



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Willetta L.,¹
Complainant,

v.

The New Jersey Judiciary,
Office of the Attorney General,
Respondent.

Appeal No. 2021001181

Docket No. 20-EEOC-001

EEOC Charge No. 530-2018-04009

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the August 14, 2020, decision of an Administrative Law Judge (ALJ) dismissing Complainant's equal employment opportunity complaint brought pursuant to the Government Employee Rights Act (GERA), 42 U.S.C. § 2000e-16c. See 29 C.F.R. § 1603.101 et seq. For the following reasons, the Commission **AFFIRMS** the ALJ's decision dismissing the complaint.

ISSUE PRESENTED

Whether Complainant established that the ALJ erred when he found that, as a state judge, she was not appointed to serve the Governor of New Jersey in a policymaking capacity, nor were there any other reasons to find that she was covered by GERA.

BACKGROUND

In 2005, the Governor of New Jersey appointed Complainant to serve on the Superior Court of New Jersey in Vicinage 15. For some time, she worked at the Gloucester County Courthouse, located in Woodbury, New Jersey. On or about August 11, 2017, A1, Assignment Judge for Vicinage 15, informed Complainant that she was being transferred to work in Bridgeton, New Jersey. Four days later, Complainant, through counsel, requested a medical accommodation based

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 an alleged disability. Specifically, Complainant asked for permission to remain assigned in Woodbury because her purported disability made it difficult to drive to Bridgeton. On August 30, 2017, Respondent denied the accommodation request and Complainant filed an internal appeal. Respondent denied Complainant's appeal and her requests for reconsideration on October 3, 2017, and February 14, 2018, respectively.²

On February 26, 2018, Complainant filed a charge with the EEOC's Philadelphia District Office (DO) alleging, *inter alia*, a violation of the Americans with Disabilities Act (ADA). That claim was ultimately dismissed. Complainant filed another claim with the EEOC on or about May 25, 2018, specifically citing GERA. On December 13, 2018, the DO dismissed the GERA claim because it was unable to conclude that a violation had occurred.³ In January 2019, Complainant filed an appeal with the Office of Federal Operations (OFO).⁴

On May 13, 2019, the DO vacated its dismissal, and on July 5, 2019, a letter was sent informing Complainant's attorney that her case was being sent to OFO for a "preliminary review." On November 17, 2019, the attorney for Complainant was referred to the Office of Field Programs (OFP) for information about her case. Upon being notified that the matter was being reviewed for timeliness and jurisdiction, the attorney submitted additional information on those issues on December 16, 2019, to OFP. On February 3, 2020, Complainant's attorney was informed by OFP that Complainant's complaint was timely and that the matter was being referred to OFO for the assignment of an ALJ, which occurred on February 11, 2020.⁵

On August 14, 2020, the ALJ issued a decision that addressed whether: (1) he had the authority to examine the issue of subject matter jurisdiction; (2) Complainant was a covered employee under GERA; and (3) Complainant was covered by the ADA if she was not covered by GERA.

The ALJ found that, pursuant to 29 C.F.R. § 1603.202(c), an ALJ assigned to a GERA claim had

² Respondent maintained that Complainant's reassignment was based on its investigation and findings regarding her conduct in the workplace. Because that matter is not pertinent to our decision, we will note only that Complainant denied Respondent's assertions.

³ 29 C.F.R. § 1603.107(a) provides that "[w]here a complaint on its face, or after further inquiry, is determined not to be timely filed or otherwise fails to state a claim under this part, the Commission shall dismiss the complaint." We also note 29 C.F.R. § 1603.107(d) which provides, in pertinent part, that "[t]he Commission hereby delegates authority to the Program Director, Office of Field Programs, or to his or her designees, and District Directors, or to their designees, to dismiss complaints."

⁴ 29 C.F.R. § 1603.301 provides, in part, that "[a]ny party may appeal to the Commission the dismissal of a complaint under § 1603.107"

⁵ Although the Respondent repeatedly referred to these discussions between Complainant and OFP as "ex parte," we note that, in accordance with 29 C.F.R. § 1603.109(a), "[b]efore referring a complaint to an administrative law judge . . . the Commission may conduct [an] investigation using an exchange of letters, interrogatories, fact-finding conferences, interviews, on-site visits or other fact-finding methods that address the matters at issue."

express authority to “take any appropriate action authorized by the Federal Rules of Civil Procedure.” Moreover, he noted that, under Federal Rule of Civil Procedure 12(h)(3) “a court may dismiss a case for lack of subject-matter jurisdiction “at any time.” Read together, the ALJ determined that he was empowered to consider the question of subject matter jurisdiction and to dismiss a case where it is lacking.

Regarding whether Complainant was covered by GERA, the ALJ noted that GERA did not apply to all state employees, but only applied to individuals “[C]hosen or appointed,” by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof-

- (1) to be a member of the elected official’s personal staff;
- (2) **to serve the elected official on the policymaking level;** or
- (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C. § 2000e-16c(a) (emphasis added).

The ALJ noted that Complainant confined her claim of coverage under GERA to provision (2). Therefore, he focused his decision on whether Complainant was appointed to serve the New Jersey Governor on a policymaking level. The ALJ found that the answer was no. He began by noting that, as defined by the Oxford Dictionary, “to serve” plainly means “to work or perform duties for a person, an organization, a country, etc.” Ultimately, the ALJ, based on the doctrine of separation of powers and the concept of an independent judiciary, could not conclude that superior court judges work for or perform duties in service of the New Jersey Governor.⁶

The ALJ further found, *sua sponte*, that any ADA claim raised by Complainant would most likely be barred by sovereign immunity. Finally, the ALJ found that, having determined that the EEOC lacked jurisdiction over Complainant’s claim because she was not an employee as described by GERA, it was not necessary to decide whether her complaint was untimely filed.

⁶ Specifically, the ALJ found:

Ultimately, the argument that a member of an independent judiciary ‘serves’ a state’s chief executive is anathema to the doctrine of separation of powers and bulldozes the idea of an independent judiciary. Congress must have been aware of the separation of powers at both the federal and state levels when drafting GERA- and the undersigned concludes they simply would not have envisioned a state judge, sitting on a court of general jurisdiction, as serving that state’s highest executive official. I decline to read GERA in a manner that relegates appointed state judges to servants of their respective governors in states where the governors appoint them to the bench.

CONTENTIONS ON APPEAL

On appeal, Complainant argued that the ALJ's decision should be reversed for the following reasons:

1. The ALJ exceeded his authority by revisiting a jurisdictional issue that had already been decided by the EEOC;
2. GERA has jurisdiction over a State Superior Court Judge's claims of disability discrimination; and
3. Complainant's complaint was timely.

Complainant also argued that the affirmative defense of sovereign immunity was never raised by Respondent at any time during litigation, that the defense was therefore waived, and that the ALJ did not have any authority to raise the issue on his own.

According to Complainant, the ALJ was subject to the authority of the EEOC and could not consider the issues of jurisdiction and timeliness because these matters had previously been decided by the EEOC. In this regard, Complainant maintained that the DO contacted her counsel to advise that her discrimination charge should be filed under GERA; jurisdiction under GERA was *constructively* agreed to when the DO vacated the initial dismissal of her complaint and submitted the complaint to OFO; and OFO transferred the complaint to the ALJ, after her detailed brief explaining why she was covered under GERA and why her complaint was timely. Thus, Complainant argues, as these issues have already been duly considered and ruled on, fairness and consistency require that these determinations be given binding effect going forward.

Next, Complainant argues that the ALJ's conclusion that a superior court judge is not covered under GERA was an abuse of his discretion and an erroneous interpretation of law. Complainant contends that she serves the Governor and the Senate by doing her job as a superior court judge, and that she renders decisions based on legislation, executive orders, and the public good. She also states that she enforces policy and enters decisions in accordance with the laws of New Jersey that promote the health and safety of the public, a goal that is of paramount importance to the Governor's office and the Legislature.

Regarding whether she serves the Governor in a policymaking capacity, Complainant cites the Supreme Court's decision in Gregory v. Ashcroft, 501 U.S. 452 (1991), where the court considered whether Missouri State Court judges were excluded from the Age Discrimination in Employment Act's (ADEA's) coverage as "appointees on the policymaking level." The Supreme Court decided that Missouri state court judges "fall presumptively under the policymaking-level exception" in the ADEA's definition of employee. Complainant also notes that the history and language of GERA plainly demonstrate that the Act was intended to import the prohibitions against discrimination in government employment to those, like her, who were excluded from Title VII, the ADEA, or in this case the ADA, because the government employer had immunity.

Finally, Complainant argued that the ALJ erred in finding that she was barred from raising an ADA claim by sovereign immunity, and that her charge of discrimination filed on May 30, 2018, was timely as a matter of law under the relation back provision of 29 C.F.R. § 1603.102(e).⁷

The Respondent argues that the ALJ's decision should be affirmed, and that Complainant did not cite any authority that supports her assertion that New Jersey State court judges serve the person who appointed them on a policymaking level. Respondent also agreed with the ALJ's assertion that he could dismiss Complainant's complaint upon determining that the EEOC lacked subject matter jurisdiction. Regarding Complainant's reliance on the Supreme Court's decision in Ashcroft, Respondent notes that the decision, which was issued before GERA was enacted, only suggests that state court judges are likely "appointee(s) on the policymaking levels," for purposes of the ADEA. Respondent argues that, because the decision was issued before GERA's enactment, it is not dispositive on the issue of whether state court judges "serve the elected official on the policymaking level."

Regarding the ALJ's determination that a potential ADA claim by Complainant would be barred by sovereign immunity, Respondent argues that, although it agrees with the ALJ, the only claim before him was the GERA claim because the EEOC did not refer any claim under the ADA to him; therefore, this issue is merely hypothetical and should not be considered on appeal. Finally, Respondent argues that the issue of timeliness should not be considered on appeal because the ALJ did not address this matter in his decision after finding that it was moot.

In November 2020, Complainant filed a 40-page reply to the Respondent's brief, and Respondent submitted a sur-reply.

STANDARD OF REVIEW

Pursuant to 29 C.F.R. § 1603.301, "[a]ny party may appeal to the Commission the dismissal of a complaint under § 1603.107, any matter certified for interlocutory review under § 1603.213, or the administrative law judge's decision under § 1603.216 or § 1603.217." Also, pursuant to 29 C.F.R. § 1603.304(a), "[o]n behalf of the Commission, OFO shall review the record and the appellate briefs submitted by all the parties and shall prepare a recommended decision for consideration by the Commission."

⁷ The provision reads:

A charge filed pursuant to 29 C.F.R. part 1601 or part 1626, that is later deemed to be a matter under this part, shall be processed as a complaint under this part and shall relate back to the date of the initial charge or complaint. A complaint filed under this part that is later deemed to be a matter under 29 C.F.R. part 1601 or part 1626 shall be processed as a charge under the appropriate regulation and shall relate back to the date of the initial complaint.

ANALYSIS AND FINDINGS

At the outset, we note that 29 C.F.R. § 1603.303(a) provides that any statement or brief filed on behalf of an appellant in a GERA matter in support of the appeal must be submitted to OFO within 30 days of filing the notice of appeal. Likewise, 29 C.F.R. § 1603.303(b) provides that any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal. There are no provisions in our regulations for parties to submit further reply briefs or sur-reply briefs. Consequently, we did not consider these submissions in reaching our determination below.

The GERA, 42 U.S.C. § 2000e-16a et seq., provides for the application of rights, protections and remedies to previously exempt employees of elected state and local officials under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq. GERA provides, in pertinent part, that all personnel actions affecting covered employees shall be made free from discrimination based on: “(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of Title 42; (2) age, within the meaning of section 633a of Title 29; or (3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of Title 42.” 42 U.S.C.A. § 2000e-16b.

The law extends coverage to any individual chosen or appointed by a person elected to public office in any State, or political subdivision of any State, by the qualified voters thereof: (a) to be a member of the elected official’s personal staff; (b) to serve the elected official on the policymaking level; or (c) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. 42 U.S.C. § 2000e-16c(a); 29 C.F.R. § 1603.101; see Clarke v. Florida Public Service Commission, EEOC Appeal No. 1120050001 (Jan. 5, 2007) (finding that a charge did not fall within GERA’s jurisdiction because the position at issue was not on the personal and/or policymaking staff of an elected official). Complaints may be made against persons, government entities, or political subdivisions. 29 C.F.R. § 1603.102(c)(2).

We find that the ALJ had the authority, notwithstanding OFP and OFO’s earlier processing of the complaint, which included the referral of this matter to the ALJ for a hearing, to consider whether, in fact, he had subject matter jurisdiction. 29 C.F.R. § 1603.216 provides, in part, that, upon motion of a party or after notice to the parties, the administrative law judge may issue a summary decision without a hearing if the administrative law judge finds that there is no genuine issue of material fact or that the complaint may be dismissed pursuant to § 1603.107 or any other grounds authorized by that part. Complainant has provided no authority to support her assertion that OFP or OFO’s preliminary actions in processing her complaint divested the ALJ of the authority provided by the Commission’s regulations to subsequently dismiss the complaint if appropriate. Furthermore, as was noted above, the DO vacated its dismissal of Complainant’s complaint; therefore, Complainant’s initial January 2019, appeal was effectively terminated at that point. Consequently,

the preliminary determinations by OFP and OFO should not be viewed as final actions by the Commission.⁸

Before the Civil Rights Act of 1991, there was no coverage for employment decisions affecting officials appointed to assist elected officials, i.e., personal staff, immediate legal advisers, and appointees engaged in policy making. The Title VII and ADEA exemptions meant that such individuals could be appointed or fired without the protection of these laws. GERA, enacted as a part of the Civil Rights Act of 1991, extended protection to these previously excluded groups. Personal staff, legal advisers, and policy-making assistants are now protected under GERA through the incorporation of the discrimination provisions of Title VII.

In the instant case, we agree with the ALJ that Complainant has not established that she falls under the coverage of GERA because she has not shown that she “serves” the Governor of New Jersey or the Legislature in a policy making capacity. We note that there are few cases discussing the coverage of GERA to appointees of elected officials; most cases consider whether Title VII or the ADEA exclude them. As Respondent points out in its brief, some courts construe the phrase “policymaking” broadly and include employees who do not work closely with the elected officials who appointed them, including state superior court judges. Other courts construe the phrase narrowly and do not include employees who do not work closely with the elected officials who appointed them.

In Reardon v. Herring, 191 F. Supp. 3d 529, 539-46 (E.D. Va. 2016), the court compared the differing circuit approaches in construing the phrase “policy making level” from the exemptions in Title VII, the ADEA, the Equal Pay Act, and the Fair Labor Standards Act. The court noted that the Seventh Circuit, in assessing the identical statutory text in Title VII and the ADEA, interpreted the exception broadly to include any position that “authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation. Americanos v. Carter, 74 F.3d 138, 141 (7th Cir.1996).” The Second Circuit, on the other hand, held that the exception applies “only to such appointees as would normally work closely with and be accountable to the official who appointed them. [Butler v. New York State Dept. of Law, 211 F.3d 739, 747 (2d Cir. 2000).]” The Reardon court noted that the Second Circuit’s focus on the proximity between the plaintiff’s position and that of the elected official was “echoed by the Tenth Circuit, which emphasizes that the exception requires ‘an immediate and personal relationship’ between the appointee and elected official. Anderson v. City of Albuquerque, 690 F.2d 796, 801 (10th Cir. 540 1982).”

Like the Second Circuit, the EEOC has previously construed the “policymaking” exception in Title VII in narrow terms, noting that Congress intended the “policymaking-level” exceptions to apply to individuals who lead agencies and who “work closely with elected officials and their advisors

⁸ Because we find that our regulations provided the ALJ with the authority to dismiss Complainant’s complaint for lack of subject matter jurisdiction, we do not find it necessary to address whether the ALJ’s reliance on Rule 12 of the Federal Rules of Civil Procedure was appropriate.

in developing policies that will implement the overall goals of the elected officials.” EEOC Decision No. 78-42 (Sept. 29, 1978) (“In exempting policymaking appointees, Congress realized the necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best.”); see also EEOC Decision No. 78-33 (June 1, 1978).

Complainant argues that: (1) she serves the Governor and the Senate in a policy-making role by doing her job as a Superior Court judge, (2) she renders decisions based on legislation, executive orders, and the public good; and (3) she enforces policy and enters decisions in accordance with the laws of New Jersey that promote the health and safety of the public, a goal that is of paramount importance to the Governor’s office and the Legislature.

As was noted above, the ALJ found that “[t]he argument that a member of an independent judiciary ‘serves’ a state’s chief executive is anathema to the doctrine of separation of powers and bulldozes the idea of an independent judiciary”, and he “[d]ecline[d] to read GERA in a manner that relegates appointed state judges to servants of their respective governors in states where the governors appoint them to the bench.” In reaching this conclusion, he cited several decisions by the Supreme Court, lower Federal courts, and New Jersey state courts recognizing the importance of the separation of powers doctrine. He also noted instances where the state courts acted “as a check on gubernatorial power,” and was “called on to restrain the governor where he or she exceeds executive authority.” We concur in the findings of the ALJ. We do not find Complainant’s arguments persuasive in that there is no indication that she works closely with the Governor or other elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In other words, her duties are not performed in service of the Governor.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, we AFFIRM the ALJ’s final order determining that Complainant’s claim does not fall under the coverage of GERA, and therefore, the EEOC does not have jurisdiction over this matter.⁹

⁹ We find that the issue regarding whether a possible ADA claim filed by Complainant in the future would be barred by sovereign immunity is not properly before this Commission. Moreover, like the ALJ, we find it unnecessary to address whether Complainant’s complaint was timely filed.

STATEMENT OF PARTIES' RIGHT TO FILE A PETITION FOR REVIEW

Any party to a complaint who is aggrieved by a final decision under 29 C.F.R. § 1603.304 may obtain a review of such final decision under chapter 158 of title 28 of the United States Code by filing a petition for review with a United States Court of Appeals within 60 days of the date of this final decision. See 29 C.F.R. § 1603.306. Such petition for review should be filed in the judicial circuit in which the petitioner resides, or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

FOR THE COMMISSION:

/s/Raymond Windmiller

Raymond Windmiller
Executive Officer
Executive Secretariat

August 2, 2024

Date