



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

[REDACTED]
Ezra P.,¹
Petitioner,

v.

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

Petition No. 2022000639

Appeal No. 2019005105

Agency No. 9N0D15005

DECISION ON A PETITION FOR ENFORCEMENT

On November 15, 2021, the Equal Employment Opportunity Commission (EEOC or Commission) docketed a petition for enforcement to examine the enforcement of an Order set forth in EEOC Appeal No. 2019005105 (August 3, 2021). The Commission accepts this petition for enforcement pursuant to 29 C.F.R. § 1614.503.

BACKGROUND

Petitioner worked for the Agency as an Identification Clerk, NF-0303-I, at the Ramstein School Age Program (RSAP), Airman and Family Services, 86th Force Support Squadron, located in Ramstein Air Base, Germany.

On September 29, 2015, Petitioner filed a formal EEO complaint, subsequently amended, claiming that the Agency subjected him to discrimination because of his race (African American), color (Black), disability (major depression/bi-polar disorder), age, and in retaliation for his prior protected EEO activity.

¹ This case has been randomly assigned a pseudonym which will replace Petitioner's name when the decision is published to non-parties and the Commission's website.

He claimed the Agency's actions were 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. The complaint covered a range of issues that included ongoing harassment, time and attendance issues, denials of reasonable accommodation, and ultimately the termination of his employment in 2016.

The Agency accepted the complaint and conducted an investigation. However, on May 29, 2019, the Agency issued a final decision dismissing the complaint for failure to state a claim, reasoning that Petitioner had not been legally employed by the Agency and therefore lacked standing to file a federal administrative EEO complaint. The Agency asserted that Petitioner's entire employment with it was "illegal under the terms of the SOFA [Status of Forces Agreement], which prohibits employment of individuals who were not German citizens but ordinarily resident in Germany." Petitioner was, according to the Agency, a United States citizen who resided in Germany. Consequently, in the Agency's view, Petitioner's appointment to "any position designated as within the civilian complement" was "null and void." The Agency concluded that as neither an applicant nor legitimate employee of the Agency, Petitioner lacked standing and his EEO complaint had been initially accepted by it in error.

In EEOC Appeal No. 2019005105 (August 3, 2021), we reversed the Agency's dismissal of Petitioner's EEO complaint. In relevant part, the appellate decision concluded the Agency's own treatment of Petitioner over the years completely undermined its assertion that he was beyond the coverage of the federal EEO complaint process. The record reflected that, since the early 1990s, Petitioner had worked in various positions in Germany for the Agency, as well as the Department of the Army and the Army Air Force Exchange, two other federal agencies. Significantly, Petitioner had also previously filed EEO complaints against the Agency, which were accepted and fully adjudicated. In light of this extensive history of employment and EEO cases between Petitioner and the Agency, as well as the Agency's treatment of Petitioner over the decades and particularly during his time as an Identification Clerk between 2013 and 2016, we concluded that the Agency could not persuasively assert Petitioner had not been its employee entitled to use the federal EEO process. The dismissal of the complaint was reversed, and the Agency was ordered to issue a final decision on the merits of Petitioner's claims based on the evidence developed during its investigation of the complaint. The Agency was further ordered to issue its decision within sixty (60) calendar days from August 3, 2021, the date the appellate decision was issued.

On November 12, 2021, Petitioner filed the instant petition for enforcement. Petitioner asserted that the Agency had failed to issue a final decision on the merits of his complaint within sixty (60) days as ordered by the Commission on August 3, 2021.

In a response dated December 12, 2021, the Agency explained that the Air Force Civilian Appellate Review Office (AFCARO), the entity responsible for preparing the Agency's final decisions, has drafted a final decision. The Agency asserts further, however, that the draft is still currently under review given the nature of the twenty-one claims at issue. The Agency indicated that it expected AFCARO to issue a final decision by the end of December 2021.

ANALYSIS AND FINDINGS

Here, Petitioner is still waiting for the Agency's adjudication of the merits of his complaint filed on September 29, 2015, more than six years ago. In EEOC Appeal No. 2019005105, the Agency was ordered to issue its decision on the merits of those claims within sixty calendar days from the issuance of the appellate decision on August 3, 2021. To date, our records show that the ordered decision has not been issued and, therefore, the Agency is not in compliance with our Order.

We further note that this matter appears to be part of a pattern of the Agency's failure to issue timely final decisions as required by our regulations. More than a year ago, this Commission issued another appellate decision addressing the Agency's failure to timely issue a final decision on another EEO complaint filed by a different employee. In that case, the Agency took two years to issue the final decision, well beyond the required sixty days. See Anthony M. v. Dep't of Air Force, EEOC Appeal No. 2019003380 (Sept. 22, 2020). Consequently, the Agency was ordered, in pertinent part, to:

...investigate its performance in timely issuing final decisions on EEO complaints during this Fiscal Year and the previous two fiscal years and to report its findings to the EEOC's Compliance Officer . . . In the event the Agency finds it is not in compliance with the regulations for issuing final decisions, the Agency is directed to propose to the EEOC, for the EEOC's approval, a corrective plan of action.

In the present case, the Agency's inability to comply with the Commission's August 3, 2021 Order indicates that the Agency is still encountering difficulty establishing and implementing procedures which will enable AFCARO to issue final decisions on the merits of EEO complaints within EEOC's regulatory requirements.

We therefore now order the Agency to issue a final decision on the merits of Petitioner's complaint within thirty (30) days of the date this decision is issued. We emphasize that any further failure on the part of the Agency to comply with this Order will result in a referral to EEOC's Office of Federal Operations, Federal Sector Programs for further review of the Agency's internal AFCARO procedures for issuing final decisions within EEOC's regulatory time requirements.

CONCLUSION

Accordingly, we GRANT the instant Petition and find that the Agency has not complied with the Order in EEOC Appeal No. 2019005105. This matter is remanded to the Agency for further action in accordance with this decision and the Order below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, to the extent it has not already done so, the Agency is ordered to issue a final decision on the merits of Petitioner's complaint pursuant to 29 C.F.R. § 1614.110(b).

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.

PETITIONER'S RIGHT TO FILE A CIVIL ACTION (R0610)

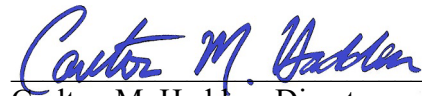
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 Petitioner’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

February 7, 2022

Date