



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

[REDACTED]
Nicki B.,¹
Complainant,

v.

Betsy DeVos,
Secretary,
Department of Education,
Agency.

Appeal No. 0120172829

Agency No. ED-2015-FSA-0008

DECISION

On August 17, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from a final Agency decision (FAD) dated July 19, 2017, denying her back pay after the Agency previously found discrimination on her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by a staffing firm serving the Agency's Federal Student Aid (FSA) program as a Software Configuration Manager/Enterprise Change Manager. She worked on Agency premises.

According to a decision dated May 5, 2016, by the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), the following occurred. On November 5, 2013, Complainant filed an EEO complaint against the staffing firm alleging a violation of Section 503 of the Rehabilitation Act of 1973, as amended. Complainant requested a reasonable accommodation in the form of permission to complete some work assignments via telework to avoid or reduce certain stimuli that can act as triggers for episodes of manic or depressive behavior resulting from her bipolar disorder. Specifically, she cited the excessive noise and distractions due

¹ 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.

to the constant chatter of colleagues and distracting movement, together with dim lighting, in the office environment which negatively affected her.

The OFCCP decision indicated that the staffing firm raised and discussed Complainant's reasonable accommodation request in a meeting with Agency management on October 23, 2013, which rejected telework but suggested the possibility of moving Complainant to the 5th Floor. According to the staffing firm, Agency officials said that if they let one person telework, everyone was going to want to do it. By emails on October 23, 2013, Agency officials confirmed the rejection of the request for reasonable accommodation, and formally asked the staffing firm to replace Complainant due to "pre-existing medical concerns that FSA was not privy with during the initial screening process" so that FSA may "ensure the safety and consideration of others in the workplace." On October 24, 2013, the staffing firm replied that this seemed premature and asked if they could work together to find an accommodation. The Agency replied the same day by disagreeing things were premature, and reiterating its request that Complainant stop serving it.

The OFCCP found that Complainant requested the accommodation so she could perform her duties more comfortably and at a more consistent level, making it easier in terms of her mental health, and the staffing firm stated that at no time did it feel Complainant's performance was an issue. The record showed that some telework would not impact on Complainant's ability to perform the essential functions of her position. While the staffing firm made several attempts to work with the Agency to accommodate Complainant at the work site via telework and alternate methods, the Agency twice requested that Complainant be removed from the contract, leaving the staffing firm unable to keep Complainant in her position. The OFCCP found that the staffing firm itself failed to reasonably accommodate Complainant when, after the Agency's refusal to keep Complainant, the staffing firm did not reassign her to one of two open positions serving other clients, and instead terminated her. In accordance with Department of Labor regulations, OFCCP invited the staffing firm to resolve this matter through conciliation with the assistance of an OFCCP compliance officer.

Meanwhile, on February 2, 2015, Complainant filed an EEO complaint against the Agency alleging that she was discriminated against based on her disability (bipolar disorder) and retaliation for EEO activity under the Rehabilitation Act (requesting reasonable accommodation), when on November 13, 2013, she was terminated. Following the Commission's reversal of the Agency's initial procedural dismissal,² the Agency investigated the complaint, and Complainant then requested a FAD without a hearing. By FAD dated November 22, 2016, the Agency concluded that Agency management improperly denied Complainant's request for reasonable accommodation out of hand because it was concerned this might lead to similar requests from other contractors, and terminated its relationship with Complainant because of her disabling condition and her request for reasonable accommodation. As relief, the Agency ordered, in part, that the Agency determine the appropriate amount of back-pay with benefits due Complainant, determine her entitlement to compensatory damages, and pay attorney fees.³

² Complainant v. Department of Education, EEOC Appeal No. 0120151697 (February 9, 2016).

³ According to the Agency, it awarded Complainant \$29,677.40 in attorney fees and \$38,024 in compensatory damages.

In October 2016, prior to issuing its decision, the Agency had sought to obtain information to assist with determining remedies. It asked counsel who represented the staffing firm before the OFCCP to provide information on any remedies provided to Complainant as a result of her case against the staffing firm. Counsel replied that due to confidentiality obligations, counsel was unable to provide such information. According to the Agency, it also called OFCCP, to no avail. In addition, Complainant's attorney indicated that Complainant was unable to disclose what she received from the staffing firm in resolution of her OFCCP claim because she was bound by a confidentiality clause in her settlement agreement with the staffing firm.

On July 19, 2017, the Agency issued a FAD denying Complainant any back-pay.⁴ It explained that it was entitled to off-set any back-pay Complainant received from the staffing firm to avoid unjust enrichment, and without information on Complainant's resolution with the staffing firm, including the amount of back pay already paid, it could not calculate the amount of back pay owed. The Agency found that even if it received information on the amount of back pay Complainant already paid, there would still be an issue on whether it was liable for awarding any back pay because Complainant was never a federal employee of the Agency.

On July 20, 2017, Complainant's attorney contacted the staffing firm's counsel after talking with the Agency's EEO Director. Complainant's attorney asked the staffing firm's counsel if it would allow an exception to the confidentiality clause in its settlement agreement with Complainant because of the Agency's position and impact on Complainant, and the staffing firm agreed to allow him to confidentially disclose to the Agency EEO Director the amount of back-pay damages awarded in its settlement with Complainant. On July 25, 2017, Complainant's attorney notified the Agency EEO Director that, pursuant to a settlement with the staffing firm, Complainant received a check "in the amount of Nine Thousand Dollars.... For alleged lost wages less lawful deductions," and the staffing firm issued Complainant an IRS Form W-2 reflecting this payment and said deductions. Complainant's attorney requested that the Agency reconsider its final decision on Complainant's entitlement to back pay. However, no new FAD on back pay was issued.

The instant appeal from Complainant followed, seeking a back pay award from the Agency.

In opposition to the appeal, the Agency argues that federal law only allows back pay to be awarded to federal employees under 5 USC § 5596(b)(2)(A) – the Back Pay Act. It asserts that Complainant is not an employee of the Agency because she was not appointed to the civil service. Rather, the Agency argues, under Federal Acquisition Regulations, Complainant is a contractor, i.e., an individual or other legal entity that (1) directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a

⁴ At one point, Federal Student Aid management determined that based on hourly rate information provided by Complainant's attorney, and the time frame that the vendor contract was in place with the Agency, the back pay amount should be \$163,012.50. This amount, however, was not offset by any award Complainant had received from the staffing firm.

Government contract or subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor. 48 C.F.R. § 9.403

The Agency also argues that under OFCCP's decision, Complainant's employer, the staffing firm was obligated to provide her reasonable accommodation, that the staffing firm, not the Agency, neglected to find Complainant a job with a reasonable accommodation, and the staffing firm, not the Agency, was liable for back-pay. It argues that it was the staffing firm's choice how to staff the contract, that the Agency paid the staffing firm the full amount owed under its contract with it, the staffing firm did not provide a deduction for Complainant's salary, and to demand that the Agency pay additional money as back-pay to Complainant would require the Agency to pay more money under the contract than agreed, a violation of Federal contract and appropriations law.

Finally, the Agency argues that the assertion that the Complainant is owed \$163,012.50 is incorrect because this is the amount the Agency paid the staffing firm for work formerly performed by Complainant under the contract, rather than her staffing firm salary. It concludes that as found in the FAD, the only way it could be liable for back pay, if any, is if Complainant was compensated less than the amount she should have received by the staffing firm.

ANALYSIS AND FINDINGS

As an initial matter, we disagree with the Agency's reading of OFCCP's decision. Complainant and the staffing firm were the parties in that litigation, not the Agency. While OFCCP found that Complainant could perform the essential functions of her service to the Agency had the Agency allowed her to telework some, it did not rule on or speak to the Agency's liability. However, the Agency itself has already issued a final decision on Complainant's EEO complaint, processed under 29 C.F.R. Part 1614, concluding the Agency violated the Rehabilitation Act when it refused to consider Complainant's request for reasonable accommodation and instead insisted that the staffing firm terminate her services with the Agency.

We also fail to see the relevance of the Agency's arguments concerning the acquisition regulations. They do not apply here because Complainant did not meet the criteria of 48 C.F.R. § 9.403 – there was no expectation that she would submit offers, nor did she do so, for an award of a Government contract or subcontract, nor was she expected to conduct business, nor did she do so, with the Government as an agent or representative of another contractor. This description fits the staffing firm. Complainant did not have a direct or indirect contract with the Agency. Further, we disagree with the Agency's argument that paying Complainant back pay would result in an illegal overpayment on its contract with the staffing firm. The payment of back pay would be pursuant to the finding of discrimination, not the Agency's contract with the staffing firm.

When, as here, the Agency qualifies as a common-law joint employer of Complainant, it is liable for discriminating against Complainant on the same basis that it would be liable for discriminating against any of its other employees. EEOC's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms,

Questions 8 and 9 (Dec. 3, 1997) (available at www.eeoc.gov.) (Guidance). Where the combined discriminatory actions of a staffing firm and the Agency result in harm to Complainant, they are jointly and severally liable for back-pay, front pay, and compensatory damages. This means that Complainant can obtain the full amount of back-pay, front pay, and compensatory damages from either one of the employers alone or from them combined. Id., Allocation of Remedies Section. Even where there is joint liability, neither the charging party nor the Commission is obligated to pursue a claim against both entities. Id., n. 42.

Counsel for the Agency argues that he found no cases awarding back pay to a contract worker from a federal agency, and Complainant cited none. We are aware of several. In Brinkley v. United States Postal Service, EEOC Appeal No. 07A40110 (April 28, 2005), the complainant worked for a staffing firm serving the Postal Service. An Equal Employment Opportunity Commission Administrative Judge (AJ) issued a decision finding that the Postal Service and staffing firm jointly employed the complainant, and that the Postal Service discriminated against him when he was terminated. As remedy, the AJ awarded the complainant back-pay with interest and benefits until the contract with the staffing firm ended, non-pecuniary damages, and other relief. On appeal, the Postal Service only challenged the award of non-pecuniary damages, arguing it should be reduced. The Commission in part ordered the Agency, if it had not already done so, to determine the appropriate amount of back pay, with interest and other benefits, due complainant for the back pay period, pursuant to 29 C.F.R. § 1614.501. In Feder v. Department of Justice, EEOC Appeal No. 0520130004 (May 14, 2013) the complainant contracted directly with Justice to serve as a linguist and was determined to be its common-law employee. The Commission found that the complainant was entitled to proven back pay for lost earnings, with interest, resulting from the Agency terminating his employment in retaliation for his requesting reasonable accommodation. In Enriqueta T. v. Department of the Army, EEOC Appeal No. 0120143048 (Sep. 2, 2016), the Complainant was employed by a staffing firm serving the Army, and under common-law, was jointly employed by them. The Commission, citing the Guidance and Brinkley, found that the Army was liable for back pay for the complainant where she did not get a raise because the Agency discriminatorily did not recommend to the staffing firm that she get it.

We need not determine whether the Back Pay Act applies to a common-law employee of an agency. Like any employee, Complainant is entitled to compensation for her lost earnings, including benefits she would have received had she not been removed from serving the Agency by the staffing firm at the Agency's request. We acknowledge that OFCCP found that the staffing firm also discriminated against Complainant when after the Agency forced it to terminate Complainant's service with it, and the staffing firm did not reassign her. Complainant's loss of earnings is still proximately caused by the Agency, as well as the staffing firm. The Agency is jointly and severally liable for the full amount of the back-pay owed.

The FAD is REVERSED. The Agency shall comply with the orders below.

ORDER

1. The Agency shall determine the wages and cash value of wage-related benefits Complainant would have received from the staffing firm had she continued to serve the Agency in her position for the duration of the relevant contract, and use this amount to calculate her back pay award, with interest. The Agency may offset this amount by any back pay award Complainant has already received from the staffing firm for this same time period. The Agency shall issue Complainant her back pay award within 120 calendar days of the date of this decision. The Agency, in accordance with its payment system, may characterize this payment as back pay, compensatory damages for wage loss, or any other characterization necessary to make the payment.

Complainant shall cooperate in the Agency's efforts to compute the above amount, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount due Complainant, the Agency shall pay Complainant the undisputed amount it believes to be due within the above deadline. Complainant may petition for enforcement or clarification of the amount in dispute within the above time limit. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she is entitled to an award of reasonable attorney's fees incurred in the processing of her wage loss claim, including this appeal. 29 C.F.R. § 1614.501(e). Once payment is made on the back pay award, the Agency shall notify the attorney to submit a verified statement of fees to the Agency, and where to do so (not to the Equal Employment Opportunity Commission, Office of Federal Operations) within thirty (30) calendar days of the notice. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501, and make payment.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The report must include supporting documentation of its calculation of the compensation for Complainant's wage loss, including the cash value of wage related benefits Complainant would have received from the staffing firm, with interest, and evidence that all corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

Under 29 C.F.R. § 1614.405(c) and §1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29

C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

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 (R0610)

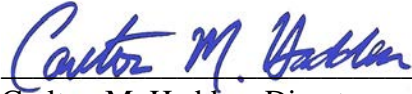
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal 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. **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

November 28, 2018

Date