



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

[REDACTED]
Fiona H.,¹
Complainant,

v.

Steven T. Mnuchin,
Secretary,
Department of the Treasury
(Internal Revenue Service),
Agency.

Appeal No. 2019002760

Agency No. IRS-18-0300

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated February 26, 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 Physical Security Specialist, GS-11, at the Agency's Facilities Management & Securities Office of the Deputy Director Operation West (Facilities Management) in Chicago, Illinois. Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On April 12, 2018, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part, that:

1. Facilities Management will identify and assign a writing mentor to [Complainant] by May 15, 2018;

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.

2. Facilities Management will set a weekly meeting with [Complainant] by April 17, 2018, to end on or before September 30, 2018; and
3. Facilities Management will initiate a search to move [Complainant] to a quieter cubicle by April 30, 2018.

By letter to the Agency dated October 11, 2018, Complainant alleged that the Agency was in breach of Term (2) of the settlement agreement.

In its February 26, 2019 final decision, the Agency concluded that it did not breach the agreement. The Agency investigated Complainant's allegations and determined that, although it did not schedule a meeting on April 17, 2018, its failure to do so was reasonable because the Settlement Agreement was executed three workdays prior. Subsequently, the Agency set meetings each of the remaining 24 weeks. These meetings occurred in 11 of the weeks. Six of the meetings that did not take place resulted when Complainant was either on leave or travel. Four meetings were canceled when the manager took leave or was traveling, and the August 28, 2018 meeting did not occur because the manager was performing performance appraisals. Therefore, the Agency concluded that it executed the settlement agreement in good faith.

ANALYSIS

Validity of the Agreement Under Title VII and the Rehabilitation Act

(Claims of discrimination based on color, disability, and reprisal for prior protected activity)

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 (Dec. 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 (Aug. 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 (Dec. 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 this case, we find the Agency did not breach the Agreement under Title VII and the Rehabilitation Act. By its terms, the Agreement provided that Facilities Management was to set weekly meetings. The record evidence establishes that the manager scheduled weekly meetings beginning in April 2018 through September 2018 in accordance with the Agreement.

While several of these meetings had to be canceled due to Complainant's or the manager's unavailability, we note that the Agreement did not specify what would occur should a meeting needed to be canceled. Nonetheless, we find that the Agency made good faith efforts and substantially complied with the terms of the settlement agreement.

Validity of the Agreement Under the ADEA

(Claims of discrimination based on age and reprisal for prior protected activity under the ADEA)

In Complainant's informal complaint, Complainant alleged discrimination on the basis of age. The Settlement Agreement specifically acknowledges that its terms were intended to settle Complainant's age discrimination claims as well as her color, disability, and reprisal discrimination claims.

The OWBPA, which amended the ADEA effective October 16, 1990, provides that a waiver of ADEA claims is not considered knowing and voluntary unless, at a minimum: (1) the waiver is clearly written from the viewpoint of the complainant; (2) the waiver specifically refers to rights or claims under the ADEA; (3) the complainant does not waive rights or claims arising following execution of the waiver; (4) valuable consideration is given in exchange for the waiver; (5) the complainant is advised in writing to consult with an attorney prior to executing the agreement; and (6) the complainant is given a reasonable period of time in which to consider the agreement. Juhola v. Dep't of the Army, EEOC Appeal No. 01934032 (June 30, 1994) (citing 29 U.S.C § 626(f)(2)).

A careful review of the record and of the Agreement demonstrates that the subject agreement does not state that Complainant is waiving her rights under the ADEA, and Complainant was not advised in writing to consult with an attorney before executing the agreement. The record does not reflect that Complainant was given a reasonable period of time in which to consider the settlement. Thus, the Agreement is not valid under the ADEA. However, Complainant has not indicated whether she seeks specific performance or reinstatement of her claims. In this matter, we find that reinstatement of Complainant's ADEA claims is the appropriate resolution.

We further note that Complainant's receipt of the benefits of the agreement and failure to tender them back to the Agency does not operate to waive her ADEA claim since the statutory requirement of a knowing waiver was not met. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426-28 (1998). While this statutory based legal principle does not apply to her Title VII claim, requiring Complainant to tender back any benefits gained under the Agreement would undermine the OWBPA, and hence we will not require it. Smith v. Dep't of Veterans Affairs, EEOC Appeal No. 0120130700 (May 9, 2013), citing Sheehy v. Nat'l Sec. Agency, EEOC Request No. 0520100403 (Feb. 27, 2012) (waiver of ADEA claims under settlement agreement voided under the OWBPA, but the settlement agreement waiver was not defective as to Title VII and Rehabilitation Act claims. To go forward with her ADEA claims Complainant was not required to tender back benefits received under settlement agreement, including a retroactive promotion, back pay, and a lump sum payment); McMahon v. Dep't of Homeland Security, EEOC Appeal No. 0120112007 (April 11, 2012) (waiver of ADEA claims under settlement agreement voided under

the OWBPA, but not her Title VII claims. To go forward with her ADEA claims, Complainant was not required to tender back benefits received under the settlement agreement, including an offer of employment).

CONCLUSION

The Agency's finding of no breach is **AFFIRMED** with respect to Complainant's Title VII claims, and **REVERSED** with respect to Complainant's ADEA claims. The matter is remanded to the Agency for further processing in accordance with the Order below.

ORDER

Within **thirty (30) calendar days** of the date this decision is issued, the Agency shall resume Complainant's ADEA claims from the point at which processing ceased pursuant to the procedures detailed in 29 C.F.R. Part 1614.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

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 CFR § 1614.503(f) for enforcement by that agency.

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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing.

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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

August 18, 2020
Date