



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

[REDACTED]
Vasiliki B.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture
(Forest Service),
Agency.

Appeal No. 0120181401

Hearing No. 430201700295X

Agency No. FS201601031

DECISION

Complainant timely appealed, pursuant to 29 C.F.R. § 1614.403, from the Agency's February 13, 2018 Final Order concerning an 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., Section 501 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Cook, WG-05, at the Schenck Job Corps Civilian Conservation Center ("JCCCC") in Pisgah Forest, North Carolina.

On October 28, 2016, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and harassment on the bases of race (African-American), disability (physical), age (48) when, on September 1, 2016, the Dining Hall Supervisor failed to reasonably accommodate her when she implemented a rotating work schedule among similarly situated

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.

employees that negatively affected Complainant's work schedule (eliminating recommended work breaks), in violation of her Reasonable Accommodation Agreement.

Complainant reported to the Dining Hall Supervisor, WS-07, as her first level supervisor ("S1," African-American, 45, no disability), and the Acting Center Director, GS-11, as her second level supervisor ("S2," white, 59, no disability).

On January 22, 2014, Complainant was in a serious car accident, resulting in "a crushed femur which was replaced by a rod" and a broken tibia, which was "replaced with screws, rods and plates." She was hospitalized until March 2014, when she was transferred to a nursing home. Complainant returned home in May 2014 with home care and extensive physical therapy. She remained employed under the Family and Medical Leave Act ("FMLA"), and S1 and S2 testified that they "fought" to keep her position since she was out for over a year."

In April 2015, Complainant submitted her FMLA medical documentation to the Agency's Disability Coordinator in Washington, D.C., to request a reasonable accommodation for her physical disabilities related to the accident. Her accommodation was to "include rest breaks as needed, access to a chair/stool for sitting, and use of a cane for ambulation."

In June 2015, Complainant returned to work. S1 and S2 confirm that they received verbal requests for reasonable accommodations from Complainant, including a closer parking space and chairs so she could sit down in the kitchen, which they honored. Complainant testifies, "I returned to work with a cane and I was supposed to be allowed to take breaks, but when I am the only person in the kitchen, this is impossible."

Rotating Work Schedule

Prior to the accident, Complainant states that she was off every other weekend, but since her return, she is the only one of the three cooks with a rotating schedule. According to S1, Complainant specifically requested her schedule. On an unspecified date, S1 changed the schedule so each cook could have one weekend off per month. At Complainant's request, S1 called a meeting with her and the other two cooks, and they agreed to change the schedule so that Complainant's days off were Tuesday and Wednesday. S1 and one of the cooks ("C1," Caucasian, 52, no disability) testified that "it was explained to [Complainant] that if the schedule is changed that it would not be switched again since the schedule was changed several times in the past to accommodate [Complainant.]" The schedule remained in place for a year, then in or around June 2016, Complainant requested her schedule from before the accident. S1 reminded Complainant that they agreed not to change the schedule, but asked C1 and the other Cook if they would mind changing it again. Both declined, and S1 told Complainant she would not change the schedule.

Grievance and EEO Actions

On July 26, 2016, Complainant filed a Step 1 Grievance through the Union, which stated, in relevant part:

[Complainant] states that the rotation of the cooks' schedules is not fair and equitable. Especially concerning Complainant's medical accommodations. ... To resolve this grievance [the Union] demands the following... Review of all cook schedules to allow a fair and equitable rotation of all shifts... Implementing that schedule fairly and equitably."

On August 4, 2016, S1 dismissed the Step 1 Grievance, but the matter was placed in abeyance for a Step 2 Grievance pending mediation between the parties.

On September 1, 2016, Complainant, S1, and a Union representative engaged in mediation and reached an Agreement. According to the Agreement, Management agreed to conduct a "review of dining hall staff implementing a rotating schedule(s) when review of Negotiated Agreement is made in late 2016, or early 2017."

On September 12, 2016, Complainant, believing S1 and S2 retaliated against her for her Union activity, and alleging that the schedule was discriminatory, initiated informal processing for the instant EEO Complaint, and filed a Step 2 Grievance on October 6, 2016. On October 7, 2016, Complainant received "Notice of Right to File" for her EEO Complaint.

On October 20, 2016, S2 dismissed Complainant's Step 2 Grievance as untimely, and determined that he was not bound to the September 1, 2016 Agreement, because "the purpose of the mediation session was to sort out personal differences between [Complainant] and [S1]. I [S2] did not attend the mediation and did not make any agreements with the Union during the session." Earlier that month, S2 declined a "Demand to Bargain" from the Union with respect to "the rotating schedule for the Cooks." S2 reasoned that scheduling fell within Management's authority under the CBA. On November 30, 2016, the Union filed an Unfair Labor Practice charge with the Federal Labor Relations Authority ("FLRA") based on S2's refusal to bargain regarding the rotating schedule of the cooks.

On October 28, 2016, Complainant filed her Formal EEO Complaint, which raised multiple allegations, including: "On September 1, 2016, her first level supervisor ("S1") failed to implement a fair and equitable rotating work schedule." Under "Corrective Action" Complainant explains that the schedule is not "fair and equitable" because (among other things) she, unlike the two other cooks, works alone during her shifts, and that for the schedule to be "fair and equitable" a second employee should be added to her shifts, so she can "have her reasonable accommodation." The instant framing is based on the Agency's December 7, 2016 Letter of Partial Acceptance.

Procedural Dismissal

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission (“EEOC” or “Commission”) Administrative Judge (“AJ”). Complainant timely requested a hearing. The Agency submitted a Motion to Dismiss pursuant to 29 C.F.R. § 1614.107(a)(4), arguing that Complainant raised the same issue in the July 26, 2016 Grievance. Over Complainant’s objection, the AJ granted the Agency’s Motion. The Agency issued a Final Order adopting the AJ’s decision. The instant appeal followed.

ANALYSIS AND FINDINGS

Under 29 C.F.R. § 1614.107(a)(4), an agency may dismiss a complaint where the complainant has raised the matter in a negotiated grievance procedure that permits claims of discrimination.

Further, 29 C.F.R. §1614.301(a), provides that a federal sector employee who is covered under a collective bargaining agreement (“CBA”) may not file both a grievance and an EEO complaint on the same matter, if the CBA allows issues of discrimination to be raised in the grievance process. See Sieczkowski v. Soc. Sec. Admin., EEOC Appeal No. 01A45859 (Aug. 29, 2005). Here, the record includes copies of the relevant portions of the CBA and local agreement, which we find to be sufficient evidence that the CBA allows claims of discrimination to be raised under its grievance procedure.

The AJ properly determined, based on, the July 26, 2016 Step 1 Grievance challenging the fairness of the “rotation of the cooks’ schedules,” that the “rotating work schedule” referenced in the instant complaint was a matter previously raised in a negotiated grievance procedure.

However, the AJ erred when he found that the phrase “Especially concerning Complainant’s medical accommodations,” within the July 26, 2016 Step 1 Grievance, sufficient to bar Complainant’s denial of reasonable accommodation claim. There is no evidence that the grievance process addressed the portion of the instant complaint alleging that the Agency “failed to reasonably accommodate [Complainant]... by “eliminating recommended work breaks.” See Complainant v. Dep’t of Commerce, EEOC Appeal No. 0120142525 (Nov. 25, 2014) (finding improper dismissal on grounds that that the complainant raised the same matter in a related grievance, when there was no evidence that the matter in her EEO action was ever addressed during the grievance procedure.)

Reasonable Accommodation

A dismissal under 29 C.F.R. § 1614.107(a)(4) is improper to the extent that Complainant is alleging denial of a reasonable accommodation.

Agencies are required to reasonably accommodate the known limitations of a qualified individual with a disability, unless it can show that doing so would cause an undue hardship to its

operations. See 29 C.F.R. §§ 1630.2 (o) and (p); see also Melodee M. v. Dep't of Veterans Affairs, Appeal No. 0120142484 (Apr. 8, 2016) citing EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002); Barney G. v. Dep't of Agriculture, EEOC Appeal No. 0120120400 (Dec. 3, 2015).

We remind the Agency that the obligation to provide reasonable accommodations to its employees is *ongoing*. Failure to provide such accommodation constitutes a violation each time the employee needs it. Burris v. Navy, EEOC Appeal No. 01200645531 (Jan. 10, 2007); EEOC Compliance Manual, Section 2, "Threshold Issues," p. 2-73, EEOC Notice 915.003 (July 21, 2005). Furthermore, the Commission has specifically held that the denial of reasonable accommodation constitutes a recurring violation that repeats each time the accommodation is needed. *Id.*; see Harmon v. Office of Personnel Management, EEOC Request No. 05980365 (Nov. 4, 1999).

This duty is independent of decisions reached through other administrative processes. See, e.g. Garrett M. v. United States Postal Serv., EEOC Appeal No. 0120160081 (Jan. 14, 2016) (Determination of limited duty by the Office of Workers Compensation Programs did not exempt the agency from providing reasonable accommodation). Therefore, the Agency cannot use a determination, reached through the Grievance Process, that the Cooks' schedule will not be negotiated, to dismiss Complainant's allegation that she is not getting rest breaks, one of the agreed upon reasonable accommodations for her known physical limitations.

Conversely, simply because Complainant identifies a changed schedule as a means to ensure she receives rest breaks, does not mean that the Agency is required to change the schedule, so long as it establishes an effective accommodation for Complainant. It is well established that while a complainant is entitled to an effective reasonable accommodation, she is not entitled to the accommodation of her choice. Lynette B. v. Dep't of Justice, EEOC Appeal No. 0720140010 (Dec. 3, 2015).

There is still a question of fact in the record as to whether Complainant was provided with an effective reasonable accommodation.

Complainant alleges, that S1 will not relieve her so she can take breaks, and since she is the only cook on duty, she cannot take rest breaks. Complainant alleges that she has "no assistance" because "Management took student cooks out of the kitchen," and, unlike her coworkers, she is the only cook scheduled with her hours.

According to S2, "to my knowledge, [Complainant] did not have a reasonable accommodation in place." But recalls Complainant verbally requested reasonable accommodations when she returned, including chairs so that she could sit down in the kitchen and a parking space close to the building, which Management provided. S2 does not address the breaks Complainant was to be provided as a reasonable accommodation, and alleges that she was not denied a reasonable accommodation because she never formally requested one.

S1 claims, without providing evidence, that Complainant gets regular breaks “along with her rest breaks.” S2 points out that regardless of schedule, Complainant’s job responsibilities remain the same. S1 states that Complainant was “never told she could not take breaks” when the schedule changed.

Complainant testifies that she does not get breaks or rest breaks “because [her] supervisor is not present for [her] to take a break,” even though she was provided more breaks as a reasonable accommodation.

CONCLUSION

Accordingly, we REVERSE the Agency’s Final Order with respect to the issue of Complainant’s reasonable accommodation only.

We hereby REMAND the matter to the Agency in accordance with the ORDER.

ORDER

1. Within **thirty (30) calendar days** of the date this Decision issued, the Agency shall submit a Request for a Hearing, along with a copy of this Decision, and the complaint file, to the Hearings Unit of the appropriate EEOC field office. The agency shall send a copy of the request for a hearing and the complaint file to complainant. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.
2. The Agency shall provide the EEOC Compliance Officer with documentation that it successfully transmitted the Hearing Request to the Hearings Unit and to Complainant in accordance with the section entitled Implementation of the Commission’s Decision” below.

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).

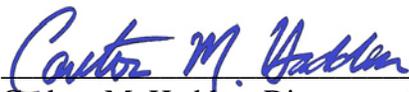
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

August 14, 2019
Date