

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

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| LISANDRA M. ROBINSON, |) | DOCKET NUMBER |
| Appellant, |) | DA-0752-96-0220-I-1 |
| |) | |
| v. |) | |
| |) | |
| DEPARTMENT OF THE AIR FORCE, |) | DATE: FEB 12, 1998 |
| Agency. |) | |
| |) | |
| |) | |
| |) | |

Lisandra M. Robinson, San Antonio, Texas, pro se.

Ruben Moreno, Esquire, Kelly Air Force Base, Texas, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision that affirmed the agency's removal action. For the following reasons, we GRANT the appellant's petition for review, VACATE the initial decision's findings with respect to the appellant's affirmative defense of disability discrimination, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

The agency removed the appellant, effective November 25, 1995, from her GS-5 Editorial Assistant (OA) position based on a charge of being unable to perform the duties of her position because of medical restrictions. Appeal File (AF), Tab 7, Subtabs 4a and 4e. The agency asserted that the permanent medical restrictions at issue - inability to remain in a sitting position with head/neck in a fixed position for greater than 15 minutes at a time, and restricted repetitive use of the right arm - prevented her from performing several duties necessary to meet the minimum requirements of her position description. *See id.* at 4e, 4m.¹

In her petition for appeal, which the administrative judge found was timely filed, *see* Initial Decision (ID) at 1, the appellant asserted, among other things, that the agency "[d]id not take precautions to make my working area safer to enable me to perform," and that she "deserved to get transferred to a position, or placed back to [her] former Secretary (Steno) GS-318-5 [position], which [she] had no problems to fulfill and perform for nine (9) years." AF, Tab 1 at 2-3. The appellant claimed that the agency "at no time made preventions, after my job injury, to make the environment safer to alleviate my pain," and "fail[ed] to accommodate limited duties." *Id.* at 3. The agency responded in opposition to the appeal, and submitted documentation in support of its action. *See* AF, Tab 7.

In an initial decision based on the written record,² the administrative judge sustained the agency's charge, found that the appellant did not prove her affirmative defense of disability discrimination because she did not articulate a reasonable accommodation under which she would be able to perform the essential functions of an established position, and found that the penalty of

¹ The appellant's physician diagnosed her as suffering from cervical spondylosis. AF, Tab 1.

² The appellant withdrew her request for a hearing. *See* AF, Tab 14.

removal was within the limits of reasonableness and promoted the efficiency of the service. The administrative judge, therefore, affirmed the removal action.

In her timely petition for review, the appellant contends that the agency improperly found that no job was "available," and asserts that her prior service as a Secretary (Steno) was exemplary. The agency has not filed a response.

ANALYSIS

The appellant has established a prima facie case of disability discrimination.

In setting forth the appropriate analytical framework for cases, such as the instant appeal, that involve direct evidence of disability discrimination, the Board distinguishes between those cases in which the appellant alleges that she can perform the essential functions of the position without reasonable accommodation, and those in which the appellant concedes that she can perform the essential functions of the position but only with reasonable accommodation. *Clark v. U.S. Postal Service*, 74 M.S.P.R. 552, 560 (1997). Where, as here, the appellant seeks some form of accommodation, she may establish a prima facie case of disability discrimination by showing that she is a disabled person, that the action appealed was based on her disability, and, to the extent possible, by articulating a reasonable accommodation under which she believes she could perform the essential duties of her position or of a vacant position to which she could be reassigned. *Id.*

An appellant who raises a claim of disability discrimination may establish that she is disabled by showing that she is substantially limited in a major life activity, that she has a record of such a limitation, or that she is regarded as having such a limitation. 29 C.F.R. § 1614.203(a)(1); *Clark*, 74 M.S.P.R. at 558. The term "major life activity" means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning or working." 29 C.F.R. § 1614.203(a)(3); *Clark*, 74 M.S.P.R. at 558-59. Here, the appellant clearly suffers from a physical disability, cervical spondylosis, that

causes her to be unable to perform a portion of her duties without accommodation, and the agency removed her because of this physical disability. AF, Tab 7, Subtabs 4g and 4m. Specifically, the appellant suffers from a physical impairment which substantially limits her in the major life activities of sitting and performing certain manual tasks. There is no question that this disability caused her removal.

As previously noted, a prima facie case of disability discrimination includes articulation of a reasonable accommodation under which the appellant believes she could perform the necessary duties of her position or of a vacant position to which she could be reassigned. *Clark*, 74 M.S.P.R. at 561; *O'Connell v. U.S. Postal Service*, 69 M.S.P.R. 438, 443 (1996). Thus, in establishing a prima facie case of disability discrimination, an appellant is not required to prove conclusively that specific job modifications are reasonable, but must only make a facial showing that her disability can be reasonably accommodated. *Clark*, 74 M.S.P.R. at 562.

Here, the appellant made a bare assertion that the agency "[d]id not take precautions to make my working area safer to enable me to perform," and "at no time made preventions, after my job injury, to make the environment safer to alleviate my pain." These statements do not constitute an articulation by the appellant of a reasonable accommodation under which she believes she could perform the necessary duties of her Editorial Assistant position.

Nevertheless, the appellant did articulate a reasonable accommodation when she further claimed that she "deserved to get transferred to a position, or placed back to [her] former Secretary (Steno) GS-318-5 [position], which [she] had no problems to fulfill and perform for nine (9) years." *Cf. Sheehan v. Department of the Navy*, 66 M.S.P.R. 490, 493 (1995) (the appellant established a prima facie case of disability discrimination where, among other things, he requested to be reassigned to a number of specified positions, thereby articulating

a method by which he believed the agency could reasonably accommodate his disability). The administrative judge's finding to the contrary, based in part on his determination that the record included no evidence that a Secretary (Steno) position was vacant following the disabling injury, was incorrect. *See Clark*, 74 M.S.P.R. at 565 (the administrative judge improperly placed the burden of identifying a vacant position to which reassignment could be made upon the appellant). The agency has the obligation, when reassignment has been requested and the agency has determined that other means of accommodation are unavailable, to determine whether it could reasonably accommodate the appellant through reassignment to vacant positions within the constraints of 29 C.F.R. § 1614.203(g). *Id.*

Because the appellant has shown that she is a disabled person, shown that the action appealed was based on her disability, and articulated a reasonable accommodation for her disability, we find that she has established a prima facie case of disability discrimination.

The appellant must prove that she would be qualified to perform the essential elements of the vacancies at issue if the agency were to adopt such a proposed accommodation, and that the proposed accommodation is objectively reasonable.

Because the appellant has established a prima facie case of disability discrimination, the agency must produce evidence to rebut the appellant's claim. As the Board held in *Clark*, 74 M.S.P.R. at 560, if the employer claims that the disabled individual is unqualified to perform the job, even with the proposed accommodation, the disabled individual must prove that she would, in fact, be qualified to perform the essential elements of the job if the employer were to adopt the proposed accommodation, and that the proposed accommodation is objectively reasonable. The burden of proof remains with the appellant. *Id.*

An agency's obligation to accommodate an employee with a disability includes reassignment to a vacant position at the same grade or level the essential

functions of which the employee can perform, and if a position at the same grade or level is not vacant, an offer of reassignment to the highest available grade or level below the employee's current grade or level is required. *O'Connell*, 69 M.S.P.R. at 443. An agency is not, however, obligated to accommodate a disabled employee by permanently assigning him to light-duty tasks when those tasks do not comprise a complete and separate position. *Id.* at 444.

Here, the agency produced a list of base-wide vacant positions for which it considered the appellant under its Medically Disqualified Employees Program. AF, Tab 7, Subtab 4b. Next to each position, the agency indicated, among other things, the grade of the position and the apparent "reason" the appellant was not qualified for it. Such reasons include "Referred non-sel," and "Prolonged sitting and typing in same psn more than 15 min." *Id.*³ The list also includes a GS-318-5 Secretary/Steno/OA position. The agency's reason for finding the appellant unqualified for that position is "Steno required." *Id.* We find that, by its submission of this list, the agency has claimed that the appellant is unqualified to perform the vacant jobs at issue, even with reasonable accommodation.

The appellant must now prove that she would, in fact, be qualified to perform the essential elements of these jobs if the agency were to adopt such a proposed accommodation, and that the proposed accommodation is objectively reasonable. *Clark*, 74 M.S.P.R. at 561 (ultimately, the appellant must prove that he is a qualified person with disabilities, i.e., a disabled individual who can

³ The term "Referred non-sel" appears to pertain to certain procedures under the agency's Medically Disqualified Employees Placement Program. AF, Tab 7, Subtab 4q. Specifically, the agency's regulations implementing this program indicate that one of the responsibilities of the "Employment Function" is to initiate base-wide placement assistance by screening position vacancies for reassignment, sending referrals to the selecting official having the vacancy for placement consideration, and accepting and reviewing responses to placement referrals and ensuring nonselections are properly justified. *Id.* at 3-4.

perform the essential functions of his position, with or without reasonable accommodation, without endangering the health and/or safety of himself and/or others).

We note that the record shows that the appellant held a GS-318-5 Secretary/Steno position from July 1, 1992, to at least August 12, 1993. AF, Tab 7, Subtab 4p. The record does not, however, include a position description or other evidence setting forth the requirements of that position. While it could be inferred that the appellant knew stenography based on the fact that she previously held a Secretary/Steno position, there is no direct evidence in the record on this issue. *See Clark*, 74 M.S.P.R. at 560. We also note that the appellant did not present any evidence indicating that unlike the Editorial Assistant position, with accommodation she could physically perform the duties of the Secretary/Steno/OA position. On petition for review, however, she asserts that she is merely restricted from typing without interruption. Petition for Review File, Tab 1.

Because the parties and the administrative judge did not have the benefit of the Board's decision in *Clark*, and because the record is insufficiently developed on the issue of whether the appellant is qualified to perform the essential functions of the vacant positions including the Secretary/Steno/OA position in question, remand is appropriate. *Cf. Phillips v. Department of the Navy*, 67 M.S.P.R. 74, 79 (1995) (remanding the appeal for further development of the record to adjudicate the issue of the sufficiency of the agency's search for vacant positions for the appellant); *Leach v. Department of Commerce*, 61 M.S.P.R. 8, 20-21 (1994) (remanding the appeal where the administrative judge did not make adequate findings on whether the agency conducted a search for full-time clerical vacancies to which the appellant could be reassigned, and considered her for any such vacancies before removing her).

ORDER

Accordingly, we VACATE the initial decision's findings on the appellant's affirmative defense of disability discrimination, and REMAND this appeal for further adjudication consistent with this Opinion and Order.

If, on remand, the appellant does prove that she can perform a position to which she can be reassigned, with reasonable accommodation, and/or the agency concedes this point, the burden of production shifts to the agency to show that the reasonable accommodation at issue would create an undue hardship. *Clark*, 74 M.S.P.R. at 560. In determining whether a proposed accommodation would create an undue hardship for the agency, the Board will consider: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of the agency operation, including the nature and composition of the agency's work force; and (3) the nature and cost of the accommodation. *Id.* at 560-61; *see* 29 C.F.R. § 1614.203(c)(3).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.