

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
Washington, DC 20013

David M. Gonzalez, Complainant,
v.
Department of Veterans Affairs, Agency.

Appeal No. 0120070746
Hearing No. 330-2004-00156X
Agency No. 200305802004101136

DECISION

On November 15, 2006, complainant filed an appeal from the agency's October 11, 2006 final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the agency's final order.

BACKGROUND

At the time of events giving rise to this complaint, complainant worked as a Staff Nurse at the agency's San Antonio, Texas facility. Complainant suffered an on-the-job injury in July 2000, and was re-injured in December 2002. Upon his return to work, complainant was placed on light duty with a lifting restriction of 25 pounds. On March 4, 2004, complainant filed an EEO complaint alleging that he was discriminated against on the basis of disability (back injury) when:

1. in November 2003, management did not select/transfer him to the position of staff nurse in the Medical Intensive Care Unit (MICU) at the Houston facility; and
in 2005, management did not select/transfer him into any of the positions at the Houston facility for which he applied.

At the conclusion of the investigation, complainant was provided with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. The AJ assigned to the case held a hearing on September 19, 2005, and issued a decision on September 27, 2006, finding no discrimination. The agency subsequently issued a final order adopting the AJ's finding that complainant failed to prove that he was subjected to discrimination as alleged.

CONTENTIONS ON APPEAL

On appeal, complainant contends that the AJ erred in finding no discrimination. Further, complainant contends that the evidence of record does not support the AJ's findings that he had numerous on-the-job injuries, that there was a high risk of potential harm to him and his patients, or that he had a poor leave record. Complainant requests that the Commission reverse the AJ's decision.

ANALYSIS AND FINDINGS

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

In analyzing a disparate treatment claim under the Rehabilitation Act, where the agency denies that its decisions were motivated by complainant's disability and there is no direct evidence of discrimination, we

apply the burden-shifting method of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Heyman v. Queens Village Comm. for Mental Health for Jamaica Cmty. Adolescent Program, 198 F.3d 68 (2d Cir. 1999); Swanks v. WMATA, 179 F.3d 929, 933-34 (D.C.Cir. 1999). Under this analysis, in order to establish a prima facie case, complainant must demonstrate that: (1) he is an "individual with a disability"; (2) he is "qualified" for the position held or desired; (3) he was subjected to an adverse employment action; and (4) the circumstances surrounding the adverse action give rise to an inference of discrimination. Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001). The burden of production then shifts to the agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. In order to satisfy his burden of proof, complainant must then demonstrate by a preponderance of the evidence that the agency's proffered reason is a pretext for disability discrimination. Id.

For purposes of analysis only, we assume without finding that complainant is an individual with a disability within the meaning of the Rehabilitation Act. Next, complainant must establish that he is a "qualified individual with a disability," which is defined as an individual with a disability who, with or without a reasonable accommodation, can perform the essential functions of the position held or desired. 29 C.F.R. § 1630.2(m).

The Commission's Interpretive Guidance of Title 1 of the ADA, Appendix to 29 C.F.R. Part 1630, § 1630.2(n) explains that "[t]he inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential." Whether a particular function is essential is a factual determination that must be made on a case by case basis, considering all relevant evidence. Id.

Here, we concur with the AJ's finding that complainant failed to establish that he is a qualified individual with a disability. Specifically, the AJ found as fact that an essential function of the nurse positions for which complainant applied is the lifting and moving of patients. (AJ Decision at 3, 6-7). The record also establishes, and complainant acknowledges, that the lifting requirement for the relevant positions is between fifty and one hundred pounds. (Hearing Transcript, 18; 173; 201; 226-227; Agency Exhibit 67-69). Complainant, however, has a lifting restriction of twenty-five pounds. (Report of Investigation, Affidavit A; 144-145; Hearing Transcript 18-19). As such, the AJ found that complainant is not able to perform the essential functions of the positions for which he applied. We find that the AJ's conclusion that complainant failed to establish a prima facie case of disability discrimination as he is not a qualified individual with a disability under the Rehabilitation Act is fully supported by the evidence of record.

After a careful review of the record, the Commission finds that the AJ's findings of fact are supported by substantial evidence in the record and that the AJ's decision properly summarized the relevant facts and referenced the appropriate regulations, policies, and laws. We find that the record supports a finding that complainant failed to show that he was a qualified individual with a disability under the Rehabilitation Act. We discern no basis to disturb the AJ's decision in this case.

We AFFIRM the agency's final order finding no discrimination.

FOR THE COMMISSION:

Carlton M. Hadden, Director
Office of Federal Operations

March 9, 2010

Date

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M1208)

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 77960, Washington, DC 20013. 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.

RIGHT TO REQUEST COUNSEL (Z1008)

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 from the Court that the Court appoint an attorney to represent you and that the Court also 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 with the Court 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").