



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

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Mickie B.,<sup>1</sup>  
Complainant,

v.

William P. Barr,  
Attorney General,  
Department of Justice  
(Federal Bureau of Prisons),  
Agency.

Appeal No. 0120180590

Hearing No. 420-2016-00019X

Agency No. BOP201400809

**DECISION**

**JURISDICTION**

On November 30, 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 31, 2017 final order concerning 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. For the following reasons, the Commission VACATES the Agency's final order.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Human Resource Manager at the Agency's Federal Correctional Institution in Talladega, Alabama. Complainant received an overall Performance Evaluation of "Minimally Satisfactory" for fiscal year 2014. She requested of the manager in charge of the evaluation (S1) that she be given a higher rating. S1 denied her request.

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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 contacted an EEO Counselor and filed a formal EEO complaint on August 10, 2014, alleging that the Agency discriminated against her on the bases of race (African-American), sex (female), and in reprisal for prior protected EEO activity when the Agency refused to consider her request for a change to her 2014 performance evaluation.<sup>2</sup>

At the conclusion of the investigation, Complainant was provided a copy of the report of investigation (ROI) and requested a hearing before an EEOC Administrative Judge (AJ). The AJ issued a summary judgment decision finding no discrimination.

While the Agency implemented the AJ's decision, the Agency determined that summary judgment was not appropriate in this case. An Agency memorandum accompanying the final order ("Agency Memorandum") explains the Agency's view that the AJ's decision was legally flawed. The Agency, nonetheless, determined that, under the Commission's regulations, it was obliged to implement the decision. The Agency's explanatory memorandum contains the following statement: "[s]hould the complainant appeal this matter, the EEOC's Office of Federal Operations is urged to remand this matter to the Administrative Judge for further development of the record and an administrative hearing." From that order, Complainant brings the instant appeal.

#### STANDARD OF REVIEW

In rendering this appellate decision, we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a *de novo* review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed *de novo*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and the Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See id. at Chapter 9, § VI.A. (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").

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<sup>2</sup> Complainant included parental status as a basis for discrimination in her formal complaint. The EEOC Administrative Judge (AJ) assigned to the matter correctly stated that the Commission does not have jurisdiction over claims of discrimination based on parental status. In addition, the AJ noted that Complainant withdrew national origin as a basis of discrimination.

### ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. Id. at 249. An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. After a careful review of the record, we find that the AJ erred when he concluded that there was no genuine issue of material fact in this case.

The central factual issue here is whether Agency's articulated reasons for giving Complainant the evaluation rating of "minimally successful" for FY 2014 are true. The record evidence on this question is in conflict on at least two important points. First, the Agency contends that Complainant's failure to properly perform her duties resulted in Agency personnel being issued weapons without being properly qualified to carry weapons. ROI at 76. Complainant denies that she had any responsibility for weapons training of employees (other than reviewing their certification documents) and asserts that she correctly reported that the employees involved were not weapons certified. Complainant Aff. at 25-26.

Second, the Agency contends that when S1 requested Complainant to provide written support for her argument that her evaluation rating should be raised, she failed to provide the requested documentation. Agency Memorandum at 2. Complainant asserts that S1 asked her to "give me a write up [showing] what's incorrect on [the evaluation]. Break it down for me and turn that in so I can look at it." In contrast to the Agency's contention, Complainant testifies that she provided the documentation S1 sought. Complainant Aff. at 28.

The contradictory evidence on these two points presents genuine issues of material fact. Furthermore, we note that the Agency also agrees that further development of the record is appropriate in this case. Complainant's evidence is not speculative. It is relevant, specific and based on personal knowledge. If Complainant's evidence on these issues were believed, and the Agency's testimony shown to be false, this would be sufficient to support a finding that the Agency's explanation is a pretext designed to conceal discriminatory animus. See Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146-147 (2000). A hearing is necessary to resolve the conflict in evidence.

### CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency's final order and REMANDS the matter to the Agency for further processing in accordance with this decision and the Order below.

### ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 hold a hearing and issue a decision on the complaint 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.

### 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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director  
Office of Federal Operations

May 9, 2019

Date