



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

[REDACTED]
Nannette T.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2020003191

Hearing No. 430-2017-00527X

Agency No. 2004-0590-2016104921

DECISION

On April 10, 2020, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's March 13, 2020, final agency decision (final decision), which found 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, we AFFIRM the Agency's final decision.

ISSUE PRESENTED

The issue presented concerns whether the Agency breached its settlement agreement with Complainant.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Licensed Social Worker, GS-0185-12, at the Hampton VA Medical Center (Hampton VA) in Hampton, Virginia.

During her time at the Hampton VA, Complainant was involved in a romantic relationship with a physician (Witness-1 [W1]); however, the relationship ended after a series of physical altercations between Complainant and W1 from August 2015 to June 2016. Following the June 2016 incident, Complainant obtained a temporary protective order against W1, which resulted in W1's transfer to the Chesapeake campus of the Hampton VA.

Through her representative, Complainant subsequently contacted the Director of the Hampton VA (Director) on November 8, 2016, to reiterate her concerns about W1. In his letter dated November 14, 2016, the Director made the following response to Complainant's representative:

Please know that the Medical Center takes your concerns seriously, as it did when [Complainant] first raised them. [W1] has been relocated to another campus based on [Complainant's] restraining order against him. Although we understand that the restraining order has now expired, [W1] will remain at the other campus in order to separate him from [Complainant].

As you are probably aware, [Complainant] continues to work at the main facility in Hampton. Due to the nature of their positions and locations of their work, [W1] and [Complainant] should have no reason to interact with or encounter each other in the workplace. Should [Complainant] be contacted by [W1] while at work, she should immediately notify her supervisor and request assistance.

On June 19, 2018, Complainant and the Agency entered into a settlement agreement to resolve an unrelated EEO complaint. Though none of the allegations contained in Complaint's EEO complaint or her subsequent amendments specifically concerned W1, the settlement agreement contained a section titled "Additional Undertakings," which incorporated the Director's November 14, 2016 letter by reference as "Exhibit 1" and limited W1's interactions with Complainant. The settlement agreement provided, in relevant part, that:

3. Additional Undertakings:

- a. The Parties mutually agree that the terms in Exhibit 1 regarding [W1] not contacting [Complainant] at work shall remain in full force and effect. If [Complainant] is contacted by [W1] while at work, then she is to notify her first-line supervisor and the Chief of the Human Resources Management Service within 3 days in writing of the contact and the circumstances. The first line-supervisor will promptly act within 7 days to determine the reason for the contact and notify [Complainant] of the results of the inquiry. If the inquiry determines the contact was intentional and was for purposes of harassing

[Complainant], the first-line supervisor would report such contact to the Chief of Mental Health, who will instruct [W1] on avoiding future contact with [Complainant].

On January 10, 2020, W1 traveled to the Hampton VA on official business to undergo training and encountered Complainant while she was working. According to Complainant, W1 came within 10 feet of her, made eye contact, and glared at Complainant for several seconds as Complainant walked away. By letter to the Agency dated February 12, 2020, Complainant alleged that the Agency was in breach of the settlement agreement by failing to keep W1 away from her. In response to the breach allegation, the Agency conducted an investigation to determine the purpose of W1's visit to the Hampton VA and whether or not the contact was intentional with the purpose of harassing Complainant.

The Agency's investigation concluded that W1 had a legitimate, business reason for visiting the Hampton VA, as W1's primary duty station in Chesapeake, Virginia was an outpatient clinic and not a full-service facility where he could undergo the necessary training. The investigative report noted that W1 had denied making eye contact and maintained that the encounter lasted two seconds or less. The investigative report emphasized that Complainant admitted that W1 did not go to Complainant's office or contact her. Based on the investigation's findings, the Agency issued a final decision on March 13, 2020, finding no breach of the settlement agreement, as the plain language of the relevant provision in the settlement agreement did not preclude W1's participation in legitimate, business activities and only restricted W1 from contacting Complainant, which W1 did not do.

In finding no breach, the Agency relied on Otzelberger v. U.S. Postal Serv., EEOC Appeal No. 01A50979 (Feb. 10, 2006), where the Commission found no breach because the settlement agreement between the parties did not restrict the movement of complainant's supervisor or prohibit the supervisor from being temporarily near complainant's work area. The instant appeal followed.

CONTENTIONS ON APPEAL

Through her attorney, Complainant contends that "[w]hen Paragraph 3(a) of the Settlement Agreement is read in conjunction with the [Director's November 14, 2016 letter], it is obvious that the Agency violated the terms of the Settlement Agreement when it assigned [W1] to work at [Complainant's] facility and allowed him to graze (sic) in her department with no prior warning to her." In this regard, Complainant maintains that the plain meaning of the Director's November 14, 2016 letter, mandated that "[W1] will remain at the other campus in order to separate him from [Complainant]." Complainant argues that by assigning W1 to work at Complainant's campus, the Agency violated the plain meaning of the settlement agreement.

Furthermore, Complainant maintains that the Agency's reliance on Otzelberger, supra, is misplaced, because the agency in that case had simply agreed "not to place complainant under [the] supervision of [S1]," whereas here, the Agency had affirmatively promised to keep W1

physically away from Complainant as per the terms of the Director's November 14, 2016 letter. While Complainant acknowledges that the terms of the Director's November 14, 2016 letter are broad, she argues that those terms were originally implemented to protect her from "encountering her assailant." As such, Complainant requests that the Commission reverse the Agency's final decision.

The Agency requests that the Commission affirm its final decision. In opposing the appeal, the Agency initially argues that the Director's November 14, 2016 letter could not reasonably be interpreted as prohibiting the Agency from assigning W1 to Complainant's facility, as the parties only mutually agreed to adopt the terms of Exhibit 1 that pertained to W1 not contacting Complainant at work.² The Agency maintains that had the parties originally intended to prohibit W1 from ever being assigned to Complainant's facility, the parties could have easily added that restriction; however, the only term that was agreed upon was that W1 would not contact Complainant at work. The Agency emphasizes that there was no agreement in either the settlement agreement or Exhibit 1 that W1 would never visit Complainant's facility.

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 (Dec. 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 (Aug. 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 (Dec. 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).

Having reviewed the record, we agree with the Agency that the probative evidence fails to show that the Agency violated the settlement agreement when W1 inadvertently encountered Complainant while W1 was undergoing training at Hampton VA. We note that W1 expressly denied engaging with or making eye contact with Complainant.

² As discussed above, Paragraph 3(a) in relevant part stated, "The Parties mutually agree that the terms in Exhibit 1 *regarding [W1] not contacting [Complainant] at work* shall remain in full force and effect (emphasis added)."

Even if we assume *arguendo* that W1 did indeed glare at Complainant for a few seconds during the unplanned encounter, we find such encounter, even if true, to be insufficient to constitute a breach of the settlement agreement, as the four corners of the settlement agreement do not appear to foreclose the possibility of a chance encounter between the two. Rather, the terms of the settlement agreement make it clear that for the purposes of determining breach, the intent behind the encounter would be controlling.³ Here, by Complainant's own admission, W1 had a valid business reason for traveling to the Hampton VA and did not go to her office or contact her. As Complainant has not persuasively demonstrated any ill-intent on the part of W1 or the Agency, we conclude that the Agency properly found no breach.

In reaching this conclusion, we are mindful of Complainant's argument that the terms of the settlement agreement incorporated by reference the Director's letter dated November 14, 2016, which provided, in relevant part, that "[W1] will remain at the other campus in order to separate him from [Complainant]." However, like the Agency, we find that the terms of the settlement agreement only incorporated by reference the Director's prohibition on W1 contacting Complainant, which W1 did not do (*i.e.*, communicate with her). Even if the incorporated portion of the Director's no-contact prohibition could be construed as completely prohibiting W1 from even being on the same campus as Complainant, we do not find that the parties intended to impose strict liability by virtue of proximity alone, as the four corners of the settlement agreement make it clear that for the purposes of determining breach, the intent of W1 would be determinative. Lastly, having reviewed *Otzelberger*, *supra*, we find that case to be instructive, as the facts in the case appear to be similar here, where the underlying terms of the settlement did not bar any chance encounters between the complainant and her supervisor.

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.

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.

³ As per the terms of the settlement agreement, "The first line-supervisor will promptly act within 7 days to *determine the reason for the contact* and notify [Complainant] of the results of the inquiry. *If the inquiry determines the contact was intentional and was for purposes of harassing [Complainant]... (emphasis added).*"

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

August 9, 2021

Date