

EEOC DOC 0120073097 (E.E.O.C.), 2011 WL 244217 (E.E.O.C.)

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

RONALD E. BENNETT, COMPLAINANT,

v.

JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES **POSTAL SERVICE**, (SOUTHWEST AREA), AGENCY.

Appeal No. 0120073097

Hearing No. 460-2007-00056X

Agency No. 1G-772-0018-06

January 11, 2011

DECISION

*1 On July 2, 2007, Complainant filed an appeal from the Agency's June 4, 2007, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. The appeal is deemed timely and is accepted pursuant to 29 C.F.R. § 1614.405(a).

ISSUES PRESENTED

(1) Whether the Agency properly dismissed Complainant's complaint on the grounds that it failed to state a claim; (2) whether the Agency violated the Rehabilitation Act when it released Complainant's **medical** information to a private party in response to a state court subpoena; and (3) whether the Agency properly found that Complainant failed to provide sufficient evidence to establish that discrimination occurred.

BACKGROUND

The record reflects that Complainant was formerly employed as a Maintenance Mechanic, MPE, PS-08, at the Agency's North Houston Processing & Distribution Center in Houston, Texas. Complainant injured his back while on duty in December 2001, and he sustained a sinus/respiratory injury in March 2003. He was given multiple limited duty assignments due to his restrictions until his physician ordered him to stop working indefinitely in August 2004.

In February 2004, a subpoena was served upon the Agency requesting Complainant's payroll and personnel information, including his **medical records**, for a civil action initiated by Complainant against Union Carbide Corporation in the Galveston County, Texas 405th District Court. A Human Resources Associate responded to the subpoena by requesting copies of Complainant's injury compensation records, Official Personnel Folder (OPF), and payroll information and transmitting the files to the Team Litigation Company. The information submitted included, in pertinent part, correspondence between Complainant's physicians and the Agency regarding his **medical** diagnosis and work restrictions, his Office of Workers' Compensation Programs (OWCP) claim forms listing his alleged injuries, and documentation regarding his limited duty job offers.

Complainant filed an EEO complaint, dated March 26, 2006, alleging that he was discriminated against on the bases of disability (back, sinusitis), age (46 years old at the time of the incident), and in reprisal for prior protected EEO activity arising under the Rehabilitation Act when, on February 7, 2006, he became aware that the Agency had turned over his personal and **medical records** to Union Carbide without a signed release, and he was not notified of the transaction.

*2 In April 2006, the Agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(1) on the grounds that Complainant failed to state a claim. *Bennett v. U.S. Postal Serv.*, Agency No. 1G-772-0018-06 (Apr. 6, 2006). The Agency found that Complainant failed to establish that he suffered any measurable personal harm and that, because he had claimed that his "privacy rights" were violated, the EEO process was not the proper forum for his complaint. *Id.* On appeal, the Commission found that

the Agency improperly dismissed the complaint and remanded the matter to the Agency for further processing in accordance with 29 C.F.R. § 1614.108. [Bennett v. U.S. Postal Serv.](#), EEOC Appeal No. 01A63239 (Sept. 28, 2006).¹

On remand, the Agency assigned the case to an investigator, and, at the conclusion of the investigation, Complainant was provided with a copy of the report of investigation and a notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew his request. In May 2007, the AJ issued an Order of Dismissal and returned the case to the Agency for the issuance of a final agency decision.

On June 4, 2007, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The Agency dismissed the complaint for failure to state a claim, finding that the Agency was not required to obtain Complainant's signature prior to complying with the subpoena, and the Agency had a "mandated legal compulsion to comply with the subpoena served upon it." The Agency noted that its policies and regulations citing the Privacy Act allowed Union Carbide to request **medical** information "with the authority of compulsory legal process such as subpoenas." The Agency alternatively found that Complainant failed to establish a prima facie case of discrimination and that he failed to establish that the Agency's legitimate, nondiscriminatory reasons for submitting his personnel information in response to the subpoena were a pretext for discrimination.

CONTENTIONS ON APPEAL

On appeal, through his representative, Complainant argues that the Agency improperly dismissed his complaint on the grounds that he failed to state a claim. He requests that the Commission reverse the Agency's decision and issue a finding of discrimination because the Agency improperly released his confidential **medical** information in violation of federal regulations. In response, the Agency urges the Commission to affirm its final decision. The Agency argues that it was required by legal compulsion to submit the documentation in question, the Human Resources Associate was providing information within the scope of her duties, and she was unaware of Complainant's prior EEO activity when she processed the request. The Agency also argues that Complainant failed to establish a prima facie case of discrimination.

ANALYSIS AND FINDINGS

*3 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 EEOC Management Directive 110, Chapter 9, § VI.A. (Nov. 9, 1999) (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").

We first address the Agency's dismissal of the complaint. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. § 1614.103, § 1614.106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. [Diaz v. Dep't of the Air Force](#), EEOC Request No. 05931049 (Apr. 21, 1994).

The Commission's previous decision in [Bennett](#), EEOC Appeal No. 01A63239, reversed the Agency's first dismissal for failure to state a claim and remanded the complaint for an investigation. The Agency subsequently conducted the investigation and again dismissed the complaint for failure to state a claim. In dismissing the complaint, the Agency held that Complainant's personnel information was released to comply with a subpoena and Agency regulations. The Agency held that it was "required by [l]egal compulsion" to respond to the subpoena, and it did not need a written release from Complainant.

The only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether the complainant is an aggrieved employee; and (2) whether the complainant alleges employment discrimination on a basis covered by EEO statutes. If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its

judgment of the merits. [Qdoski v. Dep't of Energy](#), [EEOC Appeal No. 01901496](#) (Apr. 16, 1990). We find that Complainant is an aggrieved employee and states a cognizable claim under EEO Regulations. See [Valle v. U.S. Postal Serv.](#), [EEOC Request No. 05960585](#) (Sept. 5, 1997) (finding that improper agency disclosure of **medical** information would constitute a per se violation of the Rehabilitation Act, and no showing of harm beyond the violation would be necessary to state a claim). Therefore, we find the Agency improperly dismissed the complaint.

*4 We next address the Agency's contention that no discrimination occurred. Title I of the Americans with Disabilities Act of 1990 (ADA)² 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: Preemployment 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).

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. The Commission has also interpreted the ADA to allow employers to disclose **medical** information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations. Guidance I at 4 n.10. Additionally, employers may use **medical** information for insurance purposes. *Id.*

Here, we find that the Agency improperly submitted Complainant's confidential **medical** information to the Team Litigation Company in response to the subpoena issued by the Galveston County 405th District Court. Although not all **medically**-related information falls within the confidentiality provision, "documentation or information concerning an individual's diagnosis is without question **medical** information that must be treated as confidential except in those circumstances described in 29 C.F.R. Part 1630." [Lampkins v. U.S. Postal Serv.](#), [EEOC Appeal No. 0720080017](#) (Dec. 8, 2009) (citations omitted). As noted above, the ADA only allows for the release of an applicant or employee's **medical** information in limited circumstances. A request for an employee's **medical records** pursuant to a discovery request in a civil action would not fit into one of the exceptions to the ADA's confidentiality requirement. Therefore, we find that the Agency's release of Complainant's confidential **medical** information constituted a violation of the Rehabilitation Act. See also [Griffin v. Dep't of Homeland Sec.](#), [EEOC Appeal No. 0120073832](#) (May 15, 2009) (finding that the Agency violated the Rehabilitation Act when management officials discussed Complainant's **medical** information in a public chat forum); [Higgins](#), [EEOC Appeal No. 01A13571](#) (finding a violation of the Rehabilitation Act when the Agency placed confidential **medical** information from a physician documenting Complainant's diagnosis in a non-**medical** work file).

*5 On appeal, the Agency argues that the release of Complainant's **medical** information was required by legal compulsion. However, although the ADA allows an employer to comply with the requirements of another federal statute or rule, even if that statute or rule conflicts with the requirements of the ADA, [29 C.F.R. § 1630.15\(e\)](#), it is not a valid defense to argue that the Agency's actions were required by state law, unless the challenged confidentiality breach falls within one of the exceptions enumerated above or is otherwise permitted by the ADA. Moreover, the Agency's own regulations indicate that circumstances exist where the Agency's General Counsel may refuse to authorize the production of records in response to a subpoena. See [39 C.F.R. § 265.12](#). We note that the Privacy Act allows for disclosure of an individual's records "pursuant to the order of a court of competent jurisdiction," [5 U.S.C. § 552a\(b\)\(11\)](#), but this exception does not apply in this case because the state court subpoena,

signed and issued by the Deputy Clerk, did not qualify as an “order” for purposes of the Act. See also [Doe v. DiGenova](#), 779 F.2d 74, 85 (D.C. Cir. 1985) (holding that subpoenas “do not qualify as ‘order[s] of a court of competent jurisdiction’ under 5 U.S.C. § 552a(b)(11), unless they are specifically approved by a court”).

The Agency also argues on appeal that “[t]here were no provisions to notify the Complainant” of the disclosure and that the Human Resources Associate “was not aware of any regulations being violated and providing this information was within the scope of her duties.” However, the lack of a statutory notice requirement and the fact that the Human Resources Official was not aware that the Agency was precluded under the Rehabilitation Act from providing Complainant's **medical** information in response to a state court subpoena does not excuse the Agency from liability for a violation. We note that, by filing a civil action, Complainant was not prohibited from disclosing his own **medical** information to persons beyond those to whom an employer can disclose such information. Guidance II at 18. Consequently, Union Carbide was free to request the **medical** information from Complainant.³

Pursuant to section 102(a) of the Civil Rights Act of 1991, a Complainant who establishes his claim of discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (*i.e.*, out of pocket expenses) and non-pecuniary losses (e.g., pain and suffering, mental anguish). 42 U.S.C. § 1981a(b)(3). For an employer with more than 500 employees, such as the Agency, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. *Id.* The Commission, an agency, or an AJ may also award Complainant reasonable attorney's fees and other costs incurred in the processing of a complaint regarding allegations of discrimination in violation of the Rehabilitation Act. 29 C.F.R. § 1614.501(e). The issues of compensatory damages and attorney's fees are remanded to the Agency.

CONCLUSION

*6 Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Agency's final decision is REVERSED and REMANDED for the Agency to take corrective action in accordance with this decision and the ORDER below.

ORDER

The Agency is ordered to take the following remedial actions:

(1) The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages. The Agency shall give Complainant notice of his right to submit objective evidence (pursuant to the guidance given in [Carle v. Dept't of the Navy](#), EEOC Appeal No. 01922369 (Jan. 5, 1993)) and request objective evidence from Complainant in support of his request for compensatory damages within forty-five (45) calendar days of the date Complainant receives the Agency's notice. No later than ninety (90) calendar days after the date that this decision becomes final, the Agency shall issue a final Agency decision addressing the issue of compensatory damages. 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 below.

(2) Within thirty (30) calendar days of the date on which this decision becomes final, the Agency shall provide EEO training regarding rights and responsibilities under the Rehabilitation Act to all of the Agency officials responsible for improperly releasing Complainant's confidential **medical** information.

(3) The Agency shall consider taking disciplinary action against the Agency officials found to have discriminated against Complainant. The Commission does not consider training to constitute disciplinary action. 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.

(4) 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, including evidence that the corrective action has been implemented,

POSTING ORDER (G0900)

The Agency is ordered to post at its North Houston Processing & Distribution Center 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.

ATTORNEY'S FEES (H0900)

*7 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 this decision becoming final. 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 (K0610)

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 77960, Washington, DC 20013. 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 (M0610)

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:

- *8 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), at 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 (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 (Z0610)

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").

FOR THE COMMISSION:

*9 Stephen Llewellyn
Executive Officer
Executive Secretariat

- 1 The Commission's records reflect that neither Complainant nor the Agency filed a request for reconsideration.
- 2 The Rehabilitation Act was amended to provide that the standards used to determine whether nonaffirmative action employment discrimination has occurred shall be the standards applied under Title I of the ADA. Valle, EEOC Request No. 05960585 (citations omitted).
- 3 Because the Commission finds that the agency violated the Rehabilitation Act when an official improperly transmitted Complainant's confidential **medical** information, we will not address Complainant's claim of discrimination based on age or in reprisal for prior protected EEO activity. A finding of discrimination based on age or in reprisal for prior protected activity would not alter the remedies awarded Complainant.

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