



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

[REDACTED]
[REDACTED]
Barbara C.,
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army
(National Guard Bureau),
Agency.

Appeal No. 2021002144

Hearing No. 550-2014-00259X

Agency No. T-2009-024-CA-AARGO

DISMISSAL OF APPEAL

On February 10, 2021, the Equal Employment Opportunity Commission (EEOC or Commission) docketed an appeal from Complainant regarding a decision on the above captioned complaint. For the reasons that follow, the Commission DISMISSES the appeal.

BACKGROUND

Complainant worked as a Dual-Status Military/Civilian Technician in the California Army National Guard (CANG). She was attached to the 40th Combat Aviation Brigade. In a formal EEO complaint filed on July 8, 2008 and subsequently amended, Complainant alleged that the Agency subjected her to discrimination and a hostile work environment on the bases of sex (female),

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.

disability (unspecified psychological condition), age (50), and reprisal (prior protected EEO activity). She cited numerous incidents that occurred between January 22, 2007 and November 30, 2009 that included demeaning comments from instructors and supervisors, loss of a supervisory position, involuntary reassignments to non-pilot positions, denials of leave and training, and placement of unwarranted restrictions on her flying time.

It took the parties several years to decide what allegations would be accepted and investigated. In conducting the investigation, the Agency failed to produce a report that conformed to the requirements of 29 C.F.R. Part 1614 or Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110). Instead, the Agency conducted what it termed as an "AR-15-6" military investigation and concluded that Complainant failed to prove her case. The AR-15-6 process provided no recourse beyond the Adjutant General of the CANG.

Complainant requested a hearing.² However, the AJ initially assigned to the case dismissed the complaint as "nonjusticiable," concurring in the Agency's assessment that the incidents at issue arose from military employment. But in EEOC Appeal No. 0120120460 (January 29, 2014), the Commission reversed the AJ's dismissal and reinstated the complaint. The Commission found that the incidents at issue arose from Complainant's civilian position, not her military duties, and that as such, her complaint was to be processed pursuant to 29 C.F.R. Part 1614. The matter was then assigned to the current AJ.

In a status conference order dated November 15, 2014, the AJ ordered the parties to clarify all of the allegations, to submit initial briefs no later than January 30, 2015, and to submit response briefs no later than February 20, 2015. Although Complainant submitted her initial brief by the assigned deadline, the Agency did not. Instead, in a letter addressed to the Federal Sector Programs Director within the Office of Federal Operations, the Agency's Complainants Management and Adjudication (CMA) Chief declined to accede to Commission jurisdiction and, further, declined to participate in further proceedings on the complaint.

In a response letter dated March 11, 2015, the Federal Sector Programs Director advised the CMA Chief that compliance with the Commission orders was not optional:

² It is not readily apparent how Complainant submitted her request, i.e., whether the Agency provided a notice of hearing rights.

As a point of notice for the future, the Office of Federal Operations will not acknowledge or consider valid letters from [the Agency] notifying the Commission that [the Agency] on its own initiative decided to close or dismiss a matter because of its internal determination of jurisdiction.

These matters must be processed in accordance with 29 C.F.R. Part 1614 (emphasis added).

Thereafter, the AJ issued an order to show cause on November 30, 2018, advising the Agency that it was subject to sanctions up to and including the imposition of a default judgment. The CMA Chief responded to the AJ's show-cause order on December 7, 2018. The CMA Chief did not directly respond to the show-cause order, instead taking issue with the AJ's authority to issue sanctions, and concluding, "[W]e consider this matter closed."

On November 30, 2020, the AJ issued a default judgment in favor of Complainant and ordered relief. When the Agency failed to issue a final order within 40 days of receipt of the AJ's decision, the AJ's decision became the final action of the Agency on January 14, 2021. See 29 C.F.R. § 1614.109(i).

CONTENTIONS ON APPEAL

Complainant has appealed the Agency's failure to take any action with regard to the relief ordered by the AJ.

The Agency has not responded to the appeal.

ANALYSIS AND FINDINGS

As noted, supra, the Commission's position is that when alleged discriminatory action arises from a dual-status technician's capacity as a federal civilian employee, the individual is covered by Section 717 of Title VII and as a result the Commission has jurisdiction over those cases. See EEOC Appeal No. 0120120460 (January 29, 2014). Having concluded that the incidents at issue in the complaint at bar arose from Complainant's civilian employment, we ordered the Agency to process the complaint pursuant to 29 C.F.R. Part 1614. The Agency's repeated noncompliance led to a default judgment in Complainant's favor.

Subsequent to our first decision in this matter in EEOC No. 0120120460, and while compliance by the Agency with our Order was still pending, President

Barack Obama signed into law the National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017) on December 23, 2016. Pub. L. 114-328, 130 Stat. 2000, sec. 512 (2016). The Commission views the NDAA 2017 as codifying its long-held position – that dual-status technicians have full rights in the 29 C.F.R. Part 1614 process, including the right of appeal. The Agency, however, maintains that the NDAA 2017 conferred a new right on dual-status technicians and the claims of dual-status technicians, such as Petitioner, which arose prior to the effective date of the NDAA 2017, are not within the Commission's jurisdiction, and therefore it is not bound by the orders issued in this case. See Malinda F. v. Dep't of the Air Force (Nat'l Guard Bureau), EEOC Appeal No. 2020002487 (Dec. 29, 2020).

Given the Agency's asserted position, and in light of the unsuccessful efforts already undertaken, we determine that any further efforts in the administrative process are futile.

Accordingly, we dismiss the appeal and Complainant is notified of the right to seek judicial review pursuant to 29 C.F.R. § 1614.503(g):

Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, or the Pregnant Workers Fairness Act and to seek judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and the mandamus statute, 28 U.S.C. 1361, or to commence *de novo* proceedings pursuant to the appropriate statutes.

CONCLUSION

Accordingly, the appeal is DISMISSED. Complainant's rights following this decision are appended below.

STATEMENT OF RIGHTS - ON APPEAL COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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

January 17, 2025

Date