



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
WASHINGTON, D.C. 20506

Thomas G. Lusch, )  
Appellant, )  
v. ) Appeal No. 01801135  
Department of Transportation, )  
Agency. )

Decision

Introduction

This is an appeal by an applicant for federal employment, hereinafter appellant, from a final decision of the above-captioned agency, dated August 7, 1979, which rejected appellant's complaint of discrimination on the basis of handicap (myopia) as not within the purview of equal employment opportunity regulations. The appeal was brought under Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 791. The appeal was accepted for decision by the Commissioners of the Equal Employment Opportunity Commission in accordance with the provisions of EEOC Order No. 960, as amended.

Background

Appellant sought employment with the agency as an Air Traffic Control Specialist. His application was rejected on the grounds that his uncorrected distant visual acuity (20/400) was below the agency's standard for uncorrected distant visual acuity for candidates for Air Traffic Control Specialist positions (20/200).

Appellant has demonstrated, through the introduction of a substantial body of medical and other documentation, that his visual impairment is not degenerative in nature; that he is fully capable of performing the duties of an Air Traffic Control Specialist if he is accommodated to the extent of being allowed to wear corrective lenses on the job; that the agency allows

currently employed Air Traffic Control Specialists to wear corrective lenses on the job; that a hiring standard based upon uncorrected visual acuity is not related to actual job performance requirements; and that the controverted uncorrected visual acuity requirement is not applied by the agency in other situations (e.g., the certification of private pilots) were safety considerations require visual acuity.

The Office of Personnel Management (OPM) submitted an amicus curiae brief regarding the appeal sub judice. In that brief, OPM stated that, on September 24, 1979, it had promulgated a qualification standard for air traffic control positions (FPM Letter 339-15, Attachment 2) which specified that physical conditions or impairments could be disqualifying only if there was a direct relationship between the condition and the nature of the duties of the specific position to be filled. The standard further specified that disqualification was not to take place in situations where an impairment could be compensated through prosthesis, mechanical aids, or reasonable accommodation. OPM took the position that, absent a demonstration that appellant's lack of uncorrected visual acuity would impair his ability to perform the duties of an Air Traffic Control Specialist, the agency's disqualification of appellant constituted a failure to comply with OPM's directive.

The record is devoid of evidence that, with corrective lenses, appellant could not safely perform the duties of an Air Traffic Control Specialist.

#### Analysis and Findings

The equal employment opportunity regulations concerning federal employees with handicapping conditions have been codified at 29 C.F.R. §1613.701-710 (1979). These regulations define a "handicapped person" as one who has a "physical or mental impairment which substantially limits one or more of such person's major life activities..." 29 C.F.R. §1613.702(a). A physical impairment is defined to include "any physiological disorder or condition...affecting one or more of the following systems...(including) special sense organs..." 29 C.F.R. §1613.702(b). "Major life activities" includes the function of seeing. 29 C.F.R. §1613.702(c). The uncontested evidence in this case reveals that appellant has a medical condition (poor eyesight) affecting his sense organs (eyes) which substantially limits a major life function (seeing). Accordingly, even though appellant's vision can be substantially improved through the use of corrective lenses, this Commission finds, under the standards noted above, that appellant may be regarded as being a "handicapped person." Accordingly, this Commission finds that the complaint sub judice falls within the purview of the equal employment opportunity regulations concerning discrimination on the basis of handicap.

Notwithstanding the existence of a handicapping condition, it must be determined whether appellant also meets the standard of being a "qualified handicapped person." If the appellant meets this standard, then under 29 C.F.R. §1613.704 he was entitled to a "reasonable accommodation" of his handicapping condition unless the agency is able to demonstrate that such accommodation would have imposed an "undue hardship" on the operation of the agency. The term "qualified handicapped person" has been defined at 29 C.F.R. §1613.702(f) to mean a handicapped person who, with or without reasonable accommodation, can perform the "essential functions" of his/her position without endangering his/her own health and safety or the health and safety of others.

Since the evidence here establishes that appellant did not meet the threshold qualifications required for the position, the thrust of his argument goes to the reasonableness of the standards in question. The issue that must be addressed, therefore, is whether appellant could have performed the duties of the position without endangering the health and safety of himself and others in view of his uncorrected visual condition, or, in the alternative, whether he could have safely performed them had the agency offered a reasonable accommodation for his condition.

Appellant has adduced copious medical evidence that his visual impairment is not indicative of a degenerative medical condition; that his corrected visual acuity is no different from that of an individual whose uncorrected visual acuity (i.e. 20/200) satisfies the agency's threshold qualification standard; that his lack of uncorrected visual acuity is fully compensated by the simple accommodation of wearing corrective lenses; and that there is no rational basis for the assumption that his lack of uncorrected visual acuity would impair his ability to safely perform the duties of an Air Traffic Control Specialist. He has also demonstrated that the agency allowed the wearing of corrective lenses by currently employed Air Traffic Control Specialists. Finally, he has shown that his lack of uncorrected visual acuity did not prevent him from demonstrating corrected functional visual acuity sufficient to receive, from the agency, a First Class Medical Certificate in connection with his pilot's license.

The agency has adduced no evidence, beyond its bare assertion, that appellant's visual impairment, if accommodated through the use of corrective lenses, would be an obstacle to his safe performance of the duties of an Air Traffic Control Specialist. Nor has it shown that accommodation would be unduly burdensome.

Accordingly, this Commission finds that appellant has been subjected to discrimination on the basis of handicap. Since the agency has not demonstrated, by clear and convincing evidence, that

appellant would not have been hired in the absence of discrimination, relief is ordered in accordance with the provisions of 29 C.F.R. Section 1613.271(a)(1), except that, since appellant was an applicant for employment, no backpay shall be awarded. 29 C.F.R. Section 1613.710.

#### Conclusion

For the reasons stated herein, the final agency decision is reversed and this matter is remanded to the agency for action consistent with the foregoing.

#### IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be forwarded to the Compliance Officer, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. A copy of the report should be sent to the appellant.

#### NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. §1613.282, the appellant is hereby notified that this decision is final and that he has the right to file a civil action on the Rehabilitation Act claim in the appropriate U.S. District Court within thirty (30) days of the date of receipt of this decision.

#### APPOINTMENT OF COUNSEL

If the appellant does not have an attorney, or is unable to obtain the services of one, upon his request, the District Court may, in its discretion, appoint counsel to represent him.

#### ATTORNEY'S FEES

If appellant has been represented by a member of the Bar, appellant shall be awarded attorney's fees under 29 C.F.R. §1613.271(c). The attorney shall submit to the agency, within twenty (20) days of receipt of this decision, the documentation required by 29 C.F.R. §1613.271(c)(2). The agency shall process the claim within the time frames set forth in §1613.271(c)(2).

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;
2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or
3. The previous decision is of precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. Section 1613.235. The agency's attention is directed to 29 C.F.R. Section 1613.235(b) for time limitations on agency requests to reopen.

FOR THE COMMISSION:

3/3/82  
DATE

*Laura M. Call*  
Executive Officer  
Executive Secretariat