



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

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Felton A.,<sup>1</sup>  
Complainant,

v.

Megan J. Brennan,  
Postmaster General,  
United States Postal Service  
(Capital Metro Area),  
Agency.

Appeal No. 0120182134

Agency No. 4K-230-0069-17

**DECISION**

On June 6, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 2, 2018, final decision 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 REVERSES the Agency's final decision.

**ISSUES PRESENTED**

Whether the Agency subjected Complainant to disparate treatment on the bases of his disability and in retaliation for his protected activity in violation of the Rehabilitation Act, and whether the Agency engaged in an unlawful disclosure of medical information.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a City Carrier, Q-01, in Newport News, Virginia. Although Complainant has remained "employed" by the Agency, he has not worked since 2013.

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

The record indicated that on January 19, 2017, Complainant reported to the Agency's Newport Denbigh Station (the facility) to represent a coworker in the coworker's EEO matter filed against Complainant's supervisor (Supervisor). Complainant was met by the Union Steward. The Supervisor had informed the Union Steward that Complainant was not to enter the facility. The Union Steward stated that the Supervisor indicated that it was due to Complainant's medical condition and that Complainant had been listed on a "Threat Assessment List." Subsequently, Complainant entered the facility but was instructed to only report to the Union Office. However, the Supervisor indicated that she asked Complainant to leave and he complied with her request. She noted that he is barred from all Agency facilities.

On March 24, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of disability (Post Traumatic Stress Disorder or PTSD) and in reprisal for prior protected EEO activity arising under the Rehabilitation Act when:

1. On January 19, 2017, Complainant's supervisor (Supervisor) informed the Union Steward of his medical condition and informed the Union Steward that Complainant was on the "Threat Assessment List."
2. On January 19, 2017, Complainant was not permitted to enter the facility.

The Agency initially dismissed the complaint. Complainant appealed the matter to the Commission. In Fenton A. v. U.S. Postal Serv., EEOC Appeal No. 0120172031 (Sept. 25, 2017), the Commission reversed the Agency's final decision and remanded the matter for further processing of the complaint. The decision noted that Complainant alleged two claims of discrimination. Namely, Complainant alleged that the Supervisor unlawfully disclosed his medical condition in violation of the Rehabilitation Act and that the Agency barred him from entering the Denbigh Station while other employees are permitted into the station and to visit the union office.

In compliance with the Commission's decision remanding the complaint, the Agency investigated the matter. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). When Complainant did not request a hearing within the time frame provided in 29 C.F.R. § 1614.108(f), the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency's decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The Agency found that Complainant established a prima facie claim of unlawful retaliation with respect to claims (1) and (2). The Agency found that Complainant failed to establish a prima facie case of disability-based discrimination. The Agency noted that Complainant was an individual with a disability subjected to disparate treatment. Although the Supervisor stated in her affidavit that she did not become aware of Complainant's medical condition, the Agency found that the record evidence suggested otherwise.

As such, the Agency determined that management was aware of Complainant's medical condition for purposes of a prima facie case. However, the Agency held that Complainant failed to show that others outside of his protected basis were treated more favorably or that there was evidence to draw an inference of discrimination.

The Agency then turned to management to establish legitimate, nondiscriminatory reasons for its actions. The Agency noted that the Manager, Customer Services (Manager) and the Supervisor averred that they did not disclose Complainant's medical condition. The Manager stated that she was "unsure" that the Union Steward was told of Complainant's medical restriction. The Supervisor averred that she was not aware of Complainant's medical condition when the Union Steward was told that Complainant was not authorized to enter the facility. The Agency noted that the Supervisor's comment about her knowledge of Complainant's medical condition was not consistent with the record. Specifically, the record showed that the Supervisor had knowledge of Complainant's medical condition prior to the incident alleged in the instant EEO complaint. The Agency pointed to Complainant's medical documentation and his Psychologist's report stating that Complainant was at risk for another psychotic break with violent fantasies and recommended retirement. The Agency also included a copy of the Agency's "Threat Assessment Team Guide" from May 2015.

The Agency then turned to Complainant to establish that the Agency's reasons were pretext for discrimination. Complainant argued that his medical condition and protected activity were the reasons for the Agency's decision to block his access to the Denbigh Station and to disclose private and inaccurate information about him to the Union Steward. The Agency determined that Complainant did not show he was authorized to remain at the facility against management's orders based on the Threat Assessment. The Agency also held that Complainant failed to provide evidence that his medical condition was actually revealed. Further, the Agency found that Complainant failed to provide any evidence to refute the Agency's business reasons to protect employees as their explanation for their actions. Therefore, the Agency concluded that Complainant failed to demonstrate that the Agency's actions alleged in claims 1 and 2 constituted a violation of the Rehabilitation Act.

#### CONTENTIONS ON APPEAL

Complainant filed the instant appeal without specific comment. The Agency provided the Commission with the complaint file, but no statement or brief in opposition to the appeal.

#### ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents,

statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

*Medical Disclosure – Claim 1*

Title I of the Americans with Disabilities Act of 1990 (ADA) requires that all information obtained regarding the medical condition or history of an applicant or employee must be maintained on separate forms and in separate files and must be treated as confidential medical records. 42 U.S.C. §§ 12112(d)(3)(B), (4)(C); 29 C.F.R. § 1630.14. These requirements also extend to medical information that an individual voluntarily discloses to an employer. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000) (Guidance I). The confidentiality obligation imposed on an employer by the ADA remains regardless of whether an applicant is eventually hired or the employment relationship ends. See ADA Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations, at 18 (October 10, 1995) (Guidance II). These requirements apply to confidential medical information from any applicant or employee and are not limited to individuals with disabilities. See Higgins v. Dep’t of the Air Force, EEOC Appeal No. 01A13571 (May 27, 2003); Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (Apr. 13, 2000); Bennett v. U.S. Postal Serv., EEOC Appeal No. 0120073097 (Jan. 11, 2011), req. for recon. den’d, EEOC Request No. 0520110302 (Apr. 29, 2011). Improper Agency disclosure of such medical information constitutes a per se violation of the Rehabilitation Act. Vale v. U.S. Postal Serv., EEOC Request No. 05960585 (Sept. 5, 1997).

The ADA and its implementing regulations list the following limited exceptions to the confidentiality requirement: supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and government officials investigating compliance with this part shall be provided relevant information on request. 42 U.S.C. §§ 12112(d)(3)(B),(4)(C); 29 C.F.R. § 1630.14; Guidance I, at 4.

In the case at hand, Complainant asserted that the Union Steward informed him that he was being barred from the facility because he was on the “Threat Assessment List” due to his medical condition. He averred that the Union Steward was made aware of his medical condition based on comments made by the Supervisor.

In response to the instant allegation, the Manager averred, “I was aware that the [S]upervisor advise the Union Steward that [Complainant] was not able to enter the Denbigh Station. I do not recall if the steward was told it was because of his medical condition.” The Supervisor was asked about whether she informed the Union Steward of Complainant’s medical condition.

She averred, “I was the management official who told the Union [Steward] who the Complainant was representing not to have the Complainant come to Denbigh Station due to threat assessment. I did not mention his medical condition because I did not know the Complainant’s medical condition.” When asked again by the Agency investigator, the Supervisor stated, “No medical condition was mentioned. Medical condition Unknown.”

We note that the Agency conducted the investigation. However, the Union Steward was not questioned about the incident even though he would have been in the best position to state whether or not the Supervisor informed him of Complainant’s medical condition. In the absence of this evidence, we have to rely on the statements provided by Complainant and the Supervisor. Complainant has clearly asserted that management released his medical information to the Union Steward. The Manager was not sure whether the medical information was provided. As such, the Agency’s argument relies on the statement by the Supervisor who indicated that she did not mention Complainant’s medical condition. She appears to assert that she could not have done so because she was not aware of Complainant’s medical condition. We find that the Supervisor’s statement is not reliable. The Agency’s final decision found that the record did not support the Supervisor’s assertion that she was not aware of Complainant’s medical condition. Further, we note that the Supervisor’s affidavit was very limited in terms of providing information. Many of her responses were “No,” “Unknown,” or “N/A.” Based on the lack of information and inconsistencies in the record, the Commission is skeptical of the responses provided by the Supervisor. See Sallie M. v. U.S. Postal Serv., EEOC Appeal No. 0120172430 (Oct 16, 2018) (finding that management officials statements were not reliable based on similar lack of information and inconsistencies in the record). As such, we find that Complainant has shown that the Supervisor released his medical condition to the Union Steward. There is no indication that the release of Complainant’s medical condition qualifies under the limited exceptions to the confidentiality requirement. As such, we determine that the Agency violated the Rehabilitation Act with respect to claim 1.

### *Disparate Treatment*

Complainant alleged that the Agency treated him differently based on his disability and protected EEO activity when he was denied entry into the Agency’s facility. To prevail in a disparate treatment claim, Complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant must initially establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978). Proof of a prima facie case will vary depending on the facts of the particular case. McDonnell Douglas, 411 U.S. at 802 n.13. The burden then shifts to the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To ultimately prevail, Complainant must prove, by a preponderance of the evidence, that the Agency’s explanation is pretextual. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000); St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 519 (1993).

Complainant may establish a prima facie case of reprisal by showing that: (1) he engaged in a protected activity; (2) the Agency was aware of his protected activity; (3) Complainant was subjected to adverse treatment by the Agency; and (4) a nexus exists between the protected activity and the adverse action. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2010). A federal employee engages in protected activity when he engages in "statutorily protected conduct." Walker v. U.S. Dep't of the Air Force, 518 Fed. Appx. 626, 627 (11th Cir. 2013) (citing Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001)). Complainant must demonstrate that he was subjected to discrimination in retaliation for participating in the EEO process or complaining of "unfair practices in the workplace."

Here in the case at hand, Complainant was attempting to enter the workplace to represent a coworker in the coworker's EEO matter filed against the Supervisor. The record shows that the Supervisor and the Manager were made aware before the meeting that Complainant would be attending as the coworker's EEO representative. As such, we find that Complainant engaged in protected EEO activity when he represented the coworker. The Agency was made aware that Complainant was acting as the coworker's EEO representative. Complainant was denied access to the facility in which he was to engage in the protected EEO activity. We find that the Agency's final decision properly determined that Complainant has met his burden of establishing a prima facie case of retaliation with respect to claim 2.

We turn to the Agency to articulate legitimate, nondiscriminatory reason for its action. The Agency's final decision found that the Agency met its burden because the Supervisor averred that Complainant was prohibited from entering the facility due to a threat assessment. The Agency found that the record supported management's articulated reason, citing an email indicating that Complainant was prohibited from entering the facility and the medical documentation regarding Complainant's PTSD.

Upon review of the record, we find that the record is filled with inconsistencies and lacks supporting evidence. The Manager averred that she was made aware that Complainant was denied access to the facility. However, she stated several times "to my knowledge, there is no Threat Assessment List." When the Supervisor was asked about the events, she stated, "I was Informed by the Manager... that Complainant could not come inside Denbigh Station due to Threat Assessment. I communicated that to the Union Official that the Complainant was representing when the Union Official told me that the Complainant was coming to the Station. The Union Official ignored management and allowed the Complainant to come inside Denbigh Station. I am unaware of a Threat Assessment List." The Supervisor later stated, "I was informed by the Manager of the Station that the Complainant was not to enter the station due to Threat Assessment, I am not sure who contacted her, but she disseminated the message to me." We note that the Agency failed to include any evidence of a "Threat Assessment List." The Manager and the Supervisor both stated in their affidavits that there was no "Threat Assessment List." As such, the Agency failed to demonstrate that Complainant was prohibited from entering the facility based on a "Threat Assessment List." Thus, the Agency has failed to substantiate the bases for its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991).

As the Agency failed to meet its burden, we conclude that Complainant has established that the Agency subjected him to unlawful retaliation with respect to claim 2.<sup>2</sup>

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the matter in accordance with the ORDER below.

### ORDER

The Agency is ordered to take the following remedial action:

- I. The Agency will conduct and complete a supplemental investigation on the issue of Complainant's entitlement to compensatory damages and will afford him an opportunity to establish a causal relationship between the Agency's discriminatory action and his pecuniary or non-pecuniary losses, if any. Complainant will cooperate in the Agency's efforts to compute the amount of compensatory damages and will provide all relevant information requested by the Agency. Within fifteen (15) calendar days of the date this decision is issued, the Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Dep't. of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993)) in support of his claim for compensatory damages. Complainant shall have forty-five (45) calendar days from the date the Complainant receives the Agency's notice to submit his compensatory damages evidence. The Agency shall complete the investigation on the claim for compensatory damages within forty-five (45) calendar days of the date the Agency receives Complainant's claim for compensatory damages. Thereafter, the Agency shall process the claim in accordance with 29 C.F.R. § 1614.110. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein. Within thirty (30) calendar days of determining the amount of compensatory damages due Complainant, the Agency shall pay that amount to Complainant.
- II. The Agency is directed to conduct eight (8) hours of in-person or interactive training for the Supervisor. The Agency shall address management's responsibilities with respect to maintaining medical confidentiality and eliminating discrimination and retaliation in the workplace. The Agency shall conduct the training within ninety (90) days from the date this decision is issued.
- III. Within sixty (60) days from the date this decision is issued, the Agency shall consider disciplining the Supervisor. The Agency shall report its decision. If the Agency decides not to issue any disciplinary action any of the named management officials, it shall set

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<sup>2</sup> As we find that Complainant has established discrimination based on retaliation, we need not reach a determination on his claim of discrimination based on disability.

forth the reason(s) for its decision not to impose any disciplinary action. If any of the named management officials is no longer employed by the Agency, the Agency shall furnish proof of the date(s) of separation.

- IV. The Agency shall, within thirty (30) days of the date this decision is issued, post a notice in accordance with the Order below.

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 Complainant, including evidence that the corrective action has been implemented.

#### POSTING ORDER (G0617)

The Agency is ordered to post at its Newport Denbigh Station facility 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he 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 receipt of this decision. 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 (K0719)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g).



The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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 (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:



Carlton M. Hadden, Director  
Office of Federal Operations

December 17, 2019

Date