



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

[REDACTED]  
Enola L.,<sup>1</sup>  
Complainant,

v.

Robert Wilkie,  
Secretary,  
Department of Veterans Affairs  
(Veterans Health Administration),  
Agency.

Appeal No. 2019004027

Hearing No. 530-2017-00145X

Agency No. 200H-0595-2015104505

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) concerning her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission VACATES the Agency's final decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Advanced Medical Support Assistant at the Agency's Medical Center in Lebanon, Pennsylvania. On August 24, 2015, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and a hostile work environment on the bases of race (African-American), religion (Muslim), age, disability (physical), and reprisal for prior protected EEO activity when:

1. On July 15, 2015, the Vision Rehabilitation Program Manager (VRPM), asked her if she was uncomfortable serving men because she was a Muslim, and commented that she (the VRPM) was at a pet store when she is at her (the Complainant's) window.

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<sup>1</sup> 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. On July 15, 2015, the VRPM assigned her with extra duties near the end of her tour and denied her request for overtime in order for her to complete the tasks.
3. On or about July 15, 2015, the VRPM required her to provide a list of her daily tasks and then criticized her work.
4. On July 16, 2015, the VRPM reported her for being hostile towards her.
5. On July 19, 2015, the VRPM requested that she request leave for religious purposes as close as possible to the event, whereas in the past she only needed to make the request one hour in advance.
6. The VRPM questioned her about her parking in a handicapped parking space.
7. On July 22, 2015, the VRPM denied her union representation for a meeting and accused her of being disrespectful while discussing training matters.
8. On July 22, 2015, and on other occasions, the VRPM strongly recommended that she attend training that was not mandatory some of which occurred outside of her tour.
9. On August 5, 2015, the VRPM continued to ask her about a key that did not belong to her.
10. On August 13, 2015, the VRPM issued her a probationary warning letter.

Following the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. Meanwhile, effective September 18, 2015, Complainant was removed from employment during her probationary period. Thereafter, on July 27, 2018, the EEOC AJ dismissed the hearing request without prejudice on grounds that the action was appealable to the Merit Systems Protection Board (MSPB). In the Notice of Dismissal, the AJ noted that the “matter may be reopened with the understanding that [Complainant] will also be permitted to amend the complaint herein to include appeal of the removal action.”

Subsequently, on April 2, 2019, the MSPB issued an initial decision under Docket No. PH-0752-19-0116-I-1, dismissing Complainant’s appeal for lack of jurisdiction and for being untimely filed. The Agency thereafter issued a final decision on May 14, 2019, noting that the AJ ordered it to issue a final decision after Complainant withdrew his hearing request. The Agency also noted that Complainant filed an appeal with the MSPB concerning her removal under MSPB Docket No. PH-0752-19-0116-I-1, and therefore the removal would not be addressed in its final decision. The Agency’s decision found that Complainant did not establish that she was subjected to a hostile work environment or discrimination.

### CONTENTIONS ON APPEAL

On appeal, Complainant, through her attorney, asserts that the Agency's final decision was issued in error. Complainant maintains that the AJ dismissed her hearing request without prejudice to permit her to submit an appeal before the MSPB. Complainant also maintains that the AJ noted that her case could be reopened after the MSPB's decision with the understanding that she would also be permitted to amend her complaint to include her removal action. Complainant renews her request for a hearing and requests that the Agency's final decision be vacated.

The Agency has not responded to Complainant's brief on appeal.

### ANALYSIS AND FINDINGS

Upon review, we find that the Agency improperly determined that Complainant withdrew her hearing request. Rather, we find that a fair reading of the AJ's July 27, 2018, dismissal without prejudice reflects that the Agency was required to hold Complainant's case in abeyance until the MSPB issued a decision on Complainant's removal. This is made clear by the fact that the AJ noted that the matter may be "reopened with the understanding that [Complainant] will also be permitted to amend the complaint herein to include appeal of the removal action." We find that the Agency should have suspended the processing of the complaint until the MSPB rendered a decision on its ability to take jurisdiction over the matter. See Complainant v. Navy, EEOC Appeal No. 2019001130 (Feb. 5, 2020) (finding that, after the AJ dismissed complainant's hearing request because complainant's removal was pending before the MSPB, the agency improperly issued a final decision and should have instead held the processing of the complaint in abeyance pending the resolution of Complainant's petition for review before the MSPB).

We note that Complainant has filed the instant appeal renewing her request for a hearing. When the MSPB has denied jurisdiction in such matters, 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). Thus, the case will be considered a "non-mixed" matter under the EEO complaint process and processed accordingly. See generally Schmitt v. Dept. of Trans., EEOC Appeal No. 01902126 (July 9, 1990); Phillips v. Dep't of the Army, EEOC Request No. 05900883 (Oct. 12, 1990); 29 C.F.R. § 1614.302(c)(2)(i) and (ii). In the present case, it has now become apparent that, due to the MSPB's dismissal of her appeal for lack of jurisdiction, Complainant was never provided with an opportunity for a hearing on her removal claim in addition to her claim of a hostile work environment.

The Commission's regulations further provide that when the MSPB has denied jurisdiction in a mixed case appeal, the agency will "reissue notice under § 1614.108(f) giving the individual the right to elect a hearing before an Administrative Judge or an immediate final decision." 29 C.F.R. § 1614.302(b). As such, in light of the MSPB's denial of jurisdiction over her removal, we find that this matter should be remanded back to the point where processing was supposed to have ceased. Therefore, the Agency should forward a request for a hearing on these allegations to the appropriate EEOC Hearings Unit.

See Complainant v. Dep't of Trans., EEOC Appeal No. 0120130105 (Feb. 26, 2014) (finding that because the AJ canceled complainant's hearing request because complainant's constructive discharge claim was appealable to the MSPB and since the MSPB appeal was dismissed for lack of jurisdiction, Complainant was never provided with an opportunity for a hearing on his constructive discharge claim in addition to his claim of a hostile work environment).

### CONCLUSION

Accordingly, the Commission VACATES the Agency's final decision and REMANDS the matter for a hearing in accordance with our order below.

### ORDER

The Agency is ordered to rescind in writing its May 14, 2019, final decision. Thereafter, the Agency shall submit, on Complainant's behalf, a request for a hearing to the appropriate EEOC Hearings Unit, a brief cover letter explaining its reason for doing so, and a copy of this decision. The Agency shall provide a copy of this submission to Complainant, as well as the Compliance Officer as referenced below. The Agency shall complete the above actions within 35 calendar days from the date of this decision.

### 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.

STATEMENT OF RIGHTS - ON APPEAL  
RECONSIDERATION (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

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

Alternatively, complainant can submit his or her 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, 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 his or her 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(c).

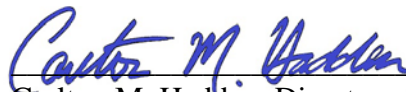
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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 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. **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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

November 3, 2020

Date