



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

Frank L. Segal, a/k/a
Ruben T.,¹
Complainant,

v.

William Barr,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 0120171405

Agency No. FBI-2015-00026

DECISION

On March 8, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 27, 2017,² final decision concerning his 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. For the following reasons, the Commission AFFIRMS in part, and REVERSES in part, the Agency's final decision; and REMANDS the matter back for further Agency action.

ISSUES PRESENTED

Whether the Agency discriminated against Complainant based on his disability (dyslexia) when it withdrew his previously granted reasonable accommodation and refused to grant him additional accommodations; and when his supervisors delayed his promotion.

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 stated, through his attorney, that he received the Agency's final decision on February 6, 2017.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Government Information Specialist (GS-9) at the Agency's Records Management Division (RMD) in Winchester, Virginia. Complainant's performance plan includes a productivity metric; at the GS-9 level, the requirement is four boxes per month, five boxes at GS-11, and six boxes at GS-12. Report of Investigation (ROI) at pgs. 95-96.

On September 28, 2012, Complainant initiated the process to request a reasonable accommodation, and was referred to the Agency's Reasonable Accommodation Program Manager (PM) (age 50, no disability). Complainant requested "no matrix or timeframe for completion of work"; additional time to complete research; and a note taker for meetings. ROI at pg. 215. Complainant was diagnosed with dyslexia and needs additional time to process information. Complainant stated that when he receives information, his mind starts to process it, but as he receives additional information, his mind is still processing the initial information, and the newer information will either "not exist" in his mind or "become jumbled" with the initial information. Complainant stated that he needs additional time to re-review information multiple times. Additionally, for written text, Complainant needs to review each word alone as a symbol, which his mind creates a definition for, and needs to read text multiple times to truly understand the meaning. ROI at pgs. 91-92. Complainant's managers adjusted his metrics but did not remove them. They further assisted him by communicating with him before and after meetings to restate central points, and by returning any work for corrections as soon as possible. ROI at pg. 139.

In February 2013, Complainant also requested: (1) Dragon Naturally Speaking Software (speech to text software); (2) Pearl (camera that scans and digitizes documents); (3) OpenBook (text reading software); (4) Read and Write Gold (grammar and word usage software); and (5) a Digital Voice Recorder (DVR). PM ordered the requested accommodations, which Complainant received on or about March 13, 2013. Complainant turned them over to the security office to obtain approval prior to use. On May 13, 2013, PM informed Complainant that his requests were approved, except for the DVR. In July 2013, Complainant received a laptop with the accommodations installed. Once Complainant started using the accommodations, he produced seven to eight boxes per month. ROI at pgs. 98-100, 248.

On October 1, 2013, the Unit Chief (UC) (age 50, no disability) of the Administration Unit notified Complainant that the "Designed Approving Authority" did not approve the software and directed that it be removed from Complainant's workstation. ROI at pg. 279. In November 2013, Complainant requested EyePal as a replacement accommodation. Complainant's production dropped back to four boxes per month, after his accommodations were removed. From December 2013, through April 2014, Complainant's second line supervisor (S2) (age 47, no disability) placed Complainant on a special assignment, and reduced his production requirement to two boxes per month. ROI at pgs. 100-101, 140. In April 2014, Complainant obtained a new first line supervisor (S1) (age 53, no disability). ROI at pg. 112.

On April 29, 2014, Complainant reached out to the Agency's Section 508 Program Coordinator (PC) to ask if he had any information regarding his requested equipment. PC stated that Complainant's request was not under the purview of the Section 508 Program because Complainant received the software as a reasonable accommodation, and that the security division did not authorize his use of the software. On May 5, 2014, Complainant contacted PM for an update on his request, who responded that he "lost track" of Complainant's approved accommodations. PM instructed Complainant to reach out to PC; and Complainant stated that PC could not help him. PM stated that they could talk to PC. ROI at pgs. 260-263.

On May 14, 2014, Complainant and S2 pursued the matter with officials in the IT office; they met and developed a plan of action. ROI at pgs. 265-270. In May and June 2014, S2 and Complainant wrote a "use case" explaining how Complainant planned to use his requested accommodations. Complainant stated that having software read information to him reduces his reading time and increases his comprehension due to its ability to read documents back to him. Additionally, the speech-to-text software assists Complainant because when he writes, he needs to decipher symbols and then convert the symbols into written text. Complainant added that this software would also improve his vocabulary, spelling, and grammar needed for emails and other correspondences required for his job. Complainant stated that a digital voice recorder would allow him to hear information he had previously missed in meetings. ROI at pg. 121, 273, 281-284. On June 24, 2014, UC followed up on the matter, and scheduled a meeting for the parties to regroup. ROI at pgs. 286-288.

In July 2014, Complainant applied for an Intelligence Analyst Position, and requested a reasonable accommodation for the exam. PM responded that they had not found an effective solution for his needs at the time. ROI at pgs. 297-299. On August 7, 2014, Complainant emailed the relevant parties, informing them that he spoke with a representative from "CAP,"³ who could help recommend equipment. Complainant requested a list of Agency-approved equipment; PM responded that he had "no idea of what's approved," and referred Complainant to PC. ROI at pgs. 304-306.

In October 2014, Complainant's supervisors were informed that they could recommend Complainant for a promotion to the GS-11 level, as long as he got through October-December without any major errors. Complainant stated that it would be too stressful without "proper equipment," and only produced one box in November; he was not promoted. ROI at pgs. 113-114.

On November 25, 2014, Complainant notified PM that his "Reader" was delivered. When Complainant requested installation, PC stated there was some confusion because EyePal was approved, but not Zoom-Ex. PM explained that Complainant cancelled the EyePal order, and changed his request to Zoom-Ex because he felt that it was a more efficient program.

³ CAP is the Computer/Electronic Accommodations Program, which is a Department of Defense program that provides assistive technology and reasonable accommodations to people with disabilities and wounded service members.

PM added that he sent an email approximately six or seven weeks ago asking for a "CR" to approve Zoom-Ex. PC stated that they would need to submit a new request to gain approval for its use. ROI at pgs. 309-311, 140. On February 5, 2015, Complainant stated that the Zoom-Ex software was installed and fully operational. ROI at pg. 314.

Complainant's production increased from January-April 2015. S1 met with Complainant on or about May 6, 2015 and informed him that if he got through May and June without any errors, and completed five boxes each month, she would recommend his promotion. Complainant responded that he was having issues with his new equipment and requested to wait until he could resolve the problems. S1 instructed Complainant to do his best, and he performed at an outstanding level. Complainant's promotion was approved on July 7, 2015, and effective July 26, 2015. ROI at pgs. 113-115, 323.

On or about March 25, 2014, Complainant was not selected for a position of a Security Specialist (Vacancy No. 17-2015-0034). On June 4, 2015, the Agency notified Complainant that he did not meet the minimum qualifications for a Management and Program Analyst (MAPA) position (Vacancy No. 17-2015-0039). ROI at pg. 46. On June 22, 2015, Complainant requested "WordQ," as an alternative accommodation to Read and Write Gold. ROI at pg. 102.

EEO Complaint

On March 10, 2015, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (dyslexia), and age (42) when:

1. on October 26, 2010, he received an "unsuccessful" performance rating;
2. between 2008 and October 17, 2014, he did not receive a promotion to a higher grade;
3. between May 2011, and September 22, 2014, he was not selected for eighteen positions;
4. Since October 2013, management withdrew his previously granted reasonable accommodations, and refused to grant additional reasonable accommodations;
5. Since October 19, 2014, his supervisors have not promoted him to a higher grade; and
6. Between December 2014, and May 15, 2015, he was not selected for a position as a Management and Program Analyst, or a Security Specialist.⁴

On June 5, 2015, the Agency notified Complainant that it was dismissing claims 1-3. The Agency noted that these claims were untimely discrete acts and dismissed them accordingly. ROI at pgs. 72-80.

⁴ The Agency initially listed seven positions, but Complainant clarified that he was only alleging discrimination for two non-selections. ROI at pg. 82.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

For claim 4,⁵ the Agency determined that Complainant was a qualified individual with a disability, and that the Agency did provide him with a reasonable accommodation. While the Agency noted that it took approximately a year before Complainant received the EyePal software, it stated that the delay was due to the security review, and that it made a good faith effort in fulfilling Complainant's request and keeping him apprised of the status of his request. The Agency also stated that Complainant's change from the EyePal to the ZoomEx software caused an additional three-month delay. With regards to the WordQ software, the Agency stated that there was no evidence that Complainant needed it to perform the essential functions of his position. The Agency concluded that Complainant was not denied reasonable accommodations for his disability.

The Agency did not present a prima facie analysis for discrimination based on age or disability because it found that the management officials provided legitimate, non-discriminatory reasons for their actions. For claim 5, S1 and S2 informed Complainant that he was eligible for a promotion in October 2014, and that his performance soon "significantly declined," preventing his promotion. S1 and S2 stated that when Complainant's performance was outstanding from January to June 2015, they received permission to promote him. The Agency found that there was no pretext for discrimination showing that his supervisors refused to promote Complainant for reasons other than his performance.

For the MAPA position, the selecting official (SO1) (age 52, no disability) stated that the ideal candidates possessed prior experience in records management training; training within RMD; and the ability to train and teach others generally. SO1 selected one candidate because she was a trainer and had other training experience outside the Agency; and the other because she was a trainer within SO1's unit. Regarding the Security Specialist position, the selecting official (SO2) (age 49, no disability) stated that they desired candidates with experience in personnel security, physical security, information systems security, industrial security, interviewing and interrogation, and writing. SO2 stated that the unit was understaffed and needed someone who would require little training and direction. She stated that the selectee was the best candidate because he had prior experience in the Security Division. The Agency then found that there was no evidence showing that Complainant was clearly more qualified than any of those selected for these positions. The Agency concluded that Complainant was not discriminated against based on his age, or disability, when he was not promoted, and when he was not selected for the MAPA and Security Specialist positions.

⁵ In the final decision, the Agency stated that Complainant's claim that his accommodations were removed in October 2013 was untimely. However, it did not dismiss this claim and addressed it on the merits in the decision.

Complainant filed the instant appeal and submitted a brief in support of his appeal. The Agency filed a response on March 29, 2017.

CONTENTIONS ON APPEAL

On appeal, Complainant alleges that the Agency discriminated against him based on his disability when it did not provide him with a reasonable accommodation until January 2015, approximately 14 months after he made his request, which was an undue delay. Complainant argues that his change in his request only added an additional three months to the process, which pales in comparison to the three year delay the Agency contributed to the entire process. Complainant alleges that the unreasonable delay precluded him from obtaining his promotion from September 2012 through January 2015. Complainant also argues that had his supervisors become involved in the process prior to April 2014, he would have received his accommodation earlier, and would have been able to perform at the level warranting his promotion. Additionally, Complainant argues that there were no extenuating factors for the delay because the Agency could have anticipated that any software would need to be inspected prior to use, and a lack of a streamlined process for providing reasonable accommodations is not an extenuating circumstance.

The Agency alleges that Complainant's claim that the Agency's October 2013 removal of his accommodation is untimely because he did not contact an EEO counselor until December 2, 2014. The Agency also argues that Complainant has not shown that the Agency failed to engage in the interactive process because the record is replete with examples of the Agency attempting to provide him with effective accommodations. The Agency asserts that Complainant himself was responsible for a three-month delay in the process when he ordered software that was not pre-approved by the Agency's security division. The Agency states that it is in the midst of providing his WordQ software.

Additionally, the Agency states that the issues surrounding Complainant's software request and security approval were complex, and that the Agency "clearly stated that there were extenuating circumstances that caused delays in the process."

For claim 5, the Agency argues that Complainant was unable to meet the metrics necessary for promotion. The Agency states that the removal of Complainant's accommodation was not the only issue affecting his performance; specifically, Complainant was dealing with the stress of his father's cancer diagnosis, in addition to meeting his metrics.

ANALYSIS AND FINDINGS

Standard of Review

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”).

As an initial matter, we note that Complainant is not appealing the Agency’s decision finding that the Agency did not discriminate against him based on his age, or disability, when he was not selected for the MAPA and Security Specialist positions; accordingly, we AFFIRM that decision. Additionally, we AFFIRM the Agency’s partial dismissal of Complainant’s claims that he was discriminated against when on October 26, 2010, he received an “unsuccessful” performance rating; between 2008 and October 17, 2014, he did not receive a promotion to a higher grade; and between May 2011, and September 22, 2014, he was not selected for eighteen positions because these claims are untimely.

Reasonable Accommodation

The Agency argues that Complainant’s claim that he was discriminated against when the Agency removed his accommodations in October 2013 was untimely because he did not contact an EEO counselor until December 2014; however, we find that this is incorrect. EEOC’s Compliance Manual, Section 2 “Threshold Issues, 2-73, EEOC Notice 915.003 (July 21, 2005), provides that “because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it.” In this case, Complainant’s reasonable accommodations were removed in October 2013, and he did not receive a replacement accommodation until February 2015. Between October 2013 and February 2015, Complainant needed an accommodation, and therefore his December 2014 contact with an EEO counselor is timely.

Under the Commission’s regulations, an agency is required to make reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that accommodation would cause an undue hardship. 29 C.F.R. § 1630.9. 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 EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (Reasonable Accommodation Guidance).

We find that Complainant is an individual with a disability. An individual with a disability is one who: (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include such functions as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to the ability of most people in the general population. 29 C.F.R. § 1630.2(j)(ii). Complainant has dyslexia, which limits his ability to concentrate, remember, focus, and comprehend. ROI at pgs. 184-189. See Melani F. v. Dep't of Homeland Security, EEOC Appeal No. 0720150027 (Mar. 5, 2016) (finding that the complainant was an individual with a disability because her dyslexia affected her short term memory for sequences, attention span, and ability to concentrate); and Medina v. Dep't of Justice, EEOC Appeal No. 01954883 (Dec. 5, 1997) (finding that the complainant demonstrated enough information that she was an individual with a disability with little documentary evidence regarding her dyslexia).

Further, we find that Complainant is a qualified individual with a disability. A qualified individual with a disability is an "individual with a disability" who 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 record established that Complainant can perform the essential functions of his position. Complainant received a "Successful" performance rating on October 24, 2014, for the previous fiscal year. ROI at pgs. 203-205.

In this case, we find that while the Agency eventually provided Complainant with an effective accommodation, it did so after an unnecessary delay. An accommodation must be effective in meeting the needs of the individual. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC No. 915.002 (Oct. 17, 2002) (Reasonable Accommodation Guidance), General Principles. In the context of job performance, this means that a reasonable accommodation enables the individual to perform the essential functions of the position. Id. The agency should respond expeditiously to a request for reasonable accommodation. Id. at Question 10. Unnecessary delays can result in a violation of the Rehabilitation Act. Id. In determining whether there has been an unnecessary delay in responding to a request for reasonable accommodation, relevant factors would include: (1) the reason(s) for the delay; (2) the length of the delay; (3) how much the individual with a disability and the agency each contributed to the delay; (4) what the agency was doing during the delay; and (5) whether the required accommodation was simple or complex to provide. Id. at n.38.

Complainant requested his software accommodations in February 2013, which he received in July 2013. Unfortunately, they were removed due to security reasons⁶ in October 2013. Complainant then requested alternative software in November 2013. While we note that Complainant's managers placed him on a special project, which reduced his performance requirement from December 2013, through April 2014, there is nothing in the record showing that he withdrew or paused his request for the additional software.

⁶ There is nothing in the record that explains what the cited "security reasons" were. We note that it was incumbent on the Agency to provide evidence of how the requested software posed security concerns and the lack of detail to support the Agency's reason for removing Complainant's accommodation undermines their assertion that it was necessary to do so.

While we understand that many parties were involved in the processing and implementation of Complainant's reasonable accommodation request, the Agency's policy on its reasonable accommodation procedures states that the Office of Equal Employment Opportunity and Affairs maintains primary oversight of the reasonable accommodation process, and the Disabilities Program Manager serves as the Accommodation Coordinator. ROI at pg. 1114. Accordingly, PM was responsible for the processing of Complainant's request. On May 5, 2014, Complainant reached out to PM to request a status update on his request. PM stated that he "lost track of what you have approved so far. What are you using at your desk right now and what is approved"? ROI at pg. 261. Based on this response, it is reasonable to conclude that PM had taken no action on Complainant's November 2013 request, as of May 5, 2014.

The record shows that Complainant was proactive during the processing of his request by researching possible options; and by contacting various Agency personnel, and a CAP representative. S2 stated that he elevated Complainant's request to the Assistant Section Chief (ASC) because Complainant was not "getting good customer service." S2 stated that ASC agreed, and that once they got involved, things "happened fairly quickly." ROI at pg. 121.

The Agency also places blame with Complainant for the delay because he changed his request from EyePal to Zoom-Ex. However, we note that PM was aware of this change, and informed others about a "CR" to get the Zoom-Ex approved. ROI at pg. 309. We are not convinced that Complainant is to blame for an additional three-month delay when he changed his request because the Agency was aware of the change approximately six or seven weeks before the Zoom-Ex was delivered.

PM's stated reasons for the length of time taken for Complainant's request include, "security issues." However, we do not find that the Agency adequately explained the "security issues" involved in this case. While we note that Complainant worked on classified information, the Agency did not specify how his requested accommodations posed a security risk. At most, PM and UC stated that software needs to be "vetted and approved" before being installed. ROI at pgs. 140, 161.

Further, the Agency argues that Complainant's request was complex. UC stated that the difficulty in Complainant's request was identifying and obtaining approval for any equipment. ROI at pg. 163. However, we find that the Agency has not shown that it was particularly helpful in identifying appropriate accommodations. When Complainant requested a list of Agency-approved software to help expedite his request, PM told him he had "no idea," and to contact PC; an IT Specialist provided a non-functioning link to a page that listed the Agency-approved products; and UC expressed that she did not think that providing a list would be "productive." ROI at pgs. 304-306, 301.

The Agency's policy on providing reasonable accommodation states that a "final disposition should be made within seven (7) business days of the request, or receipt of medical documentation... the request should be fulfilled within fifteen (15) days of the response... These timelines are firm absent extenuating circumstances." ROI at pg. 1116.

The record contains Complainant's medical documentation, dated October 31, 2013. ROI at pg. 184. For the purposes of this decision, we will assume that Complainant provided his medical documentation to the Agency on November 1, 2013. Pursuant to its internal policy, the Agency should have rendered a decision on Complainant's request by November 13, 2013 and fulfilled his request by December 3, 2013.⁷ While the Agency argued that there were extenuating circumstances, it has not explained what they were. We agree with Complainant that the need to test and approve software should be reasonably expected by the Agency. Even after receiving the Zoom-Ex, it only took about two (2) months to test and approve the software. Complainant's receipt of his accommodation was more than year after when he should have reasonably received it.

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 Cruzan v. Dep't of Def., EEOC Appeal No. 0120071893 (Aug. 15, 2008) (finding that management's failure to advise the complainant of its decision on his accommodation request for four months constituted an unnecessary delay in violation of the Rehabilitation Act); Villanueva v. Dep't of Homeland Sec., EEOC Appeal No. 01A34968 (Aug. 10, 2006) (finding that the agency's six-month delay in processing the complainant's accommodation request violated the Rehabilitation Act). Accordingly, we REVERSE the Agency's decision, and find that the Agency discriminated against Complainant based on his disability when it caused an unnecessary delay in providing him with an effective accommodation.

With respect to Complainant's career-ladder promotion, we find that the record shows that Complainant was able to meet his performance metrics to support a promotion during the times that he had a software accommodation. Accordingly, we REVERSE the Agency's decision, and find that the Agency discriminated against Complainant based on his disability when it did not promote him because it failed to provide him with a reasonable accommodation in a timely manner. This delay in providing an accommodation delayed Complainant's promotion.

Regarding the timing of Complainant's promotion, S1 stated that Complainant would be eligible for a promotion after meeting the GS-11 metrics for at least four (4) out of six (6) months. ROI at pg. 114. Complainant stated that after he received his initial accommodations, he produced 7-8 boxes per month, from July through October 1, 2013, when the Agency removed his accommodations. ROI at pg. 100. We note that S1 and S2 became Complainant's supervisors after this relevant time period, and did not confirm Complainant's assertion.⁸ However, the record shows that once Complainant received his accommodations in February 2015, he produced at least six (6) boxes per month. ROI at pgs. 212-213.

⁷ These date calculations exclude weekends and federal holidays.

⁸ S1 became Complainant's first line supervisor in April 2014; and S2 was acting as Complainant's second line supervisor since November 3, 2013, which became permanent in March 2014. ROI at pgs. 112, 119-120.

As such, we find Complainant's assertion credible; and if the Agency had not removed Complainant's accommodations on October 1, 2013, he would have been eligible for a promotion by November 2013. Accordingly, we find that Complainant is entitled to a retroactive promotion to the GS-11 level, effective November 1, 2013.

In addition, we find that Complainant is entitled to compensatory damages for the Agency's failure to timely accommodate him. Where a discriminatory practice involves the provision of a reasonable accommodation, damages may be awarded if the Agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for his disability. 42 U.S.C. § 1981a(a)(3); Gunn v. U.S. Postal Serv., EEOC Appeal No. 0120053293 (June 15, 2007). We find that the Agency did not act in good faith in this case. After the Agency removed Complainant's accommodation in October 2013, it did not act in good faith to quickly replace his accommodations. For example, PM "lost track" of Complainant's request and did not act on his request for approximately five (5) months. Additionally, UC stated that Complainant caused delays because he would identify software which was not on the list of Agency-approved software. ROI at pg. 163. However, when Complainant requested a copy of the list, UC stated that she did not think sending it to him would be "productive"; PM responded that he had "no idea"; and someone sent Complainant a broken link. ROI at pgs. 301, 304-306. Complainant is therefore entitled to present a claim for compensatory damages on the Agency's failure to timely accommodate him. See West v. Gibson, 527 U.S. 212 (1999); see also Complainant v. Dep't of Justice, EEOC Appeal No. 0120121339 (May 8, 2015) (complainant entitled to present a claim for compensatory damages when she was in bad faith denied accommodation leading to her termination).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision in part; REVERSE the Agency's final decision in part; and REMAND this matter to the Agency for further action consistent with this Decision and the ORDER set forth below.

ORDER (C0618)

The Agency is ordered to take the following remedial action:

- I. Within sixty (60) days of the issuance of this decision, retroactively promote Complainant to the GS-11 level, effective November 1, 2013.
- II. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due Complainant, no later than sixty (60) calendar days after the date this decision is issued. Complainant shall cooperate with the Agency's efforts to compute the amount of back pay and benefits due and shall provide all relevant information requested by the Agency.

- III. 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 sixty (60) calendar 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."
- IV. After the Agency has calculated and paid Complainant's back pay award, Complainant shall have sixty (60) calendar days following the end of the tax year in which the final payment is received to calculate the adverse tax consequences of any lump sum back pay awards, if any, and notify the Agency. Following receipt of Complainant's calculations, the Agency shall have sixty (60) days to issue Complainant a check compensating him for any adverse tax consequences established, with a written explanation for any amount claimed but not paid.
- V. Within ninety (90) days of the issuance of this decision, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages, if any; and attorney's fees and costs. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim, and attorney's fees and costs. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages, and attorney's fees and costs no later than thirty (30) days after the completion of the investigation.
- VI. Within ninety (90) days of the issuance of this decision, the Agency shall provide eight (8) hours of in-person or interactive EEO training on the Rehabilitation Act to PM, if still employed at the Agency. The training shall emphasize the Rehabilitation Act's requirements with respect to an Agency's duty to provide a reasonable accommodation in a timely manner to ensure that similar violations do not occur.
- VII. Within sixty (60) days of the issuance of this decision, the Agency shall consider taking appropriate disciplinary action against PM, if still employed at the Agency. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If PM has left the Agency's employ, the Agency shall furnish documentation of his departure date.
- VIII. The Agency shall immediately post a notice at its Records Management Division in Winchester, Virginia and at its Office of Equal Employment Opportunity Affairs in Washington, D.C., in accordance with the paragraph below.

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 Complainant's retroactive promotion and include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Records Management Division in Winchester, Virginia and at its Office of Equal Employment Opportunity Affairs in Washington, D.C. 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 (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).

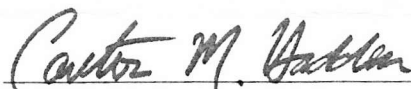
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (T0610)

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

March 22, 2019

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

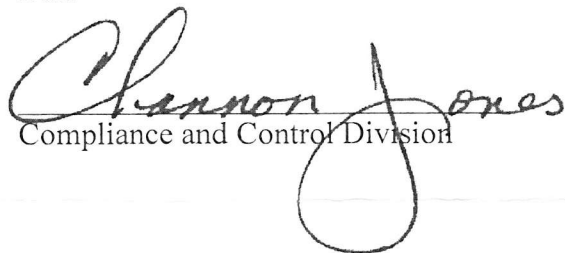
Frank L. Segal
11 Brickmason Drive
Inwood, WV 25428

A. Marques Pitre, Esq.
1300 Pennsylvania Ave NW
Suite 700
Washington, DC 20004

Arlene A. Gaylord, Assistant Director
Department of Justice (FBI)
Room 9304
935 Pennsylvania Ave., NW BLDG. JEH
Washington, DC 20535

March 22, 2019

Date


Compliance and Control Division



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an order by the United States Equal Employment Opportunity Commission dated _____ which found that a violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. has occurred at the Records Management Division in Winchester, Virginia and at its Office of Equal Employment Opportunity Affairs, FBI Headquarters in Washington, D.C. (hereinafter this facility).

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

This facility was found to have discriminated against an employee based on his disability when there was an unnecessary delay in providing him with a reasonable accommodation, which led to a delay in his promotion. The facility was ordered to provide him with a retroactive promotion, and additional remedies. This facility will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

This facility will comply with federal law and will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, federal equal employment opportunity law.

Duly Authorized Agency Representative: _____

Date Posted: _____

Posting Expires: _____