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E.E.O.C.

MICHELLE K. ZOBEL, COMPLAINANT,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, AGENCY.

APPEAL 0720050035

Hearing No. 350-2003-8089X

Agency No. 1E-853-0049-01

November 28, 2006

DECISION

Following its December 13, 2004, final order, the agency filed a timely appeal which the Commission accepts pursuant to 29 C.F.R. § 1614.405(a). [FN2] On appeal, the agency requests that the Commission affirm its rejection of an EEOC Administrative Judge's (AJ) finding of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and its rejection of the relief ordered by the AJ.

ISSUES PRESENTED

Whether complainant was discriminated against based on disability (shoulder) when: (1) from approximately May 7, 2001, to June 10, 2001, she was reassigned as a lobby clerk to the Tempe South Station in Arizona, and (2) she allegedly performed work outside her medical restrictions in Tempe. In addition, whether the AJ properly calculated damages.

BACKGROUND

Complainant filed an EEO complaint containing issues one and two. [FN3] Following an investigation, she requested a hearing. The agency filed a motion for a decision without a hearing, arguing that there were no genuine issues of material fact and there was no discrimination. In response, complainant argued that there was discrimination and requested a finding of discrimination. The AJ then issued an initial decision without a hearing finding disability discrimination on issues 1 and 2. Following a hearing on remedies, the AJ issued a decision finalizing the discrimination finding and awarding complainant \$25,000 in nonpecuniary and \$1,440 in pecuniary damages. The decision also ordered that the agency train managers in complainant's facility on the Rehabilitation Act. Thereafter, the agency issued its final action/appeal.

In September 1991, following a work-related injury, complainant was placed in the rehabilitation position of general clerk (modified) in Quality Control. An agency written description reflects the duties were

answering the telephone, receiving visitors, doing light typing, filing and the like, and that the job's physical requirements did not exceed lifting more than five pounds.

In March 1996, a physician opined that the most complainant could lift continuously was five pounds, that the most she could lift intermittently was 10 pounds, and that these restrictions were expected to be permanent.

In February 1999, complainant injured or aggravated her shoulder, and was diagnosed with bicipital tendonitis, right shoulder strain. In December 1999, she was placed in the permanent rehabilitation position of general clerk (modified) in the Phoenix Plant, Phoenix Processing and Distribution Center, In-Plant Support (IPS). The duties were primarily answering the telephone, but also included light secretarial work, minor data entry, and some filing. In a joint statement, the Manager of IPS, complainant's third level supervisor, and the Operations Support Specialist, complainant's second level supervisor, indicated that the written physical requirements of the job were consistent with complainant's medical restrictions, including lifting no more than five pounds.

On the recommendation of her physician, in early December 2000, complainant temporarily stopped working. The physician explained that complainant was unable to lift more than five pounds, was on heavy narcotics for pain, and needed additional physical therapy. He noted complainant was being treated for extreme stress and anxiety secondary to the length of her physical illness. Complainant continued to be out of work, and in February 13, 2001, had surgery on her right shoulder.

By letter to complainant dated March 8, 2001, which was copied to the agency's injury compensation office, the Department of Labor, Office of Workers' Compensation Programs (OWCP), instructed complainant to ask the agency whether work was available, and whether her usual job could be changed to meet her limitations. The acting manager of the agency's injury compensation office stated that that she interpreted this to mean that OWCP placed the obligation on the employee to ask the agency whether her usual job could be modified to meet her limitations. Complainant's physician sent the agency's injury compensation office a work capacity evaluation form dated April 19, 2001, indicating complainant could work four hours a day, to be increased to eight hours in six weeks, and that she could do no lifting, among other limitations.

Within days of the evaluation, complainant spoke to her immediate supervisor in IPS, who said she could use complainant to answer the telephones four hours a day. The supervisor affirmed that IPS could accommodate complainant's medical limitations. Complainant also spoke to the Manager of IPS, who indicated he could accommodate complainant's limitations. Complainant attempted to return to work on April 23, 2001, but was told, apparently by the injury compensation office, that she no longer had a position in IPS.

Assuming that complainant's physician's lack of further communication meant that he did not release complainant to work in her IPS job, the acting manager of the injury compensation office made arrangements for complainant to be reassigned as a lobby clerk in Tempe. In making the arrangements, she did not consult with IPS management regarding whether complainant could continue performing her duties there, explaining that was complainant's responsibility. IPS management expressed much consternation over not being consulted on this matter. The acting manager also stated that she was looking for a job lighter than that in IPS.

According to an agency written description of the Tempe lobby clerk job, the duties were greeting customers, providing them general direction and information, and lifting paper forms weighing less than an ounce; the physical requirements of the job required lifting paper of zero to one pound. Complainant's physician approved the job as being within complainant's medical limitations. By letter dated April 26, 2001, the acting manager of the injury compensation office offered complainant the position, and warned that failure to accept could result in a cut off of OWCP wage loss compensation. Complainant accepted the job under protest. In accepting the offer, she wrote that her physician never expected her to be relocated, she expected to return to IPS, and that the IPS job was very close to her home.

Upset by the Tempe offer, complainant immediately called her physician's office. In response, on April 27, 2001, the physician's office sent a fax to the agency's injury compensation office stating complainant could perform all the duties of her IPS position, that she could answer phones, do light typing, and perform minor manipulation skills. The sending fax machine printed a receipt indicating it was received by the agency's injury compensation office of April 27, 2001. The acting manager of the injury compensation office denied receiving it.

According to complainant, a large part of her job in Tempe was to retrieve "will-call" items for customers, which required lifting parcels and packages beyond her weight limitations. Will-call items include mail that was on hold during vacation, postage due mail, and registered mail. She stated that a customer's will-call mail could consist of entire tubs, and they were in a hurry to get their mail. At the remedies hearing, she testified that the station was very busy, and staff was often not available to help. She testified that customers got irate waiting for their will-call mail. A May 28, 2001, letter by a contract OWCP nurse who observed complainant stated the lobby clerk job had duties outside her limitations such as moving mail tubs. The manager of the Tempe station conceded that complainant worked with mail. He stated that certified mail shelves were lowered for complainant, and he told her to get help with any heavy parcels or packages. He stated that he repeatedly told complainant not to work beyond her restrictions, and had no knowledge of her doing so.

Complainant stated she informed management that retrieving packages and parcels in Tempe was not good for her, and testified at the remedies hearing that she called IPS management everyday saying she was being asked to do things beyond her physical limitations. She indicated in her pre-complaint that, starting in early May 2001, she repeatedly complained to the IPS manager about the will-call work, which prompted the OWCP contact nurse to observe her duties. The IPS manager stated complainant complained that Tempe did not understand her medical restrictions, and it took several meetings and weeks to persuade the acting manager of injury compensation to place complainant back in IPS. Complainant's IPS supervisor affirmed that while complainant was in Tempe, she told the injury compensation office that complainant believed she was working outside her restrictions in Tempe. The acting manager of injury compensation office stated that she returned complainant to IPS once she received medical documentation releasing her to do so. At the remedies hearing, she testified that when the IPS manager said he had work within complainant's restrictions, she returned complainant to IPS.

The record contains a work capacity evaluation form by complainant's physician dated May 7, 2001, indicating that complainant could lift five pounds. It is stamped received June 18, 2003, by the injury compensation office.

CONTENTIONS ON APPEAL

The agency argues that complainant is not an individual with a disability. It argues that the reassignment was not an adverse action. It argues that there is a genuine issue of material fact regarding whether complainant worked outside her restrictions at Tempe. Further, the agency argues that the AJ violated 29 C.F.R. § 1614.109(g)(3) when he found liability with no hearing and without notifying the agency that he intended on doing so. It argues that some medical documentation submitted in support of the damages claim should not have been admitted into evidence. Finally, it argues that the award of \$25,000 in nonpecuniary damages was too high, and there was no documentary evidence in support of the finding of pecuniary damages of \$1,440. In response, complainant argues that the AJ's decision should be upheld.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986); *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate.

As an initial matter, we disagree with the agency's argument that the AJ violated 29 C.F.R. § 1614.109(g)(3) when he found liability without a hearing and did not notify it that he intended on doing so. The AJ issued a decision without a hearing in response to the agency's motion and complainant's response thereto, not on his own initiative. Hence, the above regulation does not apply. Our regulations do not require an AJ to give advance warning to the party moving for summary judgment of an intention of reaching a different conclusion on liability.

As a threshold matter, one bringing a claim of discrimination on the basis of disability must show that she is an individual with a disability within the meaning of the Rehabilitation Act. 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 an impairment or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). Major life activities include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

The undisputed evidence shows that since at least March 1996, the most complainant could lift continuously was five pounds, and the most she could lift intermittently was 10 pounds. By 1999, her medical restriction was lifting no more than five pounds, with a period thereafter of a number of months where she was restricted from lifting even less than five pounds. A restriction of lifting only 10 pounds is a physical impairment that substantially limits the major life activity of lifting. *Selix v. United States Postal Service*, EEOC Appeal No. 01970153 (March 16, 2000). Given the number of years of complainant's restriction, we find it was permanent. Accordingly, complainant is an individual with a disability. [FN4]

A qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job related requirements of the position in question and can, with or without reasonable accommodation, perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

An agency must provide reasonable accommodation to the known physical or mental limitations of qualified applicants or employees with disabilities unless it can demonstrate that the accommodation would impose an undue hardship on the operations of its program. 29 C.F.R. § 1630.9(a) & (b). Reasonable accommodation may include job restructuring, acquisition or modifications of equipment or devices, and reassignment to a funded, vacant position. 29 C.F.R. § 1630.2(o)(2)(ii). Before considering reassignment as a reasonable accommodation, employers should first consider those accommodations that would enable an employee to remain in her current position. Reassignment is the reasonable accommodation of last resort. EEOC Enforcement Guidance on Reasonable Accommodation and Undue

Hardship Under the Americans with Disabilities Act, Reassignment subsection (October 17, 2002)
(available at www.eeoc.gov.)

The acting manager of injury compensation explained that she reassigned complainant because she did not receive a medical release for her IPS job and suggested she believed complainant needed even lighter work. Complainant communicated to the acting manager her objection to the reassignment, indicating she wanted to work in IPS. She also informed IPS management that she wanted to stay in IPS, not work in Tempe. The evidence shows complainant could have continued to work in her IPS job. First, it is undisputed that her primary duty in IPS was answering the telephone, and complainant indicates she could do that. Second, management in IPS indicated it could accommodate complainant's restrictions. Given the very light nature of complainant's job in IPS, we find the undisputed evidence shows complainant could have performed her duties there without further accommodation. [FN5] Even the medical information which the acting manager of the injury compensation office indicated she had reflected complainant could lift at least a pound. The evidence does not show a telephone receiver weighed more than that.

Moreover, complainant's medical provider opined on April 27, 2001, and again on May 7, 2001, that complainant could perform the duties of her IPS job. The acting manager of the injury compensation office avers that she did not receive this medical documentation until after complainant already returned to IPS. This, however, does not create a genuine issue of material fact.

Under the Rehabilitation Act, it is anticipated that to the extent necessary, the employer will engage in the interactive process with the individual requesting accommodation to clarify an individual's needs and identify the appropriate reasonable accommodation. 29 C.F.R. § 1630.2(o)(3). However, failure by an agency to engage in the interactive process does not constitute a violation of the Rehabilitation Act. Liability depends on a finding that, had a good faith interactive process occurred, the parties could have found a reasonable accommodation that would enable the individual with a disability to perform the essential functions of the job. In other words, an individual cannot succeed on denial of reasonable accommodation claim solely on a showing that an employer failed to engage in the interactive process because that process is not an end in itself; rather, the employee must show that an inadequate interactive process resulted in an employer's failure to provide a reasonable accommodation. *Broussard v. United States Postal Service*, EEOC Appeal No. 01997106 (September 13, 2002). Such is the case here.

First, as found above, the undisputed evidence shows, even with the medical evidence the acting manager of injury compensation undisputedly had, that complainant could perform the duties of her IPS job. Moreover, had the acting manager of the injury compensation office engaged in the interactive process, she would have uncovered additional information to support this. Complainant could have clarified for the acting manager, to the extent she had not already done so, [FN6] that she could work in the IPS job and help secure medical documentation. Moreover, to the extent the acting manager did not communicate with IPS management, she could have learned earlier that complainant could work at IPS. Accordingly, the AJ's finding that complainant was not reasonably accommodated in violation of the Rehabilitation Act when she was reassigned out of her IPS job is affirmed. In concert with this, we agree with the AJ's finding that the reassignment was an adverse action. Most significantly, as found by the AJ, the Tempe lobby clerk job made complainant work outside her restrictions. In addition, complainant strongly preferred working in IPS, and expressed this repeatedly. She was comfortable at IPS, had a good working relationship with management there, and it involved a shorter commute to work. The agency argues that there is a genuine issue of material fact regarding whether complainant worked outside her limitations at Tempe. It points to the statements of the manager at Tempe that he told complainant several times not to work outside her restrictions, to seek help with any heavy parcels, and was unaware of her working outside her restrictions. As noted by the AJ, however, the manager did not deny complainant worked outside her restrictions, rather, he stated he had no knowledge of her doing so.

Absent undue hardship, the agency was obligated to provide complainant with reasonable accommodations which would allow her to work within her restrictions. [FN7] We acknowledge that the agency in Tempe took steps to accommodate complainant's disability. However, we find that the efforts

were not effective. In particular, we note that part of complainant's job included retrieval of will-call items that were weighted beyond her restrictions. While the manager at Tempe instructed complainant not to violate her restrictions and get assistance with heavy items, this accommodation was not effective because the station was busy and staff often was not available to help. Meanwhile, customers in a rush were waiting for complainant's service, making them irate. Therefore, by failing to reasonably accommodate complainant, we conclude that the agency violated the Rehabilitation Act.

As the AJ held a hearing on the issue of compensatory damages, the AJ's factual findings regarding them are subject to the substantial evidence standard of review. 29 C.F.R. §1614.405(b).

The AJ found complainant's testimony to be highly credible. Regarding the reassignment, the AJ noted complainant's testimony that she was hysterical, and a "wreck" driving to work, a wreck on break, and a wreck at home. She testified that as a result of this ordeal, she had panic attacks, and she called ISP managers everyday "screaming like a nut" with her concerns and feelings about her assignment in Tempe. She testified that it was embarrassing and humiliating not to be able to properly serve customers and hear them say things like "What are you here for?" She testified that her feelings of hysteria occurred throughout her time in Tempe, that she was emotionally unstable and upset all the time, was screaming at her children, and would go home and could not cook dinner and take care of her children, and just wanted to go to bed.

The manager of IPS affirmed that complainant was very upset and distraught by being reassigned. Complainant's second level supervisor at IPS stated complainant was mortified and panicked at the prospect of being reassigned, and during the period of the reassignment she could not complete a conversation with him without crying. At the remedies hearing, he testified that every time complainant would have an interaction with the injury compensation office, she would come back very nervous, very hyperactive, in tears, and concerned over what was happening. He testified that when complainant was in Tempe, she called him, and her ISP supervisor and manager daily crying about why the injury compensation office was making her work in Tempe rather than in IPS. He testified that complainant was hysterical and extremely upset.

Complainant testified that even after being assigned back to IPS, some of the emotional problems continue. She testified that she gets upset easily, and is short tempered, and suffers from nightmares. *8 While not all of complainant's emotional problems can be attributed to the discrimination found, substantial evidence shows much is. The complainant's statements and testimony regarding her emotional harm caused by the reassignment, along with corroborating statements and testimony by IPS management, support with substantial evidence the nonpecuniary damages award of \$25,000, which is affirmed. [FN8] See *Neal v. United States Postal Service*, EEOC Appeal No. 07A40059 (August 29, 2005) (award of \$25,000 where complainant testified as the embarrassment she suffered, in addition to the exacerbation of her fibromyalgia, fatigue, stress, and depression). [FN9]

Complainant testified that as a result of the treatment from the injury compensation office, she sees a psychologist at least once a month and has a \$20 insurance co-payment per visit. Complainant also testified that she paid for her own medication. Complainant took medication for panic attacks and anxiety, but did not specify how much she paid for the medication. Based on complainant's testimony, the AJ awarded \$1,440 in pecuniary damages for co-payments for medication and counselling. Complainant submitted no documentation regarding bills or charges or what was paid.

In the Commission's policy guidance of Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, Section II (A)(1) (July 14, 1992) (located at www.eeoc.gov), the Commission advised that the amount to be awarded for past pecuniary losses can be determined by receipts, records, bills, cancelled checks, confirmation by other individuals, or other proof of actual losses and expenses. Damages for past pecuniary damages will not normally be sought without documentation. *Id.* The EEOC has stated that documentation, typically in the form of receipts, bills, or physician statements are required to support an award of past pecuniary damages. *Almera v. Department of Veterans Affairs*, EEOC Appeal No. 01A13618 (January 30, 2002). The Commission ruled that such documentation can take the form of a credible statement itemizing expenses. *Van Hoose v.*

Department of the Navy, EEOC Appeal Nos. 01982628 and 01990455 (August 22, 2001). Complainant's uncorroborated testimony was insufficient to support an award of past pecuniary damages. Accordingly, the AJ's award of past pecuniary damages is reversed.

As complainant prevailed on appeal, she may be entitled to attorney's fees. The attorney's fee order below explains how to apply for attorney fees and the time limits for doing so.

CONCLUSION

The AJ's decision finding disability discrimination and awarding complainant \$25,000 in nonpecuniary damages is affirmed. The AJ's decision awarding \$1,440 in pecuniary damages is reversed. The order below contains additional relief.

ORDER

The agency is ordered to take the following remedial actions:

1. Within 60 calendar days after this decision becomes final, the agency shall issue complainant a check for \$25,000 in nonpecuniary compensatory damages.

2. The agency shall require the individual identified as the acting manager of the injury compensation office to attend training on reasonable accommodation obligations under the Rehabilitation Act, and how these obligations differ from workers' compensation requirements. [FN10]

3. The agency shall consider taking disciplinary action against the above individual. The agency shall report its decision. 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.

The agency shall complete actions 2 and 3 above within 150 calendar days after this decision becomes final.

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 of the agency's payment of compensatory damages and documentation that the other ordered relief has been implemented.

POSTING ORDER (G0900)

The agency is ordered to post at its Phoenix Plant, Phoenix Processing and Distribution Center in Arizona 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.