



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

[REDACTED]
Augustine V.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice,
Agency.

Request No. 2023001244

Appeal No. 2022000607

Agency No. ATF-2019-01204

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Augustine V. v. Department of Justice, EEOC Appeal No. 2022000607 (December 12, 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 the underlying complaint, Complainant worked as a Criminal Investigator (Special Agent) at the Agency's facility in Phoenix, Arizona on a three-year excepted service appointment.

On October 21, 2019, Complainant filed a complaint alleging that the Agency discriminated against him on the bases of race (African American) and in reprisal for prior protected EEO activity 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 June 26, 2019, management issued Complainant a Non-Conversion of Appointment letter, stating that his excepted service appointment would not be extended beyond July 17, 2019; and
2. On June 14, 2019, management issued Complainant a three-day suspension for July 8 through July 10, 2019.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant timely requested a hearing. The Agency submitted a motion to dismiss arguing that the Commission lacked jurisdiction because Complainant elected to pursue his claims with the MSPB.

With respect to Complainant's MSPB filing, an MSPB AJ issued an Acknowledgment Order stating that the expiration of a temporary appointment is not appealable to the MSPB and, therefore, not within its jurisdiction. On August 28, 2019, the MSPB AJ issued an Initial Decision dismissing Complainant's appeal with prejudice. The MSPB AJ cited "voluntary withdrawal of appeal." The MSPB AJ stated:

I spoke with the parties' counsels. After discussing the jurisdictional issue in this appeal, the [Complainant's] counsel withdrew the appeal...I then accepted the withdrawal of the appeal as freely and knowingly made after satisfying myself that the [Complainant] and his counsel understood that: 1) the withdrawal would result in my dismissing the instant appeal with prejudice to refiling and without my making an appealable ruling on the jurisdictional issue.

The assigned EEOC AJ subsequently issued a decision dismissing the present complaint. In his decision, the AJ explained that the expiration of Complainant's term appointment was not an action appealable to the MSPB and that the Agency had erroneously advised Complainant that it was. The AJ found that while Complainant was misinformed by the Agency about his MSPB appeal rights, Complainant and his attorney fully appreciated what would happen if Complainant withdrew his appeal. As such, the AJ concluded that Complainant's initial election prevailed, and Complainant could not return to the EEO complaint process.

In EEOC Appeal No. 2022000607, the Commission found that the Agency appropriately dismissed claim (1) regarding failure to renew Complainant's appointment. However, the decision stated that it was not apparent that the MSPB AJ, whom the EEOC AJ agreed with, addressed claim (2), the three-day suspension, and that his dismissal addressed claim (1) only. Therefore, the Commission remanded claim (2) for processing from the point processing ceased.

In its request for reconsideration, the Agency asserts that the Commission's decision to vacate and remand claim (2) involved clearly erroneous interpretations of material fact.

The Agency argues that the MSPB addressed claim (2) and reiterates its argument that dismissal was proper because Complainant elected to pursue the three-day suspension before the MSPB and to voluntarily withdraw the MSPB appeal prior to receiving a decision from the MSPB.

ANALYSIS AND FINDINGS

An agency shall dismiss an entire complaint 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. 29 C.F.R. §16114.107(a)(4).

Upon review of the record, we note that the MSPB AJ described the matter as an appeal to the Agency's action that allowed Complainant's term appointment to expire. However, the MSPB AJ made no mention of Complainant's three-day suspension. Likewise, the EEOC AJ included claim (2) under the listed claims at issue but did not address the suspension claim in his decision. Therefore, we find that claim (2), which involved a suspension of less than 14 days, was not appealable to the MSPB or considered by the MSPB or in the EEO process. When issued the suspension, Complainant was informed of his right to file an administrative grievance, initiate EEO contact, or file a claim with the Department of Justice for reprisal for whistleblowing. We find, as in the previous decision, that the Agency's dismissal of claim (2) was improper because it does not appear the suspension was addressed in the MSPB forum or the EEO process. Therefore, we find that Complainant was denied a forum to pursue his discrimination claim regarding the suspension. Accordingly, Complainant should be given the opportunity to pursue his claim in the 29 C.F.R. Part 1614 process.

CONCLUSION

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. 2022000607 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

Within fifteen (15) calendar days of the date this decision was issued, the Agency shall file on Complainant's behalf a renewed request for a hearing for claim (2) (three-day suspension) with the Hearings Unit of the EEOC's Denver Field 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.

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 (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

July 25, 2023
Date