



EEOC Finds DoD Liable for Not Reassigning Disabled Employee as an Accommodation

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In a recent decision, *Bowers v. Robert M. Gates, Secretary, Department of Defense*, EEOC Appeal No. 0720070012 (March 22, 2010), the U.S. Equal Employment Opportunity Commission affirmed an Administrative Judge's (AJ) decision finding the Department of Defense (DoD) liable for illegal disability discrimination.

Complainant, who worked as a Personnel Security Specialist at Fort Meade, Maryland, was born with the four fingers of her left hand fused into a cone. After almost a dozen surgeries, she was left with fingers without knuckles, dexterity, or grasp. Complainant's job was to conduct background checks for security clearances of federal employees, which required a substantial amount of typing. To keep up with her responsibilities, complainant requested several accommodations including lower production levels and the use of adaptive equipment. DoD denied the request to lower her production levels, but ordered a one-handed keyboard for her to use, which was expected to improve her typing speed only slightly.

In June 2002, complainant applied for a vacant Privacy Act Specialist position, which involved less typing and for which she was qualified. Then, in July 2002, complainant asked to be reassigned to the Privacy Act position as a reasonable accommodation. DoD denied complainant's request, opting instead to give the one-handed keyboard a 30-day trial period. In addition, complainant's supervisor informed her that she could face a Performance Improvement Plan if her performance did not improve by the end of the 30-day period. At the same time, the agency increased its typing production standards from 14-17 units per day to 19-22 per day. After this increase, complainant again requested reassignment, but the agency did not grant her request.

Complainant then contacted the agency's EEO Director, who asked management to keep the Privacy Act position open until complainant's 30-day trial period ended. Management agreed, but at the end of the trial period, complainant's performance did not meet her performance requirements. Further, the agency decided to withdraw the vacancy announcement and give the position to its former incumbent, who decided to return to the agency. Complainant then left the agency after being granted disability retirement.

Complainant filed an EEO complaint alleging that she was discriminated against on the basis of disability and reprisal when the agency denied her reassignment as a reasonable accommodation. After hearing, the AJ found that the agency's failure to reassign complainant to the vacant Privacy Act Specialist position constituted a denial of reasonable accommodation, finding that she was not required to compete for the position. The AJ also found in complainant's favor on her retaliation claim.

On appeal, DoD argued that complainant is not 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 impairment; or 3) is regarded as having such impairment. A "qualified" individual with a disability is one who satisfies the requirements for the employment position she holds or desires and can perform the essential functions of that position with or without reasonable accommodation. 29 C.F.R. § 1630.2(m). The Commission was not persuaded by the agency's argument, finding that complainant is essentially one-handed and thus is substantially limited in several major life functions.

The Commission then explained that in reassignment cases like this, complainant has an evidentiary burden to establish that it is more likely than not that there were vacancies during the relevant time period into which she could have been reassigned. See *Hampton v. U.S. Postal Service*, EEOC Appeal No. 01986308 (2002).

Here, complainant established that a vacancy existed for which she was qualified, and she requested reassignment into the position on several occasions. The Commission then determined that:

Instead of simply reassigning complainant to the position, the agency essentially made her compete for the position, because it determined that the person most qualified for the position was the individual who had recently vacated the position. The position remained open for several months after complainant was denied the position. However, an employee seeking reassignment as an accommodation should be placed in the position, if qualified, without competition. . . . There was no . . . evidence presented that complainant was not qualified for the Privacy Act Specialist position. The agency therefore should have reassigned her to the vacant Privacy Act Specialist position when it became apparent that she could not be reasonably accommodated in her Personnel Security Specialist position.

The Commission also upheld the AJ's finding of retaliation. The record contained deposition testimony which established that efforts to secure the Privacy Act Specialist position for complainant ceased as soon as it became known that she had initiated EEO counseling. As noted by the AJ, the refusal of complainant's superiors to assist her in securing the reassignment was "a materially adverse action" which could have deterred complainant from pursuing her rights; further, the agency did not demonstrate that it would have dropped complainant from consideration for the position in the absence of complainant's EEO activity.

Finally, the Commission upheld the AJ's award of \$2,500 in non-pecuniary compensatory damages for physical pain and \$24,000 in non-pecuniary compensatory damages for emotional distress as reasonable, over DoD's objection.

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