



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

[REDACTED]
Heidi B.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 0120171750

Agency No. HHS-OS-0051-2014

DECISION

On January 11, 2017, 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 December 5, 2016, final decision 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., and the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k) (1978). For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether the preponderance of the evidence in the record establishes that the Agency denied Complainant a reasonable accommodation for her pregnancy-related condition (lactation).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Specialist, GS-0201-12, in the Agency's Office of the Secretary, Assistant Secretary for Administration, Office of Human Resources, National Capital Region, in Cleveland, Ohio. Complainant's first-line supervisor (S1) was a Supervisory Human Resources Specialist.

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.

In October 2012, Complainant told S1 that she would need space to pump breastmilk when she returned from maternity leave. Complainant also provided S1 with a copy of the Office of Personnel Management's guidance regarding nursing mothers. S1 told Complainant that the Agency would provide Complainant with a space to pump. Complainant gave birth in January 2013 and took maternity leave. While on maternity leave, Complainant reminded S1 that she would need space to pump, and S1 confirmed that the Agency would provide such a space.

Complainant returned from maternity leave in April 2013, and S1 told Complainant that she had arranged for Complainant to use a storage room in another part of the building for lactation. Complainant alleged that she had to take an elevator down from her workspace on the 36th floor to the lobby, take another elevator up to the 13th floor to sign out a key, then take an elevator down to the fourth floor to the designated space. Complainant stated that it took approximately 30 minutes to travel from her workspace to the designated lactation room, pump, and return to her workspace.

According to Complainant, the designated lactation room was small, dusty, and cluttered. Complainant told S1 that she was not satisfied with the designated room. S1 averred that she arranged to have the room cleaned in response to Complainant's concerns, but Complainant stated that the room was still not acceptable. Complainant did not specify whether she informed S1 or anyone else that she was not satisfied with the space after it was cleaned. Complainant provided photographs of the designated lactation room before and after it was cleaned. The photographs depict a somewhat cluttered but clean storage room used to store cubicle divider panels with a table, at least one chair, and a refrigerator available for use by Complainant.

Complainant stated that she occasionally used empty offices of teleworking employees or vacant conference rooms to lactate on an ad hoc basis to avoid using the designated room. According to S1, she permitted Complainant to use vacant offices and conference rooms and did not make alternate arrangements because Complainant did not tell her she had an issue finding an appropriate space to express breast milk. Complainant averred that other Agency employees were permitted to telework full time due to mental conditions or after a family death and suggested that she should have been offered full-time telework as an accommodation. S1 stated that Complainant did not request telework as an accommodation. According to S1, one of Complainant's coworkers teleworked for one week after there was a death in the family. S1 stated that she attempted to be flexible in allowing her subordinates to telework, including by permitting Complainant to telework when she was placed on bed rest in the late stages of her pregnancy.

On September 4, 2014, Complainant filed an EEO complaint alleging, among other issues, that the Agency discriminated against her on the basis of sex (pregnancy-related condition) when beginning in April 2013, she was denied a reasonable accommodation consisting of an appropriate space for lactation.

The Agency did not accept Complainant's reasonable accommodation claim for investigation, but the Agency did accept four separate claims for investigation.² In Heidi B. v. Dep't of Health and Human Services, Appeal No. 0120152303 (June 3, 2016), the Commission ordered the Agency to process Complainant's pregnancy-related reasonable accommodation claim. At the conclusion of the investigation into her reasonable accommodation claim, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that she established that the Agency failed to accommodate her. According to Complainant, the storage room was "dangerously cluttered" and dirty. Complainant states that she arranged to use vacant offices and conference rooms on her own initiative and that the Agency should have made alternate arrangements for her when she expressed her dissatisfaction with the storage room. Complainant suggests that, in addition to full-time telework, the Agency could have allowed Complainant to use the break room or could have temporarily reassigned her to a private office.

The Agency makes no contentions in response to Complainant's appeal.

ANALYSIS AND FINDINGS

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). 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").

The Commission has held that a complainant's status as a nursing mother is protected under the Pregnancy Discrimination Act (Pub. L. 95-955) (hereafter PDA). See O'Brien v. National Security Agency, EEOC Appeal No. 01951902 (May 27, 1997). The PDA requires that an agency treat women affected by pregnancy, childbirth, or related medical conditions the same for all employment related purposes, as other persons not so affected but similar in their ability or inability to do work. 42 U.S.C. § 2000e(k) (1994).

² This appeal solely addresses Complainant's reasonable accommodation claim.

An employee who is lactating “must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions.” See EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, EEOC Notice 915.003, I (A)(4)(b) (rev. June 25, 2015) (Pregnancy Guidance). Discriminating against a woman who is lactating or expressing breast milk violates Title VII and the PDA. EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 430 (5th Cir. 2013). Title VII mandates the provision of a reasonable accommodation for an employee who is lactating. Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) (citing Young v. United Parcel Service, 575 U.S. ___, 135 S. Ct. 1338, 1354 (2015)).

A complainant alleging that the denial of an accommodation for a pregnancy-related condition constituted disparate treatment sex discrimination may state a prima facie case by showing that: (1) she belongs to the protected class; (2) she sought accommodation; (3) the agency did not accommodate her; and (4) that the agency did accommodate others “similar in their ability or inability to work.” Young, 575 U.S. at ___, 135 S. Ct. at 1354. An agency may then seek to justify its refusal to accommodate the complainant by relying on “legitimate, nondiscriminatory” reasons for denying her accommodation. Id. at 1354 (citing, McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)). “That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (‘similar in their ability or inability to work’) whom the employer accommodates.” Id. The complainant may then show that the agency’s reasons are pretextual, which can be done “by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s “legitimate, nondiscriminatory reasons are not sufficiently strong to justify the burden, but rather -- when considered along with the burden imposed -- give rise to an inference of intentional discrimination.” Young, 575 U.S. at ___, 135 S. Ct. at 1354.

Here, we find that Complainant has failed to establish a prima facie case of failure to accommodate her pregnancy-related condition. With respect to the third prong of the prima facie case, Complainant has failed to establish that the Agency failed to accommodate her because the preponderance of the evidence in the record establishes that the Agency provided Complainant with an appropriate space other than a restroom to use to express breastmilk. When Complainant told S1 that the room was dirty, S1 arranged to have the room cleaned. Although Complainant contends that the room was dangerously dirty and cluttered even after it was cleaned, the photographs provided by Complainant show a clean room with sufficient space for lactation purposes. Moreover, there is no evidence in the record that Complainant followed up with S1 or anyone else to notify the Agency that the storage room was not an effective accommodation after it was cleaned. When Complainant decided she preferred to use vacant conference rooms or offices instead of the storage room, S1 permitted her to do so. Therefore, the preponderance of the evidence in the record establishes that the Agency accommodated Complainant’s pregnancy-related condition.³

³ The preponderance of the evidence in the record does not establish that Complainant’s preferred accommodations of full-time telework, assignment to an office, or use of the break room were necessary in order to accommodate her lactation-related needs.

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 decision because the preponderance of the evidence in the record does not establish that discrimination occurred.

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 (S0610)

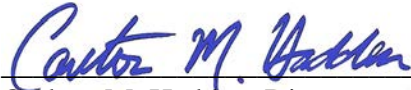
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department

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:



Carlton M. Hadden, Director
Office of Federal Operations

February 28, 2019

Date