



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Delfina Y.,<sup>1</sup>  
Complainant,

v.

L. Paige Marvel,  
Chief Judge,  
U.S. Tax Court,  
Agency.

Appeal No. 0120171334

Agency No. EDR 2016-01

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency final decision, dated February 9, 2017, concerning an equal employment opportunity (EEO) complaint claiming employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

In November 2014, Complainant accepted the Agency's offer to work as a Petitions Clerk for the Petitions and Intake Section of the U.S. Tax Court in Washington, D.C. The offer letter informed Complainant that the Excepted Service position was contingent upon a satisfactory background check and was subject to a one-year probationary period. According to the Agency, "because of the Court's unique role in the litigation of Federal tax disputes, it is essential that all Tax Court employees comply with Federal tax laws, including the timely filing of tax returns and payment of taxes."

Complainant reported to work on December 2014. Thereafter, on January 26, 2015, she was terminated from her position after the Agency determined that Complainant had not timely filed her Federal income tax returns for 2011, 2012, or 2013, and had not fully paid her Federal income

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

tax for 2010, 2011, or 2012. Believing that her termination was discriminatory, Complainant utilized the Agency's internal EEO process.

Pursuant to the Agency's Fair Employment Practices System (FEPS), Complainant initiated EEO counseling and requested mediation when counseling concluded. After the mediation period, Complainant was issued a notice of right to file a formal complaint. On October 17, 2016, Complainant filed her complaint. Complainant alleged discrimination based on her race (African-American), sex (female), age, and in reprisal for prior protected EEO activity. In addition to her allegedly discriminatory termination, Complainant also claimed she was subjected to "on-going discriminatory treatment from older Caucasian employees in upper-level positions", that allegedly included stereotypical comments, demeaning looks, and unauthorized checks into her employment history.

The complaint was assigned to an Agency Hearing Officer<sup>2</sup>, who ordered the parties to submit a statement of facts and supporting documents by November 17, 2016. Soon thereafter, Complainant requested that her case be transferred to this Commission for a hearing. The Hearing Officer, however, denied the request, simply reasoning that "[u]nder the FEPS . . . it is appropriate for [me] to consider her complaint." After granting several extension requests, the Hearing Officer ordered that submissions be provided by January 6, 2017, and "a hearing, if any, will be held by February 10, 2017."

On February 9, 2017, without a hearing, the Hearing Officer issued a Final Decision finding no discrimination. The Hearing Officer reasoned that the Agency provided a legitimate, non-discriminatory reason for terminating Complainant – that she failed to timely file and fully pay her Federal taxes. Complainant failed to show that a similarly situated individual outside of her protected bases was treated differently.

Later than same day, Complainant filed a motion with the Hearing Officer seeking rescission of the Final Decision. In addition to disputing the Hearing Officer's legal conclusions, Complainant asserted that she was not provided with adequate information about the FEPS process, Agency officials in the FEPS process acted in bad faith, and she was not provided with appropriate notice regarding the repeatedly rescheduled hearing date.

The following week, the Hearing Officer ordered the Agency to submit a response. The Agency provided a detailed response on February 21, 2017. In her February 21, 2017 reply, Complainant reiterated her request that her case be forwarded to this Commission for a hearing.

Thereafter, Complainant filed the instant appeal seeking the review of those orders by the FEPS Hearing Officer.

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<sup>2</sup> The instant record reflects that this duty was performed by the Tax Court Acting Chief Judge. In accordance with the Agency's FEPS, the EEO Counselor, mediator, and EEO Director duties were performed by various Tax Court Judges.

In response, the Agency requests that Complainant's appeal be dismissed for lack of jurisdiction. Specifically, citing 29 C.F.R. § 1614.103(b)(4), the Agency acknowledges that the Commission has authority over "the judicial branch of the Federal government having positions in the *competitive service*" (emphasis added). The Agency argues, however, that the Tax Court does not have competitive service positions as set forth in the current version of 26 U.S.C. § 7471(a), and notes that Complainant's position was in the excepted service.

### ANALYSIS AND FINDINGS

As originally enacted, Title VII's protections against unlawful discrimination did not apply to federal government employees. The Act was amended in 1972 to extend its coverage to many, but not all, federal employees. Newman v. The Presidio Trust, EEOC Request No. 05A30686 (March 18, 2004). Added by the 1972 amendments, Section 717(a) of Title VII provides, in part:

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5, . . . in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and *judicial branches of the Federal Government having positions in the competitive service*, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin. (Emphasis added.)

42 U.S.C. § 2000e-16(a).

This definition, as it relates to judicial branch employees, was incorporated into the Commission's regulation at 29 C.F.R. § 1614.103 setting out the scope of the Commission's federal sector administrative complaint process:

§ 1614.103 Complaints of discrimination covered by this part.

(b) This part applies to:

. . .

(4) All units of the *judicial branch of the Federal government having positions in the competitive service*, except for complaints under the Rehabilitation Act;  
(Emphasis added.)

Prior Commission decisions have established that the U.S. Tax Court is part of the judicial branch. See DeLuca v. U.S. Tax Court, EEOC Appeal No. 01A03404 (August 22, 2000) (citing Freytag v. Commission of Internal Revenue, 501 U.S. 868 (1991)). While we have previously considered EEO complaints from U.S. Tax Court employees, a close review of 26 U.S.C. § 7471(a) reveals

that such employees are no longer in the competitive service and under the Commission's jurisdiction. Effective January 4, 2011, 26 U.S.C. § 7471(a)(3) provides that: "[t]he Tax Court may appoint necessary employees without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such employees shall be subject to removal by the Tax Court." Moreover, the Tax Court shall "promulgate procedures for resolving complaints of discrimination by employees and applicants for employment." 26 U.S.C. 7471(a)(6)(A). Similar determinations, finding an employee's position to be in the excepted service, were considered to be outside the Commission's jurisdiction. See Complainant v. U.S. Courts, EEOC Appeal No. 0120141927 (Jan. 27, 2017) (finding Commission does not have jurisdiction over U.S. District Court probation officer's Title VII or Rehab. Act claims), citing Semper v. United States, 694 F.3d 90, 94 (Fed Cir. 2012) (federal probation officer was in the "excepted service" and, by definition, not in the competitive service) and Dotson v. Griesa, 398 F.3d 163 (2<sup>nd</sup> Cir. 2005) ("employees of the judicial branch, including probation officers . . . qualify as excepted service personnel because they are neither in the executive branch nor included in the competitive service by statute.").

### CONCLUSION

Accordingly, Complainant's appeal is hereby **DISMISSED**.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

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:

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. 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 agency's request must be submitted

in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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).

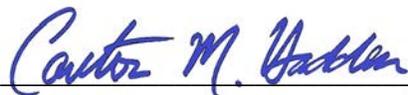
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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. 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 (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

February 8, 2019

Date