



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Marleen G.,<sup>1</sup>  
Complainant,

v.

Merrick B. Garland,  
Attorney General,  
Department of Justice  
(Federal Bureau of Prisons),  
Agency.

Request No. 2021000825

Appeal No. 2019003172

Agency No. BOP-2017-0565

**DECISION ON REQUEST FOR RECONSIDERATION**

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2019003172 (Aug. 19, 2020). EEOC regulations state the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued per 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(b).

**BACKGROUND**

At the time of events in her equal employment opportunity (EEO) complaint, Complainant was a Lieutenant Commander in the Commissioned Officer Corps, United States Public Health Service (USPHS) detailed to the Agency as an Assistant Health Services Administrator, GS-0670-11, at the Federal Correctional Institution in Talladega, Alabama.

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<sup>1</sup> 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.

In a final Agency decision (FAD) with appeal rights to this office, the Agency determined management did not harass Complainant based on her race (African American), sex (female), age (40), and reprisal for EEO activity. Complainant appealed. The previous decision reversed, finding the Agency harassed Complainant based on her race and sex, and ordered various remedies.<sup>2</sup>

For the first time on request to reconsider the Agency, citing statutes and Commission cases, argues that, as a USPHS commissioned officer, Complainant is deemed to be active-duty military, and hence excluded from coverage under Title VII's protection for federal employees.<sup>3</sup>

In reply, via counsel Complainant does not dispute Complainant's status as a USPHS commissioned officer. However, she argues that the Agency's request to reconsider was untimely filed and its failure to previously raise this jurisdictional challenge waived the defense.

### ANALYSIS AND FINDINGS

By regulation, requests to reconsider must be filed within 30 days after the party receives the previous decision. 29 C.F.R. § 1614.405(b). The Certificate of Mailing, which was part of the previous appellate decision, certified that the decision was served on the Agency electronically, via the EEOC's Federal Sector EEO Portal (FedSEP), on August 19, 2020. Via FedSEP, the Agency filed its request to reconsider the decision in EEOC Appeal No. 2019003172 electronically, per 29 C.F.R. § 1614.403(g), on November 13, 2020, beyond the 30-day limit set by regulation. No reason was provided for the delay. As such, we conclude the Agency's request for reconsideration was untimely filed.

Nevertheless, we must vacate our prior appellate decision because the EEOC has no jurisdiction over Complainant's employment or to enforce the order in the previous decision. As we have repeatedly ruled, by statute, active service commissioned officers of USPHS are deemed to be active duty military, and hence excluded from coverage under Title VII's protections for federal employees and the 29 C.F.R. Part 1614 administrative EEO complaint process. See e.g., Otto D. v. Homeland Security, EEOC Request No. 2020000284 (Jul. 26, 2020); Raymond v. HHS, EEOC Appeal No. 01987012 (Oct. 13, 2000).

These cases note that the Commission's jurisdiction in the federal sector complaint process under Title VII extends to employees and applicants for federal employment. See 42 U.S.C. § 2000e-16(a). This coverage is extended to most executive agencies within the federal government, including "military departments as defined in 5 U.S.C. § 102." 29 C.F.R. § 1614.103(b)(1). However, "uniformed members of military departments" are not covered by the federal sector process. 29 C.F.R. § 1614.103(d)(1).

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<sup>2</sup> The previous decision found that since Complainant proved discrimination based on race and sex, it need not make a decision on her claims based on age and reprisal.

<sup>3</sup> Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

The status of commissioned officers of the USPHS was clarified by The Health Professions Education Partnerships (HPEP) Act of 1998, PL 105-392 (November 13, 1998), as it amended the Public Health Service Act, 42 U.S.C. § 201 et seq. The HPEP Act states, in relevant part:

- (f) Active service of commissioned officers of the Service [USPHS] shall be deemed to be active military service in the Armed Forces of the United States for purposes of all laws related to discrimination on the basis of race, color, sex, ethnicity, age, religion, and disability.

Because an individual who is a commissioned officer in the UPHS is deemed to be active-duty military, such an individual is excluded from coverage under Title VII's protections for federal employees and the 29 C.F.R. Part 1614 administrative EEO complaint process. We further note that Complainant does not dispute the Agency's assertion that she remained an active-duty commissioned officer in the USPHS throughout her detail to the Agency.

Complainant also argues that because the Agency first raised the jurisdiction defense on request to reconsider, it is waived. We disagree, concluding that the Agency, through its agents, could not waive this jurisdictional defense.

### CONCLUSION

Accordingly, the previous decision is VACATED, and Complainant's case is DISMISSED.

### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)


This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

### 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

November 15, 2021  
Date