

Roberta M. Roberts v. United States Postal Service  
 01986449  
 April 11, 2000

Roberta M. Roberts,	)	
Complainant,	)	
	)	Appeal No. 01986449
v.	)	Agency No. 4A105112196
	)	Hearing No. 160-97-8539X
William J. Henderson,	)	
Postmaster General,	)	
United States Postal Service,	)	
(Northeast/New York Metro Region),	)	
Agency.	)	
	)	

#### DECISION

Complainant timely initiated an appeal from a final agency decision (FAD) concerning her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., and the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, et seq.<1> The appeal is accepted pursuant to 64 Fed. Reg. 37,644, 37,659 (1999) (to be codified at 29 C.F.R. § 1614.405).

Complainant claims that she was discriminated against on the bases of reprisal (prior EEO complaint) and disability (residuals of left foot fracture, herein referred to as "left foot disorder") when she was charged with absence without official leave (AWOL), instead of paid leave or leave under the Family and Medical Leave Act (FMLA) regarding three "Request for or Notification of Absences" for late arrivals in March and April 1995. These request were each annotated as being related to her left foot disorder. Complainant contends that the agency's denial of paid leave or leave under the Family Leave Act for these absences constitutes a failure to accommodate her due to her disability. Alternatively, complainant contends that her supervisor (S) was fully aware of her prior EEO complaint, as well as its settlement in her favor, and retaliated against her by charging her with AWOL.

For the reasons that follow, we REVERSE the FAD and REMAND the case for a hearing.

The record reveals that during the relevant time, complainant was employed as a Distribution Clerk at the agency's Mid-Hudson Processing and Distribution facility in Newburgh, New York. Believing she was a victim of discrimination, complainant sought EEO counseling and, subsequently, filed a formal complaint. At the conclusion of the investigation, complainant was provided a copy of the investigative file and requested a hearing before an EEOC Administrative Judge (AJ). The AJ issued a decision without a hearing finding no discrimination.

The AJ concluded that complainant failed to establish a prima facie case of reprisal finding that S had no knowledge of complainant's prior EEO complaint. The AJ also concluded that complainant failed to establish a prima facie case of disability discrimination, finding that the agency "perceived" her left foot disorder to be temporary in nature. The AJ additionally held that complainant failed to demonstrate that her left foot disorder substantially limited one or more major life

activities, so that she did not satisfy the definition of an individual with a disability under the Rehabilitation Act.<2> The AJ specifically found that complainant failed to produce any evidence that her left foot disorder was permanent.

The FAD adopted the RD. On appeal, complainant identifies two "technical" errors: one concerning irregularities with the EEO counseling; and the other concerning improper case administration by the AJ.

Regarding the first concern, we note that this is not a proper matter for appeal, and we advise complainant to refer this concern to the Director of the agency's responsible EEO Office. Regarding the second matter, complainant claims that the parties were actively engaged in settlement negotiations as ordered by the AJ, and that she and her representative had contacted the AJ for assistance in drafting a certain provision of a proposed Settlement Agreement. Instead, the AJ issued the RD, without a hearing, finding no discrimination. Again, this is not a proper matter for appeal, and we advise complainant to contact the Chief Administrative Judge of the Hearing Unit at the New York EEOC District Office.

Complainant also argues that the AJ committed error when she found that S was not aware of her prior EEO activity. Specifically, complainant contends that the record before the AJ contained evidence that S was fully aware of her prior EEO activity, and that S's affidavit on this point is not credible. Specifically, complainant's representative in the instant matter submitted an affidavit on appeal stating that she had met with S in April 1994 to explain to S that a Letter of Warning regarding excessive absences had been removed from complainant's file in resolution of an EEO complainant, and asked her to make sure not to use this in any way against complainant. Complainant was concerned that S might use it against her because she had issued the Letter of Warning while acting for her usual supervisor. We note that complainant also references this incident in her response to the agency's motion for summary judgment, which is signed by her representative, so that it was in evidence before the AJ. We note that this meeting between S and complainant's representative is also referenced in sworn statements by complainant which also were of record before the AJ.

Complainant additionally contends that the AJ committed error in finding that she submitted no evidence that her left foot disability was "permanent." To the contrary, complainant identifies two statements from her physician, dated in April 1995 and June 1995, which specifically indicate that the left foot disorder is "permanent." We find that it appears that each of these statements was contemporaneously provided to S. Moreover, we find that the June 1995 statement additionally indicates that this left foot disorder causes intermittent and unpredictable incapacitation which could affect her ability to work. The record shows that complainant fractured her left foot/ankle in 1992, while in duty status, and has received on-going medical treatment for residual problems, described as cramping, pain, and overall discomfort. The record also shows that complainant received Office of Workers Compensation benefits for this injury, but no description of the benefits, or their duration, is provided.

In response, the agency stands on the record and requests that we affirm its FAD adopting the RD.

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. This regulation is patterned after the summary judgment procedure

set forth in Rule 56 of the Federal Rules of Civil Procedure. The United States Supreme Court has stated that summary judgment is appropriate where the trier of fact determines that, given applicable substantive law, no genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An issue is "genuine" if the evidence is such that a reasonable fact-finder could find in favor of the non-moving party. *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988). In the context of an administrative proceeding under Title VII, summary judgment is appropriate if, after adequate investigation, complainant has failed to establish the essential elements of his or her case. *Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171, 173 (3d Cir. 1988). In determining whether to grant summary judgment, the trier of fact's function is not to weigh the evidence and render a determination as to the truth of the matter, but only to determine whether there exists a genuine factual dispute. *Anderson*, 477 U.S. at 248-49.

The courts have been clear that summary judgment is not to be used as a "trial by affidavit." *Redmand v. Warrenner*, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, "there is a need for strident cross-examination and summary judgment on such evidence is improper." *Pedersen v. Department of Justice*, EEOC Request No. 05940339 (February 24, 1995).

After a careful review of the record, we find that the AJ erred when she concluded that there was no genuine issue of material fact in this case. First, in finding no reprisal, the AJ relied on the representations of S that she had no prior knowledge of complainant's prior EEO activity (a material fact as to complainant's reprisal claim), which may or may not be credible in light of the sworn statements of complainant and her representative. Second, contrary to the AJ's finding, the record contains two signed and dated medical statements from complainant's treating physician indicating that the left foot disorder is permanent (a material fact to the determination of whether complainant is an individual with a disability under the Rehabilitation Act). We further find that these medical statements call into question the credibility of the agency when it proffers that it perceived the left foot disorder as temporary given that they were in possession of both of these statements. Furthermore, notwithstanding the AJ's determination that complainant failed to establish that her left foot disorder substantially limits her in one or more major life activities, we find that the two medical statements of record suggest otherwise, but that additional development of record is necessary in order to adequately support a determination on this issue. Moreover, we find that the AJ must address complainant's claim as the agency's failure to accommodate her disability, and not as a disparate treatment claim.

We note that the hearing process is intended to be an extension of the investigative process, designed to "ensur[e] that the parties have a fair and reasonable opportunity to explain and supplement the record and to examine and cross-examine witnesses." See EEOC Management Directive (MD) 110, as revised, November 9, 1999, Chapter 6, page 6-1; see also 64 Fed. Reg 37,644, 37,657 (1999) (to be codified and hereinafter referred to as 29 C.F.R. §§ 1614.109(c) and (d)). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives complainant of a full and fair investigation of her claims." *Mi S. Bang v. United States Postal Service*, EEOC Appeal No. 01961575 (March 26, 1998). See also *Peavley v. United States Postal Service*, EEOC Request No. 05950628 (October 31, 1996); *Chronister v. United States Postal Service*, EEOC

Request No. 05940578 (April 23, 1995).

In summary, we find that the RD contains mis-statements, and that there are significant unresolved issues of material fact which require credibility assessments and additional evidentiary development, such that summary judgement was improper in this case.

Therefore, after a careful review of the record, including complainant's arguments on appeal, the agency's response, and arguments and evidence not specifically discussed in this decision, the Commission REVERSES the agency's final action and REMANDS the matter to the agency in accordance with this decision and the ORDER below.

#### ORDER

The complaint is remanded to the Hearings Unit of the New York EEOC District Office for scheduling of a hearing in an expeditious manner. The agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. The agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K1199)

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 64 Fed. Reg. 37,644, 37,659-60 (1999) (to be codified and hereinafter referred to as 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)(Supp. V 1993). If the complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 64 Fed. Reg. 37,644, 37,659 (1999) (to be codified and hereinafter referred to as 29 C.F.R. § 1614.409).

#### STATEMENT OF RIGHTS - ON APPEAL

#### RECONSIDERATION (M0300)

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 64 Fed. Reg. 37,644, 37,659 (1999) (to be codified and hereinafter referred to as 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 64 Fed. Reg. 37,644, 37,661 (1999) (to be codified and hereinafter referred to as 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 (R1199)

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 (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:

April 11, 2000

Date

Carlton M. Hadden, Acting Director  
Office of Federal Operations

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 complainant, complainant's representative (if applicable), and the agency on:

Date

Equal Opportunity Assistant

1On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at 64 Fed. Reg. 37,644 (1999), where applicable, in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at [www.eeoc.gov](http://www.eeoc.gov).

2The Rehabilitation Act was amended in 1992 to apply the standards in the Americans with Disabilities Act (ADA) to complaints of discrimination by federal employees or applicants for employment. Since that time, the ADA regulations set out at 29 C.F.R. Part 1630 apply to complaints of disability discrimination. These regulations can be found on EEOC's website at [www.eeoc.gov](http://www.eeoc.gov).