



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

[REDACTED]
Scarlet G.,¹
Complainant,

v.

Wilbur L. Ross, Jr.,
Secretary,
Department of Commerce
(Patent and Trademark Office),
Agency.

Appeal No. 2020003758

Agency No. 18-56-08

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision,² 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. For the following reasons, the Commission **AFFIRMS** the Agency's final decision.

ISSUE

The issue is whether the Agency breached the settlement agreement executed by the parties on February 21, 2020.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Management and Program Analyst at the Agency's Patent Trial and Appeal Board in Alexandria, Virginia. Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an

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 We note that the Agency's final decision is not dated. However, the Agency has not challenged the timeliness of Complainant's appeal; as such, we consider her appeal to be timely.

Agency equal employment opportunity (EEO) Counselor to initiate the EEO complaint process. On February 21, 2020, Complainant and the Agency entered into a settlement agreement to resolve the matter. The settlement agreement provided, in pertinent part, that:

- (1) the Agency would restore eighty (80) hours of sick leave to Complainant;
- (2) the Agency would pay Complainant's attorney's fees and costs in the amount of \$2,500.00;
- (3) Complainant would withdraw, with prejudice, her EEO complaints (Agency Case Numbers: 19-148, 19-56-85, 19-56-21, 18-56,96, 18-56-08), any and all existing grievances, and administrative or judicial complaints; and
- (4) Complainant would waive, release, and forever discharge the Agency of any existing individual claims, demands, or causes of action, which Complainant has, could have, or may have brought against the Agency including, but not limited to, her EEO complaints (Agency Case Numbers: 19-148, 19-56-85, 19-56-21, 18-56,96, 18-56-08), any other complaints or grievances she has, could have, or may have filed in all other forums against the Agency.

By email to the Agency dated May 8, 2020, Complainant alleged that the Agency was in breach of the settlement agreement when on April 10, 2020, Complainant's supervisor issued her a Notice of Proposed Suspension for Absence Without Leave (AWOL), for instances of AWOL which occurred in October 2019. Complainant stated that the AWOL allegations were untimely and should have been brought up during the EEOC proceedings that began with the pre-hearing conference on August 30, 2019. Complainant requested that the Agency reinstate her complaint for further processing.

In its final decision, the Agency found that there was no breach of the settlement agreement. The Agency noted that the settlement agreement contained no terms relating to any discipline or contemplated discipline of Complainant, and that the Agency was under no obligation to waive or forego any legitimate disciplinary action against Complainant. The Agency found that the parties bargained for a release and waiver of claims in return for restoring Complainant's sick leave and paying her attorneys' fees and costs. The Agency asserted that Complainant knowingly and willingly entered into the settlement agreement, even though there was no term regarding discipline, and that under the rules of statutory construction, Complainant cannot infer an agreement to forego discipline merely because the alleged misconduct occurred prior to the date of the settlement agreement.

The Agency concluded that there was no breach of the February 21, 2020 settlement agreement, and it denied Complainant's request to reinstate Agency case number 18-56-08 for processing. However, since Complainant's allegation involved actions subsequent to the signing of the settlement agreement, her allegation that the proposed suspension was "continued harassment, hostile work environment, discrimination and retaliation" was forwarded for EEO counseling.

Complainant filed the instant appeal and submitted two briefs in support of her appeal.³ The Agency timely opposed Complainant's appeal.

CONTENTIONS ON APPEAL

Complainant's contentions

Through her attorney, Complainant argues that the Agency breached the settlement agreement when she was issued a proposed suspension for AWOL. Complainant states that the thirteen (13) AWOL specifications occurred in October 2019, when she participated in "activities" related to her then-open EEO complaints. Complainant asserts that she withdrew all claims including those that "touched, concerned and related to disputes surrounding time and attendance that were connected to [Complainant's] request for a reasonable accommodation." Complainant argues that the parties entered into the settlement agreement while there was a "live issue" regarding her claims related to her reasonable accommodation, and time and attendance, and that they "agreed that any time and attendance issues would not be raised at a latter (sic) date."

In her second brief, Complainant argues that the Agency was wrong to assert that discipline was not included in the parties' intentions because "the word discipline infers the existence of an employment dispute." Complainant notes that the settlement agreement did not include the term "discipline," but did include the term "dispute." Complainant asserts that to agree with the Agency would ignore the Commission's regulations and "force" complainants to choose between active participation in the EEO discovery process or the fear of future AWOL-related punishment. Complainant states that the Agency's decision omits her October 2019 EEOC discovery from the legal analysis of its decision finding no breach, which renders the decision legally insufficient because it "eliminates the purpose of 1614.605." Complainant states that the Commission should look at the Agency's actions taken in October 2019 and compare the Agency's actions taken after the settlement agreement.

Complainant asserts that if the Agency intended to issue discipline, it could have forgone the execution of the settlement agreement, and that the Agency's actions were in bad faith when it breached the settlement agreement. Complainant requests a reinstatement of her claims in Agency Case Number 18-56-08/EEOC Hearing Number 570-2010-0208X.

³ Complainant requested, and was granted, an extension to file her appeal brief through July 22, 2020. We note that Complainant filed both briefs prior to her extended deadline, and as such, we will consider the arguments in both appeal briefs.

Agency's contentions

The Agency argues that Complainant's appeal must be dismissed because the Agency did not breach the settlement agreement because it contained no terms regarding any discipline of Complainant, and that she is currently pursuing the same claim in the 29 C.F.R. Part 1614 process.

The Agency asserts that, consistent with the requirement that all terms of a settlement agreement must be reduced to writing, the EEOC has long held that settlement agreements "do not prohibit [agencies] from issuing discipline for previous attendance problems." Oliver v. U.S. Postal Service, EEOC Appeal No. 01945818 (Aug. 22, 1995). The Agency states that if Complainant expected that the settlement agreement would have an ameliorative effect on her prior AWOL, it must have been included as a written term of the settlement agreement to be enforceable.

The Agency argues that it appears that Complainant is attempting to relitigate the reasonable accommodation claim that was settled in the settlement agreement by arguing that the AWOL was the result of the Agency's alleged failure to provide a reasonable accommodation. However, the Agency notes that Complainant waived all of her claims regarding the failure to provide a reasonable accommodation, not the Agency, and that she only bargained for a restoration of sick leave and attorneys' fees and costs, and not for any immunity from discipline.

The Agency asserts that, regardless of whether Complainant's AWOL was related to the failure to provide a reasonable accommodation or her use of official time to participate in discovery, it is immaterial because Complainant did not bargain for any protection from discipline. The Agency notes that it is undisputed that there is nothing in the settlement agreement regarding discipline, and while Complainant may have interpreted the settlement agreement to mean that the Agency waived any discipline, even tangentially related to the claims she released, her view is not supported by the plain language of the settlement agreement and, therefore, not enforceable.

In response to Complainant's contention that since the "AWOL misconduct investigation emanates from an associated EEO claim," it must necessarily be included in the settlement agreement, the Agency argues that the Commission expressly rejected this construction in Davis v. Environmental Protection Agency, EEOC Appeal No. 01985079 (July 30, 1999). The Agency asserts that Complainant cannot interpret the settlement agreement to include a waiver of disciplinary action when it was not reduced to writing as part of the settlement agreement.

The Agency also asserts that it did not agree to waive any rights, let alone the right to discipline Complainant for misconduct. The Agency states that Complainant cannot save her breach claim by arguing that "allegations of AWOL in the form of an investigation" constitute a "dispute" between the parties that was resolved by the settlement agreement. The Agency also argues that the dispute about AWOL only occurred after the Agency proposed discipline for the misconduct and Complainant alleged it was discriminatory and/or retaliatory, which postdated the settlement agreement, so they could not have been contemplated or waived by the parties.

The Agency also notes that dismissing Complainant's breach of settlement claim does not negatively impact her ability to assert her rights because she is pursuing them in the 29 C.F.R. Part 1614 process, and that the Agency is currently investigating Complainant's claim that the notice of proposed suspension, and the resulting 10-day suspension, were the product of unlawful discrimination. The Agency requests that the Commission affirm its final decision finding no breach of the settlement agreement.

ANALYSIS

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 (December 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 (August 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 (December 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 the instant case, it is undisputed that in the settlement agreement, the Agency agreed to restore 80 hours of sick leave and pay Complainant's attorneys' fees and costs in the amount of \$2,500.00. We note that Complainant did not allege that the Agency failed to restore her sick leave or pay her attorneys' fees and costs.

On appeal, Complainant argued that the parties agreed that "any time and attendance issues" would not be raised in the future because there was a "live issue" regarding her claims related to her reasonable accommodation, and time and attendance. However, we find that this is an unexpressed intention, which was not included in the settlement agreement, and that the plain meaning of the settlement agreement shows that the Agency did not agree to any terms related to any disciplinary action or any time and attendance issues. While Complainant argued that the Agency waived all alleged or potential disciplinary matters concerning AWOL that were connected to her reasonable accommodation claim, we note that Complainant conceded that the settlement agreement did not include the term "discipline." The Commission has found that an interpretation of a term should have been reduced to writing as part of the settlement agreement, and in the absence of a writing, it cannot be enforced. See Jenkins-Nye v. Gen. Servs. Admin., EEOC Appeal No. 019851903 (Mar. 4, 1987). In addition, the settlement agreement noted that "[n]o other conditions or assurances, express or implied, are included." As such, we find that Complainant's interpretation that the Agency agreed to forgo any discipline related to attendance issues from her prior claim alleging a failure to accommodate is not enforceable because it was not reduced to writing in the settlement agreement.

To the extent that Complainant argues that there is a “dispute”, we agree with the Agency that the dispute arose when Complainant’s supervisor issued the proposed suspension in April 2020, which occurred after the settlement agreement. We also find that the Agency was correct when it determined that settlement agreements do not prohibit agencies from issuing discipline for previous attendance problems, and that there is no breach of a settlement agreement when an agency subsequently issues discipline. See Oliver v. U.S. Postal Service, *supra*. Here, while Complainant’s AWOL occurred prior to the settlement agreement, the proposed suspension was issued after the execution of the settlement agreement.

We note that it is not clear why Complainant believes that complainants will be “forced” to choose between active participation in the EEO discovery process or the fear of future AWOL-related punishment because EEOC Regulation 29 C.F.R. § 1614.605(b) provides that, “if the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information.” Complainant also argued that the Agency’s decision omits her October 2019 EEOC discovery from the legal analysis of its decision finding no breach, which renders the decision legally insufficient because it “eliminates the purpose of 1614.605.” However, we find that any arguments related to a possible claim of a denial of official time is not relevant because it was not discussed within the four corners of the settlement agreement.

We also find that Complainant was not deprived of her rights to pursue a discrimination claim related to her allegation that the AWOL charges, and the subsequent suspension, were discriminatory or harassing, because the Agency is currently investigating the claim.

While Complainant argues that the Agency’s actions were in “bad faith,” she did not provide any evidence to support her assertion. We note that Complainant only made a general argument that the Agency engaged in “bad faith,” without specifying any actions that demonstrate bad faith. The Commission has found that if a settlement agreement is made in good faith and is otherwise valid, it will not be set aside simply because it appears that one of the parties made a poor bargain. See Ingram v. Gen. Servs. Admin., EEOC Request No. 05880565 (June 14, 1988). Accordingly, we find that the Agency has not breached the settlement agreement, executed by the parties on February 21, 2020.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s final decision finding that there was no breach of the February 21, 2020 settlement agreement.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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 (S0610)

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. 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

January 13, 2021

Date