



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

[REDACTED]
Colene M.,¹
Complainant,

v.

Emily W. Murphy,
Administrator,
General Services Administration,
Agency.

Appeal No. 2020004322

Agency No. GSA-19-ACUS-BC-002

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency, dated June 26, 2020, 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.

BACKGROUND

At the time of events giving rise to this compliance action, Complainant was an Attorney Advisor, GS-905-14, at the Agency's Administrative Conference of the United States (ACUS) in Washington, D.C.

On October 29, 2019, Complainant and the Agency (GSA/ACUS) entered into a settlement agreement to resolve the above-referenced EEO matter. The settlement agreement provided, in pertinent part, that:

- (1) ACUS agrees to pay to [Complainant] the lump sum of \$40,000 in full and final satisfaction of all claims for relief.
- (2) ACUS agrees to provide [Complainant] a letter, the form of which is attached to this Agreement as Appendix A, for her use in seeking future employment.

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.

- (3) ACUS agrees that it will supply only [Complainant's] dates of employment, position, and General Schedule position if contacted by a third party regarding [Complainant's] employment with the Agency.
- (4) [Complainant] ... hereby completely releases ACUS and GSA ... from all causes of action, claims, grievances, damages, demands and remedies, legal and equitable ... arising at any time prior to the date this Agreement is executed. This is understood to be a complete general global release, but does not include a release for any claims that may arise under this Agreement.
- (8) This Agreement is freely entered into by the parties, free of duress, fraud, or coercion.
- (9) This constitutes the entire Agreement of the parties and it supersedes all prior and contemporaneous Agreements, promises, and understanding of the parties, if any. There are no implied promises or agreement created by this Agreement. This Agreement may not be modified except in writing, signed by the parties.

The Agreement was between Complainant and the Administrative Conference of the United States regarding her complaint against the GSA, which processes EEO complaints for ACUS. The Agreement was signed by Complainant on October 28, 2019, and by all of the parties as of October 29, 2019, which is the Agreement's effective date. The Agreement included, as Appendix A – a October 22, 2019 letter describing the dates of Complainant employment from September 4, 2018 to September 13, 2019 and describing her primary projects.

By letter to the GSA's Office of Civil Rights (OCR) dated May 26, 2020, Complainant alleged that the Agency (ACUS/GSA) violated the Agreement, when the GSA Office of Human Resources Management (OHRM) provided to two prospective employers a Notification of Personnel Action, SF-50, regarding Complainant that included an incorrect and negative code.

The record includes as Complainant's Exhibit B, the September 14, 2019 Notification of Personnel Action, that referenced a code designating "Termination during the Probationary / Trial Period." The Agency acknowledged that the negative information had been released and that "the erroneous legal authority Human Resources used on the original SF-50 (L6M instead of L2M) needed to be corrected." The revised SF-50 reflected a code (385, L2M, Legal Authority 315.804, Separation for Unsatisfactory Performance).

Via an email, dated May 20, 2020, from the Director of Finance and Operations, Administrative Conference of the United States (ACUS), the Agency official stated he attempted to correct the code, but he added that "However, it would not be appropriate to reopen or otherwise reevaluate other elements of the separation." Breach Record, page 15.

Complainant asserted the Agency violated provisions 2 and 3, because the Agreement expressly required the Agency to supply only specific information, which was identified as the dates of her employment, the position, and the General Schedule position if contacted by a third-party regarding Complainant's employment with the Agency.

Complainant maintains that the Agency remains in breach of the settlement agreement because it is failing to comply with the promise to issue only neutral information. She is requesting that the Agency implement its terms. Specifically, Complainant wants the Agency (ACUS) to refrain from issuing any statements other than those referenced in the Agreement and to abide by the Agreement's requirements to only issue the neutral information. Complainant claims that two employment offers that had been extended to her were withdrawn because the code that the Agency released to her prospective employers used a code that indicated that Complainant was terminated from ACUS because she was terminated for unsatisfactory performance, and/or did not pass a background check or falsified information in her application.

In its determination decision, the Agency concluded that it complied with the terms of the Settlement Agreement, although the Agency acknowledged that an erroneous code had been used on the original SF-50 that it released to her prospective employers. The Agency reasoned that the ACUS did not specify a legal authority when it requested that the GSA effect the personnel action. Next, the Agency concluded that the ACUS is in full compliance because the Settlement Agreement made no mention of an SF-50. The Agency found that, "Complainant has not established that either ACUS or GSA failed to meet the terms of the Agreement."

This appeal followed. On appeal, Complainant contends that the Agency failed to comply with the terms of the Agreement requiring the Agency to supply only her dates of employment and General Schedule position if contacted by a third-party regarding Complainant's employment and requiring a neutral letter for Complainant to use regarding future employment. She seeks compliance with the requirement that only neutral information be released and she seeks remedial relief for the losses she has incurred as a result of the withdrawal of employment offers due to the release of codes, implying she was terminated because she did not pass a background check or falsified information in her application.²

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).

² We note that Complainant filed a subsequent complaint to pursue her claims for relief against ACUS, which ACUS dismissed; and the appeal is pending under EEOC Appeal No. 2021001367. We also note the Agency referenced the complaint that is the subject of this action, but the Agency stated the complaint number was incorrect.

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, the Agreement required the Agency to issue a neutral reference letter and to restrict the information that it supplied to third parties to certain limited information as specified in the Agreement. The record shows that Complainant did not receive the benefit of either these provisions. To the extent that the Agency released additional negative information via an SF-50 or SF-52, we find that it was not acting in accordance with the terms of the Agreement, provision 2 and 3.

We recognize that the Agency is arguing that the Settlement Agreement did not mention the term SF-50, but that is not dispositive in this case. The Agreement clearly set forth the parties understanding that Complainant was releasing her claims, based on the promise that the Agency would not release any negative information and would only release the information expressly specified.

We find, therefore, that the Agency breached the Agreement and the record supports Complainant's claim that the Agency breached the Agreement.

Where this Commission finds that the settlement agreement has been breached, the only two remedies usually available are specific performance of the terms of the agreement or reinstatement of the underlying EEO complaint at the point processing ceased. See 29 C.F.R. § 1614.504 (c).

Here, Complainant clearly specified in her breach notices that she was specifically seeking enforcement of provisions 2 and 3. Because we find that there has not been compliance, therefore, Complainant is the prevailing party in this matter. Further, we find that Complainant did not knowingly waive and release the Agency from any claims or causes of action for future damages that were incurred after the execution of the Agreement and that any waivers that she did make were contingent on the Agency's compliance with the terms set forth in this Agreement.

To the extent that Complainant wishes to address new claims of discrimination or for relief regarding actions that occurred after the execution of the Agreement, she should initiate EEO counseling with the Agency as those other subsequent claims must be addressed in a separate complaint or appeal. We also note that Complainant did file a complaint (Agency No. ACUS-20-BC-0003), which is pending before us, on appeal, in EEOC Appeal 2021001367.

CONCLUSION

We find that the Agency breached the October 29, 2019 Agreement. Accordingly, we REVERSE the Agency's decision and REMAND the matter in accordance with the ORDER below.

ORDER

Since we are ordering specific performance of the Agreement, the Agency is ordered to take the following remedial action:

1. Within thirty (30) calendar days of the date of this decision, the Agency shall notify Complainant that the terms of the settlement agreement shall stand and the Agency will abide by all of the terms of the Agreement, including provisions 2 and 3.
2. The Agency will issue only neutral information regarding Complainant's employment and will work with Complainant to provide a statement that indicates a voluntary termination or otherwise fully complies with the terms stated in the Agreement.
3. The Agency (GSA and ACUS) will not release the SF-50 or will remove any codes from her SF-50 that indicate an involuntary termination or otherwise termination for cause.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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:



Carlton M. Hadden, Director
Office of Federal Operations

January 5, 2021
Date