



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

[REDACTED]
Angella F.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal Nos. 2022001369 & 2022001579

Agency Nos. ARCEWILM21APR01440, ARCEWILM16JUN02549,
& ARCEWILM19OCT03913

Hearing Nos. 430-2021-00447X, 430-2017-00190X, & 430-2020-00349X

DECISION

Complainant filed two appeals with the Equal Employment Opportunity Commission (EEOC or Commission) from a final decision (FAD) by the Agency dated January 10, 2022, finding that it was in compliance with the terms of the settlement agreement into which the parties entered. See 29 C.F.R. §§ 1614.402; 1614.405; 1614.504(b). Within our discretion, we are consolidating the two appeals for processing. See 29 C.F.R. § 1614.606. They assert two different arguments in response to the same FAD.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Natural Resource Specialist, GS-9, in the Agency's Wilmington Operations District/John H. Kerr Project in North Carolina.

Believing that the Agency subjected her to unlawful discrimination as to four non-selections, Complainant contacted an Equal Employment Opportunity (EEO) counselor to initiate the

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.

administrative complaint process.² On July 22, 2020, Complainant and the Agency entered into a settlement agreement to resolve Complaints One and Two. The settlement agreement provided, in pertinent part:

- (1) The Agency agrees to:
 - (a) Retroactively promote [Complainant] with backpay and benefits in accordance with the Back Pay Act, to a GS-11 Natural Resource Specialist position at John H. Kerr project effective the backpay period ending July 9, 2016. There will be no reference to an EEO settlement on the SF-50s. The Agency will also restore two weeks of sick leave to the Employee. The Employee will be responsible for all associated taxes, and the Agency will not be responsible for any additional tax liability.

On May 4, 2021, Complainant filed a formal EEO complaint (Complaint Three) alleging the Agency unlawfully retaliated against her for her prior EEO activity when, on March 22, 2021, it changed the position description she received as part of the negotiated settlement agreement. The Agency accepted Complainant's complaint for EEO investigation. Following investigation, the Agency informed Complainant of the right to request a hearing before an EEOC Administrative Judge (AJ) or an immediate FAD. Complainant requested a hearing.

In November 2021, during the hearing stage, the Agency filed a Motion to Dismiss stating that Complainant's claim was not ripe for adjudication by the EEOC. The Agency argued that Complainant's claim was one of breach of the July 2020 settlement agreement, rather than of subsequent acts of discrimination. The AJ granted the Agency's Motion to Dismiss, agreeing that Complainant had alleged noncompliance with the agreement and the Agency should process her breach claim under the regulatory process.

On January 10, 2022, the Agency issued a FAD finding no breach. The instant two appeals from Complainant followed.

In EEOC Appeal No. 2022001369, Complainant stated, consistent with the July 2020 settlement agreement, the Agency placed her in position description (PD) # GW316762, but then retaliated against her by changing the duties of the position "to make it as unattractive as possible." Specifically, Complainant alleged, in September 2020, the Agency changed her from PD # GW316762 to PD # GW545984, without notice. Complainant stated, on March 22, 2021, the Agency informed her of a change of duties and position description.

² In 2016, Complainant filed a complaint regarding three non-selections, which the Agency docketed as Agency No. ARCEWILM16JUN02549 (Complaint One). In 2019, Complainant filed a complaint regarding one non-selection, which the Agency identified as Agency No. ARCEWILM19OCT03913 (Complaint Two).

Complainant alleged that the position was changed from “nonexempt” status to “exempt;” required wearing a uniform at all times; added working nights, weekends, or holidays to its requirements; provided a cubicle rather than an office although in a GS-11 position; and substantially changed daily duties. Complainant alleged that the position was so substantially changed that it required a new PD number. Complainant stated that the EEOC AJ erred in finding that her concerns were of noncompliance, rather than subsequent retaliation.

In EEOC Appeal No. 2022001579, Complainant stated, to the extent the AJ found this is a matter of compliance with the settlement agreement, she alleges breach of the July 2020 settlement agreement based on the same assertions. She requested specific implementation of the agreement.

ANALYSIS & FINDINGS

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep’t of Def., EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract’s construction. Eggleston v. Dep’t of Veterans Affairs, EEOC Request No. 05900795 (August 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (December 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Building Eng’g Servs. Co., 730 F.2d 377 (5th Cir. 1984).

Here, Complainant alleged that the Agency retaliated against her after it initially appeared to comply with their July 22, 2020 settlement agreement. Complainant stated that the Agency initially placed her in PD # GW316762, but then retaliated against her by changing the duties of the position “to make it as unattractive as possible.” Complainant alleged, in September 2020, the Agency changed her from PD # GW316762 to PD # GW545984, without notice and then, in March 2021, informed her of the change of duties and position description. Complainant alleged that the Agency changed the position from “nonexempt” status to “exempt;” required wearing a uniform at all times; added working nights, weekends, or holidays to its requirements; provided a cubicle rather than an office although a GS-11 position; and substantially changed daily duties. Complainant alleged that the position was so substantially changed that it required a new PD number. Complainant stated that the EEOC AJ erred in finding that her concerns were of noncompliance rather than subsequent retaliation.

We agree with Complainant. We find that the instant complaint contains allegations that subsequent acts of unlawful retaliation following what appeared to be initial compliance with the July 2020 settlement agreement. As such, Complainant's claim should be processed as a separate complaint under 29 C.F.R. §1614.106. See 29 C.F.R. §1614.504(c). We do not address the allegation of noncompliance for this reason.

CONCLUSION

We VACATE the Agency's final decision finding that it did not breach the terms of the settlement agreement and REMAND the matter to the Agency for processing in accordance with the following Order.

ORDER

Within thirty (30) calendar days of the date this decision was issued, the Agency shall file on Complainant's behalf a renewed request for a hearing regarding her unlawful retaliation claims concerning the substantive changes in her position description (as articulated in Agency No. ARCEWILM21APR01440) with the Hearings Unit of the EEOC's Charlotte District Office, as well as a copy of the complete complaint file and this appellate decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the EEOC Administrative Judge shall issue a decision on the complaint 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.

A copy of documentation showing compliance with the above Order must be sent to the Compliance Officer as referenced below.

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

December 20, 2022
Date