



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

[REDACTED]
Shayne B,¹
Complainant,

v.

Bill Nelson,
Administrator,
National Aeronautics and Space Administration
(Ames Research Center),

and

Kiran Ahuja,
Director,
Office of Personnel Management,

Request No. 2023003104

Appeal No. 0120130375

Hearing No. 550-2012-00339X

Agency No. NCN12ARC00075

DECISION ON REQUEST FOR RECONSIDERATION

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Shayne B. v. Nat'l Aeronautics & Space Admin., EEOC Appeal No. 0120130375 (April 3, 2023). 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).

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.

At the time of events giving rise to this complaint, Class Agent worked as a Deputy Chief of the Thermal Protection Materials Branch at the Agency's Ames Research Center in Moffett Field, California.

On September 27, 2008, Class Agent married his husband and encountered an error in the Agency's online system when he attempted to add his husband to his health insurance. In 2011, Class Agent's husband was laid off from his job, and Class Agent encountered the same error when he tried to add his husband to his health insurance policy.

On June 28, 2012, Class Agent initiated a class complaint alleging:

NASA subjected class members to discrimination on the basis of sex (male, female, sexual orientation)² when they were denied Federal Employee Health Benefits (FEHB) coverage for their same-sex spouses.

The class complaint was forwarded to an EEOC Administrative Judge (AJ) for a determination on class certification. The Agency opposed class certification.

On August 27, 2012, an AJ issued an Order of Dismissal of Class Complaint. The AJ noted that NASA explained that the source of the class members' injury was Section 3 of the Defense of Marriage Act (DOMA), which statutorily defined a spouse as "a person of the opposite sex who is a husband or wife."

The AJ stated that the Commission has jurisdiction over statutory discrimination claims (e.g., under Title VII) and any determination that another federal statute, in this case DOMA, should not be enforced would exceed the Commission's authority; and as such, the AJ found that the EEOC did not have jurisdiction to hold DOMA unconstitutional.

The AJ agreed with the Agency that the Executive Branch of the federal government is obligated to enforce federal law, and that DOMA remained enforceable law until the U.S. Supreme Court or Congress said otherwise. Accordingly, the AJ dismissed the class complaint for failure to state a claim. On September 24, 2012, the Agency issued a final order adopting the AJ's dismissal.

On October 19, 2012, Class Agent appealed, and the Commission in EEOC Appeal No. 0120130375 reversed the Agency's decision based on the Supreme Court Decision United States v. Windsor, 570 U.S. 744 (2013), which ruled Section 3 of DOMA unconstitutional. We found that because Class Agent's appeal was pending before the Commission when the Supreme Court

² In Bostock v. Clayton Cty., the Supreme Court held that discrimination based on sexual orientation or gender identity is prohibited under Title VII. 590 U.S. ___, 140 S. Ct. 1731 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (holding as a matter of law that workplace sexual orientation discrimination is sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

invalidated Section 3 of DOMA, the statute cannot be relied upon as a basis for dismissing the Class Complaint. Thus, we reversed the Agency's final order adopting the AJ's dismissal of the Class Complaint and remanded the complaint for processing.³ The Agency now requests reconsideration.

In its request for reconsideration, the Agency asserts that, due to the Supreme Court's 2013 decision in Windsor, employees have been able to enroll their same-sex spouses in FEHB benefits since June 26, 2013. Thus, the Class's original issue is now moot and should be dismissed. However, the complaint alleges harm dating back to September 27, 2008. As the Agency has not shown or asserted that any alleged harm prior to 2013 was cured, we do not agree that the issue is moot.

The Agency further asserts that the Commission's decision was clearly erroneous because "OFO's decision that Title VII should have been applied over another federal statute, such as DOMA, is an impermissible extension of the Commission's legal authority." This is a mischaracterization of our decision in EEOC Appeal No. 0120130375. We found in that decision that once the Supreme Court invalidated Section 3 of DOMA, the statute could not be relied upon as a basis for dismissing the Class Complaint.

The Agency has not shown 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. After reviewing the previous decision and the entire record, the Commission finds that the 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. 0120130375 remains the Commission's 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

NASA is ordered to process the remanded claim in accordance with 29 C.F.R. § 1614.204. **Within thirty (30) calendar days** of the date this decision is issued, NASA shall acknowledge to the Class Agent that it has received the remanded claim; notify OPM of the Commission's decision; and then forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission for assignment to an Administrative Judge. 29 C.F.R. § 1614.204(d).

³ We also found the Office of Personnel Management (OPM) as the administrator of FEHB has the authority to grant the relief sought by Class Agent. See Lawrence and Lawrence v. Equal Emp. Opportunity Comm'n., EEOC Appeal No. 01997219 (July 27, 2000) (where complainants brought claim against employing agency for denial of infertility treatment under the FEHB program, OPM ruled the proper agency). Thus, we joined OPM as a respondent in the complaint.

As provided in the statement entitled "Implementation of the Commission's Decision," NASA must send to the Compliance Officer: 1) a copy of NASA's letter of acknowledgment to Class Agent, 2), a copy of NASA's notice to OPM; and 3) a copy of NASA's notice that transmits the investigative file and any other relevant documents to the Hearings Unit of the EEOC's San Francisco District Office.

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 (R0124)

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 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. **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 24, 2024

Date