



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Jene M.,¹
Complainant,

v.

Alejandro N. Mayorkas,
Secretary,
Department of Homeland Security
(Transportation Security Administration),
Agency.

Appeal No. 2021000224

Hearing No. 520-2019-00661X

Agency No. HS-TSA-00094-2019

DECISION

On October 9, 2020, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's September 4, 2020, final decision concerning her equal employment opportunity (EEO) complaint alleging 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. For the following reasons, the Commission VACATES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an SV-0344-F Program Assistant at the Agency's Newark Field Office in West Orange, New Jersey.

On February 22, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (Black), sex (female), disability (mental), age (born in 1964), and reprisal for prior protected EEO activity (the instant EEO complaint) when:

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.

1. On October 16, 2018, Complainant was denied telework and was forced to apply to the Reasonable Accommodation Program; and
2. On December 31, 2018, Complainant was forced to apply for disability retirement.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (EEOC AJ). Complainant requested a hearing. The EEOC AJ granted the Agency's motion to dismiss Complainant's hearing request, finding that Complainant's claim of forced retirement/constructive discharge was a mixed-case complaint.

The EEOC AJ remanded the complaint to the Agency, and the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination as alleged. The Agency provided Complainant with appeal rights to the EEOC on claim (1) and with appeal rights to the Merit Systems Protection Board (MSPB) on claim (2). Complainant appealed claim (1) to the EEOC and appealed claim (2) to the MSPB.

On December 17, 2020, an MSPB Administrative Judge (MSPB AJ) issued an initial decision dismissing Complainant's MSPB appeal for lack of jurisdiction. The MSPB AJ's initial decision became final on January 21, 2021.

ANALYSIS AND FINDINGS

A mixed-case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. *Id.* If a complainant is dissatisfied with the Agency's final decision on a mixed-case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the Agency's final decision. 29 C.F.R. §1614.302(d)(1)(ii).

As an initial matter, we note that the underlying EEO complaint should have been bifurcated, as claim (1) is a non-appealable action, meaning it cannot be appealed to the MSPB due to lack of jurisdiction. *See* 5 C.F.R. § 1201.3(a). Complainant had the right request a hearing before an EEOC AJ on claim (1). *See, e.g., Chasity v. Dep't of Homeland Sec.*, EEOC Appeal No. 0120140557 (Nov. 4, 2016) (agency should have bifurcated non-mixed allegations from mixed case allegations, issuing final decision with appeal rights to MSPB only for mixed case allegations and notifying complainant of right to request an EEOC hearing for the non-mixed allegations). Therefore, the AJ erred in dismissing Complainant's hearing request for claim (1).

After the EEOC AJ dismissed the hearing request, the Agency designated claim (2) as a mixed-case complaint and provided Complainant appeal rights to the MSPB. In MSPB Docket No. PH-0752-21-0010-I-1 (Dec. 17, 2020), the MSPB AJ dismissed Complainant's appeal for lack of jurisdiction, reasoning that Complainant did not establish that her retirement was involuntary and, as such, did not have a claim within the MSPB's jurisdiction.

The Commission's regulations governing the processing of mixed cases require that, should the MSPB dismiss an appeal on a mixed case complaint for lack of jurisdiction, the Agency is required to recommence processing the matter as a non-mixed case. 29 C.F.R. § 1614.302(c)(2)(ii). Because the MSPB AJ dismissed Complainant's appeal, claim (2) should now be processed as a non-mixed case. Complainant requested a hearing before an EEOC AJ for both claims (1) and (2), and her hearing request was improperly dismissed with respect to claim (1). Therefore, we find that both claims (1) and (2) should be remanded to the appropriate EEOC Hearings Unit.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final decision finding no discrimination and REMAND the matter to the Agency for further processing in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days from the date this decision is issued, the Agency shall submit a renewed hearing request on behalf of Complainant, as well as the complaint file and a copy of this appellate decision, to the Hearings Unit of the EEOC's New York District Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the hearing request and complaint file have been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaints in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

March 24, 2022

Date