



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

[REDACTED]  
Kyong L.,<sup>1</sup>  
Complainant,

v.

Robert Wilkie,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 0120172904

Hearing No. 520-2013-00233X

Agency No. 200H05282012104127

**DECISION**

On August 27, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), after the Agency failed to timely respond to Complainant's June 27, 2017 email disputing the Agency's award of damages regarding her equal employment opportunity (EEO) complaint alleging 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 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 worked as a Medical Supply Technician at the Agency's Medical Center facility in Buffalo, New York.

On May 5 and August 21, 2012, Complainant filed a EEO complaints alleging that the Agency discriminated against her on the bases of race (White), disability (anxiety and depression) and reprisal when Complainant was harassed, denied a reasonable accommodation, and terminated from her employment.

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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.

Complainant received a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ), who issued a decision finding no harassment, but further finding that the Agency violated the Rehabilitation Act when it denied Complainant a reasonable accommodation and when it terminated Complainant. In a Final Order, dated March 20, 2017, the Agency adopted and fully implemented the AJ's findings regarding discrimination, as well as the AJ's Order regarding remedies. Specifically, the Agency, among other things, reinstated Complainant in her previous position and agreed to pay back pay in the amount of \$158,608.00, plus interest.

By email correspondence to an Agency attorney, Complainant alleged that by not reinstating Complainant's leave, the Agency had failed to fully comply with the AJ's Order. When the Agency did not resolve the issue within 35 days, Complainant appealed to this Commission.

### ANALYSIS AND FINDINGS

Under 29 C.F.R. § 1614.504(a) and (b), if the complainant believes that the agency has failed to comply with the terms of a final decision, the complainant shall notify the EEO Director of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. If the Agency does not respond or resolve the matter to the complainant's satisfaction, the complainant appeal to this Commission. The Agency argues that Complainant did not notify the EEO Director as specified under §504(a). The record shows, however, that Complainant notified the Agency's attorney and we therefore find that the Agency EEO Director received constructive knowledge of Complainant's allegation of noncompliance.

The AJ decision ordered that Complainant, among other things, be reinstated in her position and be awarded "back pay and related benefits." The Agency argues that because the AJ did not specifically mention that her leave be reinstated, Complainant is not entitled to such leave. Instead, the Agency argues that if Complainant was dissatisfied with the AJ's failure to specifically include the reinstatement of leave she should have appealed Agency's Final Order adopting the AJ's decision. The Agency asks that the appeal be dismissed as untimely.

Following a review of the record we find that Complainant's allegation of noncompliance was not untimely. While the AJ's decision did not specifically mention restoration of leave, Complainant had no reason to believe such leave would not be restored until after the Agency issued its July 24, 2017 compliance report. With regard to the Agency's argument concerning leave, we note that we have held that when discrimination is found, an agency must provide the complainant with a remedy that constitutes full, make-whole relief to restore the complainant to the position she would have occupied absent the unlawful discrimination. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976); see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); 29 C.F.R. § 1614.501(a). The Commission construes "benefits" broadly to include, inter alia, annual leave, sick leave, health insurance, overtime and premium pay, night differentials, and retirement contributions. See Vereb v. Dep't of Justice, EEOC Petition No. 04980008 (Feb. 29, 1999). We therefore find that Complainant is entitled to reinstatement of all sick and annual leave she would have accrued had discrimination not occurred, that is, the leave

she would have been entitled to accrue from February 15, 2013, the date of her discriminatory removal, until the date of her reinstatement.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency has not fully complied with the AJ's March 20, 2017 Order and the Agency is directed to do so in accordance with the ORDER below.

### ORDER

To the extent that it has not already done so, the Agency is ORDERED to take the following actions:

Within sixty (60) days, the Agency shall reinstate all annual and sick leave that Complainant would have been entitled to accrue had she been continuously employed with the Agency from the date of her removal on February 15, 2013 up to the date of her reinstatement. The Agency shall ensure that Complainant's official personnel records, including those with OPM, are properly amended to reflect credit for the accrued leave.

The Agency is directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The Agency shall send a copy of the report and all of its enclosures to Complainant.

### 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

February 15, 2019

Date