United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-5092 **September Term, 2018**

FILED ON: JANUARY 11, 2019

SHARON LEE REAGAN-DIAZ,
APPELLANT

v.

MATTHEW G. WHITAKER, UNITED STATES ACTING ATTORNEY GENERAL,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:14-cv-01805)

Before: WILKINS and KATSAS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the judgment of the United States District Court for the District of Columbia be affirmed.

In 2009, the Federal Bureau of Investigation hired Sharon Lee Reagan-Diaz as a management program analyst in its Performance Management Unit (PMU). The PMU assigned Reagan-Diaz to the Sentinel Project, which was developing a web-based application for the Bureau's case-management system. Reagan-Diaz served as a liaison between the Sentinel team and supervisory officials in the Bureau's Resource Planning Office (RPO).

In September 2011, Reagan-Diaz was injured at work. As a result, she suffered disabling pain in her extremities, had difficulty completing daily tasks, and sometimes could not get out of bed. Reagan-Diaz left work and began receiving workers' compensation benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq*.

In December 2011 or January 2012, Reagan-Diaz contacted the Bureau to discuss returning to work part-time. She requested a ten-hour workweek to start, with the hope of increasing her

hours over time. The Bureau responded by offering her twenty hours per week. Reagan-Diaz rejected the proposal and filed two administrative complaints. After they were dismissed, Reagan-Diaz filed this lawsuit. The district court entered summary judgment for the government on three claims and dismissed the fourth for lack of jurisdiction. Our review is *de novo*, *Baylor v. Mitchell Rubenstein & Assocs., P.C.*, 857 F.3d 939, 944 (D.C. Cir. 2017), and we affirm.

Reagan-Diaz's primary claim is that officials at the PMU and RPO failed to offer a reasonable accommodation for her disability, as required by the Rehabilitation Act, 29 U.S.C. § 794(a). To establish this claim, Reagan-Diaz had to prove that "(i) she was disabled within the meaning of the Rehabilitation Act; (ii) her employer had notice of her disability; (iii) she was able to perform the essential functions of her job with or without reasonable accommodation; and (iv) her employer denied her request for a reasonable accommodation of that disability." *Solomon v. Vilsack*, 763 F.3d 1, 9 (D.C. Cir. 2014) (citations omitted). Here, only the third element is in dispute. Reagan-Diaz contends that she could have performed "the essential functions of her job" while working only two hours per day, five days per week.

This argument finds no support in the record. "Essential functions are the fundamental job duties of the employment position." *Taylor v. Rice*, 451 F.3d 898, 906 (D.C. Cir. 2006) (quotation marks omitted). Ample evidence shows that Reagan-Diaz was required to work full-time and be available on short notice for regular on-site meetings. One supervisor testified that "[i]t would have been impossible for Ms. Reagan-Diaz to serve as an effective liaison on such a limited schedule" because "[t]he work on Sentinel was extremely fast-paced and constantly changing." J.A. 68. Another supervisor agreed: "[G]iven the fast-paced nature of the [project], it would have been impossible for the Sentinel and RPO teams to wait for her return to the office to complete necessary work." J.A. 65. Reagan-Diaz herself described the work as "very fast-paced" with "impromptu meetings all the time," J.A. 962, and she admitted that she would have missed many meetings while working ten hours per week, J.A. 1025. Her failure-to-accommodate claim thus fails under *Doak v. Johnson*, 798 F.3d 1096 (D.C. Cir. 2015), which held that an employee was not entitled to a schedule change when she would have missed "interactive, on-site meetings during normal business hours and on a regular basis." *Id.* at 1105.

Reagan-Diaz's counterarguments are unavailing. She invokes the Bureau's offer of a twenty-hour workweek as evidence that full-time work and regular meeting attendance were not required, but she refused even that offer as beyond what she could handle at the time. And regardless of whether she might have performed the essential functions of her job while working only four hours per day, nothing suggests that she could have done so while working only two hours per day. True, a supervisor stated that Reagan-Diaz could perform a "meaningful role" on her proposed schedule, J.A. 1620, but he ultimately concluded that she could not return to the PMU on a ten-hour workweek, *see* J.A. 1610. Reagan-Diaz also notes that another employee performed some of her duties for one or two hours per day, *see* J.A. 411, but, in fact, several employees divided her work, J.A. 397. Finally, Reagan-Diaz argues that a different division in the RPO could have accommodated her proposed work schedule. However, the Rehabilitation Act does not require an employer to "create a new position" as an accommodation. *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1305 (D.C. Cir. 1998) (en banc).

Reagan-Diaz further argues that her failure-to-accommodate claim must proceed to trial even without proof that she could have performed the essential functions of her job while working only two hours per day. First, she claims that she was entitled to a truncated schedule so long as she could build up strength and eventually perform the essential functions of her position. This argument is foreclosed by *Minter v. District of Columbia*, 809 F.3d 66 (D.C. Cir. 2015), which held that a plaintiff must be able to perform the essential functions of her job when the accommodation is denied. *Id.* at 70. Next, Reagan-Diaz criticizes the Bureau's decision to process her accommodation request under FECA, rather than through normal Rehabilitation Act channels. She claims that this procedural snafu deprived her of the "interactive process" with the agency that the Rehabilitation Act guarantees. *Ward v. McDonald*, 762 F.3d 24, 32 (D.C. Cir. 2014). However, "failure to engage in an interactive process" cannot support a Rehabilitation Act claim "in the absence of evidence that accommodation was possible." *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 100 (2d Cir. 2009). As discussed, Reagan-Diaz presented insufficient evidence that her proposed accommodation would have enabled her to perform the essential functions of her job.

Reagan-Diaz's remaining claims are less substantial. She alleges that the Bureau discriminated against her based on her disability, but each alleged discriminatory act was supported by an uncontradicted "non-discriminatory reason." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). Reagan-Diaz also alleges that two supervisors declined to nominate her for a division award in retaliation for her filing administrative complaints. But the record shows that neither decisionmaker knew of the complaints, and we repeatedly have held that "knowledge of … protected activity" is a prerequisite of any retaliation claim. *Jones v. Bernanke*, 557 F.3d 670, 679 (D.C. Cir. 2009). Finally, Reagan-Diaz raises a separate retaliation claim arising out of a different award, and a separate failure-to-accommodate claim based on incidents that allegedly occurred after her return to work in May 2013. We cannot consider these claims because Reagan-Diaz failed to raise them in the Bureau's administrative-review process. *See Spinelli v. Goss*, 446 F.3d 159, 162 (D.C. Cir. 2006).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk