



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Rosemarie G.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Request No. 2021000412
Appeal No. 2020004267
Agency No. 20-00174-01906

DECISION ON REQUEST FOR RECONSIDERATION

Complainant timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Rosemarie G. v. Department of the Navy, EEOC Appeal No. 2020004267 (October 7, 2020). EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). For the reasons that follow, Complainant's request is GRANTED.

At the time of events giving rise to this complaint, Complainant worked as a Management Analyst at the Agency's Corporate Business Office Division in Indian Head, Maryland. Complainant filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of race (African-American), sex (female), and color (black) when, on March 13, 2020, the Agency informed her of a proposal to move her from her first-floor office to a second-floor shared cubicle space, based on seniority and years of service, while a White male with a lower grade and fewer years of service would retain his office space.

The Agency dismissed the complaint pursuant to 29.C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency determined that Complainant failed to allege a loss or harm to a term, condition, or privilege of employment because the alleged discriminatory move had not been effectuated. On

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.

appeal, the Commission affirmed the dismissal, noting that management's alleged discriminatory action was only a proposal that was never been implemented.

In her request for reconsideration, Complainant argues that the Commission's prior decision must be reversed because it was based on an erroneous interpretation of facts. She points out that she had previously presented the Agency's EEO Counselor evidence showing management had executed the proposed office move.² She further argues that her allegations, taken as a whole, sufficiently allege a loss or harm to a term, condition, or privilege of her employment.

Upon review of our previous decision and the entire record, the Commission finds that Complainant's request satisfies the criteria of 29 C.F.R. § 1614.405(c). Complainant has demonstrated that our previous appellate decision relied upon a clearly erroneous interpretation of material fact contained in the record then before us. That record indicates that on or around March 27, 2020, Complainant sent the EEO Counselor an email that contained as an attachment a document entitled, "Informal Complaint Intake Worksheet Response." In this document, Complainant states, among other things, that her supervisors carried out the move order.³ The Commission notes that where an individual received EEO Counseling on a proposed action and the agency ultimately carries out the proposed action, the otherwise premature allegation merges with the effectuated action. Newcomer v. Dep't of Homeland Security, EEOC Appeal No. 0120113513 (Aug. 16, 2013). Under these particular facts and circumstances, and as Complainant satisfactorily alleged that management discriminatorily made her, a unit manager, vacate her office while allowing a non-managerial, white male employee of lower grade and seniority remained in his office, Complainant has met her burden of alleging an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See, e.g., Emanuel W. v. Department of Agriculture, EEOC Doc. 0120180081, 2017 WL 6729138 (Dec. 12, 2017).

² In support of her request for reconsideration, Complainant also included new evidence, namely several photographs and emails, that she had not presented the Agency or the Commission previously. We note that new evidence is generally not accepted on reconsideration unless the parties affirmatively demonstrate it was not previously available despite the exercise of due diligence. See Houser v. Dep't of Homeland Security, EEOC Request No. 0520110548 (Oct. 7, 2011); Est. of Petersen v. Sec'y of Transp., EEOC Appeal No. 07A50016 (September 21, 2005). We need not address this additional evidence as we find that the record as it existed at the time the previous decision was issued sufficiently supports Complainant's claim that she told the EEO Counselor she had been required to move.

³ The Commission notes that in the document and the March 27th email, Complainant references attached photographs that she said show she vacated her office. The print-out of the March 27th email that is in the case file shows several attachments comprised the email, but none are actually included in the file that the Agency transmitted to the Commission. The Commission did not consider, and does not rely upon, these attachments in reaching this decision. However, as the matter is now remanded to the agency for further processing, the Commission instructs the Agency to ensure it maintains a complete case file.

Accordingly, we determine that the Agency's dismissal pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim was improper. It is the decision of the Commission to GRANT the request for reconsideration under 29 C.F.R. § 1614.405(c). The decision in EEOC Appeal No. 2020004267 is REVERSED and the matter REMANDED for processing in accordance with our order below. There is no further right of administrative appeal on the decision of the Commission on this request.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 representative.

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.

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:

/s/ Rachel See

Rachel See
Acting Executive Officer
Executive Secretariat

September 18, 2021

Date