



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Chasity C.,¹
Complainant,

v.

Jeh Johnson,
Secretary,
Department of Homeland Security
(Headquarters),
Agency.

Appeal No. 0120140557

Hearing No. 520-2013-003254X

Agency No. HS-HQ-00372-2011

DECISION

On November 26, 2013, Complainant filed an appeal from the Agency's October 30, 2013, final order concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission deems the appeal timely and accepts it for review. For the following reasons, the Commission VACATES the Agency's final order and REMANDS the matter for a hearing in accordance with 29 C.F.R. § 1614.109.

ISSUE PRESENTED

Whether the Agency erred when, in issuing its final decision on March 7, 2012, finding no discrimination, it failed to separate Complainant's non-mixed-case allegations from her mixed-case allegations and notify Complainant of her right to request a hearing before an EEOC Administrative Judge (AJ) on her non-mixed-case allegations.

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.

BACKGROUND

Complainant worked as a Veterinary Medical Officer at the Plum Island Animal Disease Center in Greenport, New York. On March 2, 2011, Complainant filed an EEO complaint in which she alleged that her first-line and second-line supervisors subjected her to discriminatory harassment because of her sex (female) and perceived disability (traumatic brain injury) between April 2010 and February 2011. She identified the following eleven incidents as comprising her claim:

1. On unspecified dates, Complainant's first and second line supervisors told her that she was "getting in the way of research" when she attempted to take small corrective measures to be in compliance with research regulations.
2. On unspecified dates, management questioned Complainant's clinical judgment, verbally reprimanded her, and undermined her authority.
3. On an unspecified date, Complainant's first-line supervisor blamed her for organizational deficiencies reported by the Animal Care Committee in their bi-annual inspection.
4. On unspecified dates, Complainant's direct report went directly to Complainant's first-line supervisor regarding work-related issues when the direct report did not agree with Complainant, and the first-line supervisor did nothing to discourage the direct report's actions.
5. In April 2010, Complainant's first-line supervisor told her that Complainant was interfering with research and that Complainant had no jurisdiction when the supervisor allowed a male investigator to violate published research policy by beginning a study before the prescribed seven-day acclimation period ended.
6. On October 8, 2010, Complainant's first-line supervisor forced her to provide a male investigator with one of Complainant's research animals, which Complainant needed for her study.
7. On December 28, 2010, Complainant learned that her first-line supervisor cancelled a university fellowship program because, Complainant believed, all the applicants were female.
8. On unspecified dates, management told Complainant that she was inflexible in her decision-making.
9. On approximately January 14, 2011, management called Complainant into a meeting with a Human Resources representative and told her that she would be issued a "contract of behavior" on an unspecified date.

10. After approximately January 14, 2011, management removed Complainant from her supervisory role, denied her request for additional supervisory training, and led her to believe that she should not be acting in a supervisory capacity.
11. On February 4, 2011, management prohibited Complainant from entering the Biocontainment area and required her to work from her desk because, “[Complainant is] mentally unstable” and “might forget to take a shower.”

On March 28, 2011, the Agency notified Complainant that it had accepted all eleven allegations for processing, and that she would be given notice of her right to request a final Agency decision or a hearing before an EEOC AJ. Investigative Report (IR) 53-55. On March 4, however, Complainant amended her complaint to include the following additional allegations:

12. On March 3, 2011, management issued Complainant a letter suspending Complainant's access to classified information and falsely implying that she has a traumatic brain injury or other neurological or psychological disability.
13. On March 3, 2011, management issued Complainant a Notice of Proposed Indefinite Suspension, without pay, pending final adjudication of her eligibility for access to classified information.
14. On March 3, 2011, management issued Complainant a Notice of Administrative Leave, with pay, effective immediately.

Complainant added reprisal as a basis in connection with allegations (12) through (14). In a second acceptance letter dated March 29, 2011, the Agency notified Complainant that it would accept these three additional allegations as an amendment to her original complaint. IR 57-58. Again, the Agency notified Complainant of her right to request a hearing before an EEOC AJ. On April 12, 2011, Complainant filed a second request to amend her complaint, to which she added the following additional allegation:

15. On March 23, 2011, management issued Complainant a Notice of Indefinite Suspension, without pay, effective April 3, 2011.

In a third acceptance letter dated May 13, 2011, the Agency notified Complainant that this amendment would be considered a mixed-case complaint based on disability discrimination and reprisal that would encompass allegations (12) and (15). In that notice, the Agency indicated that at the conclusion of the investigation, it would issue a final decision on the matter and would notify Complainant of her right to appeal that decision to the Merit Systems Protection Board (MSPB). The notice further provided that if Complainant believed that the accepted claim had not been correctly identified, she should contact the EEO office, in writing, within seven days of receiving the notice. IR 60-61.

On July 6, 2011, Complainant requested that her complaint be amended a fourth time to include the following incident:

16. On approximately July 6, 2011, Complainant's supervisor provided Complainant a negative reference in response to an inquiry from a prospective employer.

Supplemental Investigative Report (SIR) 1-3. In a fourth acceptance letter dated September 7, 2011, the Agency notified Complainant that it would accept allegation (16), and that a supplemental investigation would be completed. This notice did not include any references to any of Complainant's post-investigation rights before the MSPB or the EEOC. SIR 4.

The Agency conducted its initial investigation between May 3 and July 22, 2011, and its supplemental investigation between September 19 and October 28, 2011. On December 16, 2011, Complainant received both investigative reports and a notification that the Agency would subsequently issue a final decision. On December 29, 2011, Complainant objected to the designation of her complaint as a mixed-case complaint and requested a hearing before an EEOC AJ, filed as EEOC Hearing No. 520-2013-00324X.

On March 7, 2012, the Agency issued a final decision dated February 29, 2012, in which it found no discrimination on all sixteen allegations and notified Complainant of her right to appeal the Agency's final decision to the MSPB. The notice of appeal rights specifically stated that she could not file an appeal with the EEOC. Complainant filed an appeal with the MSPB on April 6, 2012, claiming that the final decision was improperly issued and that the Agency transformed her complaint into a mixed-case complaint against her will.

On August 6, 2013, in accordance with a joint motion filed by the parties, the MSPB AJ dismissed Complainant's appeal without prejudice until the EEOC AJ had determined whether or not he had the authority to hear the matter. On August 9, 2013, the Agency filed a motion to dismiss Complainant's request for a hearing before the EEOC. On September 27, 2013, the EEOC AJ granted that Agency's motion, finding that the Commission had no authority to hear the case due to the existence of the final Agency decision that the Agency had issued on March 7, 2012.

On October 17, 2013, Complainant re-filed her appeal of the indefinite suspension with the MSPB. On October 30, 2013, the Agency issued a final order dated October 28, 2013, in which it fully implemented the EEOC AJ's decision granting its motion to dismiss Complainant's hearing request. In its order, the Agency noted the EEOC AJ's acknowledgement that he had no authority to review a final Agency action, that the Complainant was given her MSPB appeal rights, and that Complainant had resubmitted her appeal of the March 7, 2012 final decision to the MSPB.

On November 26, 2013, Complainant filed the instant appeal. On December 26, 2013, the MSPB again dismissed Complainant's appeal of the indefinite suspension without prejudice.

The MSPB AJ instructed Complainant to re-file her appeal with the MSPB following the Commission's issuance of the instant appellate decision.

ANALYSIS AND FINDINGS

The fundamental problem in this case is the Agency's failure to separate Complainant's mixed case allegations from her non-mixed-case allegations when it issued its March 7, 2012 final decision on the merits. In situations involving complaints with mixed and non-mixed allegations, the Commission usually waits for the MSPB to decide whether to accept an allegation, and only if the Board declines to accept jurisdiction will the EEOC consider the matter. See EEO Management Directive 110, Chapt. 4, §B(2)(b) (August 5, 2015) (If the MSPB Administrative Judge finds that the MSPB does not have jurisdiction over the claim, the Agency shall recommence processing of the mixed case complaint as a non-mixed-case EEO complaint). Here, however, the MSPB deferred to the EEOC on this question, not once but twice, most recently in December 2013.

The MSPB generally does not have jurisdiction over non-appealable matters, even if they are connected with appealable matters. Complainant v. Inter-American Foundation, EEOC Appeal No. 0120132968 (January 8, 2014). The only exception is the situation in which a non-appealable matter is a proposed action that becomes final, in which case the proposal is said to "merge" with the final action. Wilson v. Dept. of Veterans Affairs, EEOC Appeal No. 0120122103 (Sept. 10, 2012). In this case, of the sixteen allegations comprising Complainant's claim, the only one appealable to the MSPB is allegation (15), the indefinite suspension. The proposed suspension at issue in Allegation (13) merges into the actual suspension referenced in allegation (15). None of the other allegations are appealable to the MSPB.

In the first two acceptance letters, dated March 28 and March 29, 2011, the Agency clearly stated that at the conclusion of the investigation, Complainant would be informed of her right to request a hearing before the EEOC on allegations (1) through (14).² The third acceptance letter, dated May 13, 2011, indicated that Complainant would be given MSPB appeal rights for allegations (12) and (15).³ Yet, inexplicably, the Agency issued a final decision in March 2012 that encompassed all sixteen allegations, both mixed and non-mixed. In so doing, the Agency prematurely cut off the processing of allegations (1) through (12), (14), and (16). What it should have done was to bifurcate the claim, notify Complainant of her right to request a hearing with an EEOC AJ on all of the non-mixed allegations, and issue a final decision with MSPB appeal rights **only** with respect to the indefinite suspension at issue in allegation (15).

² Because allegation (15) had not yet been accepted by the Agency, as of March 29, 2013, allegation (13) still concerned an unmerged proposal to suspend and therefore was not appealable to the MSPB at that time.

³ Including allegation (12) in the May 13th acceptance letter created additional confusion, since allegation (12) concerned a non-appealable matter.

Because the MSPB will not entertain non-appealable matters, allegations (1) through (12), (14), and (16) must be processed in accordance with 29 C.F.R. § 1614.109. We will enter an order directing the Agency to do so.

CONCLUSION

Based on a careful review of the record including Complainant's contentions on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES both the Agency's Final Decision dated February 29, 2012, and its Final Order dated October 28, 2013, and REMANDS Complaint No. HS-HQ-00372-2011 to the Agency to request assignment of an EEOC AJ in accordance with this decision and the Order below. The scope of the hearing request shall be limited to allegations (1) through (12), (14), and (16) enumerated above.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 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 (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0416)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. The requests may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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)

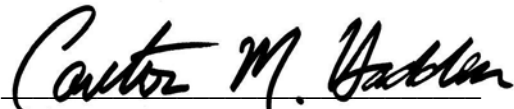
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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:

A handwritten signature in black ink, reading "Carlton M. Hadden". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

November 4, 2016
Date