



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

[REDACTED]
Luann L.,¹
Complainant,

v.

Sean Duffy,
Secretary,
Department of Transportation
(Office of Inspector General),
Agency.

Appeal No. 2024004138

Agency Nos. 2022-29435-OIG-02, 2023-30031-OIG-02

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated July 1, 2024, finding that it was in compliance with the terms of the settlement agreement into which the parties entered. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405. For the following reasons, we AFFIRM the Agency's final determination finding no breach of the settlement agreement.

ISSUES PRESENTED

Whether the Agency was in breach of the settlement agreement entered into by the parties.

BACKGROUND

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, Complainant worked as a Agency Records Officer, GS-0308-13, at the Agency's Office of Inspector General (OIG) Headquarters facility in Washington, DC.

Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. This EEO complaint was designated Agency No. 2022-29435-OIG-02 and EEOC Hearing No. 570-2022-01157X.

While that complaint was pending, the Agency issued Complainant a Letter of Reprimand on January 27, 2023.

On February 8, 2023, Complainant and the Agency entered into a settlement agreement to resolve Agency No. 2022-29435-OIG-02 and EEOC Hearing No. 570-2022-01157X ("the first settlement agreement"). The first settlement agreement provided, in pertinent part, that:

Second: Both parties agree that neither they nor their representatives will disparage the other party. Disparage as used herein shall mean any communication, either oral or written, of false information or the communication of information with reckless disregard to its truth or falsity.

...

Fifth: The Agency agrees:

...

b. That the January 11, 2022 and September 27, 2022 e-mails cited in EEOC Complaint No. 570-2022-01157X, as amended [], shall not be cited as a grounds for discipline or progressive discipline for Complainant.

Complainant subsequently filed another EEO complaint in which she alleged discrimination when, among other things, she was issued the January 27, 2023 Letter of Reprimand and a subsequent 3-day suspension which was proposed on May 25, 2023 and upheld on July 26, 2023. This EEO complaint was designated Agency No. 2023-30031-OIG-02. The Agency issued a final agency decision on the matter in which it dismissed some of the claims and found no discrimination had occurred regarding the other claims. Complainant filed an appeal with the Commission, EEOC Appeal No. 2024002854. This appeal was later withdrawn when the parties reached a separate settlement in that matter. However, prior to the withdrawal of the appeal, the Agency filed a brief in opposition to Complainant's appeal.

The Agency attached to its brief the email chains referenced in the first settlement agreement and argued that their inclusion in the first settlement agreement was evidence that Complainant was on notice regarding the behavior that led to the charges raised in the Letter of Warning and Suspension that were the subject of in Agency No. 2023-30031-OIG-02.

By email to the Agency dated May 6, 2024, Complainant alleged that the Agency was in breach of the settlement agreement, and requested that the Agency specifically implement its terms. Specifically, Complainant alleged that the Agency used the emails referenced in the settlement agreement for discipline and disparaged her when it included them in its brief in opposition under EEOC Appeal No. 2024002854 regarding the final agency decision in Agency No. 2023-30031-OIG-02. Complainant alleged that:

- A global settlement was reached in the former EEO complaint not to use the subject email "SEPT 2022" as discipline or progressive discipline. It was used to issue the Letter of Reprimand.
- The SEPT 2022 email is now being used to affirm progressive discipline.
- The SEPT 2022 email was a EEO claim the EEOC AJ in Hearing No. 570-2022-01157X accepted during the initial conference. It is a "harassment email" from the same RMO.

In its July 1, 2024 FAD, the Agency concluded that "any disagreements that the parties may have with any assertions made in EEOC Appeal No. 2024002854 are appropriately addressed in that appeal process, not in some other, collateral, process such as this breach action." The Agency further found that the Agency's brief did not qualify as disciplinary action and the agency's provision of documentation opposed the appeal did not constitute disparaging comments, therefore the Agency was not in breach of the first settlement agreement. Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends the Agency's use of the September 27, 2022 email (the subject email) violates the first settlement agreement. Complainant states the issuance of the Letter of Reprimand (LOR) (which she characterizes as discipline) and the 3-day suspension (suspension) (which she characterizes as progressive discipline) are the main subject matter being appealed. She asserts that her primary concern is that bias may have influenced the Agency's decision given that the Office of the Inspector General serves as the watchdog over the Agency.

Complainant further notes that this matter involves the Deputy Inspector General who wrongfully suspended her and cited context from the subject email in the LOR to justify the suspension.

Complainant states that settled EEO claims cannot be recycled and used in new complaints or appeal as justification for discipline or progressive discipline. She asserts that the subject email was harassment and has been included as part of a reprisal claim in another EEO complaint (Agency No. 2023-30031-OIG-02) which was subsequently settled.

Complainant asserts the subject email was explicitly part of the first settlement agreement and should not be used against her. She notes her intention in including the subject email in the first settlement agreement was to prevent any future disciplinary measures from being justified based on its content, but that is what the Agency has done.

She further notes the Agency used the subject email in its opposition to EEOC Appeal No. 2024002854 yet stated that the Agency had not threatened to discipline Complainant for those communications. Complainant states this is untrue because the Agency used it against her just days before the first settlement agreement was signed. Complainant further states that the subject email should have been redacted from the LOR and the Report of Investigation.

Last, Complainant asserts the Agency violated the disparagement clause of the first settlement agreement. She takes issue with the Agency's statement that their opposition to EEOC Appeal No. 2024002854 was "quite restrained and avoids making any salacious or provocative claims." She states this is not true and that the subject email was harassment.

The Agency did not file a brief or statement in connection with this appeal.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record,

including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep't of Def., EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction. Eggleston v. Dep't of Veterans Affairs, EEOC Request No. 05900795 (August 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (December 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Building Eng'g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

In the instant case, Complainant is alleging the Agency breached the first settlement agreement when the subject email was used in discipline and progressive discipline against her (specifically the LOR and the suspension) and used as part of the Agency's argument in another EEO complaint. Complainant further contends that the foregoing use of the subject email constitutes disparagement in violation of the first settlement agreement.

The record reflects that the LOR was issued and received by the Complainant on January 27, 2023, twelve days before the signing of the first settlement agreement. Therefore, any mention of the subject email in the LOR was not a breach of the first settlement agreement.

While Complainant's proposed suspension issued on May 24, 2023 references the LOR, there is no mention of the subject email and the earliest specification in the proposed suspension is a February 10, 2023 incident.

The July 26, 2023, Final Decision on the proposed suspension also does not mention the subject email. Thus, the subject email was not cited as grounds for discipline as alleged.

Complainant also alleged the Agency was in breach of the first settlement agreement when it used the subject email in its opposition to Complainant's appeal in EEOC Appeal No. 2024002854. The Commission has long held that an allegation of discrimination and/or unlawful retaliation directly stemming from an agency's legal defense of a previously filed EEO complaint fails to state an independent actionable claim. Fredda J. v. Dep't of the Treasury, EEOC Appeal No. 2023003984 (Dec. 20, 2023). Further, the Commission has long held that "[a]n absolute privilege is provided for statements made as part of a judicial or administrative proceeding." McBride v. Dep't of Justice, EEOC Appeal No. 07A00010 (Jan. 16, 2001). Therefore, we find that any use of the subject email as part of its legal defense in another EEO proceeding does not constitute a breach of the first settlement agreement. In any event, including the subject email in response to an EEOC appeal is not citing the subject email "as a grounds for discipline or progressive discipline for Complainant." Therefore, we find the Agency did not breach the first settlement agreement when it included the email as part of its brief and Report of Investigation.

Last, we consider Complainant's argument that the Agency breached the first settlement agreement because it disparaged her by using the subject email because it is not a warning for misconduct, but rather is harassment. As noted above, the Agency has recognized an absolute privilege for statements made as part of a judicial or administrative proceeding. However, we also find that the use here was not disparaging. Mere assertions or conjecture that an Agency, or its officials, breached a settlement agreement is insufficient because subjective belief does not constitute evidence of breach. Violet F. v. Dep't of Justice, EEOC Appeal No. 2022003035 (Dec. 7, 2022).

Complainant bears the burden to prove, by a preponderance of the evidence, that the alleged breach of settlement agreement occurred. Complainant has not done so here.

CONCLUSION

For the foregoing reasons, the Agency's finding of no breach of the February 8, 2023 settlement agreement is AFFIRMED.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

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

March 5, 2025
Date