



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

[REDACTED]
Sherill S.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2022004810

Agency No. 20DR-0001-2022-14496

DECISION

On September 8, 2022, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an August 12, 2022 final Agency decision (FAD) dismissing her equal employment opportunity (EEO) complaint alleging 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

During the period at issue, Complainant was an applicant for employment with the Agency for all six slots of the position of Executive Assistant, GS-0301-14, job announcement CARX-11288119-22-KB at the Board of Veterans' Appeals. The location was negotiable within the U.S.

On June 6, 2022, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination based on her race/color (Black/dark brown), disability, and age (43) when:

1. On February 9, 2022, she was notified that she was not selected for the above position.
2. On March 11, 2022, she was notified that her request for reconsideration of the above

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.

non-selection was denied.²

The Agency dismissed issues 1 and 2 per 29 C.F.R. § 1614.107(a)(4) because Complainant raised the same matters in an appeal she filed with the Merit Systems Protection Board (MSPB) on April 8, 2022 (actually April 20, 2022), prior to filing her EEO complaint on June 6, 2022. The instant appeal followed.

On appeal, Complainant argues that her appeal to the MSPB regarded a violation of the Veterans Employment Opportunities Act of 1998 (VEOA) in the hiring process for the same position at issue, not discrimination based on race/color, disability and age. She acknowledges that her appeal to the MSPB described how she felt, “listing many [emphasis in original] allegations of wrongdoing...”, a reference to her alleging race/color, disability and age discrimination in her appeal, but argues she did not file a mixed case complaint and the MSPB does not have the jurisdiction to docket her EEO claims.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a)(4) requires that an agency dismiss claims where the complainant has raised the matter in an appeal to the MSPB and § 1614.302 indicates that the complainant has elected to pursue the non-EEO process. EEOC Regulation 29 C.F.R. § 1614.302(a)(1) defines a mixed case EEO complaint as one filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the MSPB.

The record reflects that Complainant filed a VEOA complaint with the U.S. Department of Labor (“Labor”), Veterans’ Employment and Training Service. On April 8, 2022, Labor issued a decision finding that the Agency did not violate Complainant’s VEOA veterans’ preference rights, and gave appeal rights to the MSPB.

We take administrative notice that on April 20, 2022, Complainant appealed Labor’s decision to MSPB. See the initial decision in [Appellant] v. Veterans Affairs, MSPB No. DA-3330-22-0254-I-1, 2022 WL 17083560 (PERSONNET) (Nov. 15, 2022).

² The Agency also defined Complainant’s complaint as alleging (a) nepotism, (b) willful violation of Prohibited Personnel Practices, (c) ignoring her veterans preference, (d) ignoring her Schedule A status, and (e) violating the Freedom of Information Act (FOIA) regarding her FOIA request for the resumes of the six selectees for the above position. The Agency dismissed issues (a) - (d) for failure to state a claim because the EEO complaint process did not have jurisdiction over them, and dismissed issue (e) for failure to state a claim because this constituted a collateral attack on the FOIA process. Complainant only appeals the Agency’s reason for dismissing claims 1 and 2. Accordingly, we need not further address issues (a) - (e). But to the extent Complainant alleges that the Agency’s failure to follow its hiring procedures or practices in (a) – (d) indicates discrimination based on her race/color, disability, and/or age, evidence on that would be relevant.

The MSPB characterized it as a VEOA appeal and found Complainant did not show the Agency violated the VEOA. This was the appeal where Complainant also alleged discrimination based on race/color, disability and age.

The record reflects that Complainant filed a second appeal with the MSPB on or about July 1, 2022. The appeal is not in the record. We take administrative notice that a MSPB Administrative Judge (AJ) issued an initial decision on the appeal. See [Appellant] v. Veterans Affairs, MSPB No. DA-4324-22-0350-I-1, 2022 WL 17083561 (PERSONNET) (Nov. 15, 2022). The AJ characterized this appeal as concerning whether the Agency violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) when it did not select Complainant for the same position at issue here. Following a hearing, the AJ found that Complainant did not prove the Agency violated USERRA. Specifically, the AJ found Complainant did not prove by a preponderance of the evidence that her military service was a substantial or motivating factor in her non-selection.

On February 14, 2023, the MSPB responded to an inquiry by our office, writing that Complainant has not filed a petition for review on either of the above two initial decisions.

Complainant raised allegations of discrimination based on race/color, disability and age when she was not selected for the position at issue in her April 20, 2022 appeal to the MSPB from Labor's veterans preference decision, albeit she now suggests she did not intend to raise it there as an active claim. The MSPB's regulations on its jurisdiction are complex. See 5 C.F.R. § 1201.3. This regulation does not indicate that the MSPB has jurisdiction over an appeal alleging a non-selection in violation of Title VII, the Rehabilitation Act, or the ADEA.

Even though Complainant explicitly raised her race/color, disability and age claims in her MSPB appeal, the MSPB did not address it or accept jurisdiction over these claims, in effect denying jurisdiction over the claims. We find that 29 C.F.R. § 1614.302(c)(2)(ii) applies – "If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint."

Accordingly, the FAD is REVERSED.

ORDER (E0618)

The Agency is ordered to process issues 1 and 2, as numbered in this decision, 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

February 21, 2023
Date