



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

Sandra M. McConnell et al., a/k/a
Velva B.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service,
Agency.

Request Nos. 0520180094 & 0520180095

Appeal Nos. 0720160006 & 0720160007

Hearing No. 520-2010-00280X

Agency No. 4B-140-0062-06

DECISION ON REQUEST FOR RECONSIDERATION

On October 30, 2017, the Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal Nos. 0720160006 & 0720160007 (September 25, 2017), which found that it violated Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

BACKGROUND

This matter concerns a class of Agency employees consisting of rehabilitation and limited-duty injured-on-duty (IOD) employees whose positions were assessed by the Agency's National Reassessment Program (NRP) between May 5, 2006 and July 1, 2011. The class claims were

¹ This case has been randomly assigned a pseudonym which will replace the Class Agent's name when the decision is published to non-parties and the Commission's website.

categorized into four broad categories, three of which are relevant here: withdrawal of reasonable accommodations; hostile work environment; and disclosure of confidential medical information.

In our decision in EEOC Appeal Nos. 0720160006 & 0720160007, in relevant part, we reversed the Agency's final order rejecting the findings of discrimination made by summary judgment by an EEOC Administrative Judge (AJ) in favor of the class in her June 4, 2015 preliminary decision,² which she later finalized. Our previous decision affirmed the AJ's findings that the Class Agent established that the NRP subjected qualified rehabilitation and limited-duty IOD employees to disparate treatment and resulted in rehabilitation and limited-duty IOD employees with disabilities having their reasonable accommodations withdrawn, as well as being subjected to disability-based harassment and having their confidential medical information accessed by unauthorized persons. Based on a *de novo* review of the record, we also found that Phase 1 of the NRP (the process used to identify all IOD employees who were either in limited-duty or rehabilitation status) constituted an unlawful medical inquiry to which the class of rehabilitation and limited-duty IOD employees were subjected.

The AJ also issued a separate preliminary decision on June 4, 2015, making findings of discrimination in favor of the Class Agent *as an individual*. The AJ accurately recounted that in EEOC Appeal No. 0720080054 (January 14, 2000), we had previously found that the Class Agent was a qualified individual with a disability. The AJ determined, in relevant part, that the Class Agent was discriminated against based on her disability when she was disparately treated and her reasonable accommodation was withdrawn. The Agency also rejected this finding. In EEOC Appeal Nos. 0720160006 & 0720160007, we found that the Class Agent, having established that she is a qualified individual with a disability, was eligible for immediate relief regarding disparate treatment and withdrawal of reasonable accommodation. We found that the Class Agent was eligible for immediate relief for a hostile environment, having established she is a qualified individual with a disability who was subjected to a tangible employment action. We further found that having established that she was subjected to an unlawful disability-related medical inquiry and the confidentiality of her medical records were comprised via Phase 1 of the NRP, the Class Agent was eligible for immediate relief.

The Agency now requests that we reconsider our decision in EEOC Appeal Nos. 0720160006 & 0720160007.

ANALYSIS AND FINDINGS

In its request for reconsideration, the Agency essentially presents many of the same arguments already raised and considered in our previous decision. We emphasize that a request for reconsideration is not a second appeal to the Commission. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, § VII.A (as revised August 5, 2015). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have

² The AJ finalized both her preliminary decisions on September 21, 2015.

a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here.

In its request for reconsideration, the Agency argues, like it did before, that the AJ applied the incorrect standard of review of "more likely than not" in finding liability, and now argues that the previous decision repeated this error. As found in our previous decision, the Agency confuses the concepts of "standard of review" and "burden of proof." Contrary to the Agency's argument, the Commission has routinely ruled that after an AJ determines there is no genuine issue of material fact in dispute, on summary judgment the complainant carries the burden of proof by the preponderance of the evidence (more likely than not) that discrimination occurred. See e.g., McCready v. Dep't of Veterans Affairs, EEOC Appeal No. 0120062351 (April 1, 2003); Mallis v. United States Postal Service, EEOC Appeal No. 01A55908 (October 3, 2006); Complainant v. Equal Employment Opportunity Commission, EEOC Appeal No. 0120092463 (August 28, 2014).

The Agency also again argues that there are genuine issues of material fact in dispute. For example, the Agency recounts a passage in the previous decision that the Class Agent's evidence contradicted the explanation of the NRP's purpose and critically undermined Agency witnesses' credibility thereon. The Agency argues that it is improper to make credibility determinations in deciding whether there are genuine issues of material fact. While we agree with the Agency's statement of the law, we disagree that the previous decision in any way relied on credibility determinations in affirming the AJ's decision on summary judgment. The previous decision found that the "...massive evidentiary record..." "...documents..." the real reason for the NRP's existence, which was to move as many IOD employees as possible back to full duty in their pre-injury jobs or onto the Office of Workers' Compensation Program (OWCP) rolls for eventual outplacement. We found, in essence, that the evidence of the real reason was so overwhelming that there was no genuine issue of material fact thereon, despite some witness testimony to the contrary. For the reasons found in the previous decision, we find that there were no genuine issues of material fact in dispute.

The Agency argues, like it did on appeal, that the AJ incorrectly found that no portion of the class and the Class Agent's individual claims were "mixed" (included matters appealable to the Merit Systems Protection Board (MSPB)), and now argues that the previous decision repeated this error. We disagree. As found in the previous decision, the MSPB has ruled multiple times that the NRP class action complaint is not mixed. We add that the MSPB also found that the Class Agent's individual claim is not mixed, explicitly concluding it did not have jurisdiction over her appeal and thus could not consider her disability discrimination claim. MSPB Decision NY-0353-06-0381-I-1, 2007 WL 2239099 (June 1, 2007).

Arguing that the medical inquiries it made in Phase 1 of the NRP were lawful, the Agency avers that the previous decision erred in finding that these inquiries violated the Rehabilitation Act. However, the previous decision determined that unlawfully based their medical inquiries solely on the status of the IOD employees, without any evidence that those employees were not performing the essential functions of their positions or that they posed a direct threat to themselves or others by remaining in their positions. The Agency argues that in evaluating whether class members

could perform the essential functions of their positions, the previous decision erred in considering their modified assignments as their positions instead of their positions of record. We disagree. In a prior decision affirming the AJ's certification of this class, we found that where an employee has performed a modified position for an extended amount of time, it is that position which is considered for purposes of determining whether the employee is a qualified individual with a disability. EEOC Appeal No. 0720080054 (Jan. 14, 2010). EEOC Appeal No. 0720080054 is final, has become the law of the case, and is consistent with other decisions regarding modified positions unrelated to the class action. See e.g., Huddleson v. United States Postal Service, EEOC Appeal No. 0720090005 (Apr. 4, 2011). Huddleson contained case cites of other Commission cases holding the same. We find, for the same reasons in our previous decision, that the referenced medical inquiries violated the Rehabilitation Act.

The Agency further argues that the previous decision erred in assuming that all modified assignments provided to class members were reasonable accommodations (in other words, did not consist only of "make work"). In the context of making this contention, the Agency argued again that we should look at class members' positions of record, not the referenced modified positions in determining the Agency's reasonable accommodation obligations. As already noted, we have specifically rejected this argument. In reaching the finding of liability, we properly determined that the modified assignment of the Class Agent, as well as the class members, was properly characterized as a reasonable accommodation. As such, we determined that these employees were entitled to remain in their limited-duty or rehabilitation positions unless the Agency could demonstrate that allowing them to do so would impose an undue hardship on its operations. We then went on to conclude that the Agency failed to establish undue hardship. We found that the driving force behind the NRP was not to ensure that rehabilitation and limited-duty IOD employees were performing only work that was necessary to the Agency's mail delivery operations, as contended by the Agency, but to move as many of them as possible back to full duty in their pre-injury jobs or onto the OWCP rolls for eventual outplacement, and this was motivated by discriminatory animus (disparate treatment).

The Agency argues that the previous decision erred in considering the Class Agent's individual claim of hostile work environment because she did not appeal the AJ's finding that she was not entitled to damages on this matter. The Agency refers to the AJ's findings that the Class Agent as an individual offered no evidence that she was ever told that she would end up at Walmart or feared having to work there due to the NRP, and accordingly is denied damages related to this specific claim.

But the previous decision did not rule on the Class Agent's individual claim regarding Walmart. Rather, we ruled that the Class Agent was eligible for immediate relief for being subjected to a hostile work environment since she established that she is a qualified individual with a disability who was subjected to a tangible employment action – taking her modified assignment away from her.

Contending that the previous decision does not contain a complete statement of the Commission's procedures for evaluating individual claims on remand, the Agency asks for

clarification/elaboration thereon. It explains that while the previous decision referenced the individual claim relief procedures for class members in 29 C.F.R. § 1614.204(l)(3), it did not reference the additional procedures set forth in Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 8, Part XII.C (as revised August 5, 2015). In the previous decision's order, we directed the Agency to notify the 3,300 members of the class who were never assessed under the NRP that they are not members of the class, that their previously-filed individual EEO complaints, if any, have been de-subsumed from the class, and that they are free to pursue those individual complaints. The Agency asks for confirmation that individuals who failed to meet the class definition should be de-subsumed.

In opposition to the Agency's appeal, the Class Agent argues that the Commission's order in its previous decision and regulations are clear on how to manage the individual claim relief process, and the same order explicitly identified who was to be de-subsumed. She argues that the AJ is the appropriate person to manage the individual claim relief process for class members, and to the extent the Agency has questions about this or who should be de-subsumed, they should be directed to the AJ (who on remand will retain jurisdiction over the class complaint). We agree.

After reviewing the previous decision and the record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal Nos. 0720160006 & 0720160007 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the orders below.

ORDER (D0617)

To the extent that it has not already done so, the Agency is ORDERED to take the following remedial action:

1. Within sixty (60) calendar days after the date that this decision is issued, the Agency shall offer to reinstate the Class Agent to her former position as a Carrier Technician at the Post Office in Rochester, New York, retroactive to May 19, 2006. The offer shall be made in writing. The Class Agent shall have fifteen (15) calendar days from receipt of the offer to accept or decline the offer. Failure to accept the offer within 15 days will be considered a declination of the offer unless the Class Agent can show that circumstances beyond her control prevented a response within the time limit.
2. The Agency shall determine the appropriate amount of back pay, with interest, and other benefits due the Class Agent, pursuant to 29 C.F.R. § 1614.501, no later than sixty (60) calendar days after the date this decision is issued. The Class Agent shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Class Agent for the undisputed amount within sixty (60) calendar days of the date the Agency determines the amount it believes to be due. The Class Agent 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." If the Class Agent declines to accept the offer of retroactive reinstatement or fails to respond the offer within fifteen (15) calendar days of receipt of the offer, her entitlement to back pay and the other aforementioned equitable remedies will cease upon the date she actually or effectively declines.

3. Within sixty (60) calendar days after the date this decision is issued, the Agency shall conduct a supplemental investigation pertaining to the Class Agent's entitlement to compensatory damages incurred as a result of the Agency's discriminatory actions. See Feris v. Environmental Protection Agency, EEOC Appeal No. 01934828 (Aug. 10, 1995), request for reconsideration denied, EEOC Request No. 05950936 (July 19, 1996); Rivera v. Dept. of the Navy, EEOC Appeal No. 01934157 (July 22, 1994); Carle v. Dept. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). See also Turner v. Dept. of the Interior, EEOC Appeal Nos. 01956390 & 01960518 (Apr. 27, 1998); Jackson v. U.S. Postal Service, EEOC Appeal No. 01923399 (Nov. 12, 1992), request for reconsideration denied, EEOC Request No. 05930306 (Feb. 1, 1993). The Agency shall afford the Class Agent sixty (60) calendar days to submit additional evidence in support of her individual claim for compensatory damages. Within thirty (30) calendar days of its receipt of the Class Agent's evidence, the Agency shall issue a final decision determining the Class Agent's entitlement to compensatory damages, together with appropriate appeal rights.
4. The Agency shall process the Class Agent's request for attorney's fees associated with this class litigation, as discussed below.
5. The Agency shall immediately and thereafter take meaningful and effective measures to ensure that discrimination against qualified individuals with disabilities, particularly injured-on-duty employees who are currently working in, who apply for, or who are being evaluated for limited-duty and rehabilitation positions, does not continue. The Agency shall monitor these measures for at least five (5) years to ensure that their implementation produces effective and tangible results. The Agency shall report these measures and results as part of its barrier analysis in its annual MD-715 report for the next five (5) years. The measures in question shall include the following:
 - a. All officials, managers, and employees who are responsible for finding adequate work for employees who are injured on duty will be given at least 8 hours of training annually on the Agency's responsibilities to provide reasonable accommodations to qualified individuals with disabilities under the Rehabilitation Act. This training must include a segment on the relationship between the Agency's obligations under the Rehabilitation Act and under the Federal Employee Compensation Act, as explained in our enforcement guidance entitled: Workers Compensation and the ADA, EEOC Notice No. 915.002 (Sept. 3, 1996), which can be found at: www.eeoc.gov/policy/docs/workcomp.html. The training must also include a segment on ensuring that employees' medical information, including Form CA-17's and other relevant documents, remains confidential at all times.

- b. The Agency shall make certain that, in whatever process it utilizes to find adequate work for injured-on-duty employees who need to be placed into limited-duty or rehabilitation assignments, such employees are notified at the beginning of and throughout that process that if they meet the statutory requirements of the Rehabilitation Act, they have the right to request a reasonable accommodation, and explain the procedures for doing so as they are set forth in EL-307. Employees shall also be notified that the process of finding adequate work necessarily entails that compensation specialists and other personnel may need access to their confidential medical information in order to assist them in finding adequate work, and that the confidentiality of such medical documentation will be maintained at all times. The Agency shall ensure that information pertaining to reasonable accommodations and confidentiality of medical documentation is included in any printed and electronic materials pertinent to the process of finding adequate work for injured-on-duty employees.
6. Within ten (10) calendar days of the date this decision is issued, the Agency shall notify the members of the class of this decision and available relief through the same media employed to provide notice of the existence of the class complaint. The notice shall include the following provisions:
 - a. Within thirty (30) days of receipt of notification of this decision, a class member who believes that he or she is entitled to individual relief must file a written claim with the Agency or with its EEO director. The claim must include a specific, detailed showing that the claimant was subjected to an evaluation under the National Reassessment Program between May 5, 2006, and July 1, 2011 (hereinafter referred to as the class period), as well as of the consequences of that evaluation: being returned to full duty; receiving no change in limited-duty or rehabilitation assignment; receiving a new limited-duty or rehabilitation assignment; receiving a total or partial "no work available" determination; and separating, resigning, or retiring during the period that the NRP was in effect.
 - b. All those who were evaluated under the National Reassessment Program during the class period may put in a claim for damages to the extent that they can provide a specific and detailed showing that they suffered compensable harm as a result of being subjected to an unlawful medical inquiry or having their confidential medical information accessed by unauthorized persons. All class members are eligible for relief under this provision.
 - c. Those who were evaluated under the National Reassessment Program during the class period and who wish to file a claim seeking relief from harassment, disparate treatment, or having their reasonable accommodations withdrawn must provide a specific and detailed showing that they were qualified individuals with disabilities at the time of the violation. Those who were evaluated before January 1, 2009, are

subject to the definition of disability under the Rehabilitation Act as it existed prior to the enactment of the Americans with Disabilities Act Amendments Act of 2008. Those who were evaluated on or after January 1, 2009, are subject to the definition of disability under the Rehabilitation Act as amended by the Americans with Disabilities Act Amendments Act of 2008.

- d. Those who were evaluated under the National Reassessment Program during the class period who wish to file a claim for damages resulting from unlawful harassment must provide a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation, and that they suffered compensable pecuniary or nonpecuniary harm as a result of the National Reassessment Process.
- e. Those who were evaluated under the National Reassessment Program during the class period, who present a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation and were given a new limited-duty or rehabilitation assignment that resulted in a loss or harm to a term, condition, privilege or benefit of their employment with the United States Postal Service may put in a claim for additional damages and equitable relief to the extent such harm or loss was attributable to such new limited duty or rehabilitation assignment.
- f. Those who were evaluated under the National Reassessment Program during the class period, who were qualified individuals with disabilities at the time of their evaluation and who were given a total or partial no-work-available determination that resulted in being placed into OWCP, having reduced work hours, or otherwise suffering a loss or harm to a term, condition, privilege, or benefit of employment with the United States Postal Service may put in a claim for additional damages and equitable relief to the extent such harm or loss was attributable to receiving the total or partial no-work-available determination.
- g. Those who were evaluated under the National Reassessment Program and separated resigned, or retired during the class period and who wish to file a claim for relief must present a specific and detailed showing that they were qualified individuals with disabilities at the time of their evaluation and that they were constructively discharged as a result of that evaluation. To prevail in a constructive discharge claim, the claimant must establish that the National Reassessment Program evaluation or any consequences flowing from that evaluation made his or her working conditions so difficult that a reasonable person in his or her position would have felt compelled to separate, resign, or retire.
- h. Within ninety (90) calendar days of receiving an individual claim, the Agency will issue a final decision on that claim. That decision will include a notice of the right to file an appeal or a civil action within the applicable time limits.

7. Within ten (10) calendar days of the date this decision is issued, the Agency shall notify the 3,300 members of the class who were never assessed under the National Reassessment Program that they are not members of the class, that their previously-filed individual EEO complaints, if any, have been de-subsumed from the class, and that they are free to pursue those individual complaints. The notice shall not include language to the effect that those who had not previously filed in individual EEO complaint will be given 45 days from receipt of the notice to initiate a new individual complaint.
8. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due the Class Agent, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its facilities around the country 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 the Class Agent has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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.

CLASS AGENT'S RIGHT TO FILE A CIVIL ACTION (R0610)

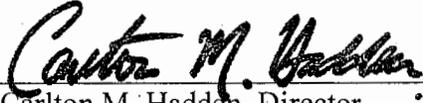
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

A handwritten signature in black ink, appearing to read "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

MAR 09 2018

Date