



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

[REDACTED]
Kyoko H.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019001697

Agency No. 200P-0653-2018103830

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency final decision, dated November 15, 2018, finding that it was in compliance with the terms of a July 24, 2018 settlement agreement. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405. The Commission accepts the appeal.

BACKGROUND

During the relevant time, Complainant worked as a Physician at the Agency's VA Roseburg Medical Center in Eugene, Oregon.

Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. Prior to filing a formal complaint, Complainant engaged in Alternative Dispute Resolution (ADR) with the Agency.

On July 24, 2018, the parties entered into a settlement agreement to resolve the matter. The July 24, 2018 settlement agreement provided, in pertinent part, that:

(2)(b) The Agency will formally designate Dr. [N] as Complainant's immediate supervisor and remove Dr. [M] permanently as her supervisor and [he

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.

will] not play a role in any future evaluations regarding Complainant within seven calendar days from the effective date of this agreement. Dr. [N] will remain Complainant's immediate supervisor until the new Chief of Surgery reports for duty. When the new Chief of Surgery reports for duty he/she will be Complainant's immediate supervisor.

On August 8, 2018, Complainant requested more time to see a wound care patient. Complainant's request was sent, by staff, to Dr. M, who denied the request. The next week, on August 15, 2018, Complainant requested sick leave to attend a doctor's appointment. Her request was denied by Dr. M. On September 5, 2018, Complainant contacted the EEO office contending that "leadership continues to include Dr. [M] in decisions related to my job and they allow him to make decisions as a supervisor. This continues to affect patient care. They have refused to allow me to operate on urgent patients who have infections." She also noted that "this is the fourth breach of the agreement."

Thereafter, on September 28, 2018, Complainant again alleged breach of the agreement, explaining that, "[t]he new Chief of Surgery, Dr. [S], continued to include Dr. [M] in my current work related duties and responsibilities. Dr. [M] is not supposed to have anything to do with me at work since he was removed as my direct supervisor." In support of this assertion, Complainant attached an email, dated September 17, 2018, from the new Chief of Surgery to Complainant which also copied Dr. [M] and another management official regarding the process for post-op X-ray films.

In its November 15, 2018 decision, the Agency found no breach. The Agency reasoned that Dr. [M] is not Complainant's supervisor, but as part of the staff, was included in group emails.

Complainant filed the instant appeal.

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 this case, the Agency agreed that Dr [M] would permanently be removed “as [Complainant’s] supervisor and not play a role in any future evaluations re Complainant. . . .” The record contains copies of communications, such as a September 17, 2018 email between Complainant and the new Chief of Surgery, where Dr. M is copied. In such instances, Dr. M is, as asserted by the Agency, merely a recipient. As Assistant Chief of Surgery, explains the Agency, Dr. M must be kept apprised of instructions provided by the Chief to the surgical staff, including Complainant. We note that the agreement did not, for example, completely remove Dr. M from receiving all information involving Complainant or assign Complainant to another department. Consequently, it is reasonable, and not a breach of the agreement, to have Dr. M included as a passive recipient on such communications.

However, our analysis does not end here. In response to Complainant’s appeal, the Agency, citing an email from the Interim Medical Center Director, contends that Dr. M is “not involved in Complainant’s supervision and was not providing input on her performance assessment or any other supervisory matter.” The record, however, also contains evidence of Dr. M exerting supervisory control over Complainant. Specifically, Complainant has provided an August 8, 2018 email regarding her request for more time to see a wound care patient. The record shows that the request was emailed by staff to Dr. M, who *denied* the request. Further, the record contains a request for sick leave by Complainant that clearly states was denied by Dr. M on August 15, 2018 at 9:10 p.m. The Agency does not dispute that these incidents occurred or that they occurred after the effective date of the settlement agreement. We find that on both occasions, Dr. M made active supervisory decisions regarding Complainant in violation of provision (2)(b) of the settlement agreement.

Where we find a breach, the Commission has two options to remedy the situation: 1) reinstate the underlying complaint or 2) order specific performance. In this case, the record is unclear as to Complainant's preference. However, because of the other benefits obtained by Complainant through the agreement (i.e. convene a panel to reassess her pay to a higher-level, review her Permanent Change of Station to ensure she receives all benefits, and provide an Operating Room block time based on historic utilization), we find that an order directing compliance is the more appropriate remedy. Therefore, on remand, the Agency is required to specifically enforce the terms of the agreement.

CONCLUSION

The Agency breached provision (2)(b) of the July 24, 2018 settlement agreement. The matter is **REMANDED** to the Agency for further processing as set forth in the **ORDER** below.

ORDER

Within fifteen (15) calendar days of the date of this Decision, the Medical Center Director shall issue a written directive to Dr. M and the new Chief of Surgery (Dr. S), with a copy to Complainant, reaffirming the Agency's duties under the provisions of July 24, 2019 settlement agreement, including provision (2)(b).

The Agency shall submit a report of compliance, as provided in the statement below. The report shall include supporting documentation verifying that the corrective action has been implemented.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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:



Carlton M. Hadden, Director
Office of Federal Operations

March 29, 2019

Date