



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Linda G.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Request No. 2020001250

Appeal No. 2019003551

Agency No. 200H-0518-2017102573

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Linda G. v. Dep't of Veterans Affairs, EEOC Appeal No. 2019003551 (Sept. 13, 2019). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). For the reasons that follow, the Agency's request is DENIED. However, the Commission reopens this matter on its own motion.

The Agency employed Complainant as a GS-11 Social Worker at the Veterans Affairs Medical Center (VAMC) in Bedford, Massachusetts. On May 10, 2017, she filed a second-level grievance in which she alleged that the Agency violated a provision of the collective bargaining agreement (CBA), which covered procedures to be followed when reassigning an employee. Complainant alleged in her grievance that on February 17, 2017, the Agency had taken her out of her full-time Social Work Clinical position and put her into a non-full time position that she could not do. On May 24, 2017, the Agency issued a decision on her level-2 grievance, finding that because Complainant had become aware of the reassignment 82 days before filing her grievance, the grievance had been untimely filed.

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.

On June 5, 2017, Complainant filed a formal EEO complaint in which she alleged that the Agency had discriminated against her on the bases of age and disability when:

1. Between February 17 and March 29, 2017, the Chief of Social Work (CSW) subjected Complainant to a hostile work environment and disparate treatment.
2. On February 17, 2017, the CSW issued Complainant a notice of reassignment.
3. On May 1, 2017, the CSW removed her from her full-time duties and position and assigned her duties as a home-base primary care provider, a part-time position.

That same day, Complainant filed a third-level grievance in which she maintained that the reassignment was carried out in violation of 25, §7 ¶D of the CBA. On June 21, 2017, the Hospital Chief of Staff issued a decision on the level 3 grievance in which he affirmed the level 2 decision finding the grievance untimely and also found that since there was no grade change, title change, or position change, there was no reassignment and hence no CBA violation.

On July 21, 2017, Complainant's EEO complaint was accepted for investigation. The following incidents were identified in the acceptance and authorization notices:

1. From February 17, 2017 through May 1, 2017, she was subjected to a hostile work environment with respect to less favorable treatment, harassing and threatening comments, issuance of notice of intent to reassign her to a position that could exacerbate her disability.
2. Since March 13, 2017, the CSW and Social Worker Supervisor (SWS) failed to provide Complainant with a reasonable accommodation.
3. On May 1, 2017, Complainant was reassigned in that half of her time was now spent working Home Based Primary Care.

On October 30, 2017, the investigative report was completed and submitted, whereupon Complainant requested a hearing.

Meanwhile, the grievance went to arbitration, and on April 24, 2018, the arbitrator issued his decision and award. The arbitrator found that the grievance was timely filed and that there was a violation of the CBA in the May 1, 2017 reassignment. In essence, the arbitrator found that Complainant had been taken out of a full-time position and instead given two half-time positions. Ultimately, the grievance was resolved in Complainant's favor in that Complainant was working in a full-time social work position as a reasonable accommodation.

On May 3, 2019, the AJ assigned to the complaint dismissed it after finding that Complainant had elected to pursue the negotiated grievance when she filed the step-2 grievance on May 10, 2017, prior to filing her formal EEO complaint on June 5, 2017.

The AJ found that both the grievance and the complaint pertained to the May 2017 reassignment and that Complainant could have raised the issue of discrimination in the negotiated grievance but chose not to. In its final order, the Agency fully implemented the AJ's dismissal of the complaint.

In our previous decision, we reversed the Agency's final order and remanded the matter to reinstate the complaint for a hearing. In a step-2 grievance decision letter dated May 24, 2017, an Arbitrator concluded that the grievance was untimely, finding that Complainant had filed it more than fifty days after the deadline for doing so had passed. We found that since the Agency rejected Complainant's grievance as untimely filed, then Complainant's case was to be processed as an administrative EEO complaint under 29 C.F.R. Part 1614. In addition, the Commission noted that Complainant's hostile work environment and denial of reasonable accommodation claims were not part of her grievance and should be allowed to proceed in the EEO process.

The Commission emphasizes that a request for reconsideration is not a second appeal. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency argues, in essence, that the Commission failed to take into account the arbitrator's April 2018 decision finding the grievance timely and awarding Complainant her requested relief, and consequently that we misinterpreted our own regulations, 29 C.F.R. §§ 1614.107 and 1614.301.

Those regulations state that an EEO complaint must be filed within 15 days of receipt of the required notice in order to be considered timely. 29 C.F.R. § 1614.106(b). They also state that an election to proceed under a negotiated grievance procedure is indicated by the filing of a *timely* written grievance [emphasis added]. 29 C.F.R. § 1614.301(a); Casey v. Dep't. of Veterans Affairs, EEOC Appeal No. 01944605 (Aug. 9, 1995). Consequently, if the Agency rejects Complainant's grievance because it was untimely filed, the case must be processed as a complaint under Part 1614. EEO MD-110, Appendix D, Sec. A.2.b (as revised, Aug. 5, 2015). Since Complainant's EEO complaint was timely filed, and since her grievance was found to be untimely prior to the commencement of the investigation, EEOC Regulation 29 C.F.R. § 1614.301 cannot form a basis for dismissing her complaint. Moreover, the arbitrator's ruling that the grievance was timely filed was not issued until almost six months after the EEO investigation had been completed. Accordingly, we find that the Agency's request fails to meet the criteria for reconsideration.

Nevertheless, we must exercise our discretion to reconsider the previous decision on our own motion because we are left with a situation that is contrary to the unequivocal legislative interest to provide only one forum in which to challenge the propriety of an agency action alleged to have been based upon discriminatory factors. See Roman B. v. Dep't of Transportation, EEOC Request No. 2020000188 (June 16, 2020) citing Jenna P. v. Dep't of State, EEOC Appeal No. 0120152041 (Jan. 28, 2016). In Roman B., the complainant filed an EEO complaint on December 3, 2016 after receiving a notice of proposed suspension which he ultimately served starting January 28, 2017.

On January 26, 2017, the complainant filed a negotiated grievance in which he alleged that the same suspension violated the CBA. The grievance went to arbitration and on October 30, 2017, the arbitrator found in the complainant's favor and ordered the suspension rescinded. On March 7, 2018, after the EEO complaint had been investigated and referred for a hearing, an Administrative Judge (AJ) dismissed the complaint after having found that the matter had been settled through the arbitration. The agency implemented the AJ's decision and the complainant appealed. In its initial decision, the Commission reversed the dismissal and ordered a hearing after finding no evidence that the CBA covered discrimination claims. In its ensuing request for reconsideration, the agency presented such evidence for the first time. Although the Commission denied the agency's reconsideration request, it reconsidered on its own motion, finding that:

[The c]omplainant's suspension has already been adjudicated in grievance process. In another case where a claim in an EEO complaint was previously adjudicated by an arbitrator after a hearing, the Commission held that this constituted an election of remedies. [citation omitted] Upholding the unequivocal legislative interest to provide only one forum in which to challenge the propriety of an agency action alleged to have been based, in whole or in part, on discriminatory factors, takes precedence over a complainant's equitable entitlement to have an adjudication of that issue in one forum or the other. Therefore, the Commission finds that the instant complaint was properly dismissed because [the c]omplainant elected to pursue his suspension in the grievance process.

Id. We now have a virtually identical situation before us. Even though the grievance was considered untimely at the time Complainant filed her EEO complaint, her ultimate success in obtaining the reasonable accommodation she desired through the grievance process is the functional equivalent of having elected to proceed through that process. Allowing an EEO complaint on the same matter to proceed would result in that matter being adjudicated in two fora simultaneously, a result contrary to the intent behind the statutes the Commission enforces. Since Complainant prevailed in the grievance process on a claim that encompassed incidents (2) and (3) listed above, we will affirm the Agency's dismissal of those incidents. Incident (1) however, raises a hostile work environment claim that is not the same matter as that which Complainant raised in the negotiated grievance process. Consequently, we will order that a hearing be held on that claim alone, except for the portion of Incident (1) relating to the "issuance of notice of intent to reassign her to a position that could exacerbate her disability" because Complainant used the negotiated grievance process to address the reassignment matter.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the Agency's request. Nevertheless, we exercise our discretion and reconsider the matter on our own motion. The Agency shall process Complainant's request for a hearing on the claim encompassing incident (1), in accordance with our order below. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order herein.

ORDER

Within fifteen (15) calendars days of the date this decision is issued, the Agency shall file a written request to reinstate the hearing on this complaint with the Hearings Unit of the EEOC's Boston Area Office. The hearing request shall encompass the following claim:

From February 17, 2017 through May 1, 2017, [Complainant] was subjected to a hostile work environment with respect to less-favorable treatment and harassing and threatening comments.

The request shall be accompanied with a copy of the complete complaint file, as well as a copy of this appellate decision. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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.

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:

/S/ Bernadette Wilson
Bernadette B. Wilson
Executive Officer
Executive Secretariat

December 3, 2020
Date