



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

[REDACTED]
Marybeth C.,¹
Complainant,

v.

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

Request No. 2022001634

Appeal No. 2021004031

Agency No. 9R1M2100122

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021004031 (January 4, 2022). 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).

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 in 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. on 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,

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.

light-duty status, although there was a written agreement authorizing her to stay on her day shift dated October 2019, from the Director, 402 AMX/CL; and

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

On May 27, 2021, the Agency issued its final decision. 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 permitted 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; specifically, that the referenced new position was a permanent light-duty position located, approved, and offered through the Department of Labor, Office of Workers Compensation Program (OWCP). Complainant appealed the decision.

The appellate decision determined that the Agency failed to provide sufficient evidence to support its dismissal of claim 1. Specifically, that the Agency failed to provide evidence that the CBA permits the acceptance of grievances which allege discrimination. Regarding claim 2, the appellate decision determined that the claim was challenging an employment action taken by the Agency and did not identify an administrative process outside of the Commission's jurisdiction. The appellate decision also noted that the Agency was addressing the merits of Complainant's complaint when it argued that the Agency supervisors were merely following OWCP procedure. Accordingly, the appellate decision reversed the Agency's dismissal and remanded the matter for further processing.

On February 2, 2022, the Agency submitted a request for reconsideration of the Commission's January 4, 2022 decision. The Agency asserts that the appellate decision erroneously interpreted material facts and that the appellate decision to remand would have a substantial impact on the policies, practices, and operations of the Agency. Regarding claim 1, the Agency asserts that claim 1 was properly dismissed as it was raised in a negotiated grievance process. In support of its argument, the Agency cites to Article 6 of the CBA between the Union and the Agency, which it argues specifically permits acceptance of grievances which allege discrimination. Regarding claim 2, the Agency argues that the Commission should not have based the determination on what the claim identified, but rather if the claim involves another process. The Agency argues that claim 2 clearly dealt with the OWCP process and to let the matter continue would allow Complainant to collaterally attack the OWCP process. Complainant did not provide a response to the Agency's reconsideration request.

As to claim 1, upon review of the record initially submitted by the Agency in response to Complainant's appeal, we find that the record did not contain a copy of the relevant portion of the CBA. In the instant request for reconsideration, the Agency submits a copy of the relevant portion of the CBA. We find that the Agency is now attempting to supplement the record with evidence that was clearly available on appeal. See La Barrie v. Dep't of Health and Human Serv., EEOC Request No. 05990951 (Mar. 7, 2002).

Regarding claim 2, Complainant alleged that she felt compelled to accept a position offered by Agency officials in order to avoid termination. Below and in its reconsideration request, the Agency claims that Complainant is attempting to invalidate the OWCP's suitability determination and that management was simply providing a position based on the OWCP's process. However, we note that the duty to reasonably accommodate an individual with a disability is independent from an agency's obligations under OWCP procedures. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120141547 (July 10, 2014) (even if a job offer is made in conjunction with an OWCP claim, and approved by OWCP, the duty to reasonably accommodate an individual with a disability is independent from the OWCP claim). In this matter, Complainant is essentially alleging that the Agency failed to provide her with a reasonable accommodation when it offered her the assignment in claim 2.

Moreover, as previously discussed in the appellate decision, the Agency's articulated reasons go to the merits of Complainant's complaint, and as such, are irrelevant to the procedural issue of whether she has stated a justiciable claim. See Ferrazzoli v. USPS, EEOC Request No. 05910642 (August 15, 1991). Based on the record, the appellate decision appropriately determined that Complainant addressed a personal loss or harm to a term, condition or privilege of employment for which there is a remedy.

The Commission emphasizes that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Aug. 5, 2015); see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here with respect to the appellate decision regarding claims 1 and 2.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2021004031 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

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/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.

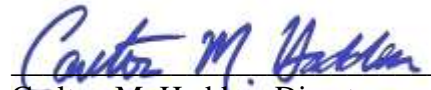
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

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:



Carlton M. Hadden, Director
Office of Federal Operations

June 23, 2022
Date