score of 95% or better. Report of Investigation (ROI) at 68-9. Complainant testified that she understood a scheme to include memorization of zip codes, and she wanted to use “Alpha Charts,” which provided the abbreviations of the addresses for the carriers, as a tool to help her qualify for the scheme requirement. Complainant Deposition at 21, 103-4.

Complainant shared her concerns about passing the scheme with her supervisor and showed her the 1990 Certification, and the supervisor made a referral to the District Reasonable Accommodation Committee (DRAC). The Supervisor noted that Complainant did not want to take and pass the scheme test, and she wanted to use the Alpha Charts while working scheme mail due to a learning disability. Id. at 47-8, Supplemental ROI at 89. Complainant was given scheme training from May 20 through August 10, 2010, and she failed to qualify on her assigned scheme on August 10, 2010. ROI at 96.

On July 29, 2010, and August 17, 2010, the DRAC requested additional medical documentation, noting that the 1990 Certification did not describe Complainant’s diagnostic evaluations and findings that led to a medical diagnosis of a disability. ROI at 70. On August 11, 2010, the DRAC noted a delay in the processing of Complainant’s request due to the lack of medical documentation, but in an effort to temporarily assist Complainant, it provided modified work assignments, such as window operations and dispatch. Supplemental ROI at 92.

On August 26, 2010, the DRAC memorialized that they met with Complainant to discuss her request. While Complainant had not yet provided documentation related to her learning disability, the DRAC granted an interim accommodation to allow her to resume one hour of training per day on her assigned scheme. ROI at 108. Complainant received more training with Alpha and scheme charts, and she was given additional opportunities to pass the scheme. Supplemental ROI at 42.

The DRAC initially closed Complainant’s request and reopened it when she provided the requested medical documentation. Supplemental ROI at 147, 150. On September 14, 2010, Complainant submitted a statement from a psychologist, who noted that Complainant “does not have the cognitive tools to pass this test nor to complete this specific type of work. This impairment has no remedy, nor does it have an accommodation as the work demands were demonstrated and reported to me.” Agency Motion for Summary Judgment, Exhibit 22.

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<sup>2</sup> It appears that a “scheme” is a method of manually sorting the mail.

On October 5, 2010, the DRAC determined that it previously found Complainant disabled, but it was unable to identify an accommodation that would allow her to perform the essential functions of her position. They discussed a part-time flexible (PTF) Mail Handler position in Phoenix, but Complainant's former representative indicated that she was not in favor of such position. The Agency formally offered a reassignment to a PTF Letter Carrier position in the Miami, Arizona Post Office, which Complainant declined. Supplemental ROI at 175-6.

On October 26, 2010, the DRAC informed Complainant that since she was not interested in the PTF Letter Carrier position, her options were: to request disability retirement; request reassignment; or bid on a job that was conducive to her restrictions. Complainant was given 30 days to make a decision. Supplemental ROI at 183. On November 30, 2010, the Agency issued a denial of Complainant's appeal of the October 26<sup>th</sup> options letter. ROI at 75.

On November 22, 2010, the Agency issued Complainant a Notice of Removal, effective December 25, 2010, for Failure to Qualify on Assigned Scheme. ROI at 72-3. Complainant grieved her removal, and pursuant to a settlement agreement, Complainant returned to work on April 23, 2011. ROI at 77.

*Agency Case No. 4E-852-0068-10 (Complaint 1)*

On September 21, 2010, Complainant filed an EEO complaint alleging discrimination based on her age (59), disability (learning disability), race (Hispanic),<sup>3</sup> sex (female), and in reprisal for prior protected activity when:

1. On April 27, 2010, Complainant was notified that she was being assigned to the residual position of Sales/Service Distribution Associate, effective May 8, 2010, and she would be terminated if she did not pass the scheme training.
2. On August 18, 2010, Complainant was instructed to provide new medical documentation.
3. On August 26, 2010, the DRAC refused to discuss Complainant's accommodations until she provided new medical documentation.
4. On August 27, 2010, Complainant received notification from the DRAC that she had until September 3, 2010, to produce medical documentation, or the DRAC would not continue the reasonable accommodation process.
5. On or about September 3, 2010, Complainant sent a certified letter to the DRAC, but she received no response.

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<sup>3</sup> The Commission notes that the term "Hispanic" typically denotes national origin rather than race. However, herein the Commission acknowledges Complainant's self-identification of her race as Hispanic.

6. On September 14, 2010, Complainant was notified that the DRAC was closing her case for failure to provide requested medical documentation, and she was given a fact-finding for failing to qualify on the scheme assigned to her.

The Agency dismissed the complaint for untimely EEO counselor contact and for failure to state a claim. The Commission reversed the Agency's dismissal and remanded the claims for investigation, finding that Complainant's initial EEO contact was timely, and that she alleged that the Agency failed to engage in the interactive process and ignored her request for a reasonable accommodation. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120110726 (Mar. 13, 2012).

*Agency Case No. 4E-852-0039-11 (Complaint 2)*

On March 11, 2011, Complainant filed another EEO complaint alleging that the Agency discriminated against her on the bases of race, sex, disability, and age when, on November 22, 2010, the Agency issued her a Notice of Removal, effective December 25, 2010.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the ROI and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. Over Complainant's objections, the AJ granted the Agency's motion for a decision without a hearing and issued a by summary judgment on May 2, 2012, concluding that Complainant did not establish discrimination or unlawful retaliation. The Agency issued a final order and adopted the AJ's decision, which Complainant appealed.

On October 9, 2014, the Commission reversed the Agency's final order for Complaint 2. The appellate decision found that there was sufficient evidence to allow a reasonable factfinder to conclude that Complainant was an individual with a disability and that she was qualified. Further, there were material facts in genuine dispute and the complaint was remanded for a hearing. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122604 (Oct. 9, 2014).

The Agency also again dismissed Complaint 1, this time for raising the same claims in another EEO complaint (Complaint 2). Complainant appealed the Agency's dismissal. The appellate decision found that the claims restated the same events and actions that were previously adjudicated by an AJ and affirmed the Agency's dismissal. Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122614 (Sept. 24, 2012).

On January 12, 2015, Complainant filed a Motion to Amend/Consolidate Complaints 1 and 2. The Agency opposed Complainant's motion. On January 26, 2015, the AJ issued an order denying the motion. The AJ found that Complaint 1 was finalized with the Commission's prior appellate decision, and Complainant had 30 days to file a request for reconsideration, but there was no indication that Complainant availed herself of that option. As such, the AJ concluded that Complainant cannot amend/consolidate Complaint 1 to Complaint 2.

Complainant withdrew her hearing request, and the Agency issued a final decision on June 9, 2015, finding that Complainant did not establish discrimination for Complaint 2. Complainant appealed the Agency's final decision. On November 22, 2017, the Commission issued an appellate decision, finding that the record was not adequately developed and remanded the complaint back to the Agency for a supplemental investigation because a fair reading of the complaint revealed that Complainant raised a claim of a failure to accommodate her disability. The Agency was ordered to investigate the following possibilities: the feasibility of Complainant being provided: (1) Alpha Charts and scheme charts during scheme training; (2) a dedicated training space or training room; and (3) a reassignment as a reasonable accommodation. Susan M. v. U.S. Postal Serv., EEOC Appeal No. 0120152580 (Nov. 22, 2017).

The Agency produced the Supplemental ROI and Complainant submitted a hearing request. On October 8, 2019, the Agency filed a Motion for Summary Judgment, which Complainant opposed. On June 21, 2021, the AJ issued a decision granting the Agency's motion, following Oral Arguments heard on June 10, 2021.

As an initial matter, the AJ noted that there was a second claim for the allegation of a failure to provide a reasonable accommodation when Complainant was unable to pass the qualification test for scheme training, in addition to the removal claim. The Agency disputed the time period for the failure to accommodate claim when it argued that it was temporally overbroad and should be limited to December 25, 2010, through April 23, 2011, while Complainant alleged that the Agency continued to fail to accommodate her after she returned to work on April 23, 2011. Since the AJ granted summary judgment in the Agency's favor, the AJ found its argument largely academic, but nevertheless, found the Agency's argument regarding temporal scope to be unpersuasive.<sup>4</sup>

The AJ then found that Complainant did not establish a prima facie case of discrimination based on race, sex, or age because she did not identify any similarly situated comparator who was treated more favorably or any other evidence to give rise to an inference of discrimination.

The AJ also determined that Complainant was unable to demonstrate that she was a qualified individual with a disability because she could not perform the essential functions of the Sales/Services Distribution Associate position, with or without a reasonable accommodation, according to her medical documentation. However, even assuming that Complainant was qualified, the AJ found that there was no genuine dispute of material fact regarding whether the Agency engaged in the interactive process and offered Complainant a reasonable accommodation.

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<sup>4</sup> Complainant's allegation that the Agency continued to fail to accommodate her upon her return in April 2011 was not previously investigated and the record contains insufficient information to make a fair and reasoned determination on this claim. Should she wish to pursue this claim, Complainant is advised to contact an EEO Counselor to initiate the administrative process.

The AJ noted that, on multiple occasions between May and September 2010, the Agency informed Complainant that the 1990 Certification from twenty years ago was insufficient and it made requests for updated medical documentation. After Complainant finally produced medical information, which stated that she could not perform the essential functions of her position, the Agency explored the possibility of a reassignment as a reasonable accommodation. However, Complainant declined two offers, and the Agency proceeded with the removal action. The AJ added that the supplemental ROI showed that the Agency provided Complainant with Alpha Charts, scheme charts, and a dedicated training space during her training.

The AJ stated that when Complainant returned to work in April 2011, she performed a variety of tasks, including mail handling; window clerk duties; and dispatch. Complainant then went out of work in October 2011, due to a foot injury, and she subsequently voluntarily retired in January 2013.<sup>5</sup> The AJ concluded by granting the Agency's motion for summary judgment.

The Agency issued a final order adopting the AJ's finding that Complainant failed to prove that she was subjected to discrimination as alleged. Complainant filed the instant appeal and submitted a brief in support of her appeal. The Agency opposed Complainant's appeal.

### ANALYSIS AND FINDINGS

#### *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 the 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 Chap. 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").

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<sup>5</sup> The AJ relied upon testimony at the Oral Arguments, but a transcript was not provided with the appeal record.

*Denial of Amendment/Consolidation Request*

An AJ has full responsibility for the adjudication of the complaint, including overseeing the development of the record, and he or she has broad discretion in the conduct of hearings. 29 C.F.R. § 1614.109(a), (e). Given the AJ's broad authority to regulate the conduct of a hearing, a party claiming that the AJ abused his or her discretion faces a very high bar. Trina C. v. U.S. Postal Serv., EEOC Appeal No. 0120142617 (Sept. 13, 2016), citing Kenyatta S. v. Dep't of Justice, EEOC Appeal No. 0720150016 n.3 (June 3, 2016) (responsibility for adjudicating complaints pursuant to 29 C.F.R. § 1614.109(e) gives AJs wide latitude in directing terms, conduct, and course of administrative hearings before EEOC).

Through her representative, Complainant challenges the AJ's denial of her request to amend/consolidate Complaints 1 and 2. Complainant argues that the claims in Complaint 1 are inextricably intertwined with Complainant's removal action, and therefore, should be consolidated with Complaint 2. Complainant asserts that the Agency did not dispute that the six issues were part of the factual background which led up to her removal. Complainant contends that the issues in Complaint 1 were not "finalized," as described by the AJ, because they were never adjudicated.

We are not persuaded that Complainant established an abuse of discretion when the AJ denied her Motion to Amend/Consolidate because the AJ lacked jurisdiction to add claims that the Commission previously affirmed as dismissed. As noted by the AJ, Complainant had thirty days from receipt of the appellate decision for Complaint 1 to request reconsideration. While Complainant asserts that she could not request a reconsideration of Complaint 1 while Complaint 2 was pending on appeal, Complainant was clearly presented the right to file a request for reconsideration for Complaint 1 on page 3 of the appellate decision.

In addition to filing a request for reconsideration, Complainant was advised of her right to file a civil action, and there is no indication that Complainant filed a civil action. A request for reconsideration and civil action were the provided options available to Complainant for Complaint 1, and she cannot disregard her options and choose her own route to bring these dismissed claims before an AJ in an attempt to revive them. As such, we find no abuse of discretion when the AJ denied Complainant's request to amend/consolidate Complaints 1 and 2.

*Decision on the Merits by Summary Judgment*

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249.

At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for 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 "material" fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, neither party raises any genuine dispute of material facts. As such, we find that a decision without a hearing is appropriate.

#### Race, Sex, and Age Discrimination

Complainant disagrees with the AJ's determination that she did not establish a prima facie case of discrimination based on her race, sex, or age. Complainant contends that she identified a Comparator (White, mid-forties) who failed the scheme but was not removed. However, the evidence shows that the Comparator passed her scheme training on July 19, 2010. ROI at 202. As such, the Comparator was not similarly situated to Complainant.

Complainant also asserts that she was the only Hispanic female Sales/Services Distribution Associate at the time of her complaint, and that she was not able to fully develop evidence due to the administrative and appeal processes that affected her complaints. However, Complainant offers no arguments related to any genuine disputes of material fact, and mere allegations, speculations, and conclusory statements, without more, are insufficient to create a genuine issue of material fact. See Lee v. Dep't of Homeland Security, EEOC Appeal No 0520110581 (Jan. 12, 2012), citing to Baker v. U.S. Postal Serv., EEOC Appeal No. 01981962 (June 26, 2001), request for reconsideration denied, EEOC Request No. 05A10914 (Oct. 1, 2001). As such, we AFFIRM the Agency's final order adopting the AJ's finding that Complainant did not establish that the Agency discriminated against her based on her race, sex, or age.

#### Disability Discrimination

In order to establish that Complainant was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability; (2) she is a qualified individual with a disability; and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance). "The term 'qualified,' with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such 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).



An agency is required to make reasonable accommodation to the known physical and mental limitations of a qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. See 29 C.F.R. §§ 1630.2(o), (p).

We find that the evidence supports that Complainant has a disability. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii). Complainant's September 14, 2010 medical document provides that she has impairments that substantially limit a major life activity. Among other things, Complainant is "extremely impaired relative to visual processing." Agency Motion for Summary Judgment, Exhibit 22.

Complainant challenges the AJ's finding that she was not a qualified individual with a disability based on her inability to perform the essential functions of the Sales/Services Distribution Associate position, with or without a reasonable accommodation. We agree that the AJ erred because the term "qualified individual with a disability," with respect to employment is defined as a disabled person who, with or without a reasonable accommodation, can perform the essential functions of the position held *or desired*. 29 C.F.R. § 1630.2(m). The AJ erroneously limited the analysis to essential functions of the Sales/Services Distribution Associate position to conclude that Complainant was not qualified.

The term "position" is not limited to the position held by the employee, but also includes positions that the employee could hold as a result of reassignment. See Hampton v. U.S. Postal Serv., EEOC Appeal No. 01986308 (Jul. 31, 2002). Therefore, in determining whether an employee is a qualified individual with a disability, an agency must look beyond the position which the employee presently encumbers. Id. In this case, Complainant held many positions over the course of her career, prior to her involuntary reassignment to the Sales/Services Distribution Associate position, and there is evidence that she was able to perform the essential functions of a number of other positions with the Agency. The 1990 Certification confirmed that Complainant "has the ability to perform the duties of the position," and she "is qualified to do the work without hazard to self or others," of the Mail Handler position. Agency Motion for Summary Judgment, Exhibit 2. Accordingly, we find that Complainant is a qualified individual with a disability.

Complainant further argues that the AJ failed to note that the Agency did not demonstrate that learning a scheme was an essential function, since passing a scheme test was no longer a requirement, or that waiving a scheme test or permitting Complainant to rely on the Alpha Chart posed an undue hardship.

The record shows that Complainant was allowed to use scheme and Alpha Charts during training, and they were available near the distribution cases; in the parcel throwing areas; and at the window for employees to utilize if they had questions. Supplemental ROI at 41-3.

However, even if the Agency waived the scheme test and allowed Complainant to use the Alpha Charts while working scheme mail, Complainant's medical provider averred that she "does not possess the cognitive tools to pass this test nor to complete this specific type of work...This impairment has no remedy, nor does it have an accommodation as the work demands were demonstrated and reported" and that Complainant's impairments, as related to these tasks, ranges from "severe to extreme." Agency Motion for Summary Judgment, Exhibit 22. Complainant's medical document clearly shows that there was no available accommodation for her disability that would enable her to perform the essential functions of the Sales/Services Distribution Associate position that required scheme skills. Complainant's Psychologist added that Complainant had been able to function in her previous assignments, and that she "clearly should be placed in a work assignment where she can repeat her command of job tasks." Id.

The Commission has long held that reassignment is the reasonable accommodation of last resort and is required only after it has been determined that there are no effective accommodations that will enable Complainant to perform the essential functions of her current position, or all other reasonable accommodations would impose an undue hardship. See Enforcement Guidance. Here, the Agency acknowledged that there were no available accommodations and considered a reassignment. The Agency raised two options of a PTF Mail Handler and PTF Letter Carrier positions with Complainant. ROI at 71.

However, the record shows that Complainant's former representative informed the DRAC that the offer of a PTF Mail Handler position would be a "demotion in pay" since Complainant was a full-time Level Six employee, and a PTF position would provide no guarantee of working forty hours per week. Supplemental ROI at 174. Complainant's former representative suggested other vacant funded full-time positions that the DRAC refused to consider. Instead, the DRAC responded that they did not have to consider the positions, and while they were vacant and funded, they were not available to Complainant. Supplemental ROI at 174. While the Commission previously ordered the Agency to include evidence on the possibility of reassignment as a reasonable accommodation in the supplemental investigation, the Agency inexplicably failed to obtain an affidavit from any DRAC member to provide testimony regarding the reassignment search for Complainant. The Supplemental ROI only contained affidavits from Complainant's management chain, who were not involved in the reassignment search. The original ROI also lacks an affidavit from a DRAC member.

While the Supplemental ROI contains some documents related to the reassignment search, no Agency official disputed that the DRAC refused to consider the vacant funded positions proposed by Complainant's former representative. An employer must reassign an employee to a vacant position that is equivalent in terms of pay, status, or other relevant factors (e.g. benefits, geographical location), if the employee is qualified for the position.

If there is no vacant, equivalent position, the employer must reassign the employee to a vacant lower-level position for which the employee is qualified. See Enforcement Guidance. Here, the Agency's offers of PTF positions were not equivalent to Complainant's full-time position, and it did not show that there was no vacant equivalent position. Further, there is no evidence that reassigning Complainant into a full-time vacant, funded position would have been an undue hardship. In sum, we find that the Agency did not offer effective accommodations when they only offered Complainant PTF positions because she held a fulltime position. ROI at 166. See Augustine V. v. U.S. Postal Serv., EEOC Appeal No. 0120180469 (Jul. 24, 2019); Demarcus I. v. U.S. Postal Serv., EEOC Appeal No. 0120171336 (Sept. 21, 2018). The Agency violated the Rehabilitation Act when it failed to offer Complainant an effective reasonable accommodation, without a showing of undue hardship, and instead, terminated her employment.

Accordingly, we REVERSE the Agency's final order adopting the AJ's finding that Complainant did not establish disability discrimination.

Where a discriminatory practice involves the provision of a reasonable accommodation, damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for a disability. See 42 U.S.C. § 1981a(a)(3); and Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). Here, the DRAC engaged in discussions with Complainant about a reassignment, but it failed to respond to Complainant's former representative's concerns that a PTF position would not guarantee full-time employment, and it affirmatively refused to consider other vacant funded positions, which does not demonstrate a good faith effort by the Agency. As such, we find that Complainant is entitled to submit a claim for compensatory damages in addition to her entitlement to other remedies.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final order adopting the AJ's findings on Complainant's race, sex, and age claims and REVERSE the Agency's final order adopting the AJ's finding of no disability discrimination.

### ORDER (C0618)

The Agency is ordered to take the following remedial action:

1. The Agency will rescind the November 22, 2010 removal notice, if it has not already done so, within 60 days of the date this decision is issued.
2. Within 60 calendar days of the date this decision is issued, the Agency shall pay Complainant any backpay still owed from December 25, 2010, through April 23, 2011, with interest and other benefits due, pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate with the Agency's efforts to compute the amount of backpay and benefits due, and she shall provide all relevant information requested by the Agency. If there is a

dispute regarding the exact amount of backpay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within 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."

3. After the Agency has calculated and paid Complainant's back pay award, Complainant shall have 60 calendar days following the end of the tax year in which the final payment is received to calculate the adverse tax consequences of any lump sum back pay awards, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have 60 calendar days to issue Complainant a check compensating her for any adverse tax consequences established, with a written explanation for any amount claimed but not paid.
4. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, attorney's fees, and costs, if any, for the Agency's failure to accommodate and termination of Complainant's employment on December 25, 2010. The Agency shall allow Complainant to present evidence in support of her compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, attorney's fees, and costs, no later than 30 days after the completion of the investigation.
5. Within 90 days of the date this decision is issued, the Agency shall provide four (4) hours of interactive EEO training to the DRAC committee members who were involved in Complainant's reasonable accommodation request, with an emphasis on the Agency's obligation to properly engage in the interactive process and offer effective reasonable accommodations to qualified individuals with disabilities.
6. Within 60 days of the date this decision is issued, the Agency shall consider taking appropriate disciplinary action against the DRAC committee members who were involved in Complainant's reasonable accommodation request. 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 employment, then the Agency shall furnish documentation of their departure date(s).
7. Within 30 days of the date this decision is issued, the Agency shall post notices in accordance with the paragraph below.

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 evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Tempe Main Post Office in Tempe, Arizona 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 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

July 24, 2023  
Date