



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

[REDACTED]  
Mike T.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2021001024

Agency No. 200P-X002-2018102031

**DECISION**

On November 16, 2020, 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 October 16, 2020, final decision concerning his 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

During the period at issue, Complainant worked as an Attorney, GS-0905-14, at the Agency's Greater Los Angeles Veteran Affairs Medical Center in Los Angeles, California.

On February 6, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Iran), sex (male), religion (secular

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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.

Muslim), color (brown), disability (Post Traumatic Stress Disorder), and reprisal for prior protected EEO activity<sup>2</sup> when:

1. From July 1, 2017, through December 22, 2017, management delayed issuing Complainant his annual performance appraisal/rating of record;
2. Beginning on July 1, 2017, and ongoing, management failed to provide a reasonable accommodation to Complainant thereby causing him to take leave under the Family and Medical Leave Act (FMLA); and
3. On or about December 20, 2017, the Deputy Executive Director, Office of General Counsel, denied Complainant's requests for reasonable accommodation and instead informed him that he needed to be reassigned.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, on October 16, 2022, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), finding no discrimination.

The instant appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant, through counsel, argues that the Agency unreasonably delayed processing his November 27, 2017, request for reasonable accommodation when it did not reassign Complainant until June 6, 2018. Complainant argues that a delay of this length created a failure to accommodate. Complainant further states that the cause of the delay falls solely on the Agency.

In response, the Agency contends that Complainant has abandoned claim 1, noting that Complainant's appeal addresses only claims 2 and 3. The Agency further contends that Complainant raises no new arguments on appeal, and that the statement of facts proffered by Complainant is "erroneous" and omits material facts.

### STANDARD OF REVIEW

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).

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<sup>2</sup> Complainant checked the "LGBTQ" box under basis, but he did not raise an allegation or present evidence bearing on LGBTQ status.

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”).

### ANALYSIS AND FINDINGS

#### *Delay in Issuing Performance Evaluation – (Claim 1)*

As an initial matter, we note that the Commission has the discretion to review only those issues specifically raised in an appeal. See EEO MD-110, at Chap. 9, § IV.A.3. On appeal, Complainant does not address the Agency’s finding of no discrimination regarding claim 1 (delay in issuing his performance evaluation). Therefore, we will not address this claim.

#### *Reasonable Accommodation – (Claims 2 and 3)*

Under the Commission's regulations, 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. 29 C.F.R. §§ 1630.2(o) and (p). To establish that he was denied a reasonable accommodation, Complainant must show that: (1) he is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) he is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation. Id.

Here, the record supports a finding that Complainant is a qualified individual with a disability. Complainant suffers from PTSD following combat exposure. The condition is chronic, symptomatic, and partially disabling. Records show that, even with treatment, his condition is subject to acute episodes of worsening that are temporarily totally work-disabling. His PTSD is exacerbated by litigation work. Complainant testified that his request for reasonable accommodation was based on recommendations from Agency and non-Agency doctors.

Complainant first requested a reasonable accommodation in November 2016 by submitting an Agency Form VA0857e. In early February 2017, the Agency requested further medical documentation, which Complainant provided. Complainant’s physician stated that Complainant required non-litigation work. It was not until April 7, 2017, that Complainant met with the Deputy Executive Director (DED) regarding reassignment. The DED had Complainant placed with the Torts Law Group (TLG).

Complainant was assigned to a position that still had considerable litigation work. The DED testified that she spoke with Complainant and was aware of his limitations and that he “couldn’t do litigation.” ROI at 113. The DED’s testimony confirms that she was aware that the assignment to the TLG still consisted of litigation work in the form of litigation support. There was nothing in the Complainant’s medical documentation to suggest that he could perform litigation-adjacent or indirect litigation work. On November 27, 2017, Complainant emailed the Executive Director, Management, Planning and Analysis (EDMPA) and the DED that his work in the TLG still consisted of litigation work and was not an effective reasonable accommodation.

On December 1, 2017, a Local Reasonable Accommodations Committee Human Resources Specialist (ER/LR) emailed Complainant and advised him that his reasonable accommodation request could not be located and would be considered closed, and that he would need to resubmit Form VA0857a to continue his request for accommodation. ROI at 202. It was not until February 2018 that an interim accommodation was granted, removing litigation support duties from Complainant. The fact that there was no action taken by the Agency regarding the ineffectiveness of Complainant’s reasonable accommodation for two and a half months was, in effect, a denial of reasonable accommodation. Additionally, the new reasonable accommodation request form indicated, inexplicably, that this was not a “time sensitive” matter according to the Agency official handling the matter.

On March 13, 2018, ER/LR proposed a contracts law position. But this was not an actual offer because approval by the Office of General Counsel was still needed. Further, ER/LR required documentation from Complainant’s doctor that this new position would be an effective accommodation, despite already having Complainant’s medical documentation stating his need for non-litigation work. Complainant was not advised that reasonable accommodation request was granted, in the form of reassignment to the contract law position, until May 31, 2018. He accepted the reassignment that same day. ROI at 126-127. Complainant was reassigned on June 6, 2018.

Additionally, Complainant alleged that the Agency’s unreasonably delayed implementation of his reasonable accommodation forced him to use FMLA leave. In the Agency’s decision, it is stated that Complainant used FMLA leave between February 20 and April 2, 2018. The record supports that Complainant used FMLA leave from March 8, 2017, through March 15, 2018. ROI at 199-200. There are no records showing what, if any, FMLA leave and other leave Complainant used after March 15, 2018. Complainant failed to respond to the question regarding FMLA in his affidavit. On appeal, Complainant does not specifically address what FMLA leave may be related to his delayed reasonable accommodation. We find that the record is incomplete regarding how much FMLA leave Complainant’s used that is related to the delay in providing his reasonable accommodation. We remand this claim back to the Agency for further processing as indicated in our Order below.

The Agency took more than nineteen months from when Complainant first requested a non-litigation position to finally place him in a position that aligned with his medical restrictions.

Additionally, the Agency required Complainant to resubmit his reasonable accommodation request and additional medical documentation to support the same reasonable accommodation request: non-litigation work. The Agency's extreme delays, as well as initially assigning Complainant work that was clearly outside of his documented medical restrictions is demonstrative of failing to provide Complainant with an effective reasonable accommodation, in good faith. Complainant therefore may be entitled to compensatory damages. We will therefore order the Agency to conduct a supplemental investigation and issue a final decision on damages.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, our determination is as follows: we AFFIRM the Agency's finding of no discrimination with regard to the delay in rating (claim 1). We REVERSE the Agency's finding of no violation of the Rehabilitation Act (Claims 2 and 3). We REMAND Claims 2 and 3 to the Agency in accordance with the ORDER below.

### ORDER

1. Within ninety (90) calendar days from the date this decision is issued, the Agency shall conduct a supplemental investigation into Complainant's entitlement to compensatory damages regarding the Agency's failure to timely process Complainant's reasonable accommodation request and issue a decision on compensatory damages thirty (30) days after the investigation is completed.
2. Within ninety (90) calendar days from the date this decision is issued, the Agency shall calculate the amount of annual and sick leave Complainant used pursuant to FMLA and restore all such leave taken by Complainant while he awaited resolution of his reasonable accommodation request, from the February 20 through April 2, 2018.
3. Within ninety (90) calendar days from the date of this decision, the Agency will provide DED and ER/LR a minimum of eight (8) hours of in-person or interactive virtual EEO training focusing on processing reasonable accommodation requests and the Agency's responsibility to timely respond to these requests.
4. The Agency shall consider disciplining DED and ER/LR. The Commission does not consider training to constitute disciplinary action. The Agency shall issue a report to the Compliance officer, providing whether it proposed discipline. If the Agency decides not to issue any disciplinary action, it shall set forth the reason(s) for its decision. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.

POSTING ORDER (G0617)

The Agency is ordered to post at its **Greater Los Angeles Veteran Affairs Medical 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 (H0610)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/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 this decision becoming final. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999).

**If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.**

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

### STATEMENT OF RIGHTS - ON APPEAL

#### RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the agency.

Requests for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the request for reconsideration.** The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



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Carlton M. Hadden, Director  
Office of Federal Operations

September 29, 2023

Date