



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

[REDACTED]
Terrie M.,¹
Complainant,

v.

Tom Vilsack,
Secretary,
Department of Agriculture
(Food Safety and Inspection Service),
Agency.

Request No. 0520180084
Appeal No. 0120172443
Agency No. FSIS-2017-00397

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Terrie M. v. Dep't of Agriculture, EEOC Appeal No. 0120172443 (October 6, 2017). 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, we DENY the Agency's request, but will reconsider this matter on our own motion.

BACKGROUND

Complainant, a Food Inspector, GS-1863-07, working at the Agency's District Office in Baker, Alabama, received notice on June 21, 2016, that management was proposing to remove her for unauthorized absences and failure to follow instructions. Complainant File (CF) Exhibit (Ex.) 11. On July 11, 2016, Complainant contacted an EEO Counselor on what became Agency No. FSIS-2016-00805. Agency's Request for Reconsideration (RFR), Ex. C. She alleged to the Counselor that the Agency had discriminated against her on the bases of race (African-American) and age (51) by issuing her a notice of proposed removal on June 21, 2016. The proposed removal was dated June 15, 2016. Efforts to resolve the matter informally were unsuccessful. On October 12,

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.

2016, Complainant received the Notice of Right to File a Formal EEO Complaint. The Notice informed Complainant that if she wished to pursue a formal complaint, she was required to file her complaint within 15 calendar days after receipt of the Notice. Complainant failed to file a formal complaint prior to expiration of the 15-day timeframe, and the Agency closed Agency No. FSIS-2016-00805.

On August 26, 2016, Complainant received notice that the proposed removal dated June 15, 2016 had been sustained by the District Manager (DM). The DM found that the charges which led to the removal being proposed were supported by a preponderance of the evidence. The last page of the notice advised Complainant that if she decided to file a complaint through the Agency's discrimination complaints process, she would have to contact the Civil Rights Division within 45 days of the effective date of the action. RFR, Ex. D.

On February 22, 2017, Complainant contacted an EEO Counselor on what became Agency No. FSIS-2017-00397, the complaint now before us. CF, Ex. 13, p. 1. The Counselor's report identified the allegations as whether the Agency discriminated against her on the bases of race and age when:

1. On February 15, 2017, Complainant was notified that her request to return to duty had been denied; and
2. On January 7, 2017, during arbitration, Complainant became aware that a similarly-situated employee was offered a Last Chance Agreement to return to work while she was not.

CF, Ex. 8, Ex. 13, pp. 2-3. On May 16, 2017, Complainant received Notice of her Right to File a Formal EEO Complaint. On May 25, 2017, Complainant filed her formal EEO Complaint on Agency No. FSIS-2017-00397. In her complaint, Complainant claimed that the Agency discriminated against her on the bases of color (Black) and age when:

1. On August 26, 2016, she was terminated from her position of Food Inspector, GS-1863-07; and
2. On or about January 7, 2017, during arbitration, she learned management did not offer her a Last Chance Agreement to return to work following her removal.²

CF, Ex. 5. The Agency issued a final agency decision (FAD) on June 9, 2017. Therein, the Agency dismissed the first claim pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely contact with an EEO Counselor. Further, the Agency dismissed the second claim pursuant to 29 C.F.R. § 1614.107(a)(1) as a collateral attack on the grievance process. CF, Ex. 3. As to the first claim, the Agency reiterated in the FAD that the termination occurred more than five months before

² Complainant did not raise any claims related to allegedly being denied reinstatement in February 2017.

Complainant initiated contact with the EEO Counselor, and that she was presumed to be aware of the 45-day time limit as a result of having had prior experience with the EEO process.

On July 12, 2017, Complainant filed an appeal with the Commission. In her appeal, Complainant presented documentation regarding a mediation that she claimed demonstrated that she timely contacted an EEO Counselor and that she had a pending EEO matter regarding the proposed removal. In Terrie M. v. Department of Agriculture, EEOC Appeal No. 0120172443 (October 6, 2017), the Commission reversed the Agency's dismissal of the first claim. Based on the evidence that was before us at the time, the Commission reasonably believed that Complainant still had a pending EEO complaint regarding the proposed removal. As a result, the Commission found that Complainant's timely EEO Counselor contact on the proposed removal dated June 15, 2016 obviated the need for Complainant to contact an EEO Counselor for a second time, as the proposed removal merged with the actual removal. Additionally, the previous decision affirmed the Agency's dismissal of the second claim.

In its request for reconsideration, the Agency argues that Agency No. FSIS-2016-00805 was not pending in February 2017 because Complainant dropped her case by not filing a formal complaint after being notified of her right to do so. The Agency also argues that Complaint never sought EEO counseling with regard to her August 26, 2016, removal and that, even if the proposed removal had merged with the actual removal, Complainant's February 22, 2017, EEO Counselor contact was still untimely. Complainant did not respond to the Agency's request for reconsideration.

ANALYSIS

The Agency argues that because the removal occurred on August 26, 2016, the last date for contacting an EEO Counselor on Agency No. FSIS-2017-00397 was October 10, 2016, and, consequently, Complainant's contact with the EEO Counselor on February 22, 2017, was untimely. But, as noted above, with respect to Agency No. FSIS-2016-00805, Complainant contacted an EEO Counselor on July 11, 2016, after the proposed removal had been received by Complainant on June 21, 2016, but before it had been sustained on August 26, 2016. When an agency proceeds on a proposed action, the completed action merges with the proposed action. Jaskot v. Dep't of Veterans Affairs, EEOC Appeal No. 01962880 n. 1 (Aug. 12, 1998). Because Complainant contacted the Counselor less than 45 days after she received the notice of the proposed removal, her contact on the actual removal was timely with respect to Agency No. FSIS-2016-00805. Consequently, based on the information that was available to the Commission at the time, the Agency's request fails to satisfy the criteria for reconsideration. Nevertheless, the Commission will exercise its discretion and reconsider the previous decision on its own motion. See e.g. Brown v. Soc. Sec. Admin., EEOC Request No. 05990822 (July 20, 2001); Freeman v. Dep't of the Army, EEOC Request No. 05990031 (July 13, 2001); Anderson v. Soc. Sec. Admin., EEOC Request No. 05960035 (July 19, 1996).

It is well established that when a complainant receives counseling on an allegation but does not go forward with a formal complaint on that allegation, the matter is deemed abandoned, and cannot

be raised in another complaint. Small v. U.S. Postal Serv., EEOC Request No. 05980289 (July 16, 1999). With respect to Agency No. FSIS-2016-00805, Complainant was counseled on the removal claim while it was still in the proposed removal stage, as noted above. She received notice of her right to file a formal complaint regarding Agency No. FSIS-2016-00805 on October 12, 2016, after the removal action had been completed on August 26, 2016, but never filed that complaint, thereby allowing the filing period to lapse after October 27, 2016. In so doing, Complainant effectively abandoned Agency No. FSIS-2016-00805 insofar as the August 26, 2016 removal is concerned.

After her February 2017 Counselor contact, Complainant was counseled regarding a denial of reinstatement claim. However, in her formal complaint, Complainant attempted to resurrect the removal claim that she had previously abandoned. She is clearly barred from doing so under our precedent.

In addition, a second ground exists for dismissing Agency No. FSIS-2017-00397. The Agency must dismiss a complaint that raises a claim that has not been brought to the attention of an EEO Counselor and is not like or related to a matter that has been brought to the attention of an EEO Counselor. 29 C.F.R. § 1614.107(a)(2). As just discussed, Complainant, in her formal complaint for Agency No. FSIS-2017-00397, raised the August 26, 2016, removal that had been abandoned instead of the February 15, 2017, reinstatement request denial claim that she raised with the EEO Counselor during the informal processing of Agency No. FSIS-2017-00397. The two incidents are completely separate and independent discrete actions that occurred nearly six months apart and are not part of any claim of continuous harassment or ongoing deprivation of employment terms, conditions, privileges, or benefits. The August 2016 removal was therefore neither brought to an EEO Counselor's attention during the informal processing of Agency No. FSIS-2017-00397 nor like or related to the 2017 denial of reinstatement that was brought to the EEO Counselor's attention during the informal processing of Agency No. FSIS-2017-00397. Accordingly, this complaint can be dismissed pursuant to 29 C.F.R. § 1614.107(a)(2).

CONCLUSION

After reconsidering the previous decision and the entire record, the Commission finds that the Agency's request fails to meet the criteria of 29 C.F.R. § 1614.405(c). Nevertheless, it is the decision of the Commission to reconsider the previous decision on its own motion. The decision of the Commission in Appeal No. 0120172443 is REVERSED. The final agency decision dismissing Agency No. FSIS-2017-00397 is AFFIRMED. There is no further right of administrative appeal on the decision of the Commission on a Request to Reconsider. The Agency does not have to comply with previous decision's Order.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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/ Rachel See

Rachel See
Acting Executive Officer
Executive Secretariat

April 22, 2021

Date