



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

[REDACTED]
Carroll R.,¹
Complainant,

v.

Richard V. Spencer,
Secretary,
Department of the Navy,
Agency.

Appeal No. 0120170064

Agency No. DON-16-4523A-00486

DECISION

On September 20, 2016, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's August 17, 2016, final decision (FAD) 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. For the following reasons, the Agency's FAD is REVERSED, and the complaint is REMANDED for further proceedings.

ISSUES PRESENTED

Did Complainant prove by a preponderance of the evidence that he was subjected to disability discrimination when Agency managers did not allow him to take a polygraph examination which was required for him to remain in his position as a Mechanical Engineer with the Ocean Engineering department?

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mechanical Engineer at the Ocean Engineering (OE) department at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility in Bremerton, Washington. Complainant had obtained a transfer from the

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.

Agency's Air Systems Branch. FAD, p 1. At the time of his transfer, Complainant was being treated for multiple sclerosis (MS), with which he had been diagnosed in 2012. ROI, p. 198.

Complainant was required to take a polygraph test for the position and was scheduled to do so on September 22, 2015. ROI, p. 7. However, the Polygraph Examiner assigned to conduct the polygraph declined to administer the test based on Complainant stating that he had a medical condition. ROI, p. 7. The Polygraph Examiner believed that medications Complainant was taking could interfere with polygraph results. FAD, p. 3. The Polygraph Examiner gave Complainant a standard letter for his doctor to complete and return. ROI, p. 7.

On September 22, 2015, Complainant informed his manager, the Supervisory General Engineer (S1), about what had occurred, mainly that the Polygraph Examiner would not administer the polygraph because of medications associated with Complainant's medical condition. ROI, p. 217. S1 was aware that Complainant sustained "nerve damage while in the Navy" but he did not know of Complainant's exact medical condition of MS at the time. ROI, p. 216. The Security Specialist stated that S1 informed him about events surrounding Complainant not being able to take the polygraph. ROI, p. 224.

Complainant's doctor drafted a letter dated November 11, 2015, stating that "he was unable to find any published information in peer reviewed literature on the effect of MS on the validity of polygraph testing." ROI, p. 151. Further, the doctor stated that he had "no evidence that MS or the medication used by [Complainant] for MS treatment, either affect or do not affect the validity of polygraph results ... I have no reason to believe that polygraph testing, per se, is contraindicated by his having MS." *Id.* Finally, the doctor stated that Complainant's condition has been "under excellent control since he started his current treatment in September 2012, without evidence of clinical relapses" ROI, p. 139. The doctor stated that, if the Agency was considering removing Complainant from his position, careful consideration should be given to the fact that Complainant's condition was under excellent control. *Id.*

According to S1, Complainant's doctor did not provide a "yes or no" answer in his letter regarding whether Complainant could take the polygraph. ROI, p. 217. Therefore, he told Complainant that he would pay Complainant's salary until he found a different job. ROI, p. 218.

The Polygraph Examiner stated that he "did not know why [the Security Specialist] and/or security just did not permit the Complainant to take the polygraph after receiving the doctor's letter. I told them that if the Complainant's doctor did not say the Complainant was not able to take the polygraph and (sic) they needed to give the Complainant the opportunity to let the process play out." ROI, p. 233. The Polygraph Examiner continued, "The way I took it was that the doctor was being neutral and I felt the Complainant could be tested." *Id.*

Complainant decided to move back to his previous department at the Air Systems Branch. ROI, p. 6.

On February 9, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (multiple sclerosis) when, on November 23, 2015, Complainant was informed that he would not be granted a polygraph waiver which denied him the opportunity to be employed by Ocean Engineering (OE).

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a FAD pursuant to 29 C.F.R. § 1614.110(b). Therein, the Agency concluded that Complainant did not prove that the Agency had subjected him to disability discrimination, as alleged.

CONTENTIONS ON APPEAL

Complainant contends that he requested reasonable accommodation for his polygraph test in the form of a waiver, but that the Agency did not allow him a waiver. Complainant contends that he can prove that the Agency's claim that he could not be granted a waiver was pretext for discrimination because when the wait times for taking a polygraph are lengthy the Agency allows individuals who have not taken a polygraph to have access to classified information. Further, Complainant contends that the FAD's conclusion that his doctor advised that he should not take the polygraph is incorrect. Complainant explained that his doctor's letter stated that he (the doctor) could not speculate on whether Complainant's multiple sclerosis would interfere with the polygraph. Complainant contends that the Ocean Engineering department made the decision not let him take the polygraph.

The Agency did not offer contentions on appeal.

ANALYSIS AND FINDINGS

Disparate treatment

Complainant must satisfy a three-part evidentiary scheme to prevail on a claim of disparate treatment discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, Complainant must establish a *prima facie* case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Second, the burden is on the Agency to articulate a legitimate, nondiscriminatory, reason for its actions. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Third, should the Agency carry its burden, Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

Complainant can establish a *prima facie* case of disability discrimination by establishing that: (1) he is an individual with a disability; (2) he is a qualified individual with a disability; and (3) he

was subjected to an adverse personnel action under circumstances giving rise to an inference of disability discrimination. See Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981).

Complainant established that he is an individual with a disability in that he has multiple sclerosis. Multiple sclerosis is an autoimmune condition where the immune system causes nerve damage. ROI, p. 192. According to Complainant, his multiple sclerosis is a permanent condition. ROI, p. 192. Complainant could perform the essential functions of the Mechanical Engineer position with the Ocean Engineering department. Complainant previously performed duties of a Mechanical Engineer with the Agency's Piping Systems division prior to his transfer to the position in question with the Ocean Engineering department. Complainant was subjected to an adverse personnel action in that he was not permitted to take a polygraph to remain in the Ocean Engineering department. Complainant was notified that he should look for a new job.

The Agency stated legitimate, nondiscriminatory, reasons for not allowing Complainant to take a polygraph examination. Management explained that a polygraph was a requirement for all new employees of the Ocean Engineering department. Management further explained that there was no waiver of polygraphs for employees, but that, in some circumstances, employees who later developed medical conditions were not made to take new polygraphs; but these employees all had to take initial polygraphs. Complainant disclosed to the individual administering the polygraph that he was under medication for an undisclosed condition, and he was instructed to obtain clearance from his doctor to take the polygraph. Other individuals in past years who disclosed either a medical condition or medication to the polygraph examiner were made to obtain medical clearance from their doctor, and were allowed to take the polygraph. However, according to the Agency, Complainant's doctor did not clear him for the polygraph. Management explained that the main concern was that Complainant's medication would cause false inputs. Depending on what Complainant disclosed, it could cause him to lose his employment with the government altogether. This explanation is sufficient to meet the Agency's burden of proof under Burdine, supra.

We find, however, that Complainant has demonstrated that the Agency's legitimate, nondiscriminatory, reasons were pretext for disability discrimination. While the polygraph examiner declined to administer the polygraph due to concerns that the medication Complainant was taking would interfere with the polygraph, Complainant followed through with instructions that he should obtain a letter from his doctor clearing him to take the polygraph. The letter from Complainant's doctor explained that "[he] was unable to find any published information in peer-reviewed literature on the effect of MS on the validity of polygraph testing." ROI, p. 151. Further, the doctor stated that he had "no evidence that MS or the medication used by [Complainant] for MS treatment, either affect or do not affect the validity of polygraph results ... I have no reason to believe that polygraph testing, per se, is contraindicated by his having MS." ROI, p. 151. The doctor explained that Complainant's MS was under excellent control. ROI, p. 151. However, despite this letter, managers determined that Complainant would not be allowed to take the polygraph because Complainant's doctor had not provided a simple "yes" or "no" answer.

According to the Polygraph Examiner, Complainant should have been allowed to take the polygraph. As the Polygraph Examiner explained: “Later [the Security Specialist] told me that he got the letter from the doctor and the letter said nothing, but he did not provide the doctor’s letter to me. [The Security Specialist] could have sent the letter to me but he did not. I did see the letter when I was interviewed by the EEO counselor and I told her after seeing the letter I would attempt to administer a polygraph examination to the Complainant. The letter did not say he could not take the polygraph.” ROI, p. 232.

After receiving the letter, S1 and the Security Specialist decided on their own that Complainant would not be referred to take the polygraph again. Additionally, the Security Specialist stated that he “was upset that [Complainant] would not inform shipyard medical of the (sic) 1) medications he was taking and 2) his medical condition.” ROI, p. 237. The Security Specialist stated that they spoke about “putting himself (primarily) at risk and also his fellow workers.” ROI, p. 237. The comments evince that the Security Specialist had an issue with Complainant’s medical condition and perceived Complainant’s condition to be a risk, in the complete absence of medical evidence to support that conclusion. The Security Specialist and S1 denied Complainant the opportunity to take the polygraph for no reason other than the fact that he has MS.

CONCLUSION

Complainant has proved by a preponderance of the evidence that he was subjected to disability discrimination in not being allowed to take a polygraph examination necessary for him to remain in his role as a Mechanical Engineer with the Ocean Engineering department.² Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed, the Agency’s FAD finding that Complainant was not subjected to disability discrimination is REVERSED. The Complaint is REMANDED for further proceedings consistent with this decision and the Order of the Commission, below.

ORDER

The Agency is ORDERED to take the following actions within **one hundred and twenty (120) calendar days** from the date this decision is issued:

1. Offer Complainant the opportunity to return to his previous position in the Ocean Engineering department;

² To the extent that Complainant requested a “waiver” of the polygraph as a reasonable accommodation, the Agency established that it would be an undue hardship for it to waive the polygraph requirement. The position in question required a top-secret clearance, which in turn involved passing a polygraph examination. As the Agency explained, all new employees to Ocean Engineering were required to take a polygraph. There is no evidence to support a different conclusion.

2. Allow Complainant the opportunity to take a polygraph examination, whether or not he elects to return to the Ocean Engineering department;
3. Conduct a supplemental investigation into compensatory damages for harm caused by the disability discrimination within **90 (ninety) calendar days** of the date this decision is issued. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages, if any, and will provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to the Complainant for the undisputed amount within **30 (thirty) calendar days** of the date the Agency determines the amount it believes to be due, and issue a final agency decision on the issue of compensatory damages;
4. Provide 8 hours of in-person or interactive training to the responsible management officials, S1 and the Security Specialist, on an employer's obligation not to engage in disability discrimination;
5. Consider taking appropriate disciplinary action against the responsible management officials. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s);
6. Post at the Ocean Engineering (OE) department at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility in Bremerton, Washington copies of the notice discussed below.

The Agency shall provide a report of its compliance with this Order to the Compliance Officer referenced below.

POSTING ORDER (G0617)

The Agency is ordered to post at the Agency's Ocean Engineering (OE) department at the Puget Sound Naval Shipyard and Intermediate Maintenance Facility in Bremerton, Washington, 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 (H1016)

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 the date this decision was issued. 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 (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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)

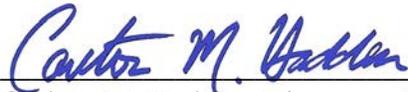
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

February 8, 2019

Date