



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

[REDACTED]  
Amina W.,<sup>1</sup>  
Complainant,

v.

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

Appeal Nos. 2020004360 & 2020004343

Agency Nos. IRS-20-0426-F & IRS-20-0484-F

**DECISION**

On July 28, 2020, Complainant filed two timely appeals with the Equal Employment Opportunity Commission (EEOC or Commission) from two final Agency decisions (FADs) dated July 28, 2020, dismissing two complaints 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.

**BACKGROUND**

At the time of events giving rise to her two equal employment opportunity (EEO) complaints, Complainant worked for a staffing firm serving the Agency as a Technical Writer at the Agency's Information Technology Cybersecurity division in Lanham, Maryland.

On May 18, 2020, Complainant filed EEO Complaint 1 (IRS-20-0426-F – 2020004360). On June 15, 2020, she filed EEO Complaint 2 (IRS-20-0484-F - 2020004343). She alleged in Complaint 1 that the Agency subjected her to discrimination and harassment based on her race (African-American), sex (female), parental status (this is only protected by Title VII if it is part of a sex claim, which is unclear here) and reprisal for prior protected EEO when:

1. After IRS, based on a background investigation proposed on February 27, 2020, that she was not suitable to access IRS facilities, around the same day IRS changed her assignment

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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.

from Technical Writer to Technical Publisher, meaning she was now required to request approval from an editor;

2. By email on February 28, 2020, the IRS notified her staffing firm of its proposed decision that she was not suitable to access IRS facilities, advising she is not permitted to enter on duty and/or perform work on the contract until IRS determines whether to continue her interim staff like access;
3. After receiving Complainant's response to the proposed unsuitability decision, the IRS on April 23, 2020, decided that because she did not mitigate their concerns she was not suitable to have access to IRS facilities, information systems, and/or sensitive but unclassified information;
4. Despite not needing access to IRS facilities and sensitive IRS data to serve the IRS as a Technical Writer, the IRS did not permit her to continue serving the IRS on the contract from around February 28, 2020 and/or April 23, 2020, onward;
5. By April 15, 2020, the IRS's Electronic Tax Administration department did not provide her a stimulus check to which she was entitled under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act);

and she was discriminated against based on her sex (female) and reprisal for prior protected EEO activity under Title VII (Complaint 2) when:

6. On May 21, 2020, IRS management closed out her Anti-Harassment claim without taking action regarding some or all the above claims.<sup>2</sup>

The record reflects that after the IRS cut off Complainant's service, on July 14, 2020, her staffing firm emailed her that she was terminated immediately because there was insufficient work available outside the IRS contract to keep her gainfully employed.

The Agency's EEO function dismissed Complaint 1 for failure to state a claim. It reasoned that the Commission did not have jurisdiction to review the substance of a security clearance determination, and the stimulus check did not regard a term, condition or privilege of employment. For purposes of analysis, the Agency assumed without finding that under common law it jointly employed Complainant with her staffing firm.

The Agency dismissed Complaint 2 for stating the same claim as Complaint 1. It reasoned that the gravamen of Complaint 2 was the denial of Complainant's "security clearance" access to IRS facilities, information systems, and/or sensitive but unclassified information. The instant appeals followed.

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<sup>2</sup> We have redefined Complaints 1 and 2 to better capture the claims.

### ANALYSIS AND FINDINGS

The Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance decision. Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988). But pursuant to Section 703(g) of Title VII, jurisdiction must be raised as an affirmative defense to a charge of discrimination. This means that an agency must raise it and prove the challenged employment decision was made because of national security requirements imposed by statute or Executive Order.

While the IRS EEO function found that Complainant was denied a security clearance, the record only shows that IRS made an unfavorable determination on Complainant's suitability. Evelina M. v. Department of Homeland Security, EEOC Appeal No. 0120180056 (Mar. 5, 2018). As explained in EEOC's Policy Guidance on the use of the national security exception contained in § 703(g) of Title VII of the Civil Rights Act of 1964, introduction section, OLC Control No. EEOC-CVG-1989-17 (May 1, 1989), to meet its affirmative defense under Section 703(g), the Agency must show:

- (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive Order of the President; and
- (2) such individual has not fulfilled or has ceased to fulfill that requirement.

There is no documentation in the record showing the position duties Complainant performed were subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive Order of the President. The IRS made determination on "suitability", not a "security clearance." While it is possible the Agency used these terms interchangeably, the record does not show this. Accordingly, the Agency's dismissal of issue 3 is reversed.

Complainant contended that she was able to perform her duties as a Technical Writer without access to IRS facilities, information systems, and/or sensitive but unclassified information. Accordingly, we find that issues 1 and 4 state a claim.

Complainant indicated that issue 2 regards the IRS notifying her staffing firm of the proposed unsuitability decision on February 28, 2020, rather than waiting until April 23, 2020, when a final determination was made thereon. We find this fails to state a claim because Complainant was not aggrieved or harmed by this, nor would it reasonably likely deter EEO activity.

We agree with the Agency that issue 5 fails to state a claim. Issue 5 arises from Complainant's status as a taxpayer, not an employee.

We agree with the Agency that Complaint 2 (issue 6) states the same claim as Complaint 1. Complainant is using Complaint 2 as a vehicle to get a second review on whether some or all the actions in Complaint 1 were discriminatory. Complaint 2 also constitutes a collateral attack on the process of IRS management making a determination on Complainant's Anti-Harassment action.

While the issue is not before us, we note there is insufficient information in the record for a determination to be made on whether under common law Complainant is jointly employed by the Agency and the staffing firm.

The FAD on Complaint 1 is MODIFIED. The FAD on Complaint 2 is AFFIRMED.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 (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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

November 4, 2020

Date