



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

██████████
Becky N,¹
Complainant,

v.

Mark Esper,
Secretary,
Department of Defense,
Agency.

Appeal No. 2020001560

Agency No. USU-14-002

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated December 13, 2019, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Research Biologist, GS-0401-12, at the Agency's Uniformed Services University of Health Sciences (USUHS) facility in Bethesda, Maryland.

Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On October 24, 2016, Complainant and the Agency entered into a settlement agreement (Agreement) to resolve the matter. The Agreement provided, in pertinent part, that the Agency would:

(2)(e) Create an office in Complainant's existing space in A3017 within 90 days.

By correspondence to the Agency dated November 20, 2019, Complainant alleged that the Agency was in breach of the Agreement and requested that the Agency specifically implement its terms.

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.

Specifically, Complainant alleged that she had been notified her office would be moved from A3017 to A3022, and subsequently confirmed that the move took place on November 25, 2019.

In its December 13, 2019 FAD, the Agency concluded it was not in breach of the Agreement. The Agency found that it had created an office for Complainant in A3017 within the 90-day timeframe set out in the Agreement. The Agency further found that the Agreement was not intended to last forever; that the new office was “comparable to the office space Complainant previously occupied in A3017”; and that Complainant had recently accepted new responsibilities and duties so that “proximity to the laboratory was no longer needed, which the location of Complainant's office in room A3017 had provided.” Finally, the Agency noted that “Complainant's office move was also part of a larger re-arrangement of several offices involving 14 staff members of the Department of Surgery.”

The instant appeal followed.

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 maintains that “the office move was not being done for any administrative efficiency or other valid reason. Rather, [it was] based on a pattern of hostility and retaliation against me after my recent 2019 complaints and participation as a witness in EEO activity.”

Following a review of the record we agree with the Agency's determination that it did not breach provision (2)(e), which provides that the Agency create an office in Complainant's existing space in A3017 within 90 days of the date of the Agreement. The Commission has held that where an individual bargains for a position without any specific terms as to the length of service, it would be improper to interpret the reasonable intentions of the parties to include the provisions to apply *ad infinitum*. See Holley v. Dep't of Veterans Affairs, EEOC Request No. 05950842 (Nov. 13, 1997).

That is, a settlement agreement that places personnel into specific duties, without defining the length of service or other elements of the employment relationship, will not be interpreted to require the agency to place the personnel in the identified job duties or positions in perpetuity. See Hamilton v. United States Postal Service, EEOC Appeal No. 01A22268 (July 5, 2002).

The Commission has also held that there is no breach of a settlement agreement “where an individual has been assigned to a position pursuant to a settlement agreement, has held the position for a period of time, and then is excised out of the position because of agency downsizing that was not anticipated at the time of the agreement.” Gish v. Department of the Army, EEOC Appeal No. 01950923 (August 14, 1995). The same rationale applies to the instant case where Complainant was assigned to a specific office pursuant to a settlement agreement and then was moved to a different location because of changes that were not anticipated at the time of the agreement.

We find that the record establishes that the Agency complied with the terms of provision (2)(e). Although that provision is silent as to the length of time that Complainant would occupy her new office, Complainant occupied the office for approximately three years and the Agency is not obligated to keep her in the same office forever. Furthermore, the Agency explained that Complainant’s new office was “comparable to the office space Complainant previously occupied in A3017”; that Complainant had recently accepted new responsibilities and duties so that “proximity to the laboratory was no longer needed, which the location of Complainant’s office in room A3017 had provided”; and finally, that “Complainant’s office move was also part of a larger re-arrangement of several offices involving 14 staff members of the Department of Surgery.”

We note that the instant decision addresses Complainant’s claim of breach only. To the extent Complainant disbelieves the Agency’s explanation and believes that the Agency’s action was retaliatory and discriminatory, Complainant may wish to file a complaint with such allegations. With regard to timeliness under 29 C.F.R. § 1614.105(1) we find that Complainant’s November 20, 2019, notice of breach shall constitute Complainant’s Counselor contact for any such complaint.

CONCLUSION

The FAD is AFFIRMED.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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 his or her 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

April 29, 2020

Date