



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

[REDACTED]  
Davina W.,<sup>1</sup>  
Petitioner,

v.

Lloyd J. Austin III,  
Secretary,  
Department of Defense  
(Department of Defense Education Activity),  
Agency.

Petition No. 2025000194

MSPB No. DC-0752-22-0591-I-1

**DECISION**

On October 14, 2024, Petitioner filed a timely petition with the Equal Employment Opportunity Commission (EEOC or Commission) asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning her claim of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the reasons that follow, we DENY consideration of Petitioner's petition and REMAND this matter to the Agency for further processing.

**ISSUE PRESENTED**

Whether the Commission has jurisdiction to review the Petitioner's petition.

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<sup>1</sup> 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.

## BACKGROUND

During the relevant time, Petitioner worked as an Administrative Specialist at the Agency's Office of Military Community & Family Policy in Washington, D.C. On December 29, 2021, Petitioner filed a formal complaint alleging that the Agency subjected her to harassment based on disability (physical), and in reprisal for requesting a reasonable accommodation, from June 22, 2021, to October 31, 2021, including when on October 31, 2021, Petitioner was forced to retire due to the alleged harassment and denial of a reasonable accommodation. The Agency accepted the constructive retirement claim as a mixed-case complaint,<sup>2</sup> and issued a final decision on July 8, 2022, finding no discrimination. The Agency provided appeal rights to the Merit Systems Protection Board (MSPB). Petitioner filed an appeal before the MSPB.

Separately, Petitioner requested a hearing before an EEOC Administrative Judge (AJ) for her other claims and she included the constructive retirement claim. On October 31, 2022, the EEOC AJ issued a dismissal order without prejudice, noting that Petitioner filed an MSPB appeal and the MSPB will determine its jurisdiction over the constructive retirement claim. If the MSPB finds no jurisdiction, the Agency shall provide notice to Petitioner that she may re-file her EEOC hearing request on the constructive retirement claim and her other claims.

On May 12, 2023, an MSPB AJ issued an Initial Decision and dismissed Petitioner's appeal as untimely, and in the alternative, for lack of jurisdiction. The MSPB AJ considered Petitioner's assertions and supporting documentation and concluded that her allegations that the Agency coerced her into retirement were conclusory, vague, speculative, and/or contradicted by her own evidence. For example, Petitioner contended that her performance appraisal was "full of slanderous words and unfounded accusations," and that managers "conspired against" her and "tortured/harassed" her every day. However, she failed to provide details or facts to support these vague and conclusory claims. The MSPB AJ found that there was nothing in the record to support a finding that Agency officials caused a reasonable person in Petitioner's position to retire. The MSPB AJ concluded that Petitioner failed to non-frivolously allege facts that she lacked a meaningful choice, or that the Agency's actions wrongfully deprived her of that choice and forced her to retire.

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<sup>2</sup> A mixed-case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1).

Petitioner filed a petition for review of the Initial Decision before the full Board. She argued that her appeal was timely, and that the Agency coerced her into retirement. The MSPB issued a Final Order on September 13, 2024, affirming the Initial Decision. The MSPB noted that jurisdiction was a threshold issue and ordinarily determined before addressing the issue of timeliness. Here, Petitioner asserted that the Board has jurisdiction over her constructive retirement claim because the Agency made her working conditions “unbearable” by its actions. However, the MSPB found that the MSPB AJ correctly concluded that Petitioner’s conclusory allegations, even if true, were insufficient to establish a claim of involuntary retirement. As such, the Board lacked jurisdiction.

The instant petition for review followed.

#### CONTENTIONS ON PETITION

Petitioner did not submit any arguments with her petition. She requested an extension to file a supporting brief, but the Commission denied her request because 29 C.F.R. § 1614.304(b)(3) requires the concurrent submission of the petition for review and her supporting statement.

The Agency did not respond to the petition.

#### STANDARD OF REVIEW

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation, or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

#### ANALYSIS

When the MSPB, as it did here, denies jurisdiction, the Commission has held that there is little point in continuing to view the matter as a “mixed case” as defined by 29 C.F.R. § 1614.302(a), because the MSPB did not address any matters within the Commission’s jurisdiction. Therefore, the Commission finds that it has no jurisdiction to review Petitioner’s petition.

This matter will be considered a "non-mixed" case and processed accordingly. See generally Schmitt v. Dept. of Transportation, EEOC Appeal No. 01902126 (July 9, 1990); Phillips v. Dept. of the Army, EEOC Request No. 05900883 (October 12, 1990); 29 C.F.R. § 1614.302(c)(2)(i) and (ii).

In accordance with these principles, Petitioner's request for review is DENIED and Petition No. 2025000194 is hereby administratively closed. MSPB No. DC-0752-22-0591-I-1 is referred to the Agency for further processing as outlined below.

#### ORDER

Petitioner is advised by operation of 29 C.F.R. § 1614.302(b) that the Agency, if it has not already done so, is required to process her allegation of discrimination. Pursuant to 29 C.F.R. § 1614.108(f), the Agency shall, within 30 calendar days of its receipt of this decision, notify Petitioner of the right to elect between a hearing before an EEOC Administrative Judge or an immediate final decision on her discrimination claims pursuant to 29 C.F.R. § 1614.110.

A copy of the notification shall be provided to the Compliance Officer listed below.

#### 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.

#### PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0124)

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, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

November 26, 2024

Date