



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

[REDACTED]
Ciera B.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2019001426

Agency No. DeCA-00226-2018

DECISION

On December 24, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a November 20, 2018 final Agency decision (FAD) dismissing her complaint of unlawful 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and 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 served as a Bagger at the Agency's Buckley Air Force Base Commissary Aurora, Colorado.

On November 20, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging that she was subjected to disparate treatment and harassment discrimination based on her race (White), sex (female), religion (Observant Jew), disability, age (65), and reprisal when:

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.

1. Starting in February 2018, after new Head Baggers were elected, identified Head Baggers made things difficult and inflexible for her in that they denied some of her requests to be off work, made it more difficult for her to swap shifts with other Baggers, denied her requests to permanently change to the day shift on Mondays and Wednesdays, falsely accused her of walking out before the end of her shift, suspended her for a week, and one yelled at her that she was a trouble maker and hung up on her.
2. She was terminated by a Head Bagger on June 27, 2018, with Agency consent.

The Agency dismissed the complaint for failure to state a claim. It reasoned that Complainant was self-employed, not an employee of the Agency. The instant appeal followed.

On appeal, Complainant argues that she was mistreated and fired by identified Head Baggers and the Agency did not intervene on her behalf, despite her requests.

In opposition to the appeal, the Agency argues that the FAD should be affirmed.

ANALYSIS AND FINDINGS

The Commission applies the common law of agency test to determine whether an individual is an agency employee versus an independent contractor. Serita B. v. Army, EEOC Appeal No. 0120150846 (Nov. 10, 2016); Ma v. Dep't of Health and Human Services, EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998) (citing Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318, 323-24 (1992)). The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls or has the right to control the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer. In assessing the right to control, EEOC does not consider any one factor to be decisive.

The Agency granted Complainant access to the Commissary so she could bag the purchases of customers and bring them out to their cars. Head Baggers are independent contractors elected by Baggers. Complainant was chosen by a Head Bagger to serve as a Bagger, Head Baggers set her tour, schedule, approved her requests for time off, and her compensation consisted of voluntary tips by customers to her. In response to questions by the EEO counselor, Complainant wrote that her first line supervisors were identified Head Baggers, that her work is assigned by them, she never was evaluated by the Agency, the Agency did not reimburse her for expenses, she did not work for the Agency, and was an independent contractor.

While Complainant's work was performed at an Agency facility using Agency shopping carts, we do not find that the Agency had sufficient control over her service to qualify as her employer for the purposes of the EEO complaint process. The Commission has, on several recent occasions, considered whether similar commissary Baggers are *de facto* employees of the Agency, and has decided they were not.

See Teddy D. v. Department of Defense (Defense Commissary Agency), EEOC Appeal No. 0120181409 (July 18, 2018); Delphia F. v. Department of Defense (Defense Commissary Agency), EEOC Appeal No. 0120181098 (May 16, 2018), and Chara S. v. Department of Defense (Defense Commissary Agency), EEOC Appeal No. 0120172859 (Jan. 9, 2018).

The FAD 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)

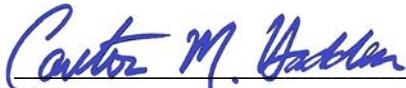
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision.

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:



Carlton M. Hadden, Director
Office of Federal Operations

November 29, 2019

Date