

Teri Mitchell v. United States Postal Service
01A50971
03-03-06

Teri Mitchell,
Complainant,

v.

John E. Potter,
Postmaster General,
United States Postal Service,
(Southwest Area),
Agency.

Appeal No. 01A50971

Agency No. 4G-720-00142-02

Hearing No. 250-2002-08346X

DECISION

Complainant timely initiated an appeal from the agency's final action concerning her equal employment opportunity (EEO) complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The appeal is accepted pursuant to 29 C.F.R. § 1614.405. For the following reasons, the Commission AFFIRMS the agency's final action.

The record reveals that complainant, a former Mail Processor at the agency's Northwest Arkansas Processing and Distribution Facility in Fayetteville, Arkansas ("facility"), filed a formal EEO complaint on May 22, 2002, alleging that the agency discriminated against her on the basis of disability (breast cancer lump/lymph node removal) when: (1) on April 15, 2002, she was denied light duty; and (2) from April 15, 2002 and continuing, the agency subjected her to a hostile work environment.

The record reflects that complainant began her employment with the agency in 1997 as a Mail Processor at the facility. Complainant was diagnosed with breast cancer in February of 2002, and she had breast cancer/lymph node removal surgery in April of 2002. The record indicates that the surgery caused complainant to have limitations in the use of her right arm. Due to the diagnosis of breast cancer, complainant had radiation therapy between May and July of 2002. Complainant missed work on two (2) occasions while she underwent the radiation as she suffered from nausea and fatigue. The record indicates that due to the effects of the surgery, complainant was unable to raise her right arm at the shoulder, but she could move it at the elbow. While complainant is left-handed and was able to perform several of her usual activities, she had some restrictions in dressing and doing housework. The record indicates that complainant was not able to operate machines at the facility because they are designed for right-handed operation and require two (2) hands

to operate. Complainant was given a five (5) pound lifting restrictions with no raising of the right arm above the shoulder. The record also indicates that complainant has no permanent or long-term effects as the result of the impairment or the radiation, but she has the possibility of developing swelling in her arm.

The record indicates that complainant initially provided the facility's Plant Manager (PM) with a form dated April 15, 2002, detailing her surgery and restrictions. Complainant's physician released her to return to work with the following restrictions: she could sit, stand and walk for eight (8) hours per day; no lifting/carrying, climbing, kneeling, twisting or pulling/pushing; bending and stooping were limited to two (2) hours with no simple grasping or fine manipulation on the right arm. Complainant was cleared to return to work without any functional restrictions in 6-10 weeks from April 15, 2002; and her physician indicated that her restrictions were temporary. However, the PM wrote complainant a letter dated April 15, 2002, in which he stated that the agency was unable to accommodate her request for an accommodation and suggested that she reapply as her condition improved. The PM's letter stated that it was necessary for complainant to take sick leave, annual leave or leave without pay in the interim, and that she needed to provide approval from her physician to return to work. The PM did inform complainant that she was able to contact other functional area managers regarding light duty.

However, the record indicates that on April 17, 2002, complainant spoke with the PM regarding her situation, and the PM stated that he would help her find a light duty position. The PM contacted the Postmaster of the Fayetteville, Arkansas Post Office about the possibility of complainant working in the Passport office or in another position, but no work was available. On May 6, 2002, a physician's assistant completed a Duty Status Report which indicated complainant's ability to perform certain functions which had been identified by the agency. Complainant had a five (5) pound lifting/carrying restriction on her left arm, with no reaching above her shoulder or operating machinery on her right side. Similarly, on May 14, 2002, complainant's physician completed a Non-Occupational Work Restriction Evaluation Form for complainant, with the restrictions of five (5) pounds lifting/carrying and needing light duty during her radiation treatment and the three (3) weeks after the treatment occurring on July 19, 2002. On May 17, 2002, complainant's physician issued a Premedical/21 Day Clearance to Return to Work Following Extended Illness/Surgery, and complainant presented this form to facility management with the restrictions dated May 14, 2002. The record indicates that shortly thereafter, the agency offered complainant a light duty assignment. Hearing Transcript (HT) at 73. The record further indicates that between May 23, 2002 and July 27, 2002, complainant performed three (3) temporary light duty assignments. There is no evidence in the record that after July 27, 2002, complainant required any further light duty assignments.

Believing she was the victim of discrimination, complainant sought EEO counseling and filed the aforementioned formal complaint. At the conclusion of the investigation, complainant received a copy of the investigative report and requested a hearing before an EEOC Administrative Judge (AJ). Following a hearing held on November 17,

2003, the AJ issued a decision and found that complainant was not covered by the Rehabilitation Act. In so finding, the AJ noted that any impairment complainant had as the result of her surgery was temporary in nature, and her condition was improving, to the point where she was no longer substantially impaired. Further, the AJ found that there was no evidence that complainant required a light duty assignment after July 27, 2002. Due to the temporary nature of complainant's impairment, the AJ found that complainant failed to establish that she was an individual with a disability. However, the AJ found that assuming, arguendo, complainant was covered by the Rehabilitation Act, she nevertheless failed to establish a prima facie case of discrimination. The AJ found that the agency ultimately provided an accommodation for complainant which was within her medical restrictions. The AJ noted that while the PM initially denied complainant's light duty request as there was no work available within her restrictions, assignments were found which she could perform. The AJ found credible PM's testimony that complainant was not provided a light duty position initially as there was no work within her restrictions. In addition, the AJ found that the delay in providing the accommodation did not suggest discrimination, as the PM made efforts to find work for complainant within her physical restrictions.

Regarding complainant's allegation that she was subjected to a hostile work environment, the AJ found insufficient evidence to establish a prima facie case. The AJ found insufficient evidence that complainant was subjected to harassment due to her alleged disability. While the AJ noted complainant's allegation that the PM became less friendly to her after she requested the light duty position, he found no evidence to link any behavior by the PM to complainant's impairment. In addition, the AJ found that complainant failed to demonstrate that the alleged conduct by the PM was sufficiently severe or pervasive to alter the conditions of her employment such that a hostile work environment was created. The AJ concluded that the alleged conduct of the PM did not rise to the level of conduct that affected a term, condition or privilege of complainant's employment. The agency's final order implemented the AJ's decision. On appeal, complainant restates arguments previously made at the hearing. In response, the agency restates the position it took in its FAD, and requests that we affirm its final order.

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

After a careful review of the record, the Commission finds that the AJ's findings of fact are supported by substantial evidence in the record and that the AJ's decision properly summarized the relevant facts and referenced the appropriate regulations, policies, and laws. We note that to establish a prima facie case of disability discrimination under a disparate treatment and/or a failure to accommodate theory, the complainant must demonstrate that: (1) she is an "individual with a

disability" as defined in 29 C.F.R. § 1630.2(g); (2) she is a "qualified individual with a disability" as defined in 29 C.F.R. § 1630.2(m); and (3) she was subjected to an adverse personnel action under circumstances giving rise to an inference of disability discrimination and/or denied an accommodation. *Carney v. Federal Deposit Insurance Corporation*, EEOC Appeal No. 01986113 (August 3, 2000) (citing *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981)). In the instant case, we find that even assuming, arguendo, that complainant is an individual with a disability, she failed to demonstrate that she was discriminated against by the agency. In so finding, we note that it is undisputed that complainant could not temporarily perform the essential functions of the Mail Processor position due to the effects of her surgery which caused pain in her right arm.

However, the record indicates that the agency provided a reasonable accommodation for complainant's temporary impairment. We concur with the AJ's finding that initial denial of light duty and the delay in finding a position within complainant's medical restrictions was due to unavailability of work, rather than discriminatory animus. AJ's Decision at 14. We note that within two (2) days of being informed of complainant's light duty request, the PM sought to place her in a position, either at the facility or at another agency facility, which was within her medical restrictions. In addition, the record indicates that upon receiving the appropriate medical documentation, the agency offered and complainant accepted three (3) positions at the facility within her medical restrictions which she performed between May 23, 2002 and July 27, 2002. As such, we concur with the AJ's finding that complainant failed to establish her claim that the agency failed to provide her with a reasonable accommodation.

The Commission also determines that complainant failed to establish that she was subjected to a hostile work environment after April 15, 2002. We find that complainant has not shown that the actions of the PM as alleged were sufficiently severe or pervasive as to constitute hostile work environment harassment. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993); Enforcement Guidance on *Harris v. Forklift Systems, Inc.*, EEOC Notice No. 915.002 (March 8, 1994). We thus discern no basis to disturb the AJ's decision. Therefore, after a careful review of the record, including complainant's contentions on appeal and arguments and evidence not specifically addressed in this decision, we affirm the agency's final action.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0701)

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 or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. 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 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 (S0900)

You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the

Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

____ 03-03-06 _____
Date