



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

████████████████████
Lee R.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Capital Metro Area),
Agency.

Appeal No. 0120180413

Hearing No. 531201600267X

Agency No. 4K210003913

DECISION

On October 19, 2017, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 11, 2017 final decision concerning his equal employment opportunity (EEO) complaint. He alleged employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mail Handler, Level 4, at the Agency's Post Office in Millersville, Maryland.

On March 3, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of age (74) when he was forced to retire (constructive discharge) after he received a letter of removal, dated October 25, 2012 and effective November 30, 2012, on the charge of improper conduct. Complainant stated that there were no other employees of the office anywhere near his age.

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.

The Agency initially dismissed the complaint on procedural grounds, but the Commission reversed and remanded the complaint for continued processing. EEOC Request No. 0520140162 (January 28, 2016).

The investigation showed that Complainant was employed as a Rural Carrier. The named responsible management officials were the then-Officer-in-Charge (“OIC”) (44), his then-Acting Supervisor, Customer Service (40), and the Manager of Post Office Operations (age not specified).

On October 25, 2012, Complainant was issued a Notice of Removal by the OIC because, on the prior day (October 24, 2012), he had not received a Post Office Form 5630, Shipment Confirmation Acceptance Form for outgoing prepaid packages that was normally given to him by an identified business customer. Instead, Complainant scanned each one of the packages individually. Usually, the carrier would simply scan the Form 5630 that covered all the packages and load the packages in his vehicle. Complainant testified that the OIC did not believe Complainant when he informed him that the Form 5630 had not been given to him by the customer. Management contended that Complainant was trying to inflate his numbers.

Complainant said that on October 24, 2012, he had explained to the OIC and his acting supervisor that he had not received the Form 5630 from the business customer. He said the customer informed Complainant that it was his busiest day of the year and he did not have time to print one up. Despite this explanation, Complainant said management threatened him with removal. Although Complainant’s union representative then obtained a signed statement from the customer supporting the fact that Complainant had not been given the Form 5630, management charged him with Improper Conduct, indicating they believed that his actions of not obtaining a PS Form 5630 were “an attempt to inflate his rural route mail count outgoing parcel volume” in violation of ELM 665.16 Behavior and Personal Habits.

Complainant stated that upon considering the ramifications of the Letter of Removal, he felt forced to retire to avoid the loss of his health insurance. He said his wife had medical conditions for which she was undergoing treatments.

Complainant averred that during the last two weeks of his employment, the acting supervisor badgered him to retire instead of being removed. Complainant attested that the supervisor would mimic him daily regarding the way he walked and often asked Complainant when he was going to retire. Complainant stated that he informed management several times that he found the behavior unacceptable, unwelcomed and offensive, but management ignored him.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before a United States Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant requested a hearing.

On August 9, 2017, the parties appeared for the scheduled hearing. Complainant was then represented by legal counsel. The parties engaged in settlement discussions. Under the terms of an agreement orally agreed to by the parties, at least initially, Complainant would withdraw his complaint and the Agency would return Complainant to employment. The Agency also agreed to pay Complainant's attorney \$10,000.

Although Complainant verbally acknowledged his acceptance of the terms of the agreement to the AJ on the record, the settlement agreement was never finalized because Complainant later refused to sign the agreement. When his legal counsel informed the Agency that Complainant would not sign the agreement, he informed the Agency that Complainant had rights under the ADEA to revoke an agreement within 7 days.

Thereafter, on September 1, 2017, the Agency also moved to set aside the agreement for other reasons. The AJ did not act on the Agency's motion.

On September 6, 2017, the AJ issued an Order dismissing the matter as settled.

On October 11, 2017, the Agency issued a final decision on the merits of the complaint, pursuant to 29 C.F.R. § 1614.110(b), based on the evidence developed during the investigation. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

This appeal followed. On appeal, Complainant requests that this matter be remanded to the AJ for a hearing.² He maintains: 1) he did not agree to, or sign, the settlement agreement with the Agency; 2) the AJ erroneously dismissed his hearing request because she thought the complaint was settled; 3) the Agency erred in issuing a Final Agency Decision under these circumstances where the Agency's unjustified issuance of a notice of removal forced Complainant to retire.

In response, the Agency argues that it had a legitimate, nondiscriminatory reason for issuing Complainant a proposed removal and that Complainant cannot prove constructive discharge. In addition, the Agency argues that, even if the agreement was never finalized, its decision finding no discrimination should be affirmed because the record overwhelmingly shows that this case is ripe for summary disposition in favor of the Agency.

² Complainant states that he was told at the September hearing that if the offer was not signed, the hearing would be rescheduled.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

The record shows that the parties arrived at a tentative oral agreement to resolve the complaint, which was read into the record before the AJ. However, the agreement was never finalized in writing as both parties almost immediately sought to set the agreement aside. The AJ did not respond to the Agency’s motion to rescind the agreement and dismissed the matter as settled.

Here, Complainant has raised a claim of age discrimination in violation of the ADEA. The Older Workers' Benefit Protection Act (OWBPA) amended the ADEA and provides the minimum requirements for waiver of ADEA claims. We conclude that under the circumstances presented in this case, Complainant is entitled to set the agreement aside under the provisions of OWBPA. We note that the Agency apparently realized this and issued a decision on the merits of the complaint rather than dismissing the complaint as settled. Therefore, we conclude that the AJ erred in dismissing the matter as settled.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we VACATE the Agency’s final decision on the merits, and REMAND the matter for further processing in accordance with the following Order.

ORDER

Within fifteen (15) calendar days of the date of this decision, the Agency shall submit to the Hearings Unit of the EEOC Baltimore Field Office a request for a hearing on the instant complaint, as well as a copy of this decision. The Agency is also directed to submit a copy of the full complaint file to the Hearings Unit of the EEOC Baltimore District Office within fifteen (15) calendar days of the date of this decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall process the matter in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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).

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 tends 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)

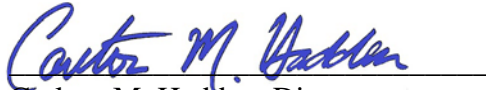
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

May 9, 2019

Date