



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

[REDACTED]
Reginald C.,¹
Complainant,

v.

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

Appeal No. 2023002234

Agency No. ARCEMEMP22AU

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 14, 2023, dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant at the Agency's U.S. Army Corps of Engineers, Memphis District in Memphis, Tennessee. On April 4, 2022, Complainant applied for the full-time position of a Motor Vehicle Operator. Complainant received a Tentative Offer of Employment for the position on May 25, 2022, pending the satisfaction of a physical examination. Part of the examination included an on-site (Memphis District Facility) visit preliminary screening, in which Complainant was observed using a walking cane. The official physical examination was on June 17, 2022, during which Complainant disclosed his Veteran status, knee replacement surgery and medical history.

On July 21, 2022, Complainant attended a follow-up appointment for his employment physical examination. The nurse at the appointment approved Complainant's physical examination results but expressed concerns about his mobility.

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.

On August 12, 2022, Complainant was informed that his tentative offer of employment was withdrawn over concerns about his ability to meet the physical demands of the Motor Operator position, particularly, the ability to stand and work on uneven surfaces.

Complainant initiated EEO contact August 18, 2022. The Agency issued to Complainant the Notice to File a Formal Complaint (the Notice) on September 19, 2022. On October 5, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of disability (physical) when on August 12, 2022, Complainant's tentative job offer for the position of Motor Vehicle Operator, XF-5703-08 was rescinded.

Along with his complaint, Complainant submitted a copy of a doctor-issued letter certifying that, regardless of Complainant's disability, he was able to fulfill prospective job demands. The letter did not address the Agency's concern over Complainant's ability to stand and work on uneven surfaces.

In his complaint, as relief, Complainant requested a job placement of comparable pay and work hours. On November 29, 2022, the Agency sent a negotiated Settlement Agreement to Complainant. On December 21, 2022, Complainant declined the settlement, and did not accept the offer.

On January 6, 2023, the Agency called Complainant to revisit the offered settlement. Again, Complainant rejected the offer. The Agency contacted Complainant about the settlement job offer again before Complainant's final rejection on February 1, 2023.

On February 14, 2023, the Agency dismissed Complainant's Complaint as moot under 29 C.F.R. §1614.107(a)(5). The Dismissal Letter reflects that the original tentative job for which Complainant applied had a Temporary Duty (TDY) of 50 percent or less (Letter of Dismissal).

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the dismissal of his claim as moot was improper. According to Complainant, he later learned that his job offer was withdrawn because he failed the physical examination.

Complainant also argues that the settlement job offer was not of comparable pay and work hours. He notes that the settlement agreement provided the position would include 90 percent TDY (Temporary Duty) as a condition of employment. As such, Complainant contends he should be awarded back pay and compensatory damages.

The Agency did not file a response.

ANALYSIS AND FINDINGS

The Commission's regulations at 29 C.F.R. § 1614.107(a)(5) provides that an Agency shall dismiss an entire Complaint if it is moot. A complaint is moot if there is no reasonable expectation that the alleged violation will recur, and if the interim relief has completely and irrevocably eradicated the effects of the alleged discrimination. City. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Tera B. v. U.S. Postal Serv., EEOC No. Appeal 2021001319 (Feb. 22, 2021).

Here, we find that the Complaint is not moot because the Agency's proposed interim relief would not completely and irrevocably erase the alleged discrimination. The record shows that upon Complainant's request, the Agency offered Complainant the full-time position of a Motor Vehicle Operator, the job for which he applied as a settlement. There are however differences in the TDY that make the offer incomparable to the initial offer the Agency made to Complainant and subsequently withdrew. The TDY was 50 percent in the initial job offer; whereas, the new offer has a 90 percent TDY. This material difference between the TDY in the two positions means that Complainant did not receive his requested remedy that would supplement the tentative job offer withdrawn because of the alleged discrimination.

Moreover, it does not appear that element 2 of the basis for dismissing a claim for mootness is satisfied in this case because there would arguably be more backpay as the new offer was not retroactive to the date of the initial job offer. For that same reason, compensatory damages would also be outstanding if Complainant prevails.

Importantly, it is unclear from the record whether Complainant had requested any accommodation prior to the initial job offer. If he had, nothing in the record shows that the new offer would be consistent with such a request, or any potential accommodation Complainant might have needed.

CONCLUSION

Therefore, we REVERSE the Agency's final decision dismissing Complainant's entire complaint for mootness, pursuant to 29 C.F.R. § 1614.107(a)(5). We REMAND the complaint to the Agency for investigation and processing consistent with the order 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.

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 (S0610)

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. If you file a request to reconsider and also file a civil action, **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 26, 2023
Date