



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Delia R.,¹
Complainant,

v.

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

Appeal No. 2021000829

Hearing No. 410-2020-00043X

Agency No. FSIS-2019-00305

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated October 14, 2020, dismissing her complaint alleging unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Food Inspector, GS-07, at the Agency's OFO, Jackson District facility in Chattanooga, Tennessee.

On March 28, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and harassment (nonsexual) on the bases of disability and reprisal for prior protected EEO activity when:

1. On October 31, 2018, management placed her in an AWOL status pending removal from Federal service;

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. On October 30, 2018, management directed her to return to work without her oxygen tank;
3. On August 15, 2018, management placed her on administrative leave and issued her a notice of proposed removal;
4. Since October 30, 2018 to the present, management rescinded her prior reasonable accommodation, which was in place since May 2015, and failed to engage in the interactive process;
5. On unspecified dates, management denied her requests for LWOP and placed her in AWOL status; and
6. On several dates, she was subjected to various incidents of harassment, including, but not limited to (a) on unspecified dates, management informed her not to request advanced sick leave, as such requests would be denied.

The Agency accepted the complaint and, after its investigation, provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion to dismiss the complaint and, over Complainant's objections, the AJ issued an order granting the Agency's motion to dismiss and entering final judgment, dismissing the complaint with prejudice. In so doing, the AJ found the claims in the instant complaint had been raised during a grievance procedure that permits allegations of discrimination and were, therefore, barred, pursuant to 29 CFR §1614.301(a). The Agency issued its final order fully implementing the AJ's decision.

The instant appeal followed. On appeal, Complainant argues that the grievance did not address all the claims in the instant EEO complaint. In response, the Agency asks that we affirm its final order implementing the AJ's decision. In so doing, it argues that the instant complaint presents the same facts as those alleged in the grievance and that Complainant's claims in the instant case are inextricably intertwined with those in the grievance.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.301(a) states that when a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or whether the grievance has raised an issue of discrimination.

At the time of Complainant's employment, she was employed by an agency subject to 5 U.S.C. § 7121(d). She was also covered by a collective bargaining agreement (CBA) that permitted allegations of discrimination to be raised in the negotiated grievance procedure.

The record establishes that, on March 7, 2019, prior to filing the instant EEO complaint, the Union filed a grievance on behalf of Complainant, pursuant to the CBA. The grievance alleged that the Agency refused to allow Complainant to perform her job with her small oxygen tank since October 31, 2018. It alleged that, at that time, Complainant provided the Agency medical documentation, a request for a reasonable accommodation, and demonstrated that she could perform post-mortem inspection with the small oxygen tank. It alleged that Agency officials observed the post-mortem inspection under these conditions. It alleged that the Agency never provided Complainant the reasonable accommodation form and Complainant was under the impression that she had been given a reasonable accommodation since the Agency allowed her to work with the oxygen tank from June 2015 until October 31, 2018. It alleged that the Agency never gave Complainant any official documentation that the reasonable accommodation had been denied but she was told in a text message that she could no longer use the oxygen tank at work. Grievance documents indicate that Complainant requested back pay and the night differential rate and the accrued hours, beginning October 31, 2018 onward. They also indicate that she was placed on administrative leave, AWOL, and/or LWOP at various times at issue and was issued a proposed notice of removal in August 2018.

As noted above, the instant EEO complaint concerns Complainant's allegations regarding having been told not to request sick leave; being denied LWOP; being placed on administrative leave and issued a notice of proposed removal; having her reasonable accommodation rescinded on October 30, 2018; being directed to return to work on October 30, 2018 without her oxygen tank; and being placed on AWOL pending removal on October 31, 2018. We find these issues to be inextricably intertwined with the issues raised in the grievance proceeding.

We recognize that Complainant argues that the grievance process did not address all her allegations in the instant EEO complaint, including the claims relating to a reasonable accommodation and a hostile work environment, and that her remedy of back pay did not compensate her for all her claims. However, we find the underlying factual issues relevant to the instant EEO complaint were considered in the grievance process. The Commission has held that a complainant need not actually raise a claim of discrimination in a grievance in order to have elected the union forum. Perkins v. Dept. of Treasury, EEOC Appeal No. 01A20964 (May 6, 2003) (claims were determined inextricably intertwined with the issue of complainant's removal, which were raised in complainant's grievance. As the complainant elected to pursue the non-EEO process, the agency's decision dismissing complainant's complaint was affirmed). The Commission has also held that the adjudication of the case in another forum is tantamount to an election of remedies. See Spriesterbach v. United States Postal Service, EEOC Appeal No. 01A00346 (April 6, 2000) (citing Aho v. Department of Agriculture, EEOC Request No. 05860085 (May 22, 1985)). See also Woodley v. Dept. of Veterans Affairs, EEOC Appeal No. 01A34931 (Jan. 9, 2004) (dismissing EEO complaint notwithstanding that it was filed prior to the grievance because the merits of the underlying factual issues were considered through the grievance process). Therefore, we find that the dismissal of the instant EEO complaint was proper.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the final agency 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.

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

April 22, 2021
Date