



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

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Donna W.,<sup>1</sup>  
Complainant,

v.

Kirstjen M. Nielsen,  
Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Appeal No. 2019000362

Agency No. HS-CBP-02118-2007

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated September 21, 2018, finding that it was in compliance with the terms of the settlement agreement into which the parties entered. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Officer at the Agency's Cargo Unit, JFK International Airport facility in New York, New York.

Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On November 9, 2007, Complainant and the Agency entered into a settlement agreement (Agreement) to resolve the matter. The Agreement provided, in pertinent part, that the Agency agreed to:

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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.

(II)(A) Assign Complainant to the U.S. CBP Cargo Unit at JFK International Airport at the same series and grade she currently possesses. However, the Agency retains the right to temporarily assign Complainant to other work assignments at other branches as exigent circumstances, changes in threat condition, and/or operational needs may require.

By letter to the Agency dated August 17, 2018, Complainant alleged that the Agency was in breach of the Agreement and requested that the Agency specifically implement its terms. Specifically, Complainant alleged that on or about July 5, 2018, the Agency transferred Complainant from her position as an Officer working in the Cargo Unit to performing clerical work in the Fines and Penalties Unit.

In its September 21, 2018 final decision, the Agency concluded there was no breach of the Agreement. Specifically, the Agency noted that the Agreement permitted the Agency to “temporarily assign Complainant to other work assignments at other branches as exigent circumstances, changes in threat condition, and/or operational needs may require.” In addition, the Agency noted that Complainant had enjoyed the benefits of the Agreement for almost eleven years, and essentially found that the Agency was therefore in substantial compliance with the Agreement.

#### ANALYSIS

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep’t of Def., EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract’s construction. See Eggleston v. Dep’t of Veterans Affairs, EEOC Request No. 05900795 (August 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (December 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Building Eng’g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

In the instant case we find no breach of the Agreement. Complainant argues that the Agreement only gives the Agency the right to temporarily assign Complainant to other work assignments while the current reassignment is more than just temporary.

Regardless of the duration of her assignment to Fines and Penalties, however, we note that the Commission has held that where a settlement agreement assigns a position and does not specify the duration of that position, it is reasonable to assume that the parties did not intend that the position would last forever. See Parker v. Dep't of Defense, EEOC Request No. 05910576 (Aug. 30, 1991). Pursuant to the Agreement, Complainant held her Officer position in the Cargo Unit for almost eleven years. See Complainant v. Dep't of Homeland Sec., EEOC Appeal No. 0120140927 (June 23, 2014) (finding that Complainant's reassignment, even after less than a year, did not constitute a breach of the Agreement); see also Buck v. Dep't of Veterans Affairs, EEOC Appeal No. 01A12839 (July 6, 2001) (finding no breach where Complainant was reassigned in accordance with a settlement agreement, and held the new position for more than a year before the position was reclassified and ultimately downgraded). Because Complainant received the benefit of the Agreement for almost eleven years we find that the Agency substantially complied with the Agreement.

Complainant argues that the Agency could have offered her a light duty assignment in the Cargo Unit, and further argues that the Agency violated its own procedures in making the determination that Complainant should be reassigned. We note, however that the Commission cannot second-guess an Agency's decisions involving personnel matters unless there is evidence of a discriminatory motivation on the part of the officials responsible for making those decisions. See Texas Department of Community. Affairs v. Burdine, 450 U.S. 248, 259 (1981). If Complainant feels that her reassignment was discriminatory she may seek to file a new complaint raising such an allegation, but as regards her instant claim, we find that Complainant has not shown that the Agency breached the Agreement.

### CONCLUSION

The Agency's final decision is AFFIRMED.

### 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 (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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. If you file a request to reconsider and also file a civil action, **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

April 12, 2019

Date