



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

[REDACTED]
Stacie D.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Citizenship and Immigration Services),
Agency.

Appeal No. 2020005130

Agency Nos. HS-CIS-24868-2015 & HS-CIS-00836-2017

Hearing Nos. 560-2020-00287X & 560-2020-00288X

DECISION

On September 12, 2020, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the September 2, 2020 decision of an EEOC Administrative Judge (AJ), which under 29 C.F.R. § 1614.109(i) became the Agency's final action, that she was not entitled to reinstatement of her two equal employment opportunity (EEO) complaints that were closed by a settlement agreement the Agency determined was breached. 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 her two EEO complaints, Complainant was employed by the Agency as an Immigration Services Officer, GS-1801-12, at the Nebraska Service Center in Lincoln, Nebraska.

Complainant filed two EEO complaints alleging violations of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. There were separate EEO investigations on each complaint. Complainant separately requested a hearing on each complaint before an EEOC AJ.

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.

While the hearing requests were pending, on June 14, 2018, Complainant and the Agency entered into a settlement agreement to resolve the matters. It provided, in pertinent part, that:

1.
 - a. The Agency will, within sixty days..., pay the Complainant... \$40,000.00 for nonpecuniary damages.
 - b. The Agency will, within sixty days..., replace the FY17 and FY18 Performance Evaluations with evaluations indicating no-rating....

In return Complainant agreed to resign, not reapply to the Agency for a job, and to waive the Agency's liability for all that occurred prior to the settlement agreement.

In August 2019, Complainant contacted the Agency asserting a breach of the terms of the settlement agreement.

On May 5, 2020, the Agency issued a final determination decision agreeing with Complainant's breach claim. Specifically, pursuant to Complainant's application for disability retirement under the Federal Employees Retirement System (FERS), on June 4, 2019, management provided the Office of Personnel Management (OPM) her FY 2017 Performance Evaluation with the negative rating, not the one showing no rating as agreed upon.

Thereafter, on May 19, 2020, the Agency asked Complainant whether: (a) she wanted management to implement the settlement provisions as agreed, or (b) request that the settlement agreement be voided, with her complaints being reinstated and the parties otherwise returning to their status quo before they signed the agreement. The Agency advised if Complainant chose option (b), she must return the \$40,000 she received via the settlement agreement. Complainant chose option (b).

Complainant's complaints were then returned to AJ for processing. Complainant, however, did not pay back the \$40,000. She explained that she did not have the funds, was 150% below the Nebraska poverty line, and asked for a payment plan.

Thereafter, the AJ issued a decision declining to reinstate Complainant's complaints (and otherwise return her to the status quo changed by the settlement agreement which would include her reinstatement). The AJ found that once a breach of a settlement agreement is found, the remedial relief is either reinstatement of the underlying complaint for processing or specific enforcement of the settlement agreement. This is in accord with 29 C.F.R. § 1614.504(c). The AJ found in order for Complainant's complaints to be reinstated, she must return any benefits she received per the settlement agreement (here, the \$40,000). Citing Jones v. Defense, EEOC Request No. 05A01067 (Nov. 3, 2003), the AJ found that Complainant's idea of a repayment plan was an ineffective way to return the Agency to the status quo before the settlement agreement. Accordingly, the AJ dismissed Complainant's request for a hearing. The instant appeal followed.

On appeal, Complainant seeks to distinguish Jones, and requests that the AJ's decision be reversed.

ANALYSIS

We agree, for the reason set forth by the AJ, that because Complainant has not repaid the Agency the \$40,000 she received under the settlement agreement, she is not entitled to have her EEO complaints being reinstated (or otherwise returning to the position she was in prior to the settlement agreement) because a payment plan is not an effective way return the Agency to the status quo before the settlement agreement. The AJ's reliance on Jones was not misplaced.

We find, however, that Complainant is entitled to specific performance of the terms of the settlement agreement, as ordered below.

ORDER

Within 30 calendar days of the date of this decision, to the extent it has not already done so, the Agency shall replace Complainant's FY 2017 and 2018 Performance Evaluations with evaluations indicating no rating in all Agency files, including copies in the files of her former superiors if they are still there.² The Agency shall take steps to ensure that when requests are made for the above Performance Evaluations by Complainant, potential employers, entities processing benefits for her, and others, that only the FY 2017 and 2018 Performance Evaluations indicating no rating are provided.

If Complainant wishes the Agency to substitute the FY 2017 Performance Evaluation it earlier provided to OPM with the revised evaluation indicating no rating, along with an explanation that the one it previously provided was erroneously sent, she must request the Agency to do so in writing, and the Agency shall comply within 30 calendar days of when it receives this request. Within 15 calendar days of the date of this decision, the Agency shall provide Complainant a point of contact for making such a request.

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.

² The Agency may maintain the versions of these evaluations with ratings in litigation files only.

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 (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)

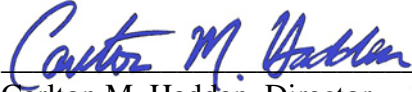
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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:



Carlton M. Hadden, Director
Office of Federal Operations

March 5, 2021

Date