



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

[REDACTED]
Petitioner,

v.

Jeh C. Johnson,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Petition No. 0320110053

MSPB No. DA-0752-10-0223-I-1

DECISION

On September 16, 2011, Petitioner filed a petition with the Equal Employment Opportunity Commission, asking for review of a final order issued by the Merit Systems Protection Board (MSPB) concerning his claim of 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 reasons stated below, we DIFFER with the MSPB's final order, which found no discrimination.

ISSUES PRESENTED

1. Did the Commission err in Bouffard v. Dep't of Homeland Security, EEOC Appeal No. 0120065257 (Jan. 16, 2008), in finding that the essential functions of a seasonal, part-time Customs and Border Protection Officer included the ability to work rotational shifts and overtime?
2. Did the MSPB err in relying on Bouffard when it determined that an essential function of a Customs Border and Protection Officer was to be able to work the graveyard shift and substantial amounts of overtime, and therefore Petitioner, who had sleep apnea, was not qualified for the position and not entitled to a reasonable accommodation?
3. Would modifying Petitioner's work hours so he could work between 6 a.m. to midnight significantly disrupt the facility's operations and cause undue hardship, given the size of the facility and the number of staff, and the flexible policies and practices governing shifts and schedules?

BACKGROUND

Petitioner worked as a Customs and Border Protection Officer at the Port of El Paso, Texas. This facility employed about 700 such officers to monitor, at all times, four bridges connecting the United States and Mexico. The officers rotated morning, afternoon, and evening shifts, and could swap shifts with each other if approved by their supervisors. Female officers who were pregnant or breastfeeding were exempt from working the evening shift for up to two years per child.¹

In February 2007, Petitioner informed the Agency that he suffered from sleep apnea and asked to modify his work schedule so he could get consistent sleep each night. Specifically, he requested to work daytime shifts, rather than the "graveyard" shift from 12:00 a.m. to 8:00 a.m. At first, the Agency accommodated his request, by informally placing him on light duty and did not assign him to the graveyard shift.

But then in 2008, a new director of field operations questioned why this facility had so many employees not performing their full range of duties, and whether some of these employees ought to return to full duty. So in March 2008, the Agency presented Petitioner with four options: (1) return to full duty; (2) apply for disability retirement; (3) resign, or (4) request a reasonable accommodation.

In response, he asked for several possible reasonable accommodations:

- A modified work schedule that would allow him to get nocturnal sleep each night, such as scheduling him to 12-hour shifts (6:00 a.m.-6:00 p.m.; 8:00 a.m.-8:00 p.m.; 10:00 a.m.-10:00 p.m.);
- Reassignment to another division that did not have graveyard shifts.

In April 2009, the Agency determined that Petitioner was an individual with a disability, whose sleep apnea substantially limited him in the major life activity of sleeping. But the Agency found that he was not qualified for his current position, a Customs Border and Protection Officer, because he could not perform the "essential functions" of rotating his shifts and performing "substantial" amounts of overtime. Therefore, he was not entitled to the accommodation of a modified work schedule in his current position.

Rather, the Agency searched for a vacant-funded position within the local commuting area to reassign Petitioner, but could not find any. Consequently, it stopped processing his reasonable accommodation request in September 2009, and removed him, effective January 7, 2010.

¹ For example, the Port Director for the Port of El Paso testified in his deposition: "We have had individuals that are medically restricted from [working the graveyard shift]. I can give you an example. Mothers that are expressing milk, we have doctors' excuses for that where they cannot work midnight shift. We honor that through the term of that." Port Director Deposition, at 41.

On January 26, 2010, Petitioner challenged the Agency's decision by filing a "mixed case appeal" to the MSPB.

Merit Systems Protection Board

In a mixed case, a federal employee alleges that an agency personnel action appealable to the MSPB was based on unlawful discrimination otherwise subject to EEOC jurisdiction. In these cases, the employee must choose whether to pursue a "mixed case complaint" through the federal sector EEO process administered by EEOC, or a "mixed case appeal" subject to MSPB jurisdiction in the first instance.

Here, Petitioner filed a "mixed case appeal." A "mixed case appeal" is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, genetic information, or reprisal. 29 C.F.R. § 1614.302(a)(2). Appealable agency actions include removals. See, e.g., Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), Chapter 4: Procedures for Related Processes, Appendix I: Appealable Actions—5 C.F.R. (rev. Nov. 9, 1999).

In his mixed case appeal, Petitioner alleged, among other things, that the Agency discriminated against him on the basis of disability (sleep apnea) when it denied him a reasonable accommodation, and subjected him to reprisal for prior EEO activity when it removed him for requesting reasonable accommodations.

A hearing was held before an MSPB Administrative Judge (AJ). The AJ issued an initial decision, determining, in relevant part, that Petitioner was an individual with a disability, under the Americans with Disabilities Act Amendments Act of 2008, because the parties had stipulated that Petitioner satisfied the definition of an individual with a disability.

Next, the AJ found that Petitioner was not qualified for his current position as a Customs and Border Protection Officer. The AJ reasoned that the essential functions of a Customs and Border Protection Officer included working rotating shifts and significant amounts of overtime. For support, the AJ referenced hearing testimony from management officials and cited Bouffard v. Dep't of Homeland Security, EEOC Appeal No. 0120065257 (Jan. 16, 2008), in which the Commission found that the ability to work rotational shifts and overtime were essential functions of a seasonal, part-time Customs and Border Protection Officer. Here, because Petitioner's sleep apnea prevented him from working all rotational shifts and unlimited overtime, he could not perform the essential functions of a Customs and Border Protection Officer, and was not entitled to a modified work schedule as an accommodation.

Instead, the AJ found that Petitioner was entitled to reassignment as an accommodation, and determined that the Agency had attempted to reassign Petitioner to a vacant-funded position, but none were available. Therefore, the AJ concluded that the Agency did not discriminate

against Petitioner on the basis of disability when it did not provide him with a reasonable accommodation.

Next, the AJ found that Petitioner failed to show that the Agency retaliated against him because he did not establish a nexus between his removal and requests for reasonable accommodation. The MSPB AJ ultimately affirmed the Agency's removal of Petitioner.

Petitioner sought review of the MSPB AJ's decision by the full Merit Systems Protection Board. He argued that the AJ erred in finding that the ability to work the graveyard shift and substantial overtime were essential functions of a Customs and Border Protection Officer. He also argued that the Agency failed to show that providing a modified work schedule would pose an undue hardship, since (1) the Agency had previously exempted him from working the graveyard shift with no apparent adverse effect on the Agency's mission, and (2) the Agency exempted female officers, who recently gave birth, from working the graveyard shift.

The Board upheld the MSPB AJ's decision, finding that the AJ had properly determined that Petitioner could not perform the essential functions of a Customs and Border Protection Officer. The Board deferred to the EEOC's determination in Bouffard that the ability to work rotational shifts and overtime were essential functions of this job. The Board found it unnecessary to address whether providing a modified work schedule would pose an undue hardship.

Petitioner then filed this petition with the Commission, maintaining that the Board erred in finding no discrimination.

ANALYSIS AND FINDINGS

Standard of Review

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq.

Upon review, the Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

Reasonable Accommodation

The Rehabilitation Act requires federal agencies to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship.

a. Individual with a Disability

Here, the parties have stipulated that Petitioner satisfies the definition of an “individual with a disability. Specifically, in its “Responses to Requests for Admissions,” the Agency stated: “The Agency determined Appellant had substantiated his disability However, the Agency determined that there was no reasonable accommodation that would allow Appellant to perform the essential functions of a [Customs Border and Protection Officer].”

We therefore move on to determine whether Petitioner is a “qualified” individual with a disability, who can perform the essential functions of a Customs and Border Protection Officer.

b. 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).

i. Essential Functions v. Time for Performing Essential Functions

Essential functions are the duties of a job, that is, the outcomes that must be achieved by someone in that position. Ta v. U.S. Postal Serv., EEOC Appeal No. 0120080613 (Dec. 23, 2013).

There is a strong temptation among agencies to frame attendance, or other measures of the time at which functions must be performed, as essential functions. This represents a flawed understanding of the requirements and structure of the Rehabilitation Act.

Performing certain job functions sometimes requires a person’s presence at the worksite. But the fact that attendance can be a condition precedent to performing a function does not render it a job function in and of itself. Job functions are the duties that a person must perform or the outcomes that must be achieved by the person in the job. Attendance and timing are neither duties nor outcomes by themselves.

Rather, attendance and timing are methods, albeit important ones, by which a person accomplishes the essential functions of a job. And, as with other methods by which a function is accomplished (e.g. lifting as a method of transporting packages or use of certain software as a method of transcribing notes), attendance and timing are subject to the law’s obligation to provide a reasonable accommodation that does not impose an undue hardship.

In fact, considering attendance as an essential job function as opposed to a method by which essential functions are accomplished, leads to the perverse and unacceptable conclusion that any employee with disability-related absences is an unqualified individual and, therefore,

unable to claim the protections of the Rehabilitation Act. See e.g., Cottrell v. U.S. Postal Serv., EEOC Appeal No. 07A0004 (Feb. 2, 2001); McCullough v. U.S. Postal Serv., EEOC Request No. 05950539 (Apr. 25, 1996); Ruiz v. U.S. Postal Serv., EEOC Request 05880859 (May 21, 1990).

This does not mean, however, that attendance and timing are irrelevant or unimportant to a Rehabilitation Act claim. To the contrary, as we have recognized in our past guidance, attendance and timing can be crucial factors in determining whether a request for accommodation imposes an undue hardship on the finances or operations of an agency:

For certain positions, the time during which an essential function is performed may be critical. This could affect whether an employer can grant a request to modify an employee's schedule. Employers should carefully assess whether modifying the hours could significantly disrupt their operations – that is, cause undue hardship – or whether the essential functions may be performed at different times with little or no impact on the operations or the ability of other employees to perform their jobs. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice 915.002, Question 22 (Oct. 17, 2002).

Similarly, our precedential federal sector cases have recognized that the proper way to determine whether an individual is qualified for a job is to ask whether that person can perform the essential functions of the job *when at work*. See e.g., Cottrell v. U.S. Postal Serv., EEOC Appeal No. 07A0004 (Feb. 2, 2001); McCullough v. U.S. Postal Serv., EEOC Request No. 05950539 (Apr. 25, 1996); Ruiz v. U.S. Postal Serv., EEOC Request 05880859 (May 21, 1990). Once that determination is made, the analysis then moves to whether an accommodation (if needed) that would enable the person to perform those functions when at work (such as leave or a modified schedule) imposes an undue hardship on the finances or operation of the agency.

Because Bouffard did not adhere to our Enforcement Guidance and precedential federal sector cases in its analysis of the essential functions of a part-time Customs and Border Protection Officer, we find that it was wrongly decided on that point. We therefore overturn that portion of the decision. As the MSPB relied upon Bouffard in finding that the essential functions of a Customs and Border Protection Officer include working rotating shifts and significant amounts of overtime, we must conclude that its analysis was in error and conclude that its decision constitutes an incorrect interpretation of our applicable policy directives and Enforcement Guidance.

ii. Essential Functions of a Customs and Border Protection Officer

For a Customs and Border Protection Officer, the essential functions may include duties such as inspecting travelers; examining applicants for immigration privileges and benefits; seizing suspect property; and detaining people engaging in suspicious activity.

Here, there is no question that Petitioner can perform such duties *when he is at work*. Therefore, we find that Petitioner is a qualified individual with a disability, who can perform the essential functions of a Customs and Border Protection Officer.

Because Complainant is qualified and can perform the fundamental job duties of a Customs and Border Protection Officer, the appropriate question is whether the Agency had a duty to accommodate his sleep apnea by allowing his absence from the graveyard shift. The Agency must therefore establish that modifying Petitioner's work hours would significantly disrupt the facility's operations—that is, cause undue hardship.

c. Undue Hardship

An employer does not have to provide a reasonable accommodation that would cause an "undue hardship" to the employer. Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
- the impact of the accommodation on the operation of the facility.

Although the MSPB did not make a finding on undue hardship,² the Commission determines that the record is adequately developed to make a finding on this issue. Here, the facility employed about 700 Customs and Border Protection Officers to monitor, at all times, four

² In dicta in footnote 25 of the initial decision, the MSPB AJ cited Cyr v. Dep't of Homeland Security, EEOC Appeal No. 01A43015 (July 13, 2005) for the proposition that providing a permanent day shift to an Immigration Inspector would cause undue hardship. But we note that Cyr involved a different position (a GS-9 Immigration Inspector) at a different and smaller port of entry (Van Buren, Maine), in which providing the complainant a permanent day shift would eliminate the day shifts of all other immigration inspectors. In the present case, there is no evidence that modifying Petitioner's work schedule would eliminate the day shifts of the hundreds of other Customs and Border Protection Officers at this facility.

bridges connecting the United States and Mexico. It is undisputed that the Agency permitted officers at this facility to swap shifts with each other, and exempted female officers, who were pregnant or breastfeeding, from working the graveyard shift for up to two years per child.

Based on these facts, we find that allowing Petitioner, as one of 700 officers, to work between 6:00 a.m. and midnight would not cause an undue hardship at this particular facility. Given that the Agency had previously allowed Petitioner to modify his work schedule for about one and a half years without significantly disrupting the facility's operations,³ and the flexibility with which other officers could adjust their work schedules for various reasons, such as training, leave, an unexpected emergency, pregnancy, and breast-feeding, we find no compelling evidence to suggest that modifying Petitioner's hours would significantly disrupt the facility's operations or the ability of the hundreds of other officers to perform their jobs.

Nor are we convinced by the generalized assertions of Agency officials, who argued that the Agency had never before permanently modified the work schedule of a Customs and Border Protection Officer (although they conceded that there have been "temporary" modifications of substantial duration), and that permitting such a permanent modification would lower morale.

Our Enforcement Guidance makes it clear that an employer cannot claim undue hardship "based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice 915.002 (Oct. 17, 2002). Moreover, our Enforcement Guidance commands that, absent undue hardship, an employer must provide a modified schedule when required as a reasonable accommodation, "even if it does not provide such schedules for other employees." *Id.* at Question 22.

For all these reasons, we determine that the Agency failed to show that modifying Petitioner's work schedule would cause undue hardship. Therefore, we conclude that the Agency erred in (1) denying Petitioner's reasonable accommodation request to work between the hours of 6:00 a.m. and midnight, and (2) removing him.

CONCLUSION

Based upon a thorough review of the record, it is the decision of the Commission to DIFFER with the final order of the MSPB finding no discrimination. The Commission finds that the MSPB's final order constitutes an incorrect interpretation of the laws, rules, regulations, and policies governing this matter and is not supported by the evidence in the record as a whole.

³ In his deposition, the Port Director for the Port of El Paso acknowledged that the Agency's mission was not necessarily compromised when it previously exempted Petitioner from the graveyard shift for about one and half years. Nevertheless, he maintained that what had been compromised was the "flexibility of the Agency . . . when we do not have access to all our full-duty officers." Port Director Deposition, at 26.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (V0610)

Your case is being referred back to the Merit Systems Protection Board for further consideration and the issuance of a new decision. You will have the right to file a civil action in the appropriate United States District Court, based on the new decision of the Board:

1. **Within thirty (30) calendar days** of the date that you receive notice of the decision of the Board to concur in this decision of the Commission; or,
2. If the Board decides to reaffirm its original decision, **within thirty (30) calendar days** of the date you receive notice of the final decision of the Special Panel to which your case will then be referred.

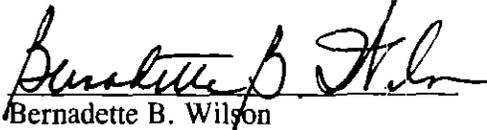
You may also file a civil action if you have not received a final decision from either the Merit Systems Protection Board or the Special Panel **within one hundred and eighty (180) days** of the date you filed this Petition for Review with the Commission. If you file a civil action, you must name as 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.

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:



Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

July 10, 2014
Date