



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

[REDACTED]
Jeffrey R.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency.

Appeal No. 0120180058

Hearing No. 480-2013-00475X

Agency No. 4F-967-0006-12²

DECISION

Complainant appeals to the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated August 31, 2017, finding no discrimination regarding his 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. and Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, we MODIFY the Agency's final order finding no discrimination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed as a City Letter Carrier, Q-01, at the Agency's Main Post Office in Honolulu, Hawaii.

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.

² The record indicates that Complainant filed two complaints, Agency Nos. 4F-967-0006-12 and 4F-967-0014-12, which were consolidated for processing and referred to as Agency No. 4F-967-0006-12.

On October 22, 2012, and December 13, 2012, Complainant filed his EEO complaints, which were later consolidated for processing and further amended, alleging discrimination based on disability (stroke, hemiparesis) and in reprisal for prior EEO activity when he was denied a reasonable accommodation during the period January 25, 2012, to April 22, 2015.

Complainant had been employed by the Agency as a City Letter Carrier since 1993. As a Letter Carrier, his duties involved casing and delivering mail.

In April 2011, Complainant had a stroke causing him hemiparesis (muscular weakness or partial paralysis restricted to one side of the body) of the left side of his body. Complainant was on leave under the Family and Medical Leave Act from April 2011, to October 2011, at which time he requested to return to work on light duty.

The record indicates that on September 6, 2011, Complainant underwent Drivers Rehabilitation Evaluation and Training Program. During the evaluation, he drove his personal vehicle that had a spinner knob³ on the steering wheel approximately at the 12 o'clock position. After the evaluation, the Driver Rehabilitation Specialist found Complainant safe to operate a motor vehicle.

In September 2011, Complainant submitted to his then supervisor the evaluation report from his stroke specialist physician (D1). Therein, D1 stated that Complainant was restricted from lifting more than 10 pounds, needed to use a leg brace, and needed a spinner knob, which would allow him to use one hand for steering. He also submitted the Driver Rehabilitation Specialist report stating that he could operate a motor vehicle if he used a spinner knob on the steering wheel.

On September 13, 2011, Complainant submitted a CA-17 form which stated that he was limited to lifting/carrying 5 pounds continuously and 10 pounds intermittently each day for 4 hours and was prohibited from operating machinery.

On September 29, 2011, Complainant received a note from an Agency's District Reasonable Accommodation Committee (DRAC) requesting medical information concerning his accommodation request.

In October 2011, Complainant's first level supervisor (S1), relying on the CA-17 form, returned Complainant to light duty for 4 - 6 hours a day, casing mail and delivering light express mail. Complainant drove a postal vehicle without a spinner knob approximately 2 - 3 hours per day and delivered some mail, including express mail, on his own route.

³ A spinner knob (also referred to as a brodie knob) is a small, independently rotating knob (similar to a door knob) facing the driver that is attached to the outside rim of a steering wheel, and it enables a driver to use one hand for steering.

After his return to work in October 2011, Complainant submitted medical documentation to the Agency's Registered Nurse, Occupational Health Nurse Administrator (OHNA). The OHNA and a Human Resources Generalist were co-chairs of the DRAC.

On November 28, 2011, D1 submitted medical documentation to the DRAC indicting that Complainant should not lift anything over 10 pounds; he was unable to use his left arm for any activities including pushing, pulling, reaching, and typing; he was able to drive with a spinner knob; he would need additional time to perform his tasks; and he would need to wear an ankle-foot orthotic to reduce "foot drag" and falls. Therein, D1 noted that Complainant was extremely motivated and hardworking; and he expressed his strong desire to continue working as long as possible.

On January 19, 2012, Complainant was notified by the DRAC not to drive the postal vehicle which did not have a spinner knob and to go home.

On January 22, 2012, S1, based on the DRAC's recommendation, instructed Complainant not to report to work until further notice.

On January 24, 2012, Complainant submitted to the OHNA a note from his primary care doctor (D2) indicating that he was able to work full-time (8 hours or more per day) and that his lifting restriction was revised.

On January 26, 2012, the DRAC conducted its first interactive session with Complainant. During the session, Complainant informed the DRAC that he was able to drive a postal vehicle with a spinner knob and turn signal extension which allowed their operations from the right side of the vehicle.

On February 23, 2012, Complainant contacted an EEO Counselor, Agency No. 4F-967-0006-12, alleging that he was discriminated against based on disability when on January 22, 2012, S1 told him not to return to work the next day.

On March 5 and 6, 2012, the Agency conducted Complainant's job observation. During the observation, Complainant was not allowed to drive; he was not provided with the vehicle accommodation with a spinner knob; his mail was not counted; and at the beginning, instead of loading the truck (that another carrier drove) with only what he could deliver, he was instructed to load all his route mail and then instructed to remove what he could not deliver. The Agency indicated that Complainant took 2 – 3 hours to make 50 deliveries with about 20 packages not delivered; and it took him more than two hours to case his route and over a half hour to load his postal vehicle. Based on the observation, the DRAC concluded that Complainant would require 12 to 16 hours to deliver his route and thus would need 4 to 8 hours of assistance to deliver the mail on his route.

On March 8, 2012, D1 submitted a note indicating Complainant was now able to lift up to 25 pounds. On March 16, 2012, D2 reported that Complainant was capable of using his left

arm/hand with assistance of his right arm up to 25 pounds of pulling, pushing, carrying, and sorting mail.

On March 29, 2012, during mediation, the parties entered into a settlement agreement resolving Agency No. 4F-967-0006-12. Therein, the parties agreed that Complainant would be provided with light duty; and if the Agency approved the vehicle modification, it would recommend an observation of him performing tasks.

On March 29, 2012, Complainant was returned to work on light duty with reduced hours, 4 to 6 hours per day. He cased his mail but did not drive or deliver the mail on his route.

On April 4, 2012, the Agency's Headquarters Disability and Operations approved and recommended the DRAC to add a spinner knob as long as it could be easily installed and removed by the driver without damage to the vehicle on the days he operated the vehicle.

On April 16, 2012, the Manager of Vehicle Maintenance at the Honolulu Vehicle Maintenance Facility (VMF) informed the DRAC that installing a spinner knob on a postal vehicle was considered a permanent modification.

On May 31, 2012, the DRAC conducted an interactive follow-up meeting with Complainant. During the meeting, Complainant told the DRAC that he could lift up to 25 pounds and suggested a change in the route. On that date, the DRAC issued Complainant a letter denying his reasonable accommodation request for a spinner knob as it was a permanent modification.

On June 22, 2012, the OHNA scheduled a Fitness For Duty (FFD) examination for Complainant but it was canceled. Complainant asked that an FFD be conducted by his own doctor. There is no indication that an FFD was ever conducted.

On July 6, 2012, the OHNA issued Complainant a letter indicating that the DRAC was still working on his request for reasonable accommodation to install a spinner knob on the steering wheel of the postal vehicle.

On July 20, 2012, Complainant contacted an EEO Counselor and on October 22, 2012, he filed a formal complaint, Agency No. 4F-967-0014-12, regarding the denial of his request for reasonable accommodations on July 6, 2012.⁴

⁴ In the complaint, Complainant also alleged discrimination when on June 27, 2012, his claim for unemployment benefits was denied. On January 3, 2013, the Agency dismissed the unemployment benefits claim for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). Since Complainant does not dispute this on appeal, we will not address this claim in this decision.

On August 22, 2012, D1 submitted a note to the Agency indicating that Complainant would need an ankle brace to reduce falls; he could lift up to 25 pounds; he had restriction using his left arm; and he would need a spinner knob.

On September 6, 2012, the DRAC issued its decision that Complainant could not perform the essential functions of his position based on the March 5 – 6, 2012 observation and there was no vacant funded position he could perform with or without reasonable accommodation.

On September 11, 2012, Complainant was told not to report to work. Complainant did not come to work from September 11, 2012, until March 7, 2014.

On September 24, 2012, Complainant notified the Agency claiming that it breached the March 29, 2012 settlement agreement of Agency No. 4F-967-0006-12. Specifically, Complainant indicated that a spinner knob was not a permanent fixture in a postal vehicle and the knob would reasonably accommodate Complainant's driving ability within the Agency's safety standards. Complainant included a document from a certified installer of Hawaii Mobility Concepts on August 9, 2012, regarding a spinner knob. The installer indicated that: a spinner knob was a steering device enabling a driver to use one hand for steering; a turn signal-extender was an easy to use device that allowed operation of the signal function from the righthand side of the steering column; they were installed by a simple clamping system that could be attached and detached by any driver; they could be adjusted to any driver; they were not permanent fixtures; and there would be no impact on other drivers since they were designed to be not obstructive. Complainant also included the manufacturer's brochure showing its phone number and address. The manufacturer's brochure indicates that a spinner knob would leave no permanent damage to a vehicle's steering wheel; and it had a quick-release function that would remove and refit at the touch of a button.

On October 23, 2012, the Manager, Human Resources (HR), confirming the DRAC's September 6, 2012 finding, issued a letter to Complainant indicating that he was not a qualified individual with a disability and the Agency could not provide the requested accommodations.

On December 5, 2012, D1 submitted his letter indicating that Complainant could carry and walk with any object up to 30 pounds, he was able to operate a motor vehicle, and he required a spinner knob on a steering wheel.

On October 1, 2013, D1 reported that Complainant could walk on uneven terrain with a left ankle-foot orthosis, not carrying anything over 75 pounds.

On November 12, 2013, the DRAC asked the VMF Manager to visit Hawaii Mobility Concepts. After his visit, the VMF Manager informed the DRAC that: a spinner knob would cost \$75; Hawaii Mobility Concepts would install the clamp that was used to fasten a spinner knob to the steering wheel and that the spinner knob could be easily removed; the clamp would have to be adhered to the steering wheel correctly to ensure tightness and safety of the actual installation;

and this process (of installing a spinner knob which includes installing a clamp) was not temporary due to proper installation and tools that employee would have to utilize and verify.

In January 2014, Complainant requested additional accommodations such as allowing him to case mail from the ledge, providing him with a new cutter and large rubber bands, and delivering mail from a satchel and a satchel cart.

On January 29, 2014, the Agency, via approval by the VMF Manager and the Safety Manager, ultimately approved the modification of a postal vehicle with a spinner knob and turn signal extension.

On February 24, 2014, the Agency notified Complainant that he would be provided with his recently requested accommodations, including a spinner knob and turn signal extension.

On March 6, 2014, Complainant was required to undergo a pass/fail refresher driver training. From March 7 – 29, 2014, he was required to undergo a trial job observation which was extended until April 12, 2014. During this period, Complainant was provided with his requested accommodations, including a spinner knob. He continued to exceed the projected office and street time on average by 3 hours and 20 minutes.

On April 27, 2014, the DRAC concluded that based on the foregoing observation, Complainant could not efficiently deliver his route. Although he was informed of a couple openings for custodian positions at that time, Complainant expressed that he was not interested in those positions.

On May 5, 2014, Complainant was placed on paid administrative leave via a settlement conference facilitated by an EEOC Administrative Judge. He remained on paid administrative leave until September 6, 2014.

On May 12, 2014, Complainant underwent an FFD examination. After the examination, the FFD physician reported to the OHNA that Complainant could carry up to 45 pounds.

On June 16, 2014, Complainant underwent a Functional Capacity Examination (FCE) using assistive devices, including a splint for the right wrist and a lifting hook to assist with weights exceeding 50 pounds. After the FCE, the FFD physician reported to the OHNA that Complainant had the ability to perform the critical physical demands of the position on that day but recommended a trial period of three months to see if he could continue to perform his position duties.

On August 13, 2014, the DRAC and Complainant had a meeting and he indicated to the DRAC that he wanted to remain as a Letter Carrier.

On February 10, 2015, an arbitrator issued his decision on Complainant's grievance filed on February 5, 2013, finding that management violated the National Agreement when they denied

Complainant his right to work by denying his reasonable accommodation, a spinner knob. The arbitrator ordered management to make Complainant whole for all lost wages and benefits from May 31, 2012 (the grievance incident date), up to the date he is provided a reasonable accommodation. Specifically, the arbitrator stated that although he, the arbitrator, lacked mechanical skills, he installed and removed a spinner knob within five minutes with a screw driver; he has driven cars and trucks with a spinner knob; and a spinner knob was not a piece of equipment that was a permanent revision to a postal vehicle.

On April 22, 2015, Complainant returned to work as a result of the arbitrator's decision. Complainant was provided with his requested accommodations including a spinner knob, turn signal extension, shoulder straps with metal hooks, a satchel, casing from the lead, and rubber bands. As a result of another employee's grievance, Complainant's route was adjusted sometime between February 2015, and when he returned to work. The Agency determined that Complainant's route was previously overburdened by about 45 minutes up until this adjustment. For the first three to four months, Complainant took longer to complete this route but thereafter, he was able to complete his route in eight hours.

After its investigation into the complaint, Complainant requested a hearing before an EEOC Administrative Judge (AJ). On August 24, 2017, the AJ, after a hearing, issued a decision finding no discrimination. Specifically, the AJ indicated that since installing a spinner knob required a tool, i.e., an Allen wrench or screw driver, this was considered a permanent modification to a postal vehicle which was prohibited under Agency policy.

The AJ found that Complainant was not a qualified individual with a disability during the period January 25, 2012, to April 22, 2015, because he could not perform an essential function of the position even with accommodations. Specifically, the AJ determined that since Complainant could not efficiently deliver his route during the March 5 – 6, 2012 observation period and again during the March – April 2014 observation period, he was not a qualified individual with a disability. The AJ further found that Complainant failed to establish that the Agency retaliated against him based on his protected activity or that he was subjected to unlawful harassment.⁵

On August 31, 2017, the Agency issued its final order implementing the AJ's decision. Complainant appeals.

⁵ On February 14, 2015, Complainant filed a motion to amend and/or consolidate a claim of harassment in that he was subjected to harassment when: he was required to undergo a pass/fail refresher driver training on March 6, 2014; he was required to undergo a trial job observation on March 6 to April 12, 2014; on May 27, 2014 the Agency denied his May 12, 2014 request for a special route inspection; he was sent to a May 12, 2014 FFE and a June 16, 2014 FCE; and he was not allowed to return to work after the job observation period. In his January 26, 2017 order, the AJ denied the motion since the issues were not timely raised to an EEO Counselor and they were not previously raised in a timely motion to amend. The AJ however noted that since these events were relevant to and intertwined with the claim at issue, they were already part of the accepted claim.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a de novo standard of review, whether or not a hearing was held.

An AJ's credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive 110, Chapter 9, at § VI.B. (Aug. 5, 2015).

After a review of the record, including arguments and evidence not specifically discussed in this decision, we find that the AJ properly found no reprisal by the Agency. However, we find the AJ improperly found Complainant failed to establish he was discriminated against based on disability.

Reasonable Accommodation

The Rehabilitation Act of 1973 prohibits discrimination against qualified disabled individuals. See 29 C.F.R. § 1630. In order to establish that Complainant 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 a reasonable accommodation. See Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (“Enforcement Guidance”). 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. See 29 C.F.R. §§ 1630.2(o) and (p).

In the instant case, Complainant had a stroke in April 2011, causing him hemiparesis (muscular weakness or partial paralysis restricted to one side of the body) of the left side of his body. He was substantially limited in his ability to lift, carry, walk, and use his left arm. Complainant's medical records indicated that he was restricted from lifting more than 10 pounds, needed to use a leg brace, and needed a spinner knob, which would allow him to use one hand for steering. We find that Complainant was an individual with a disability. See Haygood v. U.S. Postal Service, EEOC Appeal No. 01976371 (April 25, 2000) (a complainant with maximum 15 pounds lifting restriction and restriction on reaching above found to be an individual with a disability).

After establishing that he was an individual with a disability, Complainant must establish that he was a “qualified” individual with a disability. The term “qualified,” with respect to an individual with a disability, means 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). The Interpretive Guidance to the regulations in question further define “essential functions” as “those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.” See Interpretive Guidance to 29 C.F.R. § 1630.2(n). It also states that “the inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards, whether qualitative, nor to require employers to lower such standards.” Id.

The record indicates that the essential functions of a Letter Carrier are casing and delivering mail. Complainant was clearly able to case and deliver mail. The Agency indicated that Complainant was not a “qualified” individual with a disability because he was not able to case and deliver mail efficiently within the projected time. After a review of the record, we find that the Agency failed to provide any evidence that Complainant could not have efficiently case and deliver his mail within the projected time if he was provided with a postal vehicle. Further, when he was finally allowed to drive a postal vehicle with a spinner knob in March 2014, the Agency only gave Complainant a one-month trial period to acclimate his route. At that time, Complainant had not been delivering mail or driving a postal vehicle over two years since January 2012. After a review of the record, we do not find that one month was enough time for Complainant to acclimate and re-familiarize himself with his route driving a postal vehicle with a spinner knob and other accommodations. The AJ indeed noted that Complainant was a “qualified” individual with a disability since shortly after April 22, 2015 (3 – 4 months thereafter), with the reasonable accommodations provided, along with his being able to walk more quickly resulting from his using a new leg brace, he had been able to efficiently case and deliver his route. Based on the foregoing, we find that Complainant was a “qualified” individual with a disability within the meaning of the Rehabilitation Act.

Next, we must determine whether the Agency was unable to provide Complainant with his requested accommodation due to undue hardship. The question of undue hardship arises where an employer asserts that it was unable to provide a requested accommodation because it would have been unduly costly, extensive, substantial, or disruptive, or it would have fundamentally altered the nature of the agency’s operations. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 01A51457 (June 13, 2006); 29 C.F.R. § 1630.2(p). We find that the Agency failed to establish that providing Complainant with his requested spinner knob would have caused undue hardship. Although the Agency initially had a concern that installing a spinner knob would cause damage to a postal vehicle, they provided no evidence to support that argument. Complainant was allowed to drive the vehicle for a month (using the spinner knob) and has made no claim that the vehicle was damaged. Further, there is no evidence that the Agency made any effort to change Complainant’s route as requested. The record is devoid of any evidence that changing Complainant’s route to a different or shorter route, or providing him with street

assistance or auxiliary assistance when he could not complete his route, would have caused the Agency significant difficulty or expense.

The Agency repeatedly failed to provide Complainant with a spinner knob despite his continuously updated medical documentation and his constant requests to be returned to work. It was not until November 2013, over two years after Complainant's initial request for a spinner knob, that the Agency actually researched the feasibility of providing him with a spinner knob. After the research, the Agency determined that it could provide a spinner knob to Complainant. Complainant was not returned to work with his requested accommodations until April 22, 2015. After a review of the record, we find that the Agency violated the Rehabilitation Act by failing to provide Complainant with a reasonable accommodation.

We further find that the Agency violated the Rehabilitation Act by delaying its response to Complainant's request for an accommodation. The Enforcement Guidance provides that an employer should respond "expeditiously" to a request for reasonable accommodation. Enforcement Guidance at Question 10. If the employer and the individual with a disability need to engage in an interactive process, this, too should proceed as quickly as possible. *Id.* Similarly, the employer should act promptly to provide the reasonable accommodation. *Id.* The Commission has held that failure to respond to a request for accommodation in a timely manner may result in a finding of discrimination. See *Denese G. v. Dep't of the Treasury*, EEOC Appeal No. 0120141118 (Dec. 29, 2016); *Complainant v. EEOC*, EEOC Appeal No. 0120070356 (April 18, 2011).

Complainant initially requested a reasonable accommodation in September 2011. At that time, he provided the Agency with his medical report and evaluation for his physical restrictions and asked for a spinner knob which would enable him to drive a postal vehicle with his right hand. Upon the Agency's request for additional medical documentation, Complainant submitted the requested medical documentation in November 2011. The Agency did not engage in an interactive process to discuss Complainant's limitations and accommodations until January 26, 2012, i.e., almost five months after his request for a reasonable accommodation. Further, the Agency did not return him to work with a reasonable accommodation until April 22, 2015, i.e., more than three and half years after his request for a reasonable accommodation. After a review of the record, we find that the Agency did not respond to Complainant's request for an accommodation within a reasonable period time. Therefore, we find that the Agency unnecessarily delayed responding to Complainant's request, and that the delayed response constituted a violation of the Rehabilitation Act. See *Complainant v. Dep't of Def.*, EEOC Appeal No. 0120071893 (Aug. 15, 2008) (finding that management's failure to advise complainant of its decision on his accommodation request for four months constituted an unnecessary delay in violation of the Rehabilitation Act); *Villanueva v. Department of Homeland Security*, EEOC Appeal No. 01A34968 (August 10, 2006), request for reconsideration denied, EEOC Request No. 05A61069 (September 27, 2006) (finding that the agency's six-month delay in processing complainant's accommodation request violated the Rehabilitation Act).

Also, the circumstances of the denial (including the lengthy time period where Complainant had provided information regarding the spinner knob but the Agency had not attempted to validate the information submitted by Complainant) indicate that the Agency did not make a good faith effort to provide a reasonable accommodation. Therefore, Complainant is entitled to compensatory damages as part of his relief. See Alejandrina L. v. Department of State, EEOC Appeal No. 0120152145 (Nov. 16, 2017).

Disparate Treatment

To prevail in a disparate treatment claim such as this, complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he or she was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 804 n. 14. The burden then shifts to the agency to articulate a legitimate, nondiscriminatory reason for its actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Once the agency has met its burden, the complainant bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

This established order of analysis in discrimination cases, in which the first step normally consists of determining the existence of a prima facie case, need not be followed in all cases. Where the agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly to the third step of the McDonnell Douglas analysis, the ultimate issue of whether complainant has shown by a preponderance of the evidence that the agency's actions were motivated by discrimination. See U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Hernandez v. Department of Transportation, EEOC Request No. 05900159 (June 28, 1990); Peterson v. Department of Health and Human Services, EEOC Request No. 05900467 (June 8, 1990); Washington v. Department of the Navy, EEOC Petition No. 03900056 (May 31, 1990).

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Soc. Sec. Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). Specifically, in a reprisal claim, and in accordance with the burdens set forth in McDonnell Douglas, Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318, 324 (D. Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976), and Coffman v. Dep't of Veteran Affairs, EEOC Request No. 05960473 (Nov. 20, 1997), a complainant may establish a prima facie case of reprisal by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected

activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

Assuming *arguendo* that Complainant established a *prima facie* case of reprisal discrimination, we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. Specifically, Complainant alleged that as a result of his February 2012 EEO Counselor contact of Agency No. 4F-967-0006-12 and its subsequent mediation settlement, he was denied his requested equipment and vehicle modification. Complainant also alleged that because of his filing of Agency No. 4F-967-0014-12 on July 20, 2012, his reasonable accommodation request was subsequently denied.

The Agency indicated that Complainant was not provided with his requested accommodation because the VMF Manager notified the DRAC that installing a spinner knob on a postal vehicle steering wheel was considered as a permanent modification which would violate the Agency's policy. And it was not until January 2014, that the VMF Manager and the Safety Manager approved modification of a postal vehicle with a spinner knob and turn signal extension. The Agency also stated that Complainant was not provided with a reasonable accommodation because the DRAC determined that he was not a qualified individual. Complainant has not shown by a preponderance of the evidence that the Agency's actions at issue in this complaint were motivated by reprisal.

Regarding Complainant's harassment claim, the AJ found that Complainant failed to establish that the Agency's actions were based on his disability or in retaliation for his requesting an accommodation or filing and pursuing an EEO complaint. After a review of the record, we find that the Agency properly found Complainant was not subjected to harassment. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

CONCLUSION

We AFFIRM the Agency's final order finding that Complainant has not proven he was subjected to discrimination in reprisal for his filing of EEO complaints and that he has not proven he was subjected to harassment. We REVERSE the Agency's final order finding no discrimination based on disability regarding Complainant's denial of reasonable accommodation claim and REMAND the matter for further action in accordance with the Order herein.

ORDER

The Agency shall take the following actions:

1. Within 60 days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. The Agency shall make payment to Complainant of the back pay due within 60 days from the date of the Agency's

determination of how much back pay is due. The back pay period shall be calculated from January 25, 2012, to April 22, 2015. The back pay award shall be mitigated by the award Complainant received as a result of the February 10, 2015 arbitrator's decision. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within 60 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."

2. Within 90 days of the date this decision is issued, the Agency shall conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and provide him an opportunity to submit evidence of pecuniary and nonpecuniary damages regarding the Agency's failure to provide him with a reasonable accommodation. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under §102 of the Civil Rights Act of 1991 (July 14, 1992) (available at eeoc.gov). Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages and provide all relevant information requested by the Agency. The Agency, within 120 days of the date this decision is issued, shall issue a final Agency decision on the issue of compensatory damages. 29 C.F.R. § 1614.110. The final Agency decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final Agency decision to the Compliance Officer at the address set forth herein.
3. Within 60 days of the date this decision is issued, the Agency shall provide a copy of this decision to the DRAC.

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 the Agency's calculation of back pay and other benefits due Complainant and include evidence that all the corrective actions ordered above have been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Honolulu U.S. Postal Service District facilities, including Honolulu Main Office Carrier Annex and Honolulu Vehicle Maintenance Facility, in Honolulu, Hawaii, 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 (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 CFR § 1614.503(f) for enforcement by that agency.

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 (T0610)

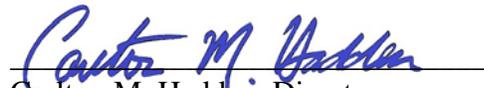
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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:



Carlton M. Hadden, Director
Office of Federal Operations

September 6, 2019

Date