



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

[REDACTED]
Lilian C.,¹
Complainant,

v.

James F. Bridenstine,
Administrator,
National Aeronautics and Space Administration
(Kennedy Space Center),
Agency.

Appeal No. 0120181917

Hearing No. 510-2017-00174X

Agency No. NCN-16-KSC-00021

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 5, 2018, 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. For the following reasons, the Commission VACATES in part the Agency's final order, and REMANDS the complaint for processing in accordance with our ORDER below.

ISSUE

The issue is whether the EEOC Administrative Judge (EEOC AJ) properly dismissed Complainant's complaint on the grounds that the Merit Systems Protection Board (MSPB) fully litigated the issues while reaching a determination on Complainant's subsequent removal claim.

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

At the time of events giving rise to this complaint, Complainant worked as an Engineer Program Management at the Agency's Exploration Research and Technology Programs Directorate in Kennedy Space Center, Florida. On March 4, 2016, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discriminatory harassment on the bases of race (African-American), and disability (physical), and in reprisal for prior protected EEO activity since 2014 when:

1. she received a poor performance evaluation for the 2014-2015 performance period;
2. her supervisor denied her reasonable accommodation request to telework;
3. she was placed on a fixed time and attendance schedule;
4. on April 22, 2014, she received a Letter of Instruction for use of leave;
5. on November 20, 2014, she received an Amended Letter of Instruction for frequent, unplanned absences; and
6. on January 6, 2016, she received a Letter of Reprimand for failure to follow supervisory instruction.

On May 10, 2016, the Agency removed Complainant, who then filed a mixed-case appeal with the MSPB on June 9, 2016. The MSPB Administrative Judge (MSPB AJ) conducted a hearing on January 19-20, 2017, and issued a decision on January 27, 2017, affirming the Agency's decision to remove Complainant. The MSPB AJ found that the Agency did not fail to reasonably accommodate Complainant and that there was no evidence of race or reprisal discrimination regarding her removal from the Agency.

At the conclusion of the EEO investigation, Complainant was provided a copy of the investigative file, and she requested a hearing before an EEOC AJ on January 26, 2017. On February 23, 2018, the EEOC AJ issued an Order of Dismissal stating that the issues in the instant complaint had been fully litigated in another forum, namely the MSPB. The EEOC AJ stated that, under the doctrine of collateral estoppel, once an issue is determined by a court of competent jurisdiction, that decision precludes re-litigation of the issue in a different cause of action. The EEOC AJ noted that the record reflected that Complainant raised the claims in the underlying EEO complaint as an affirmative defense to her removal in her MSPB appeal. The EEOC AJ stated that, when Complainant raised her affirmative defense, she was obligated to raise her remaining inextricably intertwined claims in that forum. The MSPB AJ found that Complainant did not establish that the Agency failed to provide a reasonable accommodation and that Complainant did not establish the affirmative defense of race or reprisal discrimination. As such, the EEOC AJ dismissed Complainant's complaint, with prejudice.

The Agency issued a final order fully implementing the EEOC AJ's decision.

CONTENTIONS ON APPEAL

Complainant, through her attorney, argues that the EEOC AJ erred because Complainant did not attempt to litigate the claims in the instant complaint before the MSPB. Complainant acknowledges that, while the MSPB AJ addressed her claim regarding a denial of a reasonable accommodation, none of the other issues in her EEO complaint were either raised, or addressed, in the MSPB decision. Additionally, Complainant argues that the MSPB did not have jurisdiction over her reasonable accommodation claim.

Regarding the argument that Complainant's claims were "inextricably intertwined" with her removal, Complainant asserts that she did not allege that the hostile work environment was the reason for her removal, or that it was related to the removal in any way. Complainant requests that the Commission reverse the Agency's final order and remand the matter back for a hearing.

In response, the Agency argues that Complainant's claim of discrimination and harassment has already been fully litigated as an affirmative defense in her MSPB appeal. For Complainant's claim that the Agency failed to provide a reasonable accommodation, the Agency argues that the MSPB can decide an issue of discrimination when it is a basis for an action which the employee may appeal to the Board. In this case, Complainant alleged that a lack of accommodation caused her to fail her performance improvement plan, which then led to her removal. As such, the MSPB had jurisdiction to make a determination regarding the affirmative defense of failure to provide a reasonable accommodation. The Agency requests that the Commission affirm its final order implementing the EEOC AJ's dismissal of Complainant's complaint.

ANALYSIS AND FINDINGS

As an initial matter, we note that the AJ stated that, under the doctrine of collateral estoppel, once an issue is determined by a court of competent jurisdiction, that decision precludes re-litigation of the issue in a different cause of action. The Commission has previously held that the doctrine of collateral estoppel is applicable to discrimination claims. See Fitz-Gerald v. Tenn. Valley Auth., EEOC Request No. 05910573 (Jan. 16, 1992). Also, in Magnallanes v. Dep't of Justice, EEOC Request No. 05900176 (July 13, 1990), the Commission noted that the doctrines of res judicata and collateral estoppel both fall within the *purview* of "res judicata," each concerning the preclusive effect of a prior adjudication. Bezelik v. Nat'l Sec. Agency, EEOC Request No. 05A11104 (May 8, 2003).

As explained by the Commission in Magnallanes, the first doctrine is res judicata itself, or claim preclusion. This approach provides that a final judgment on the merits bars further claims by the same parties based on the same claim or cause of action and issues relevant to that claim, treating the judgment as the full measure of relief to be accorded between the same parties. Under true res judicata, when the judgment is rendered for the defendant, the plaintiff's claim is extinguished, and the judgment then acts as a bar. Id.

The second doctrine under *res judicata* is collateral estoppel or issue preclusion. It recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. Thus, issue preclusion bars the re-litigation of issues actually adjudicated and necessary to the judgment in a prior litigation between the parties. *Id.*

Upon review, we find that the EEOC AJ properly dismissed Complainant's reasonable-accommodation claim but improperly dismissed Complainant's hostile work environment claim on the grounds that her complaint was fully litigated before the MSPB.

We find no persuasive evidence here that the MSPB AJ, either expressly or implicitly, assumed jurisdiction of Complainant's harassment claim. The MSPB AJ, in initially describing Complainant's appeal, stated that "[o]n June 9, 2016, [Complainant] filed this appeal from the agency's action removing her from the position of AST, Engineer Program Management, GS-0801-11, effective May 10, 2016. ... The action was based upon a charge that [Complainant's] performance was unacceptable in one or more critical elements of her position and was taken under 5 U.S.C. Chapter 43." This was the claim over which the MSPB found it had jurisdiction, pursuant to 5 U.S.C. § 4303(e) and 5 C.F.R. § 432.106(a).

Clearly, the MSPB AJ's decision addressed the question of whether Complainant's removal was the result of discriminatory animus because she raised this as an affirmative defense. Complainant argued that her removal was the result of discrimination due to a failure to accommodate and disparate treatment. The MSPB AJ found that Complainant was an individual with a disability, and that the Agency accommodated her by providing alternative work space in other buildings. Regarding Complainant's request to telework as a reasonable accommodation, the MSPB AJ found that the Agency did not fail to reasonably accommodate Complainant when it denied her request because she did not explain how telework would improve her performance. The MSPB AJ also determined that Complainant's race, disability, and prior EEO activity, were not factors in her removal from the Agency.

Complainant argued before the MSPB that her removal resulted from the Agency's failure to accommodate. We find that the failure-to-accommodate claim cannot be sensibly bifurcated from her removal claim, and that the MSPB AJ properly issued a determination on this claim. Complainant's reasonable-accommodation claim was adjudicated in the MSPB proceeding and necessary to the determination on her removal claim.

However, based on the totality of the record, we are not persuaded that Complainant's harassment claim was fully litigated and addressed by the MSPB AJ. We do not find that the MSPB assumed jurisdiction over Complainant's claim of a hostile work environment. We note that harassment is not an agency action over which the MSPB typically has jurisdiction, but that the MSPB may, in its discretion, consider harassment as it pertains to an involuntary (constructive) discharge or retirement. *See Thomas v. Dep't of the Army*, EEOC Appeal No. 0120082616 (Nov. 10, 2008). In this case, Complainant did not allege that her removal was a constructive discharge.

Further, we note that the Commission has long ago abandoned the doctrine of claims being “inextricably intertwined” because the MSPB generally does not have jurisdiction over non-appellable matters, even if they are related to appellable matters. See Complainant v. Dep’t of Health and Human Servs., EEOC Appeal No. 0120130459 (Aug. 28, 2014); Complainant v. Inter-American Foundation, EEOC Appeal No. 0120132968 (Jan. 8, 2014) (wherein the Commission essentially overturned the doctrine of inextricably intertwined).

A review of the MSPB AJ’s decision reveals that there is no mention of Complainant’s harassment claim. Because the instant complaint raises a cause of action distinct from the removal, i.e., a hostile work environment claim, we do not find that res judicata bars Complainant from prosecuting her harassment complaint. Further, because the MSPB AJ did not decide the harassment issues not related to the reasonable-accommodation claim, the doctrine of collateral estoppel does not bar Complainant from pursuing those issues. Accordingly, we will vacate the Agency’s final order adopting the EEOC AJ’s dismissal of Complainant’s harassment claim, and remand this claim, in accordance with the Order below.

CONCLUSION

We find that the EEOC AJ improperly dismissed Complainant’s harassment claim because it was not fully litigated by the MSPB; and that she properly dismissed Complainant’s failure to accommodate claim because it was fully litigated by the MSPB. Therefore, after a careful review of the record, including Complainant’s arguments on appeal, the Agency’s response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES in part the Agency’s final action, and remands the matter to the Agency in accordance with this decision and the ORDER below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC’s Miami District Office within thirty (30) 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 hold a hearing and issue a decision on the harassment claim or issue a decision without a hearing on the claim, 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 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

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. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request 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 agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). 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).

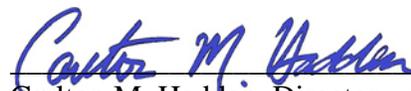
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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:



Carlton M. Hadden, Director
Office of Federal Operations

August 27, 2019
Date