



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Nadine M.,¹
Complainant,

v.
Janet Dhillon,
Chair,
Equal Employment Opportunity Commission,²
Agency.

Appeal No. 0120180745

Agency No. 2016-0014

DECISION

On December 22, 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 December 5, 2017, final decision 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission VACATES the Agency's final decision.

On December 1, 2014, Complainant began working with the Agency as an Information Intake Representative (IIR) at its Chicago, Illinois District Office (CHIDO). Complainant was required to serve a one-year probationary period that was scheduled to end on December 1, 2015. On November 25, 2015, management informed Complainant that it had decided to terminate her employment effective November 30, 2015. In response, Complainant resigned from the Agency effective November 25, 2015.

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.

² In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority. The Commission's adjudicatory function is housed in an office that is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party to this action.

On January 12, 2016, Complainant filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of national origin (Mexican), sex (female), disability, and in reprisal for prior protected EEO activity arising under the Rehabilitation Act when:

1. On November 17, 2015, November 20, 2015, and November 25, 2015, she was denied the ability to work from home as a reasonable accommodation;
2. On November 25, 2015, she was given a termination letter; and
3. On November 25, 2015, she was constructively discharged.

On July 19, 2016, the Agency completed its investigation of Complainant's complaint and provided her with a copy of the Report of Investigation. Additionally, the Agency informed Complainant that it would issue a final decision pursuant to 29 C.F.R. § 1614.302 because the complaint was a mixed-cased complaint.

In a decision dated December 5, 2017, the Agency determined that Complainant did not prove that she was subjected to unlawful discrimination or denied a reasonable accommodation for her disability. Additionally, the Agency found that Complainant's claim that her complaint had been improperly processed was without merit. The Agency then provided Complainant with rights to appeal the matter to the MSPB within 30 days of receiving the final decision, as well as the MSPB appeal forms on which to file the appeal.

Upon review, we note that the Agency determined that Complainant's complaint essentially concerns her claim that she was constructively discharged by a series of Agency actions, and therefore, should be processed as a mixed case complaint pursuant to 29 C.F.R. § 1614.302. The Agency only provided Complainant with appeal rights to the MSPB and did not provide her with the right to request a hearing before an EEOC Administrative Judge (AJ). There is no evidence that Complainant filed an appeal with the MSPB.

The MSPB has jurisdiction over appeals of adverse actions, which include removals and involuntary resignations after completion of probationary service periods, suspensions for more than fourteen days, reductions in grade or pay, and furloughs of thirty days or less. See 5 C.F.R. § 1201.3(a)(1). In this case, Complainant had not completed her probationary period at the time she resigned from the Agency. As such, Complainant's complaint is not a mixed complaint over which the MSPB has jurisdiction. Therefore, the Agency should have provided Complainant with the opportunity to request a hearing before an EEOC AJ, which it failed to do. Therefore, we remand this matter to the Agency to provide Complainant with an opportunity to request a hearing before an AJ.

CONCLUSION

Accordingly, the Commission VACATES the Agency's final decision and REMANDS this matter to the Agency for further processing consistent with this decision and the ORDER set forth below.

ORDER

Within thirty (30) calendar days, the Agency shall acknowledge to Complainant that it has received the remanded claim and simultaneously provide Complainant with a copy of the investigative file and a notice of her right to a hearing pursuant to 29 C.F.R. § 1614.108(f). After receipt of the investigative file and notice of her right to request a hearing, Complainant shall have thirty (30) calendar days to request a hearing before an AJ, or a final agency decision, in accordance with 29 C.F.R. § 1614.108(f). If Complainant requests a hearing, the Agency shall promptly contact the Office of Federal Operations to request the assignment of an independent contract Administrative Judge. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 CFR § 1614.503(f) for enforcement by that agency.

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:

/s/ Bernadette B. Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

November 27, 2019
Date