



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

██████████
Joshua F.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs (VA)
Agency.

Appeal No. 0120181309

Agency No. 200J-0609-2017101967

DECISION

On February 26, 2018, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's February 1, 2018 final decision 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

In October 2016, Complainant applied for the position of Motor Vehicle Operator (MVO), WG-07, under Announcement Number MRN-MPA-16-1842369-BU, in the Agency's Health Administration Service at the VA Medical Center (VAMC) in Marion, Illinois.

On May 25, 2017, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the basis of perceived disability (color perception deficiency) when, on January 24, 2017, the Human Resources Officer (HR1) rescinded a tentative offer of employment for an MVO position following Complainant's pre-employment medical examination.² The Agency accepted Complainant's claim for EEO investigation.

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 Complainant's pre-employment physical was on January 5, 2017.

During the EEO investigation, it was established that Complainant submitted a timely application in response to an Agency Vacancy Announcement for a Motor Vehicle Operator (Announcement Number MRN-MPA-16-1842369-BU) which stated, in pertinent part:

The Motor Vehicle Operators serve as part of the Veterans Transportation Program (VTP) team providing safe transportation to Veterans and their caregivers who live in rural areas of the Marion, IL VA Medical Center . . . shuttling to and from approved locations up to a 150 mile radius.

Complainant was tentatively selected for the position pending successful completion of the pre-employment physical examination and a background investigation.

By letter dated January 24, 2017, from the Human Resources Officer (HR1), Complainant was notified that the offer of employment was rescinded “[b]ased on [Occupational Health medical examination] findings, the determination was made that you would not be able to meet the physical requirements for a Motor Vehicle Operator.” This decision was reaffirmed in a letter dated March 14, 2017, from Medical Center Director stating, “[t]he criteria for vision [in VA Handbook 5019, Employee Occupation Health Service, Part II, Appendix A] includes the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber colors.” The Medical Center Director went on to state that Complainant’s physical showed that he did not meet the Agency’s vision requirement for an MVO position.

In his affidavit submitted during the EEO investigation, Complainant stated that his color perception deficiency does not impair his daily life activities or the ability to perform the duties of the MVO position for which he applied. Complainant stated that the colorblindness test administered during his pre-employment examination focused on differentiating shades of colors rather than the ability to recognize red, green, and amber colors in traffic signals or devices. Complainant stated that while the Agency regarded him as colorblind and thus unfit for the driver position, he already held a commercial driver’s license (CDL) and a position as a state mass transit Bus Operator for more than a year. Complainant stated that the Occupational Health Physician (Agency Physician) subjected him to a colorblindness test that it does not give to all applicants. He stated that he and the Agency Physician discussed his vision during the pre-employment examination. Complainant stated, the Agency Physician conducted a test using an in-office wall chart.

The Agency Physician stated that she did not recall Complainant’s name specifically but recalled that she examined an MVO candidate who failed the standard colorblindness test. The Agency Physician stated that the standard test requires discernment of shades of color. The Agency Physician stated that the test is routine, and she did not consult anyone else regarding a colorblindness test. The Agency Physician stated that she wondered how a candidate who is colorblind was authorized for a commercial driver’s license.

HR1 stated that he has no knowledge of Complainant's medical condition beyond the results of his pre-employment physical. HR1 stated that Complainant met the basic requirements for the MVO position and the Agency rescinded Complainant's offer due to "negative physical results" during his pre-employment exam. HR1 stated that the Agency's Qualification Standards and Occupational Health Handbooks list the requirements for Agency employment. HR1 stated that Occupational Health Handbook 5019 required the specific test that Complainant did not pass. HR1 stated that he can not address the requirements for drivers in private sector or other agencies, but the position Complainant applied for would have required him to transport Veteran patients. HR1 stated, from his understanding, all MVO applicants are given the same test.

A Supervisory Human Resources Specialist (HR2) stated that the physical requirements of the position are for all candidates. HR2 stated that Complainant's physical results listed "red/green colorblindness."

In pertinent part, the investigative record contained the VA Handbook 5019, Employee Occupation Health Service, Part II, Appendix A (March 27, 2015), which states, in pertinent part:

Special examinations are required for motor vehicle operators, firefighters, police officers and boiler plant operators . . .

1. MOTOR VEHICLE OPERATORS . . .

d. Critical Core Elements for Clearance. Critical systems performance evaluation must focus on visual, auditory, neurologic, cardiac, respiratory, and metabolic conditions. A person shall not operate a motor vehicle unless medically qualified to do so. A person is physically qualified to transport patients if that person . . .

(10) Has distant visual acuity of at least 20/40 (Snellen) in each eye with or without correctives lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green and amber colors.

The record also contains medical record notes made by the Agency Physician, dated January 5, 2017, stating that Complainant had 20/20 vision in both eyes without corrective lenses, including acceptable depth and peripheral vision. The notes went on to state that Complainant was "[a]ble to distinguish Basic Colors" but "seems [to have] red green blindness" thus not passing the "Ishara Color Blind Test."

Following the EEO investigation, the Agency informed Complainant of the right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate final agency decision. Complainant requested the latter.

On February 1, 2018, the Agency issued a final decision finding no discrimination. The Agency assumed that Complainant established a prima facie case of discrimination based on perceived disability, but found that Complainant failed to show the Agency's actions were not job-related and consistent with business necessity. The Agency stated that management rescinded the tentative offer due to Complainant's difficulty in distinguishing the standard colors of traffic signals, which is needed for an Agency MVO position. The Agency stated that it is VAMC policy to test for color blindness and Complainant did not show that the test administered was flawed. Further, the Agency stated that it hired three MVOs in the prior two years and those candidates were not required to undergo a pre-employment physical because they were internal and transferred within the same occupation.

The instant appeal from Complainant followed. On appeal, Complainant provided the affidavit of his brother who has a similar medical condition as Complainant and drives passengers for his employer. In response to Complainant's appeal, the Agency stated that Complainant could have requested a hearing to develop the record further. It also stated that it does not have an across-the-board color perception deficiency exclusion, but its policy "limits only those who lack the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber under the [Federal Motor Carrier Safety Administration] standard."

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").

Here, Complainant alleged that the Agency violated the Rehabilitation Act in rescinding its tentative offer of employment, based on the results of a physical examination. In order to prove disability discrimination Complainant must first establish that he is an "individual with a disability" and that he is "qualified" for the position desired – in other words, can perform the essential functions of the position with or without an accommodation. Here, the Agency does not dispute that Complainant is an individual with a disability or that, at a minimum, it regarded him as such.

The next inquiry is whether Complainant is a “qualified individual with a disability.” A “qualified individual with a disability” is one who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. §1630.2(m). The record shows that Complainant met all the Agency's job requirements except its standard related to his vision and was tentatively offered the MVO position. After the pre-employment physical, it is the Agency’s position that Complainant was not qualified for the position because of his vision. The Agency cited to its qualification standard for MVO positions in VA Handbook 5019 requiring the ability to “recognize the colors of traffic signals and devices showing standard red, green, and amber colors.” The Agency contends that the medical record from Complainant’s January 2017 pre-employment physical showed Complainant could only identify one out of six colors and seems to have “red green blindness.”

The key question then is whether the vision standard that the Complainant failed, or the manner in which the Agency applied the vision standard to Complainant, is consistent with the requirements of the Rehabilitation Act. If the standard itself fails to meet the “job-related and consistent with business necessity” requirement, or if the Agency failed to apply the standard in an appropriate way (for example, by failing to determine whether performance could be achieved through reasonable accommodation), Complainant has a valid claim.

The Agency’s standard in question does not generically refer to colorblindness, but rather focuses on “the ability to recognize the colors of traffic signals and devices showing standard red, green and amber colors.” Thus, the standard, as written, for the MVO position appears job-related and consistent with business necessity for a position involving driving veterans and their caregivers significant distances for medical services. Therefore, we must now examine whether the Agency applied its standard to Complainant in an appropriate way.

In order to exclude an individual on the basis of possible future injury, as was done here, the Agency bears the burden of showing Complainant posed a “significant risk of substantial harm” to the health or safety of him or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). A speculative or remote risk is insufficient. This “direct threat” analysis must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job. *Id.* If no such accommodation exists, the Agency may refuse to hire an applicant. *Id.*

Here, the Agency must prove that its decision to discontinue the hiring process of Complainant, due to the results of his pre-employment physical concerning his vision, satisfies the “direct threat” standard. The burden of showing a significant risk is on the Agency. *Selix v. U.S. Postal Service*, EEOC Appeal No. 01970153 (March 16, 2000). In doing so, the Agency must show that its decision was based on an individualized assessment of Complainant that took into account: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r). See *Nathan v. Dep't of Justice*, EEOC Appeal No. 0720070014 (July 19, 2013).

See also, Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of Rhode Island, Department of Mental Health Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the Agency must gather information and base its decision on substantial information regarding the individual's work and medical history. Chevron U.S.A. Inc. v. Echazabal, *supra*; Harrison v. Department of Justice, EEOC Appeal No. 01A03948 (July 30, 2003).

We find that substantial evidence supports a finding that the Agency did not perform an individualized assessment of whether Complainant could perform the essential functions of the MVO position without posing a direct threat to himself or others. Complainant asserts he can safely perform the duties of the MVO position as evidenced by the fact that he holds a commercial driver's license (CDL) and successfully performs in a similar position as a Bus Operator for state mass transit. The record clearly establishes that the decision to rescind the job offer was based solely on the Agency Physician's report that Complainant did not pass the "Ishara Color Blind Test" because he was "[a]ble to distinguish Basic Colors" but "seems [to have] red green blindness."

Based on this report, the Agency apparently assumed Complainant would be unable to see traffic signals while driving. However, the Agency conducted no inquiry into how, based on his vision, Complainant obtained and continued to hold his commercial driver's license and performed successfully in his Bus Operator position for the state mass transit authority. Moreover, the Agency acknowledged that it hired other MVOs without utilizing the colorblindness test because they already worked for the Agency and transferred within job category.

We find that the results of the visual examination alone are insufficient to establish that there would be a high probability of substantial harm to Complainant or others. The evaluation of an applicant's unique abilities or disabilities is the crux of an individual assessment. At a minimum, such an assessment should take into account any special qualifications that might allow an applicant to successfully perform the essential functions of a position without posing a direct threat to himself or others. While the Agency refutes Complainant's contention that his color perception deficiency does not impact his daily activities or his current vehicle operator position, they have failed to perform an individualized assessment to determine how Complainant's color perception deficiency would actually affect his performance as an MVO. Because the Agency failed to meet its burden under the direct threat standard as required by the Rehabilitation Act, we find that the evidence supports the finding that the Agency violated the Rehabilitation Act.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we REVERSE the Agency's final order and REMAND the matter to the Agency to take corrective action in accordance with this decision and the Order below.

ORDER

The Agency shall provide Complainant the following remedial relief:

1. Within thirty (30) calendar days of the date of this decision, the Agency shall reinstate its *tentative* offer to Complainant of a Motor Vehicle Operator position at the VAMC in Marion, Illinois, substantially equivalent to the one advertised under Vacancy Announcement Number MRN-MPA-16-1842369-BU.
2. Within sixty (60) calendar days of the date of its reinstated tentative offer of employment, the Agency shall conduct the required individualized assessment to determine if Complainant's hiring into the Motor Vehicle Operator position would pose a "significant risk of substantial harm" to the health or safety of himself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. This assessment should include the opportunity for Complainant to submit relevant evidence in support of his claim that he can safely perform in the position. If, following the assessment, the Agency determines Complainant poses a direct threat, it shall provide Complainant with a written decision on this issue that details the evidence considered and the reasoning for the decision.
3. If the Agency decides Complainant does not pose a direct threat, it shall offer Complainant placement in the Motor Vehicle Operator, WG-07, position advertised, or a substantially equivalent one, retroactive to the date his tentative offer of employment was rescinded. If Complainant should decline the Agency's offer of the position, the date of his rejection shall be the end date for any back pay due Complainant. Complainant shall have fifteen (15) days from the date of the offer to accept or decline the offer of employment.
4. Within sixty (60) calendar days of the date Complainant accepts or rejects retroactive placement as described in Paragraph 3 above, the Agency shall determine and remit to Complainant the appropriate amount of back pay, with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501. 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.

5. 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. 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."
5. Within ninety (90) calendar days of the date this appellate decision is issued, the Agency shall conduct a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. The Agency shall give Complainant notice of the right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)) and request objective evidence from Complainant in support of his request for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. No later than sixty (60) calendar days after the supplemental investigation is complete, the Agency shall issue a final Agency decision addressing the issue of compensatory damages and remit payment of said amount. The final decision shall contain appeal rights to the Commission.
6. Within ninety (90) calendar days from the date this decision is issued, the Agency shall provide eight hours of interactive or in-person training to the supervisors and managers of the Human Resources office at the VA Medical Center in Marion, Illinois, regarding their responsibilities under the Rehabilitation Act, with special emphasis on hiring and qualification standards, and the appropriate guidance to provide to relevant medical personnel involved in the hiring process. The Agency shall provide proof of the contents of the in-person training provided.
7. Within thirty (30) calendar days from the date this decision is issued, the Agency shall post a finding notice, as provided in the statement entitled "Posting Order."

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation of the Agency's implementation of the corrective actions ordered.

POSTING ORDER (G0617)

The Agency is ordered to post at its Marion, Illinois VA Medical Center copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted.

The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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 (R0610)

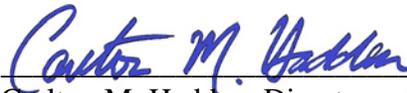
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

August 30, 2019

Date