



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

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Marybeth C.,<sup>1</sup>  
Complainant,

v.

Frank Kendall,  
Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 2021004031

Agency No. 9R1M2100122

**DECISION**

Complainant filed an appeal with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from a May 27, 2021 Final Agency Decision (“FAD”) dismissing her complaint alleging unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (“ADEA”), as amended, 29 U.S.C. § 621 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant was employed by the Agency as a Security Guard, GS-04, at Robins Air Force Base, Georgia.

On April 28, 2021, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination on the bases of race (African American), sex (female), age (69), and reprisal for engaging in protected EEO activity when:

1. In October 2020, Complainant was placed on a swing shift by the Human Resources Team Lead until a new position could be found for her to accommodate her permanent, light duty status, though there was a written agreement authorizing her to stay on her day shift dated October 2019, from the Director, 402 AMX/CL; and

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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.

2. On November 19, 2020, Complainant involuntarily accepted a new position to avoid termination, presented by two 562 AMXS/MXAD Supervisors.

The Agency dismissed Claim 1 pursuant to 29 C.F.R. § 1614.107(a)(4), stating that Complainant resolved the matter through a negotiated grievance procedure which permits allegations of discrimination, and was provided in the collective bargaining agreement (“CBA”) between the Union and the Agency.

The Agency dismissed Claim 2 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim, reasoning that the matter fell outside EEOC jurisdiction, as the referenced new position was a “permanent light duty position [that] was located, approved, and offered” through the Department of Labor (“DOL”), Office of Workers Compensation Program (“OWCP”).

The instant appeal from Complainant followed.

### ANALYSIS AND FINDINGS

An Agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that they were discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). In relevant part, 29 C.F.R. § 1614.107(a)(1) provides that an Agency shall dismiss a complaint that fails to state a claim.

The alleged discriminatory actions in Claim 1 (change in schedule) and Claim 2 (reassignment) are sufficient to render Complainant “aggrieved” for purposes of stating a claim, as both identify a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Id.

#### *Claim 1*

The regulation set forth at 29 C.F.R. § 1614.107(a)(4) provides that an agency may dismiss a complaint where the complainant has raised the matter in a negotiated grievance procedure that permits claims of discrimination. Further, under 29 C.F.R. § 1614.301(a), 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.

The Agency has the burden to provide evidence or proof to substantiate its final decision. See Complainant v. Dep't of Commerce, EEOC Appeal No. 0120142525 (Nov. 25, 2014) quoting Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991). The Commission has previously found a procedural dismissal under 29 C.F.R. § 1614.107(a)(4) to be improper where the record did not contain a copy of the relevant portion of the CBA reflecting that claims of discrimination were permitted to be raised in the grievance process. See Complainant v. Dep't of Commerce, EEOC Appeal No. 0120142525 (Nov. 25, 2014).

For the instant complaint, the Agency provided sufficient evidence that Complainant raised the event described in Claim 1 through the negotiated grievance procedure provided by the CBA. Specifically, the record contains a November 18, 2020 Decision Letter regarding the outcome of Complainant's Step 1 Grievance, along with a completed Grievance Form 913, signed by Complainant and her representative. The grievance did not allege discrimination.

However, the Agency has not offered evidence that the CBA "permits the acceptance of grievances which allege discrimination." In different parts of the record, the Agency identifies Article 2 (section 3.303), and Articles 3 and 19 of the CBA as well as Article 1 of the Local Supplement Agreement, as the relevant portions of the Agreement to support a dismissal pursuant to 29 C.F.R. § 1614.107(a)(4). Yet, the only excerpt in the record from these citations was part of Article 3 that did not address whether the CBA would permit Complainant to raise issues of discrimination in the grievance process.

As the Agency failed to meet its evidentiary burden and Claim 1 is sufficient to render Complainant is "aggrieved," a procedural dismissal of Claim 1 is improper. Diaz.

### *Claim 2*

The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding, and that allegations that attempt to lodge a collateral attack fail to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). See Wills v. Dep't of Def., EEOC Request No. 05970596 (Jul. 30, 1998). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's adjudicatory proceeding, such as the workers' compensation process. See Fisher v. Dep't of Def., EEOC Request No. 05931059 (July 15, 1994) (challenge to agency's appeal of an OWCP decision constituted an attempt to lodge a collateral attack and failed to state a claim); see also, Hogan v. Dep't of the Army, EEOC Request No. 05940407 (Sept. 29, 1994) (claim that agency officials provided misleading statements to OWCP about the complainant's workers compensation claim constituted an attempt to lodge a collateral attack and failed to state a claim because it would require the Commission to essentially determine what workers' compensation benefits the complainant would likely have received, a matter outside the scope of Commission jurisdiction), Schneider v. United States Postal Serv., EEOC Request No. 05A01065 (Aug. 15, 2002) (rejecting a complainant's claim that the agency's delay in processing her OWCP paperwork constituted harassment).

The Agency argues that Claim 2 is an attempt to lodge a collateral attack against an OWCP process, citing our decision in Parker v. United States Postal Service, EEOC Appeal No. 0120072385 (Jul. 20, 2007). In Parker, the Commission determined that the complainant attempted to lodge a collateral attack when she alleged that the agency obstructed her from conducting union business, an administrative process governed by the grievance procedure, and outside EEOC jurisdiction. However, unlike the allegation in Parker, Claim 2 does not identify an administrative process outside EEOC jurisdiction. Rather, it challenges an employment action taken by the Agency. See, e.g. Complainant v. Dep't of Justice, EEOC Appeal No. 0120122277 (Sept. 20, 2012).

Moreover, the Agency's stated reason for its action in Claim 2 – that Agency supervisors reassigned Complainant to a new position because it was identified and approved by OWCP, addresses the merits of Complainant's complaint, and is irrelevant to the procedural issue of whether Complainant stated a justiciable claim. See Ray v. United States Postal Serv., EEOC Appeal No. 0120083541 (Jul. 26, 2012) citing Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996).

We also remind the Agency that its ongoing duty to provide reasonable accommodations for employees' known disabilities is independent of the OWCP and its processes. See Garrett M. v. United States Postal Serv., EEOC Appeal No. 0120160081 (Jan. 14, 2016), see also Gonzalez v. United States Postal Serv., EEOC Appeal No. 0120082632 (Nov. 27, 2009).

### CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED, and the matter is REMANDED for further processing in accordance with this Decision and the following Order.

### ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. 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/her 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.

### 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).

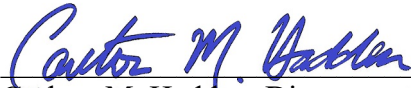
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:



Carlton M. Hadden, Director  
Office of Federal Operations

January 4, 2022

Date