



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

[REDACTED]
Marine V.,¹
Complainant,

v.

Frank Kendall III,
Secretary,
Department of the Air Force
(National Guard Bureau),
Agency.

Appeal No. 2022000533
Prior Appeal Nos. 0120171333, 0120181061
Petition No. 2020000584
Agency No. T201630NCFRHO

DISMISSAL OF APPEAL

On November 8, 2021, the Equal Employment Opportunity Commission (EEOC or Commission) docketed an appeal from Complainant regarding Orders of the Commission issued in prior EEOC decisions as captioned above. For the reasons that follow, the appeal is DISMISSED.

BACKGROUND

Complainant worked as a Base Service Specialist in a dual-status technician position at the Headquarters 145th Airlift Wing facility in Charlotte, North Carolina. On September 23, 2016, Complainant filed a formal complaint alleging that the Agency subjected her to ongoing discriminatory harassment on the bases of race (African-American) and reprisal for prior protected activity under Title VII of the Civil Rights Act of 1964.

¹ This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

The Agency dismissed the complaint in its entirety, asserting that, because Complainant was a dual-status technician, her EEO rights were under the military's EEO process, not the civilian process found at 29 C.F.R. Part 1614.

EEOC Appeal No. 0120171333

In the first appeal related to the complaint at bar, the Commission found that the incidents at issue pertained to Complainant's civilian employment, not her military duties, and therefore the matter was subject to the Commission's jurisdiction. The Commission vacated the Agency's dismissal and remanded the case for further processing under 29 C.F.R. Part 1614, including an order that the Agency provide Complainant with a report of investigation (ROI) and notice of her right to request a hearing before an EEOC Administrative Judge (AJ) (rights notice).

On remand, however, the Agency instead issued a final decision finding no discrimination, but including appeal rights to EEOC.

EEOC Appeal No. 0120181061

Complainant appealed the Agency's finding of no discrimination. Noting that it had previously ordered the Agency to provide Complainant with a ROI and rights notice, the Commission vacated the agency's final decision and remanded the matter, again ordering the Agency to provide Complainant with a ROI and a rights notice.

EEOC Petition No. 2020000584

The Agency took no action with the complaint. Complainant then filed a Petition for Enforcement. The Commission issued a decision finding that the Agency was not in compliance with its previous orders, and once again reiterated that the Agency was to provide Complainant with a ROI and rights notice.

EEOC Compliance Order

The Agency continued to take no action on the complaint. The Commission therefore issued a January 22, 2021 Compliance Enforcement Order, whereby the Commission transferred Complainant's case to an EEOC District Office for assignment to an AJ. In its order, the Commission noted that the Agency had twice failed to comply with Commission orders to provide Complainant with a ROI and rights notice.

Agency's Continued Non-Compliance

Once the matter was assigned to an AJ, however, the Agency refused to participate in the hearing process. Accordingly, the AJ issued a default judgment in Complainant's favor and awarded relief. The Agency neither issued a final order declining to implement the AJ's decision nor appealed the matter to the Commission. The AJ's decision therefore became the decision of the Agency by operation of 29 C.F.R. § 1614.109(e).

EEOC Appeal No. 20220005333

Complainant next filed the instant appeal, noting that the Agency continues to take no action on the Commission's orders, and requesting her right to file a civil action.

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. 0120171333 (Aug. 11, 2017). 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. 0120171333, 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