



EEOC DOC 0120080613, 2013 WL 8338375 (E.E.O.C.)

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

***1 * * ***, COMPLAINANT,

v.

PATRICK R. DONAHOE, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, (WESTERN AREA), AGENCY.

Appeal No.

0120080613

Hearing No. 541-2007-00142X

Agency No. 4E-800-0297-06

December 23, 2013

DECISION

On November 13, 2007, Complainant filed an appeal from the Agency's October 15, 2007, final decision concerning her 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.](#) The Commission accepts the appeal pursuant to [29 C.F.R. § 1614.405\(a\)](#). For the following reasons, the Commission AFFIRMS IN PART and REVERSES IN PART the Agency's final decision.

ISSUES PRESENTED

1. Whether the Agency erred in finding that Complainant, who had a 10-pound lifting restriction at work, was not a qualified individual with a disability under the Rehabilitation Act and therefore not entitled to work as a Sales, Services, and Distribution Associate.
2. Whether Complainant was subjected to a hostile work environment on the basis of her disability when she spent two hours with various management officials trying to fill out and submit an on-the-job injury form.
3. Whether the Agency erred in denying Complainant's request to return to work and be reassigned to a different tour with a modified daytime work schedule as a reasonable accommodation for her work-induced stress and anxiety.
4. Whether the Agency erred in finding that it did not retaliate against Complainant for engaging in prior EEO activity when it made "negative adjustments" to her thrift savings plan (TSP) account.

BACKGROUND

At the time of events giving rise to this complaint, Complainant manually sorted letters as a Mail Processing Clerk in a permanent light duty assignment with a 10 pound lifting restriction at the Agency's Processing and Distribution Center in Denver, Colorado. Exhibit (Ex.) 20.

Complainant bid for the position of Sales, Services, and Distribution Associate at the Glendale Branch of the Denver Post Office. The position description for a Sales, Services, and Distribution Associate (PS-05) lists thirteen general duties and responsibilities:

1. Perform sales and customer services at a retail window;
2. Provide sales and customer service support;
3. Provide product and service information to customers;
4. Handle and process customer purchases and returns;
5. Maintain the appearance of the store;
6. Conduct product inventories;
7. Verify presort and bulk mailings of all classifications;
8. Check and set post office stamp-vending machines and postage meters;
9. Rent post office boxes;
10. Assign and clear accountable items;
11. Distribute primary and secondary schemes of incoming mail;
- *2 12. Distribute primary and secondary schemes of outgoing mail;
13. Perform additional duties.

Human Resources Generalist Affidavit (Aff.) 20-21.

The knowledge, skill, and ability requirements for this position specify only one physical requirement: "Individual must be physically able to perform efficiently the duties of the position."EEO Dispute Resolution Specialist's Inquiry Report 40-41.

On May 19, 2006, the Agency awarded Complainant the position of Sales, Services, and Distribution Associate. Human Resources Generalist Aff. 17. The Agency noted that Complainant was on a permanent restricted status, which could prevent her from meeting the full physical requirements of a Sales, Services, and Distribution Associate. The Agency, by letter, requested Complainant to "provide medical certification that [she] is fully able to perform all the duties of the bid position."Id.

The letter also provided.

If you are not medically qualified to perform all the duties of the bid position at this time, you may contact [the Reasonable Accommodation Committee Coordinator) if you feel you would be able to perform the essential functions of the position with accommodation. If you fail to provide the medical certification requested and do not contact the Reasonable Accommodation Committee the bid shall be disallowed and you will remain in your current bid position/assignment. . . .

You are to remain in your current assignment until such time as medical certification stating you are able to perform all the duties of the bid position is received in this office or the reasonable accommodation process is complete.

Id.

On May 30, 2006, the Agency's Reasonable Accommodation Committee informed Complainant that she had two options: participate in the reasonable accommodation process or provide medical certification that she is fully able to perform all the duties of the bid position. Id. at 18. Complainant chose to participate in the reasonable accommodation process. Id.

On August 2, 2006, the Reasonable Accommodation Comminee met to review her request for a reasonable accommodation. The Comminee acknowledged her lifting limitation, but asked her how her limitation affected her daily activities. Complainant responded that her children had to assist her with housework, that she had to carry a small amount of groceries at a time, and that she could not do yard work. Id. at 19.

On August 16, 2006, the Reasonable Accommodation Comminee found that Complainant was not a qualified individual with a disability. Id. The Committee then specified that:

- Complainant was still bound by the May 19, 2006 letter to submit medical certification that she is fully able to perform all the duties of the bid position;
- Complainant could request that the manager of human resources reconsider the denial of a reasonable accommodation;
- *3 • Complainant could pursue the EEO complaint process for the denial of her request for accommodation.

Id.

On September 1, 2006, the human resource manager denied Complainant's request to reconsider the August 16, 2006 decision. In determining whether Complainant was significantly restricted in performing a major life activity, the human resources manager noted that "much more than work functions are considered." Complainant initiated EEO counselor contact on September 9, 2006.

Filing an On-the-Job Injury Claim

On September 14, 2006, the Lead Manager for Distribution Operations (lead manager) denied Complainant's request to change her schedule to work only day-time hours. According to Complainant, the lead manager thought Complainant was not telling the truth about why she needed a change of schedule. Complainant Aff. 3. This accusation upset Complainant, and she immediately requested leave. Her acting supervisor granted the request for leave.

On September 17, 2006, Complainant returned to the facility to fill out a Form CA-1 in order to file an on-the-job injury claim based on the September 14, 2006 incident with the lead manager. [FN1] According to Complainant, management tried to prevent her for two hours from filing an on-the-job injury claim by (1) taking her to a separate room, and (2) telling her she could not leave until she filled out other paperwork that they wanted. Id. at 3-4.

Denial of Light Duty

After the events of September 17, 2006, Complainant did not return to work for the rest of the year. Complainant's physician diagnosed her as suffering from stress and anxiety. Ex. 12. On October 23, 2006, a limited duty coordinator offered a limited duty assignment for Complainant to return to work at a different facility on a temporary basis,

but Complainant's physician did not approve of the job offer because Complainant first had to be treated for severe stress and anxiety. Ex. 13.

Complainant filed a formal EEO complaint on December 12, 2006. On December 19, 2006, Complainant requested to return to work in a permanent light duty assignment to tour 2 with a modified daytime work schedule. Ex. 15; Supervisor of Distribution Operations Aff. 1-2. On January 2, 2007, her physician released her to return to work, provided that she could only work a day-time shift due to her anxiety. Complainant Aff. 18.

On February 7, 2007, the coordinator for limited and light duty work denied Complainant's request because there was no light duty work available within her restrictions. Complainant Aff. 20.

Negative Adjustment to Thrift Savings Account (TSP)

On February 7, 2007, twelve "negative adjustments" were made to Complainant's Thrift Savings account, totaling \$1,150.80. Complainant Aff. 21. A "negative adjustment" is defined as "the removal of money from a participant's TSP account by an employing agency."⁵ C.F.R. § 1605.1(b).

EEO Complaint Processing

*4 On March 6, 2007, the Agency amended Complainant's complaint and accepted the following issues for investigation:

Complainant was subjected to discrimination on the basis of disability (left shoulder, stress) when:

1. the Agency did not provide her with a reasonable accommodation for the Sales, Services, and Distribution Associate position on August 28, 2006;
2. management harassed her for over two hours by attempting to prevent her from completing a Form CA-1 and failing to inform her of her EEO and workers compensation rights.
3. the Agency denied her light duty on February 7, 2007.

Complainant was subjected to reprisal for prior EEO activity when:

4. Money was taken out of her thrift savings account without her authorization.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an EEOC Administrative Judge (AJ). Complainant requested a hearing but subsequently withdrew her request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

Final Agency Decision

The final agency decision determined that Complainant failed to prove that the Agency subjected her to discrimination as alleged. With regard to her denial of a reasonable accommodation claim, the Agency found that Complainant was not an individual with a disability under the Rehabilitation Act because she failed to provide examples of how her "lifting restrictions affected a major life activity outside of the Postal Service." The Agency found that the examples Complainant gave to the reasonable accommodation committee (shopping carefully to avoid strain, not doing yard work) failed "to point to tasks central to daily living."

Moreover, the Agency found that Complainant was not a qualified individual with a disability under the Rehabilita-

tion Act. The Agency found that one of the essential functions to the position of Sales, Services, and Distribution was to be able to lift objects weighing up to 70 pounds. The Agency determined that Complainant's requested accommodation, that other employees help her lift mail weighing over 10 pounds, was unreasonable.

As for the harassment claim, the Agency dismissed Complainant's allegation that the Agency tried to prevent her from filing an on-the-job injury claim, reasoning that she was not an aggrieved individual because the Agency (1) eventually processed her injury claim and (2) took no personnel action against her during her absence.

Regarding the claim that Complainant was denied light duty, the Agency found that it was appropriate to deny Complainant's request for a reasonable accommodation because she was not a qualified individual with a disability. Moreover, the Agency found that Complainant failed to show that there was a vacant, funded position on tour 2 whose essential duties she was capable of performing.

*5 Finally, with respect to the TSP claim, the Agency dismissed it for failing to state a claim, reasoning that it is not the Agency that manages TSP accounts and therefore is not the Agency that allegedly discriminated against Complainant. The Agency went on to find that, even absent the dismissal, there is no other evidence that raises an inference of discrimination.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the Agency erred in determining that she was not an individual with a disability under the Rehabilitation Act. She also contends that she was a qualified individual with a disability because lifting up to 70 pounds is not an essential function of a Sales, Services, and Distribution Associate.

Complainant also maintains that she was subjected to a hostile work environment on the basis of her disability because management officials tried to prevent her from filing an on-the-job injury claim for two hours by refusing to sign her form, and telling her she could not leave a room until she signed other forms.

Complainant also argues that the Agency erred in denying her request to return to work on a different tour and during the daytime shift as a reasonable accommodation for her stress and anxiety because the Agency had offered similar positions to other employees.

Complainant argued that she established a prima facie case of retaliation when the Agency authorized negative adjustments to her thrift savings plan shortly after she had engaged in EEO activity.

ANALYSIS AND FINDINGS

Standard of Review

The Commission reviews de novo an agency's final decision that is issued without a hearing under [29 C.F.R. § 1614.110\(b\)](#). [29 C.F.R. § 1614.405\(a\)](#).

“The de novo standard requires that the Commission examine the record without regard to the factual and legal

determinations of the previous decision maker. . . . The Commission will review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . will issue its decision based on the Commission's own assessment of the record and its interpretation of the law.”Equal Employment Opportunity Management Directive for 29 C.F.R. Pan 1614 (EEO MD-110), at 9-15 (Nov. 9, 1999).

Sales, Services, and Distribution Associate Position at Glendale Branch

Under the Rehabilitation Act, federal agencies are prohibited from discriminating against applicants and federal employees who meet the statute's definition of a qualified individual with a disability.

1. Individual with a Disability

This case arose before January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008, which made a number of significant changes to the definition of “disability” under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Because these matters occurred in 2006 and 2007, the Commission will use the analytical framework as it existed before the enactment of the ADA Amendments Act of 2008, to determine whether Complainant is an “individual with a disability.”

*6 Under the pre-ADA Amendments Act framework, an individual with a disability is one who (1) has a physical or mental impairment that substantially limits a major life activity, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1630.2(g). The Agency does not dispute that Complainant has a physical impairment that limits her ability to lift objects heavier than 10 pounds. But it argues that for Complainant to establish that she is an individual with a disability, Complainant has to show how her inability to lift heavy objects affects other activities in her personal life outside of work.

We disagree. The Commission has long recognized lifting to be a major life activity. Interpretive Guidance on Title I of the Americans with Disabilities Act, Appendix to 29 C.F.R. § 1630.2(i). We are deeply troubled by the line of questioning that the Agency's reasonable accommodation committee subjected Complainant to because such an inquiry would defeat almost any valid disability and reasonable accommodation claim. Explicitly asking employees to show how major life activities affect them in their personal lives encourages them to unwilingly specify their activities to such a personal and individual extent as to render them too narrow to be considered “major.”

For example, walking is a major life activity. The major-life-activity inquiry should end there, and the agency should move on to determine whether a complainant is substantially limited in performing that activity. But if an agency instead asks an employee how his difficulties in walking affect his personal activities outside of work, he may offer that it makes it difficult for him to walk in a mall and shop for items. Framed in this improper way, the major life activity of walking would be reduced to the activity of shopping at the local mall, and would probably be considered to not be “major” simply because not everyone shops at malls.

Here, the record reflects that after Complainant returned to work from a shoulder injury, she was restricted to lifting no more than 10 pounds. Therefore, we find that Complainant is an individual with a disability under the Rehabilitation Act because she is substantially limited in the major life activity of lifting. *See, e.g., Higgins v. U.S. Postal Serv.*, EEOC Appeal No. 07A300S6 (Sept. 14, 2005) (finding complainant was substantially limited in the major

life activity of lifting where he was restricted to lifting no more than 20 pounds).[FN2]

2. Qualified Individual with a Disability

A qualified individual with a disability is an “individual with a disability who satisfies the requisite skill, experience, education, and other job-related requirements of the employment positions such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.”²⁹ C.F.R. §1630.2(m).

*7 Here, the Agency does not dispute that Complainant satisfied the requisite skill, experience, education, and other job-related requirements of the position of a Sales, Services, and Distribution Associate. Rather, the Agency believes that the Complainant is unable to perform what it deems to be an essential function of the position with reasonable accommodation specifically, the requirement that the Complainant be able to lift parcels of mail weighing up to 70 pounds. In response, the Complainant contends that the ability to lift parcels weighing up to 70 pounds is a marginal function of the position.

Both the Complainant and Agency are mistaken about the central issue in this case. The specific lifting requirement imposed by the Agency is not an essential function of the position. Rather, it is a qualification standard that has been established by the Agency in order 10 ensure that employees can perform the essential functions of the job. See²⁹ C.F.R. §1630 App. (“[The Qualification Standards] provision is applicable to all types of selection criteria, including . . . lifting requirements.”)

The essential functions are the duties of a job - i.e., the outcomes that must be achieved by the person in the position. Once an agency identifies the essential functions for a position, the agency can then put in place qualification standards, selection criteria, or employment tests that are designed to determine whether an employee or applicant can perform those essential functions.

In this instance, the outcomes that must be achieved by the person in the Sales, Services, and Distribution Associate position that the Complainant applied for are facilitating sales of postal services, providing customer service, and collecting and distributing mail. The qualification standard that the employer has tied to the essential function of collecting and distributing mail (which is one part of the job) is the ability to lift parcels up to 70 pounds. [FN3]

There is no dispute about whether Complainant is able, in some form, to perform the essential function of collecting and distributing mail. The only requirement that the Complainant is unable to meet is the lifting standard that the Agency has attached to that function. Therefore, the question of whether the Complainant is or is not “qualified” to perform the job hinges on whether the standard she is unable to meet has been justified by the Agency and, if it has been justified, whether there is a reasonable accommodation (including the use of an alternate standard) that would enable her to meet the standard.

3. Use of a Discriminatory Qualification Standard.

A qualification standard, selection criteria, or employment test that screens out or tends to screen out a person with a disability or a class of persons with disabilities, violates the Rehabilitation Act unless the employer is able to show that the standard, test, or criteria meets the affirmative defenses laid out in 42 U.S.C §12113(a).

***8** The Complainant in this case is unable to lift more than 10 pounds due to her disability. This restriction prevented her from meeting the Agency's 70 pound lifting standard and resulted in her being screened out from the position she sought. The question then is whether the Agency is able to justify the standard under the test set forth under the law. In order to justify a standard, the statute requires that the Agency:

- 1) show that the standard, criteria, or test is “job-related and consistent with business necessity;” and
- 2) show that there is no accommodation that would enable the person to meet the existing standard or no alternative approach (itself a form of accommodation) through which the employer can determine whether the person can perform the essential function. *See* 42 U.S.C. §12113(a); 29 C.F.R. §1630.15(b).

We note that the record below centers on the question of whether the lifting requirement was an essential function, which is not the question we need to decide for purposes of this claim. That being said, we believe that the evidence gathered during the agency's investigation is sufficient for us to make findings on the criteria listed above.

When determining if a standard or test is job-related and consistent with business necessity, the central question is whether the standard or test is “carefully tailored to measure [an individual's] actual ability to [perform] the essential function of the job” H.R. Rep. 101-485(11) at 36, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 303, 353-5.

The evidence in the record does not support a finding that the Agency's lifting requirement of 70 pounds was carefully tailored to measure the Complainant's actual ability to perform the essential functions of this position. For example:

- The Chair of the District Reasonable Accommodation Committee, a human resource specialist at the time, averred that the committee relied on an “essential functions worksheet,” which supposedly stated that associates in this position frequently lift objects weighing between 0 and 35 pounds for 3 to 6 hours per day. Supplemental Report of Investigation (Supp. ROI), Affidavit (Aff.) C, at 1.
- And according to the Chair of the District Reasonable Accommodation Committee, a manager of customer service allegedly indicated that the associates were required to lift only 20 to 30 pounds frequently. *Id.* at 1-2.
- The essential function worksheet indicates that associates will occasionally lift between 35-50 pounds, and rarely lift between 50-70 pounds. *Id.* at 53.
- A supervisor at the Glendale facility stated that associates spent no more than 30 minutes to an hour per day lifting objects over 10 pounds. Supp. ROI, Aff. A, at 1-2.

***9** At best, this evidence supports a finding that a lifting requirement of 35 pounds would be carefully tailored to measure the Complainant's ability to perform the essential functions of a Sales and Distribution Associate at the Glendale facility. It is far from sufficient for the required showing by the Agency that its requirement that Sales and Distribution Associates be able to lift up to 70 pounds met this standard. [FN4]

As the Agency has failed to meet its burden of showing that the standard it employed is job-related and consistent with business necessity, the second element of the affirmative defense the need to show that there is no accommodation that would enable the person to meet the existing standard, as well as no alternative approach through which the employer could determine whether the person can perform the essential functions of the job - [FN5] does not impact

the outcome of this case. [FN6]

We return then to the question of whether the Complainant is qualified for the position she sought. We noted above that there is no dispute about whether the Complainant is able to perform the essential functions to which the qualification standard in dispute is tied in some form. The Agency's decision to deny the Complainant's requested transfer is based solely on the fact that the Complainant cannot meet the 70 pound lifting standard.

We have found that this 70 pound standard is not justifiable. Therefore, we are left with only the essential functions of facilitating sales of postal services, providing customer service, and collecting and distributing mail.

Undoubtedly, the Agency may have been able to justify a qualification standard that tied a lower lifting requirement to these essential functions. But the Agency did not utilize a lower standard and hypothesizing about which standards might be sufficient would be speculation on our part. [FN7] We therefore find that the Complainant is qualified to perform the job and that the Agency, by utilizing a qualification standard that is not job-related and consistent with business necessity which screened out the Complainant, has discriminated against the Complainant in violation of the Rehabilitation Act.

Filing an On-the-job Injury Claim

Complainant maintains that she was subjected to a hostile work environment on the basis of her disability when, on September 17, 2006, she tried to fill out a Form CA-1, but management delayed her for two hours by taking her to a conference room and telling her that she could not leave until she filled out additional forms.

The Agency in its FAD dismissed her claim of a hostile work environment regarding the events on September 17, 2006, reasoning that Complainant was not an aggrieved employee. Upon review, the Commission will consider the merits of this hostile work environment claim. [FN8]

To establish a claim of harassment a complainant must show that: (1) they belong to a statutorily protected class; (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on their statutorily protected class; (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment; and (5) there is a basis for imputing liability to the employer. See [Henson v. City of Dundee](#), 682 F.2d 897 (11th Cir. 1982). Further, the incidents must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." [Harris v. Forklift Systems, Inc.](#), 510 U.S. 17, 21 (1993). The harasser's conduct should be evaluated from the objective viewpoint of a reasonable person in the victim's circumstances. Enforcement Guidance on [Harris v. Forklift Systems Inc.](#), EEOC Notice No. 915.002 at 6 (Mar. 8, 1994).

*10 The record includes the affidavit of an MOS clerk. She averred that on September 17, 2006, the attendance office called her because Complainant requested to fill a Form CA-1 for the stress caused by management. MOS Clerk Aff. 2. According to the MOS clerk, the attendance office suggested that Complainant file a Form CA-2 because a CA-1 form was for traumatic on-the-job injuries. *Id.* She and Complainant went to a work room. *Id.* As Complainant filled out Form CA-1, Complainant answered several questions in the supervisor's section of the form. Complainant

took about half an hour to fill out the form and asked the MOS clerk to sign it. Id. The MOS clerk declined to sign the CA-I form at that time because of Complainant's mistake in answering some questions meant for the supervisor and because the MOS clerk had never dealt with a stress claim before. Id. According to her, she wanted to ask a manager for advice. Id. One of the acting managers of distribution operations came in, and Complainant became upset that the MOS clerk still had not signed the CA-I form. Id.

The MOS clerk averred that Complainant took the CA-I form and went to the attendance office to fill out a form for leave with continuity of pay. The attendance office called the MOS clerk. Id. Because the MOS clerk believed that she had no authority to sign a request for leave with pay, another acting manager of distribution operations tried to talk to Complainant, who was very upset at this point. Id.

We find that Complainant has not demonstrated that management subjected her to a hostile work environment. In particular, we find that the testimony of the MOS clerk indicates that the incidents in which the MOS clerk declined to sign Complainant's on-the-job injury forms and sought assistance from other managers in a work room was not sufficiently severe or pervasive enough to have altered the conditions of Complainant's employment and create an abusive working environment, even though Complainant was upset about the MOS clerk's actions. We find no persuasive evidence that the MOS clerk's actions were motivated by Complainant's disabilities, but appear to have been the result of her initial uncertainty about how to handle the situation. Therefore, we find that Complainant did not establish her claim of a hostile work environment on the basis of disability.

Denial of Light Duty

On December 19, 2006, Complainant requested that the Agency reasonably accommodate her stress and anxiety by reassigning her to a tour 2 position with a modified daytime work schedule.

***11** To be entitled to a reasonable accommodation, Complainant must first establish that she is a qualified individual with a disability, and that there is a nexus between her disability- and her need for an accommodation. See, e.g., Ricco v. U.S. Postal Serv., EEOC Appeal No. 07A10007 (Feb. 21, 2002) (“complainant has the threshold burden of establishing that she is a qualified individual with a disability, and that there is a nexus between her disability and her need for accommodation”); Harden v. Social Security Administration, EEOC Appeal No. 0720080002 (Aug. 12, 2011) (finding documentation and explanations submitted by Complainant were sufficient to establish that she was a qualified individual with a disability and her need for a reasonable accommodation was related to her disability).

Here, Complainant alleged that her need for the accommodation of light duty was related to the impairments of stress and anxiety, not her lifting restrictions. Therefore, we first examine whether Complainant established that she is an individual with a disability with respect to her stress and anxiety conditions.

The record includes several notes from Complainant's physician. Ex. 12. In an October 16, 2006 note, the physician indicated that Complainant suffered “extreme stress reaction with anxiety and depression.”Id. at 4. The medical documentation also suggests that Complainant experienced insomnia, headaches, anorexia, and severe anxiety. Id. at 6. Although the physician indicates that Complainant's stress and anxiety affect her ability to sleep and eat, the physician does not specify to what degree these major life activities were restricted. There is no further medical documen-

tation describing Complainant's restrictions, and Complainant does not address in her affidavit how her stress and anxiety limit her ability to sleep or eat, nor does she establish substantial limitations in any other major life activity.

Accordingly, we find that Complainant failed to establish that her stress and anxiety conditions constitute impairments that substantially limited her in a major life activity. Therefore, we find that Complainant has not shown that she was entitled to the reasonable accommodation of reassignment to tour 2 with a modified daytime work schedule. [FN9]

Negative Adjustment to Thrift Savings Account

The record shows that Complainant initially filed a formal EEO complaint on December 12, 2006. Then on February 7, 2007, twelve transactions, labeled ““negative adjustment,” were made, resulting in the removal of \$1, 150.80 from Complainant's TSP account.

In its FAD, the Agency dismissed Complainant's claim of reprisal concerning the February 7, 2007 negative adjustments to her TSP account. The Agency relied on the affidavit of the Human Resources Generalist, who denied that the Agency had the authority to remove any funds from Complainant's TSP account. Human Resources Generalist Aff. 2. Rather, the Human Resources Generalist speculated that the monetary losses were more likely due to stock market changes. *Id.* The Agency ultimately determined that Complainant should have raised her discrimination claim concerning the negative adjustments with the federal agency in charge of TSP accounts.

***12** We disagree with the Agency's contention that it did not authorize the negative adjustment to Complainant's TSP account. As stated above, 5 C.F.R. § 1605.1(b) defines the term “negative adjustment” to mean “the removal of money from a participant's TSP account by an employing agency.” In addition, 5 C.F.R. § 1605.12 describes in detail the procedure in which federal agencies may request negative adjustments, that is the removal of funds erroneously contributed to the TSP. In particular, 5 C.F.R. § 1605.12(b)(1) states: “To remove money from a participant's account, the employing agency must submit, for each attributable pay date involved, a negative adjustment record stating the attributable pay date and the amount, by source, of the erroneous contribution.” Thus, we find that it is reasonable to conclude that it was the Agency that removed \$1,150.80 from Complainant's TSP account as a ““negative adjustment.” Therefore, the Agency erred in dismissing Complainant's claim of reprisal on the grounds that she filed the complaint against the wrong agency.

We turn now to the merits of Complainant's reprisal claim. An initial inference of retaliation arises where there is proof that the protected activity and the adverse action were related. EEOC Compliance Manual Section 8: “Retaliation,” No. 915.003, at 8-18 (May 20, 1998). Typically, the link is demonstrated by evidence that: (1) the adverse action occurred shortly after the protected activity, and (2) the person who undertook the adverse action was aware of the employee's protected activity before taking the action. *Id.*

Here, the record, initially, did not indicate which Agency employee may have authorized or caused the negative adjustment to Complainant's TSP account. The Agency's witnesses all denied being responsible for the negative adjustments.

To address this deficiency in the record, the December 21, 2011 interim order requested that the Agency provide the

names and positions of the Agency officials responsible for authorizing or initiating the negative adjustments to Complainant's TSP account on February 7, 2007, and their reasons or motivations for conducting those negative adjustments.

The supplemental investigation included the affidavits of the injury compensation specialist and a systems accountant. They testified that Complainant had been in a continuation of pay status. But then on December 6, 2006, the Office of Workers' Compensation sent a letter to the Agency, stating that it had categorized Complainant's workers' compensation claim as an "occupational disease claim" rather than a "traumatic injury claim." Therefore, continuation of pay was not applicable. Supp. ROI, Exhibit 1. Under 20 C.F.R. § 10.221, the Agency gave Complainant a choice to have the relevant time period changed to annual or sick leave or to consider the monies paid as an overpayment. Complainant wrote that she was unable to decide. Supp. ROI, Ex. 2, at 2. Nevertheless, on January 11, 2007, the injury compensation specialist wrote that Complainant had elected to change the relevant time period to leave without pay, thus considering the monies received as an overpayment. The injury compensation specialist therefore requested a pay adjustment. Supp. ROI, Ex. 3. Complainant authorized the Agency to adjust her pay on January 29, 2007. Supp. ROI, Ex. 4. On February 7, 2007, the Agency executed the pay adjustment. One of the consequences of this action was that it also deducted monies from Complainant's thrift savings plan. Supp. ROI, Aff. D, at 2.

*13 According to the systems accountant, the Agency subsequently restored the continuation of pay and re-deposited the monies into Complainant's thrift savings plan as a result of a June 28, 2008 pre-arbitration settlement agreement. Supp. ROI, Aff. E, at 4.

For purposes of this decision, we will assume that Complainant established a prima facie case of reprisal discrimination. We further find that the supplemental witness testimonies and documents provide a legitimate, non-retaliatory explanation for the negative adjustments, they were a consequence of the Office of Worker Compensation's decision in December 2006. In her response to the Agency's supplemental investigation. Complainant argues that this articulated reason was pretextual, because the Agency failed to adhere to provisions of the labor manual that required the Agency to first notify her in writing that it would attempt recover the monies from her TSP account. But the supplemental investigation indicates that Complainant was given adequate notice of the pay adjustments and authorized the adjustments on January 29, 2007. Thus, we conclude that Complainant has not shown that the Agency discriminated against Complainant on the basis of reprisal for prior EEO activity when it made 12 "negative adjustments" that removed \$1, 150.80 from Complainant's TSP account.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision with respect to the hostile work environment claim, the denial of light duty claim, and the negative adjustment claim. But we REVERSE the Agency's final decision with respect to Complainant's nonselection for the position of Sales, Services, and Distribution Associate in the Glendale Branch of the Denver Post Office. The Agency is directed to comply with the order below.

ORDER

Within one hundred and twenty (120) days of the date this decision becomes final, the Agency, to the extent that it has not done so, is ordered to take the following actions:

A. The Agency shall issue a written offer to Complainant of placement in the permanent position of Sales, Services, and Distribution Associate in the Glendale Branch of the Denver Post Office or a substantially equivalent position.

B. The Agency shall provide Complainant with 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless Complainant can show that circumstances beyond her control prevented a response within the time limit. If the offer is accepted, appointment shall be retroactive to the date the Complainant would have started her new bid assignment. If no substantially equivalent position is available, then the Agency shall pay Complainant front pay, which includes all other benefits of employment and the value of earnings to her Thrift Savings Plan (TSP) account, within sixty days of the date it determined that no position was available. Front pay shall be awarded until Complainant has been placed in the appropriate position as stated above. If there is a dispute regarding the exact amount of front pay, the Agency shall issue a check to the Complainant for the undisputed amount within sixty days of the date the agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

*14 C. The Agency shall determine the appropriate amount, from the time Complainant should have started her bid assignment of Sales, Services, and Distribution Associate, of back pay, with interest, and other benefits due complainant, including the value of lost earnings to Complainant's TSP account, [FN10] pursuant to 29 C.F.R. § 1614.501. The Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to the Complainant for the undisputed amount. The Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision;"

D. The Agency shall undertake a supplemental investigation to determine Complainant's entitlement to compensatory damages under the Rehabilitation Act. [FN11] The Agency shall give Complainant notice of her right to submit objective evidence (pursuant to the guidance given in [Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 \(Jan. 5, 1993\)](#)) and request objective evidence from Complainant in support of her request for compensatory damages within 45 days of the date Complainant receives the Agency's notice. After which the Agency shall issue a final 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 herein.

The Agency shall provide a report of its compliance with Paragraphs A to D of this Order to the Compliance Officer as referenced below. Copies must be sent to Complainant and her representative.

POSTING ORDER (G0610)

The Agency is ordered to post at its Processing and Distribution Center in Denver, Colorado 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 (H0610)

*15 If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he/she 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:

- *16 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. Pan 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).

COMPLAINANTS RIGHT TO FILE A CIVIL ACTION (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 (20610)

***17** 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:

Bernadette B. Wilson

Acting Executive Officer
Executive Secretariat

[FN1]. Form CA-1 is a U.S. Department of Labor form titled “Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation.”

[FN2]. On appeal. Complainant primarily contends that she is an individual with a disability under the Rehabilitation Act because she meets the definition of “disability” under the Federal Employees Compensation Act. The Rehabilitation Act's definitions of the terms “disability” and “qualified individual with a disability” are tailored to the broad remedial purposes of the Act; they differ from the definitions of the same or similar terms used in other laws and benefits programs designed for other purposes. The definitions of the terms used in the Social Security Act, state workers' compensation laws, disability insurance plans, and other disability benefits programs are tailored to the purposes of those laws and programs. Therefore, representations made under those laws and programs are not determinative of coverage under the Rehabilitation Act. See EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a “Qualified Individual with a Disability” Under the Americans with Disabilities Act of 1990 (ADA), EEOC Notice Number 915.002 (Feb. 12, 1997).

[FN3]. Our decision in Hull v. U.S. Postal Serv., EEOC Appeal Nos. 01A34062, 01A42180 (Aug. 17, 2004) found that a 70 pound lifting standard was an essential function of the Sales, Service, and Distribution Associate position at the Main Post Office in Jonesboro, Arkansas. Hull involved a different facility operating under different conditions and dealt with the lifting standard as an essential function instead of a qualification standard. As a result, its findings are not binding on our decision in this case.

[FN4]. Though our finding in this case is limited to the application of this qualification standard to this specific Complainant in this specific position, we strongly urge the Agency to reevaluate the need for its 70 pound standard for Sales, Service, and Distribution Associates generally. If the record in this case is any indication of the evidence the Agency can gather to support employing this standard, we find it hard to envision a scenario under which the standard would be found to be job-related and consistent with business necessity.

[FN5]. We note that this requirement mirrors the general reasonable accommodation obligation imposed on the Agency by the Rehabilitation Act.

[FN6]. Assuming arguendo that the Agency had put forward a valid qualification standard, we note that the evidence in the record could support a finding that the Complainant was capable of performing the lifting required by her position with the accommodation of requesting assistance from her co-workers when she was unable to lift a parcel. Contrary to the arguments presented by the Agency, the evidence is not clear whether an accommodation of this type would impose an undue hardship on the operations of the Agency, as it is already the policy of the Postal Service that employees should seek assistance with any packages they find difficult to lift. See “Job Analysis/Essential Function Sales, Services & Distribution Associate,” Report of Investigation, Affidavit B, at 23. However, as noted, we need not reach this issue here.

[FN7]. As noted in fn. 6, the evidence suggests that even if the Agency had utilized an appropriate standard, the Complainant would have been able to transport any parcels presented to her if she had been permitted to request assistance from her co-workers when a package proved too heavy for her to transport alone. It is unclear whether this would have imposed an undue hardship on the Agency.

[FN8]. Complainant essentially alleged that, because of her disability, she was restrained from leaving a bounded area without her consent for two hours during her attempt to file an on-the-job injury claim. Assuming this to be true, we find that the allegation of a two-hour restraint sufficient to state a hostile or abusive work environment claim.

[FN9]. We note that in Complainant's response to the supplemental investigation, she included a copy of an October 29, 2008 arbitrator's decision on a grievance about the denial of light duty. The arbitrator found that the Agency violated Article 13 of the National Contract when it denied Complainant's request for light duty assignment during daytime hours because the Agency did not make reasonable efforts to conduct a search for light duty work. The arbitrator directed the Agency to make Complainant whole for the loss of pay and benefits, backdated to April 19, 2007, and to assign her to a light duty assignment during daytime hours.

The arbitrator's decision is not controlling here, because that matter involved a different legal issue, whether the Agency made reasonable efforts to find light duty work, than the ones in this case, whether Complainant is substantially limited in a major life activity, and whether there is a nexus between her disability and her need for an accommodation.

[FN10]. In [Munno v. Dep't of Agriculture](#), EEOC Petition No. 04A10042 (June 18, 2001), the Commission noted "make whole" relief regarding TSP contributions requires the Agency to make retroactive tax-deferred contributions to petitioner's TSP account during the back pay period, (citations omitted) The Commission has also held that, to the extent an employee would have received government contributions to a retirement fund as a component of her salary, she is entitled to have her retirement benefits adjusted as part of her back pay award, including receiving earnings which the account would have accrued during the relevant period, (citations omitted) But a complainant is not additionally entitled to interest on these amounts, inasmuch as the award of earnings which would have accrued on her account will make her whole for these losses.

[FN11]. See, e.g., [Poquiz v. Dep't of Homeland Security](#), EEOC Appeal No. 0720050095 (Apr. 10, 2008) (awarding \$9,000.00 in non-pecuniary compensatory damages after finding that the agency discriminated against the complainant when it did not hire him for failing to meet a qualification standard).

EEOC DOC 0120080613, 2013 WL 8338375 (E.E.O.C.)

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