



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P. O. Box 19848
Washington, D.C. 20036

Mauro Dybvik,
Complainant,

v.

John E. Potter,
Postmaster General,
United States Postal Service,
Agency.

Appeal No. 0720080028

Hearing No. 443-2007-00075X

Agency No. 1E-554-0025-06

DECISION

Following its February 20, 2008 final action, the agency filed an appeal with this Commission requesting that we affirm its rejection of the discrimination finding of an EEOC Administrative Judge (AJ), in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.* The agency also requests that the Commission affirm its rejection of the relief ordered by the AJ.

Complainant, a former Casual, EAS-07, at the agency's Minneapolis Processing and Distribution Center (P&DC), filed a formal EEO complaint on December 20, 2007. Therein, complainant claimed that the agency discriminated against him on the basis of disability (diabetes) when:

on September 8, 2006, he was reprimanded for being away from his machine when he went to obtain insulin; and on September 20, 2006, he received a negative evaluation, and was not re-appointed to a causal appointment.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and requested a hearing before an AJ.

Following a hearing on August 28, 2007, the AJ issued a decision on January 7, 2008, finding discrimination.

In her January 7, 2008 decision, the AJ found that complainant established a *prima facie* case of disability because he established that his diabetes created a substantial limitation on the major life of eating and the regimen involved with monitoring and controlling diabetes. Moreover, the AJ determined that the agency failed to provide complainant with a reasonable accommodation of monitoring his blood sugar levels.

After a review of the testimony and medical records, the AJ found complainant established a link between his being subjected to disability discrimination and the resulting emotional distress. The AJ awarded complainant reappointment to a Casual position; and back pay from the time he would have been reappointed as a Casual employee to the expiration of the casual appointment. The AJ also awarded complainant \$3,000.00 in non-pecuniary compensatory damages. Specifically, the AJ found complainant suffered from anxiety and physical symptoms. The AJ found that following these events, complainant suffered anxiety, sleep deprivation, loss of appetite and was embarrassed for his father who worked for the agency. The AJ noted that complainant saw a psychiatrist on several occasions in December 2006, regarding the agency's negative performance evaluation, and the failure to reappoint him.

As for the remaining remedies, the AJ ordered the agency to cancel complainant's performance evaluation dated August 31, 2006 and to expunge any adverse materials relating to the evaluation; engage in an interactive process with complainant and reasonably accommodate his need to monitor his blood sugar levels; pay attorney's fees in the amount of \$28,208.75; provide EEO training for all employees, including an emphasis on disability discrimination; notify agency officials not to retaliate against complainant when he is reappointed to a casual position; and post a notice on all employee bulletin boards stating that it was found in violation of Rehabilitation Act.

The Commission discerns no basis to disturb the AJ's findings. The findings of fact are supported by substantial evidence, and that the AJ correctly applied the appropriate regulations, policies and laws. Moreover, we further find that given the specific facts in this case, the AJ's remedial award is appropriate. We note that in regard to attorney's fees and costs, the record contains a copy of complainant's attorney's petition fee dated December 12, 2007. Therein, the primary attorney requested a total of \$30,476.93 (\$29,208.75 in attorney's fees and \$1,268.18 in costs). Specifically, the primary attorney stated that he and his staff spent 180.45 hours working on complainant's case at the hourly rate of \$400.00 in attorney's fees and \$250.00/\$175.00/\$95.00 per hour for associate and law clerk for a total of \$29,208.75; and incurred legal costs in the amount of \$1,268.18. We note in her decision, the AJ stated that on January 4, 2007, she was notified by the agency that the parties agreed to reduce complainant's attorney's fees by \$1,000.00 to \$28,208.75. We note that while the AJ did not mention anything about legal costs, she awarded complainant attorney's fees in the amount of \$28,208.75. We determine that the agency shall pay the attorney in the amount of \$28,208.75 in attorney's fees and costs.

We **REVERSE** the agency's final action, and **REMAND** this matter to the agency to take remedial action in accordance with this decision and the **ORDER** below.

ORDER

The agency is ordered to take the following remedial action:

1. Within sixty (60) calendar days of the date this decision becomes final, the agency shall reappoint complainant to a Casual position; and notify agency officials not to retaliate against complainant when he is reappointed to a casual position.
2. Within sixty (60) calendar days of the date this decision becomes final, the agency shall remit complainant all back pay and/or benefits lost as a result of its discrimination actions, from the time he would have been reappointed as a casual employee to the expiration of the casual appointment.
3. Within sixty (60) calendar days of the date this decision becomes final, the agency shall cancel the performance evaluation dated August 31, 2006 and expunge any adverse materials relating to it.
4. Within sixty (60) calendar days of the date this decision becomes final, the agency shall engage in an interactive process with complainant and reasonably accommodate his need to monitor his blood sugar levels.
5. Within sixty (60) calendar days of the date this decision becomes final, the agency shall tender to complainant \$3,000.00 in non-pecuniary compensatory damages.
6. Within sixty (60) calendar days of the date this decision becomes final, the agency shall tender to complainant's attorney \$28,208.75 in attorney's fees.
7. Within sixty (60) calendar days of the date this decision becomes final, the agency shall provide all employees EEO training with an emphasis on disability discrimination.
8. The agency shall post a notice in accordance with the paragraph below.

The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

ATTORNEY'S FEES (H0900)

If complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/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 this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

POSTING ORDER (G0900)

The agency is ordered to post at its Minneapolis P&DC in Minneapolis, Minnesota, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (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 at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0408)

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 submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. 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.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0408)

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 (S0408)

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.**



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 a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e *et seq.* has occurred at 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 PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The Minneapolis P&DC of the United States Postal Service in Minneapolis, Minnesota, supports and will comply with such Federal Law and will not take actions against individuals because they have exercised their rights under law.

The Minneapolis P&DC was found to have violated Rehabilitation Act when an employee was reprimanded for being away from his machine while taking care of a medical situation; issued him a negative evaluation and did not reappoint him to a casual appointment. An EEOC Administrative Judge has ordered the agency to undertake a variety of remedies, to include reappointment, back pay plus interest and benefits, cancel the negative evaluation and expunge any adverse materials relating to it; engage in an interactive process with the employee and reasonably accommodate his medical needs; non-pecuniary compensatory damages; provide training to all employees, with an emphasis on disability discrimination; attorney's fees and costs; and the posting of this notice.

The 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.

Postmaster,
Minneapolis P&DC
Minneapolis, Minnesota

Date Posted: _____

Posting Expires: _____

29 C.F.R. Part 1614

RIGHT TO REQUEST COUNSEL (Z0408)

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

Carlton M. Hadden, Director
Office of Federal Operations

JUN 3 2008
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:

Mauro Dybvik
2800 Spy Glass Dr
Chaska, MN 55318

Gerald Laurie, Esq
1660 S Hwy 100
508 E Parkdale Plaza
St Louis Park, MN 55416

U.S. Postal Service (Western)
NEEOISO - Appeals
U.S. Postal Service
PO Box 21979
Tampa, FL 33622-1979

JUN 3 2008

Date

AS

Equal Opportunity Assistant