



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

[REDACTED]
Terrence F.,¹
Complainant,

v.

Deb A. Haaland,
Secretary,
Department of the Interior
(National Park Service),
Agency.

Appeal No. 2022003476

Hearing No. 570-2021-01134X

Agency No. DOI-NPS-21-0050

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 May 12, 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 was employed by the Agency as a Laborer/Motor Vehicle Operator at the Agency's National Military Park in Vicksburg, Mississippi. Complainant began working February 16, 2020 and was subject to a one-year probationary period. Report of Investigation (ROI) at 352. Complainant held a Career Seasonal position and only worked from November through April, if there were projects available. ROI at 282.

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.

Complainant averred that on or about September 18, 2020, he requested light duty because he was unable to lift or carry items over ten pounds, and he was restricted from shoveling or laying on his back, due to his medical condition (costochondritis). ROI at 105-6, 103. Complainant's first-line supervisor ("Supervisor") found simple duties until Complainant was furloughed in October. ROI at 228.

Complainant testified that on October 8, 2020, the Supervisor suggested that he resign during a meeting to discuss Complainant's performance evaluation. Complainant averred that he informed the Supervisor that he experienced pain and was receiving medical treatment, and he hoped to be cleared of his medical restrictions by November 9, 2020. Complainant attested that the Supervisor responded that if Complainant was not better by then, he should resign because he would no longer be needed. Complainant Deposition at 28-31.

Complainant and his team returned from furlough on or about November 9, 2020, to work on special projects. Upon his initial return to work, Complainant was able to perform the measuring tasks. ROI at 185, 233. On December 10, 2020, the Facility Manager assigned Complainant temporary administrative duties while they engaged in the interactive process for his reasonable accommodation request. Complainant requested administrative, janitorial, and landscaping duties as accommodations. ROI at 185, 106.

Complainant submitted a document from his physician, dated December 21, 2020, noting which tasks that Complainant was able to perform. For example, Complainant was unable to load and unload supplies and materials from trucks, trailers, or dollies; properly or safely use common hand tools and light power tools; or dig ditches or trenches. Complainant's physician noted that the restrictions were through January 25, 2021. ROI at 666-9. Complainant was subsequently placed on leave without pay (LWOP) because the Agency had no work for him. ROI at 188.

On January 25, 2021, Complainant emailed the Facility Manager and asked when he should report back to work. The Facility Manager requested that Complainant submit clearance from his doctor of his light duty restrictions. Complainant responded that there were duties that he could perform and that the Facility Manager had documentation from his physician of the duties he could perform. ROI at 661-2, 220-2.

On February 5, 2021, the Agency issued Complainant a Notice of Termination During Probationary Period. The Acting Superintendent noted that the Facility Manager recommended Complainant's termination after he requested medical documentation to clear Complainant's return to work, but as of February 5, 2021, Complainant had not provided documentation. ROI at 315-18.

On February 7, 2021, Complainant filed an EEO complaint alleging that the Agency subjected him to a hostile work environment, failure to accommodate and disparate treatment based on disability, as well as reprisal for prior protected EEO activity, when:

1. during the first week of January 2021, the Supervisor disclosed Complainant's medical information.
2. on September 18, 2020, the Supervisor denied Complainant's request for "light duty" restrictions based on his medical condition.
3. on October 8, 2020, the Supervisor suggested that Complainant resign from his position due to his medical condition.
4. on November 4, 2020, the Supervisor ordered Complainant not to report to work until his physician released him from light duty limitations.
5. on December 23, 2020, the Facility Manager placed Complainant on LWOP until January 25, 2021; and
6. on February 8, 2021, the Facility Manager terminated Complainant's employment.

After its investigation into the complaint, the Agency provided Complainant with a copy of the ROI and notice of right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion for a decision without a hearing.

The Agency contended that Complainant was not a qualified individual with a disability because he was unable to perform the essential functions of his position. Specifically, Complainant's December 21, 2020, medical document stated that he was unable to do a "vast amount" of his essential functions. Agency Motion for Summary Judgment at 14. However, assuming, arguendo, that Complainant was a qualified individual with a disability, the Agency asserted that it properly engaged in the interactive process. It sought additional medical information from Complainant to clarify his restrictions in December 2020, and Complainant's physician noted that Complainant's restrictions were through January 25, 2021. As such, the Agency determined that it was unable to accommodate Complainant.

Complainant requested to return to work on January 25, 2021, and he was instructed to submit medical documentation clearing him from light duty. The Agency contended that Complainant's failure to provide medical documentation ceased the interactive process. Since the Agency could not retain an employee who was unable to perform the essential functions of his position, the Agency terminated his employment during his probationary period. The Agency argued that Complainant could not meet his burden to show a genuine issue of material fact, and it requested that the AJ grant its Motion for Summary Judgment.

Complainant opposed the Agency's motion. Complainant contended that he was threatened with reprisal during the meeting on October 8, 2020, when the Supervisor stated that he would no longer need Complainant due to his medical condition. Complainant also argued that the Facility Manager displayed retaliatory animus when he stated that he did not appreciate Complainant making false statements. Complainant further asserted that his EEO complaint was pending when he was denied an accommodation; placed on LWOP; denied his return to duty; and fired. As such, Complainant requested that the Agency's motion for a decision without a hearing be denied.

The AJ subsequently issued a decision by summary judgment in favor of the Agency, concluding that there were no material facts in dispute.

The Agency issued its final order adopting the AJ's finding that Complainant failed to prove discrimination as alleged. The instant appeal followed.

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").

Decision by Summary Judgment

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).

After a careful review of the record, we find that the AJ erred when concluding that there was no genuine issue of material fact in this case. On appeal, Complainant opposes the Agency's contentions, which were adopted by the AJ, that Complainant was not a qualified individual with a disability; the Agency engaged in the reasonable accommodation process and provided legitimate, nondiscriminatory reasons for its actions; Complainant did not establish the elements of a hostile work environment; and that he cannot prove pretext.

We find that there is a genuine dispute of material facts regarding Complainant's medical restrictions in January 2021. Complainant contends that his medical restrictions were lifted on January 25th and the issue became moot. Complainant Appeal Brief at 13. Complainant testified that his medical document noted that his restrictions “would end on January 25, 2021, and that was it.” Complainant Deposition at 64. However, we find that the record reveals a genuine dispute related to the medical restrictions, if any, Complainant had when he expected to return to work from LWOP on January 25, 2021.

The Facility Manager explained that Complainant informed him that he had scheduled a doctor's appointment on January 25, 2021, to see if his conditions were permanent. ROI at 195. On January 25, 2021, the Facility Manager asked if Complainant received medical clearance and requested a status of his restrictions, and Complainant responded that there were duties that he could perform, and the Facility Manager had “documentation from [his] physician for the duties [Complainant] can perform.”

Complainant added that his “physician has allowed [him] to perform certain tasks that are in [his] position description.” ROI at 661, 663. Complainant did not notify the Facility Manager that he no longer had any medical restrictions, and a fair reading of his emails show that his return to work would be under the same conditions.

Complainant did not submit medical documentation from his doctor’s appointment on January 25, 2021. As such, we find that further evidence is needed regarding any medical restrictions that Complainant may have had at the end of January 2021, to enable a factfinder to determine whether Complainant was able to perform the essential functions of his position prior to his removal in February 2021.

Further, we find that additional evidence is necessary for Complainant’s harassment claims. Complainant testified that the Facility Manager stated that he “didn’t appreciate the comments and false statements [Complainant] made about [the Supervisor],” and Complainant “assum[ed] that [the Facility Manager’s] talking about the claims” made against the Supervisor in Complainant’s EEO complaint.² Complainant Deposition at 43. However, the record is not adequately developed for summary disposition because it lacks a response from the Facility Manager.

Complainant also alleged that, during a discussion about his performance evaluation on October 8, 2020, the Supervisor stated that Complainant should resign if he did not heal from his medical condition, and that Complainant’s age made it hard for him to believe that Complainant had a medical condition. Complainant Deposition at 29-30. The Supervisor admitted that he suggested Complainant may want to look at the possibility of resigning due to concerns for his health, but he asserted that it was Complainant who stated that he had a lot of health issues at a young age and could not figure out why. ROI at 232, 234. We find that a hearing is essential for an AJ to evaluate the Supervisor’s credibility regarding his response that it was Complainant who made the statement about his own age and health condition.

In addition, we find that the Supervisor’s admission that he stated that Complainant should resign if he did not heal from his medical condition was not viewed in the light most favorable to Complainant when the AJ adopted the Agency’s motion for summary judgment. In its motion, the Agency only considered Complainant’s protected EEO activity to be the current EEO complaint, initiated on November 9, 2020,³ and not his requests for a reasonable accommodation.

² Complainant did not raise this allegation until his deposition. To the extent that Complainant claims this as a separate incident of retaliatory harassment, as opposed to evidence of a retaliatory motive, he may wish to file a motion to amend to include this additional incident.

³ Complainant testified that his reprisal claim was based on his EEO activity that occurred on November 9, 2020. ROI at 104, Complainant Deposition at 82-3.

It is well established that requesting a reasonable accommodation is protected EEO activity. See EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, Sect. II.A.2.e (Aug 25, 2016). As such, we find that further examination is needed regarding this incident as part of Complainant's retaliatory harassment claim.

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 EEO MD-110, 7-1; 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 her 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 for this complaint.

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 action 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 is directed to submit a renewed hearing request on Complainant's behalf, upload the complaint file, and a copy of this appellate decision, to the Hearings Unit at EEOC's Birmingham District Office. 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:



Carlton M. Hadden, Director
Office of Federal Operations

November 7, 2023

Date