



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Hilaria S.,¹
Complainant,

v.

Thomas J. Vilsack,
Secretary,
Department of Agriculture
(Risk Management Agency),
Agency.

Request No. 2022004040

Appeal No. 2020004876

Hearing No. 570-2018-00016X

Agency No. RMA-CF-2017-00242

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Hilaria S. v. Dep't of Agric., EEOC Appeal No. 2020004876 (June 21, 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).

Complainant, the Director of Program Support, GS-0301-15, at the Agency's facility in Washington, D.C., filed a formal complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American/Caucasian/Indian), color (light skinned), disability (physical and mental), and in reprisal for prior protected EEO activity as evidenced by multiple incidents.

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.

Following an investigation, Complainant requested a hearing before an EEOC Administrative Judge. Complainant subsequently withdrew the request, and the Agency issued a final decision finding that Complainant was not subjected to discrimination, reprisal, or a hostile work environment as alleged.

In the appellate decision, the Commission affirmed the Agency's final decision in part. The Commission found that Complainant failed to show that she was subjected to discrimination, reprisal, or a hostile work environment; however, the Agency violated the Rehabilitation Act by improperly disclosing Complainant's confidential medical information. Complainant asserted that the then-Deputy Administrator for Insurance Services (Deputy) improperly disclosed her medical information when he forwarded her email including her medical information without her permission to individuals who did not have a need to know. The Commission noted that the EEO Investigator requested that the Agency provide documentation and correspondence regarding Complainant's allegation; however, the Agency failed to respond. The Commission found that the Deputy forwarded Complainant's email including medical information to the Timekeeper and the Agency failed to provide any argument or reason indicating that the release was qualified under the limited exceptions to the confidentiality requirement. As a result, the Commission concluded that the Agency had violated the Rehabilitation Act. To remedy the violation, the Commission ordered the Agency to conduct a supplemental investigation into Complainant's entitlement to compensatory damages; to provide training to and consider disciplining the official identified as the Deputy; and to post a notice.

In its request for reconsideration, the Agency argues that the Commission erred in determining that the Timekeeper was not an appropriate recipient of Complainant's medical documentation. Further, the Agency contends that Complainant had previously disclosed to the Timekeeper that she was "fully incapacitated." The Agency argues that the information provided to the Timekeeper did not include confidential medical information. Finally, the Agency claims that if the Commission's previous decision is implemented, it would improperly interfere with the Agency's ability to designate the duties and responsibilities of its staff. Accordingly, the Agency requests that the Commission grant its request for reconsideration.

In response, Complainant requests that the Commission deny the Agency's request for reconsideration.

As discussed in the appellate decision, the Agency did not respond to the EEO Investigator's request for documentation and correspondence regarding this allegation. Further, the Agency's decision did not address this claim adequately and the Agency did not provide any arguments regarding whether the Timekeeper was an official who had a need-to-know basis for receiving Complainant's confidential medical information in response to Complainant's appeal. Thus, the Commission found that, under the specific circumstances and record presented, the Agency did not meet its burden to demonstrate that the Deputy's disclosure to the Timekeeper was exempted under the Rehabilitation Act. Only now, in its request for reconsideration, does the Agency present arguments regarding this claim. However, the Commission has consistently held that a party may not raise new arguments in a request for reconsideration.

A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, Chap. 9 § VI.A (Aug. 5, 2015); see e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). A request for reconsideration is not the time to raise new arguments. 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. Based on the record that was before us when the previous decision was issued, we do not find that we clearly erred in determining that Complainant's confidential medical information was improperly disclosed.

Furthermore, despite the Agency's contentions otherwise, upholding the Commission's decision will not have a significant, negative impact on the policies and operations of federal agencies. The previous decision made no finding as to whether a Timekeeper may or may not receive medical information in connection with their time and attendance duties and responsibilities. Rather, the previous decision only reiterated that it is the Agency's burden to show that an official to whom confidential medical information is disclosed has a need-to-know basis as required under the Rehabilitation Act. Based on the record that was before us at the time, the Commission was unable to find that the Agency met that burden.

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. 2020004876 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

The Agency is ordered to take the following remedial actions:

1. Within ninety (90) calendar days of the date this decision is issued, the Agency shall complete a supplemental investigation concerning Complainant's entitlement to compensatory damages and determine the amount of compensatory damages due Complainant in a final decision with appeal rights to the Commission. The Agency shall pay this amount to Complainant within thirty (30) calendar days of the date of the determination of the amount of compensatory damages. If there is a dispute regarding the exact amount of compensatory damages, the Agency shall issue a check to Complainant for the undisputed amount. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within ninety (90) calendar days of the date this decision is issued, the Agency shall provide eight hours of interactive EEO training to the Deputy regarding his responsibilities with respect to eliminating discrimination in the federal workplace. The training must emphasize the Agency's obligations under Section 501 of the Rehabilitation Act, as amended, 29 U.S.C. § 791 et seq., particularly its duties regarding medical confidentiality.
3. Within ninety (90) calendar days of the date this decision is issued, the Agency shall consider taking disciplinary action against the Deputy. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission and specify what, if any, action was taken. If the Agency decides not to take disciplinary action, then it shall set forth the reasons for its decision not to impose discipline. If the Deputy has left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
4. The Agency shall post a notice in accordance with the paragraph entitled, "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Washington, D.C. facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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 (Q0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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

September 28, 2023
Date