



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

Katrina L. Webster,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Request No. 2023000882

Appeal No. 0120181068

Agency No. 17-00030-01579

DECISION ON REQUEST FOR RECONSIDERATION

On March 16, 2020, the Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120181068 (Feb. 14, 2020). In EEOC Request No. 2020003073 (Nov. 9, 2020), the Commission dismissed the Agency's request for reconsideration because Complainant filed a civil action in United States District Court. The United States Court of Appeals for the District of Columbia dismissed without prejudice a claim of reprisal based on the disclosure of Complainant's prior protected activity, which was the subject of the Agency's request for reconsideration. On November 23, 2022, Complainant filed an appeal with the Commission, attaching a copy of the decision of the Court of Appeals dismissing the claim without prejudice. The Commission docketed Complainant's "appeal" as the instant request for reconsideration.

¹ Typically, cases are randomly assigned a pseudonym to replace a complainant's name when the decision is published to non-parties and the Commission's website. Complainant requests that her real name be used rather than a pseudonym.

ISSUES PRESENTED

The issues presented are: (1) whether Complainant's claim of reprisal based on the disclosure of her protected EEO activity is properly before the Commission; and (2) whether the Agency's request for reconsideration of EEOC Appeal No. 2022001961 meets the criteria detailed in 29 C.F.R. § 1614.405(c).

BACKGROUND

During the relevant time, Complainant was employed by the Agency as a Secretary in the Agency's Strategic Systems Programs Headquarters in Washington, D.C.

On May 20, 2017, Complainant filed a formal complaint, alleging discrimination based on race and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., when, on or about March 3, 2017, her first-line supervisor allegedly permitted a working environment where she was subjected to a hostile work environment by a contract employee.

Following an investigation, Complainant requested the issuance of a final Agency decision. The Agency's final decision found that Complainant did not establish that she was subjected to discriminatory harassment as alleged. Complainant appealed.

In EEOC Appeal No. 0120181068, the Commission affirmed in part the Agency's final decision, finding that Complainant did not establish that she was subjected to harassment by the contract employee based on race and/or reprisal as alleged.

However, the Commission found that the Agency subjected Complainant to discrimination based on reprisal when her supervisor, the Branch Head, revealed her prior protected EEO activity to the Fire Control and Guidance Branch Deputy ("the Branch Deputy"). In his affidavit, the Branch Deputy stated that the Branch Head told him that Complainant had filed EEO complaints in the past. We found that the Branch Head should not have disclosed her EEO activity to the Branch Deputy because the Branch Deputy did not supervise Complainant and did not have a need to know about her prior EEO activity. We determined that the disclosure, on its face, discouraged participation in the EEO process and constituted reprisal.

The Commission also determined that the Agency's anti-harassment policy did not adequately address the Agency's legal obligation to prevent harassment in the workplace. The Commission found that the Agency's policy was not in accordance with EEOC Management Directive 715 (MD-715) because it did not effectively communicate harassment policies and procedures, including by clearly describing the complaint procedure, and did not ensure confidentiality to the extent possible.

Pursuant to the finding of discrimination, the Commission ordered the Agency to: (1) conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages and pay Complainant that amount; (2) request technical assistance from the EEOC Office of Federal Operations, Federal Sector Programs (FSP), on revising its anti-harassment policy to comply with the standards set forth in MD-715, revise its anti-harassment policy to FSP's satisfaction, reissue a new anti-harassment policy statement signed by the agency head, and disseminate the revised anti-harassment policy; and (3) post a notice.

The Agency filed a request for reconsideration, but the Commission dismissed the Agency's request for reconsideration because Complainant filed a civil action (no. 1:20cv610) in the United States District Court for the District of Columbia. EEOC Request No. 2020003073 (Nov. 9, 2020).

The District Court granted the Agency's motion to dismiss, finding that Complainant's non-promotion claim was barred by claim preclusion and that the remaining claims failed to state a claim under Title VII. Webster v. Braithwaite, 2020 WL 7340058 (D.D.C. Dec. 14, 2020). Complainant appealed.

The United States Court of Appeals for the District of Columbia denied in part the Agency's motion for summary affirmance regarding the District Court's conclusion that Complainant failed to state a claim based on unlawful disclosure of her prior EEO activity. Webster v. Del Toro, 2021 WL 6102269 (Dec. 15, 2021). The Court of Appeals subsequently determined that Complainant could not pursue the disclosure of protected EEO activity claim, which had not been raised in her complaint and was not like or related to the claims raised in her complaint, in court without first exhausting the administrative process. Webster v. Del Toro, 49 F.4th 562 (D.C. Cir. 2022), request for rehearing en banc denied, 2022 WL 15524449 (D.C. Cir. Oct. 21, 2022).

Because the determination was based on exhaustion, the Court of Appeals modified the dismissal of the disclosure of protected activity claim to be without prejudice. Webster v. Del Toro, 49 F.4th at 569 n.3. On October 31, 2022, the Court of Appeals issued its Mandate to the District Court.

On November 23, 2022, Complainant filed an appeal with the Commission, which was docketed as the instant request for reconsideration.

On September 18, 2023, Complainant filed another civil action (no. 23-cv-2716) in the United States District Court for the District of Columbia, which included the same disclosure of protected activity claim. The Court dismissed Complainant's civil action, noting that the D.C. Circuit had affirmed the dismissal of Complainant's reprisal based on disclosure of protected activity claim for failure to exhaust her administrative remedies and finding that Complainant had not cured the failure to exhaust. Webster v. Del Toro, 2024 WL 4362127, at *2 (D.D.C. Sept. 30, 2024).

CONTENTIONS ON REQUEST

Contentions on Initial Request for Reconsideration

In its request for reconsideration, the Agency contends that the Commission erred, as a matter of fact and law, in addressing the sufficiency of its anti-harassment policy through the vehicle of Complainant's individual EEO complaint. The Agency asserts that the record focused on Complainant's harassment allegations, not whether its anti-harassment policy was consistent with MD-715. According to the Agency, while the Commission has the authority to engage in oversight of agencies' EEO programs through its separate technical assistance programs, exercising this oversight authority in the individual complaint process pushes aside the principle that the complaint process is intended to make victims of discrimination whole.

The Agency further argues that neither the evidence in the record nor case law supports the Commission's finding of per se reprisal when the Branch Head "revealed Complainant's protected EEO activity" to the Deputy Chief. The Agency maintains that the EEO counselor was the first person to inform the Deputy Chief about Complainant's prior EEO activity. The Agency also contends that, while the Deputy Chief was not Complainant's official first-level supervisor, the Deputy Chief was responsible for coordinating her assignments and therefore had a "reason to know" about Complainant's prior EEO activity.

According to the Agency, the situation was distinguishable from other cases in which the Commission found reprisal because there was no evidence that the communication was shared with Complainant and the decision did not demonstrate it had or could potentially have a chilling effect.

In response to the Agency's request for reconsideration, Complainant argues that the Commission acted within its authority and suggests that the Agency has a history of targeting employees who engage in protected EEO activity.

Contentions on Complainant's "Appeal"

In the "appeal" that was docketed as the instant request for reconsideration, Complainant requests compensatory damages from the Agency based on the Commission's February 14, 2020, decision and the September 20, 2022, decision of the Court of Appeals for the D.C. Circuit dismissing her claim without prejudice.

On January 19, 2023, the Agency filed a motion to strike Complainant's filing, which it characterized as ambiguous, redundant, and barred by res judicata. The Agency argues that the matter was not properly before the Commission, as the D.C. Circuit had denied Complainant's request for rehearing.

In response to the Agency's motion to strike, Complainant asserts that she filed her "appeal" based on the Court of Appeals dismissing her retaliation-by-disclosure claim without prejudice. Complainant states that she wishes to continue pursuing the claim administratively.

On October 5, 2023, the Agency notified the Commission pursuant to 29 C.F.R. § 1614.409 that Complainant filed a civil action including the disclosure of EEO activity claim.

On October 16, 2024, the Agency renewed its motion to strike and its notification pursuant to 29 C.F.R. § 1614.409. The Agency argues that Complainant's claims were already adjudicated and dismissed and that the Commission must terminate Complainant's filing in deference to the authority of the federal district court.

STANDARD OF REVIEW

EEOC regulation 29 C.F.R. § 1614.409 provides that the filing of a civil action shall terminate Commission processing of an appeal. The regulation set forth at 29 C.F.R. § 1614.107(a)(3) provides that an agency shall dismiss a complaint that is the basis of a pending civil action in a United States District Court or that was the basis of a civil action decided by a United States District Court in which the complainant was a party.

EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

ANALYSIS

Whether Complainant's Reprisal Claim Is Properly Before the Commission

As the Commission found in EEOC Request No. 2020003073, Complainant's civil action, no. 1:20cv610, encompassed the claims at issue in the underlying EEO complaint, including the claim that she was subjected to reprisal when the Branch Head disclosed her EEO activity to the Branch Deputy. Accordingly, the Commission dismissed the Agency's request for reconsideration pursuant to 29 C.F.R. § 1614.409. The Agency correctly observes that the D.C. Circuit Court of Appeals dismissed Complainant's claims. However, Complainant correctly observes that the D.C. Circuit Court of Appeals dismissed her claim that she was subjected to reprisal when the Branch Head disclosed her EEO activity without prejudice, finding that she had not exhausted her administrative remedies regarding this matter.

In cases where a civil action has been dismissed without prejudice, the Commission has held that the complaint may be reinstated in the administrative process, subject to a timely request for reopening by the complainant. Gala B. v. Soc. Sec. Admin., EEOC Appeal No. 2022004186 (Nov. 21, 2022); Garcia v. Dep't of the Navy, EEOC Request No. 05960023 (July 9, 1997); Spencer v. Dep't of the Army, EEOC Request No. 05920931 (July 9, 1993).

The Commission has also found that, where a court dismisses a civil action for failure to exhaust administrative remedies, the complaint is not properly subject to dismissal. Cooper v. Dep't of Def., EEOC Appeal No. 0120083148 (Oct. 7, 2008); Rudolph v. Dep't of Veterans Affs., EEOC Appeal No. 01975221 (Apr. 16, 1998). Similarly, in Otto D. v. Dep't of Transp., EEOC Appeal No. 0120160542 (Apr. 6, 2016), the Commission reversed the dismissal of the complainant's disparate impact claims, as these claims had been dismissed by the court without prejudice on the grounds that he had not exhausted his administrative remedies on the disparate impact claims.

Here, on October 31, 2022, the Court of Appeals for the District of Columbia Circuit transmitted its Mandate to the District Court. Complainant filed the instant "appeal" on November 23, 2022. We find that Complainant timely requested reinstatement of her claim of disclosure of her EEO activity after it was dismissed without prejudice. Complainant subsequently filed another civil action, no. 23-cv-2716, but the Commission did not dismiss the instant request for reconsideration while the civil action was pending. On September 30, 2024, the District Court dismissed Complainant's claim that she was subjected to discrimination based on reprisal based on the disclosure of her EEO activity on failure to exhaust grounds.

We find that Complainant's claim of reprisal based on the disclosure of her prior protected activity is now properly before the Commission based on her timely request to reinstate her complaint after the Court of Appeals dismissed the claim without prejudice and because the District Court again dismissed the claim without prejudice. Accordingly, we shall reinstate this claim at the point where processing stopped and consider the Agency's request for reconsideration.

The Agency's Request for Reconsideration

In its request for reconsideration, the Agency challenges the authority of the Commission to evaluate whether its anti-harassment program comports with MD-715 in the context of the adjudication of an individual EEO complaint. The Commission ordered the Agency to request technical assistance from FSP to correct the deficiencies in its anti-harassment policy. The Commission's records reflect that, on January 4, 2023, FSP's Agency Oversight Division notified the Agency that, upon review of its draft anti-harassment policy, the document was in full compliance with Commission guidance. Accordingly, the issue related to the anti-harassment policy is moot, and we need not address whether this portion of the Agency's request meets the criteria of 29 C.F.R. § 1614.405(c).

In the Agency's request for reconsideration, nothing that the Agency submitted supports a determination that the prior decision finding discrimination based on reprisal was in error. A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here. Even if the Branch Deputy was responsible for assigning work to Complainant, the Agency has not shown that the Branch Deputy had a need to know about Complainant's prior EEO complaints. Further, the Agency has not established that it was clear error to find that the disclosure of Complainant's prior EEO activity by her supervisor to someone without a need to know was likely to deter protected activity by Complainant or others. The fact that learning about this breach of confidentiality did not actually deter Complainant's protected activity is irrelevant.

After reviewing the previous decision and the entire record, the Commission finds that the Agency's request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 0120181068 remains the Commission's decision, subject to the modification of the Order in accordance with this decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the ORDER as set forth below.

ORDER

The Agency shall take the following remedial actions:

1. Within **sixty (60) calendar days** of the date this decision is issued, the Agency shall conduct and complete a supplemental investigation to determine whether Complainant is entitled to compensatory damages for this violation of Title VII. In so doing, the Agency shall:
 - a. Issue a notice to Complainant of her right to submit evidence based on our guidance in Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993) and request evidence from

Complainant in support of compensatory damages.² The Notice shall provide Complainant with **thirty (30) calendar days** to respond (with an option and instructions to request an extension in the case of extenuating circumstances). Complainant has a duty to cooperate with Agency's investigation to determine compensatory damages, including responding to agency requests for documentation or completing agency forms.

- b. Issue a new final agency decision ("Compensatory Damages FAD") based on the findings of the supplemental investigation. The Compensatory Damages FAD shall state the amount (if any) of compensatory damages owed to Complainant and explain how the Agency determined that amount. The Compensatory Damages FAD shall include appeal rights to the Commission.

Within **sixty (60) calendar days** of the date the Compensatory Damages FAD is issued, the Agency shall pay Complainant the amount of compensatory damages it determined are owed. If there is a dispute over the exact amount of compensatory damages owed, the Agency shall pay the undisputed amount to Complainant. If Complainant disagrees with the agency's award, they may challenge the Agency's decision on the amount of compensatory damages by filing an appeal of the Compensatory Damages FAD with the Commission. Instructions on how to appeal, including the deadline to file, will be included in the appeal rights portion of the Compensatory Damages FAD.

² To establish entitlement to compensatory damages, the evidence must show a causal relationship between the Agency's discriminatory action and any pecuniary (monetary) or non-pecuniary losses/harm experienced by Complainant. For more information on evidence to determine compensatory damages: Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 11 § VII (Aug. 5, 2015), available at https://www.eeoc.gov/federal/directives/md-110_chapter_11.cfm (provides the types of compensatory damages available under EEOC statutes and "Objective Evidence" of entitlement); and N. Thompson, Compensatory Damages in the Federal Sector: An Overview, EEOC Digest Vol. XVI, No. 1 (Winter 2005) available at <https://www.eeoc.gov/federal/digest/xvi-1.cfm#article> (explains Carle v. Dep't of the Navy under the subsection "Proof of Damages").

2. Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall post a notice in accordance with the section listed below, entitled "Posting Order." The Agency shall provide the Compliance Officer with the original signed and dated notice, reflecting the dates that the notice was posted, along with evidence that the notice was physically posted at the facility and electronically.

POSTING ORDER (G0617)

The Agency is ordered to post at its Strategic Systems Programs Headquarters facility in Washington, D.C. copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H0124)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), they are entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance

docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

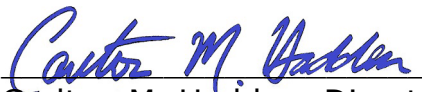
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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

February 4, 2025

Date