



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

[REDACTED]
Judie D.,¹
Complainant,

v.

Kristine L. Svinicki,
Chairman,
Nuclear Regulatory Commission,
Agency.

Appeal No. 0120182763

Agency No. NRC-11-15

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final agency decision (FAD) by the Agency dated January 16, 2018, finding that it was in compliance with the terms of the settlement agreement into which the parties entered. See 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a General Engineer, GG-801-11, Step 2, at the Agency's Office of Nuclear Material Safety and Safeguards. Believing that the Agency subjected her to unlawful discrimination, Complainant contacted an Agency EEO Counselor to initiate the EEO complaint process. On October 18, 2012, Complainant and the Agency entered into a settlement agreement (SA) to resolve the matter. The settlement agreement provided, in pertinent part, that:

- (4) Complainant may teach one American Sign Language (ASL) course a year at the Professional Development Center (PDC).

By letter to the Agency dated December 11, 2017, Complainant alleged that the Agency was in breach of the SA and requested that the Agency specifically implement its terms. Specifically,

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.

Complainant alleged that the Agency failed to allow her to teach an ASL class in the 2017 calendar year.

In its January 16, 2018 FAD, the Agency concluded that it complied with the terms of the SA. It found that Complainant taught an ASL class each year from 2013 through 2016. In 2017, several attempts were made over several months to schedule a class for Complainant to teach. However, Complainant resigned from the Agency on October 17, 2017. Complainant notified the Agency's EEO office of the alleged breach on December 5, 2017. The Agency determined that Complainant's notification to the Agency was untimely pursuant to 29 C.F.R. § 1614.504(a). The Agency also stated in its FAD that even if Complainant's notice was not untimely, it found that no breach occurred. The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant states that she did not receive the Agency's January 16, 2018 FAD until July 5, 2018. In Complainant's August 4, 2018 appeal, she contends that term four of the settlement agreement was breached because she was told she required supervisor approval to teach the ASL class. Complainant said her first-line supervisor changed multiple times in 2017 and that the first supervisor she made the request to (S1), refused the request. Complainant states that the subsequent first-line supervisor (S2) never responded to her request and instead put Complainant on administrative leave. Complainant alleges that her notice of breach was timely because she continued to contact S1 for her appraisal until November 16, 2017. Complainant argues that she would have 30 days, as stated in the settlement agreement and 29 C.F.R. § 1614.504(a), from November 16, 2017. Finally, Complainant states that the Agency is in breach of term four because she was not permitted to teach an ASL class in 2017. She argues that she could have taught the ASL course in October 2017, however, she was placed on indefinite administrative leave on September 21, 2017.

In its brief in opposition to Complainant's appeal, the Agency argues that claim was untimely under the SA, that the Agency had not refused to allow Appellant to teach the ASL course, and that intervening events had made it impossible for the Agency to continue to allow Complainant to teach ASL at the Agency, given her proposed removal and subsequent resignation. It urged the Commission to affirm its determination of no breach.

ANALYSIS

Initially we note that Complainant was required to appeal the Agency's January 16, 2018 FAD within 30 days of receipt. The Agency's FAD is dated January 16, 2018 with a presumed delivery date of January 21, 2018. Complainant did not appeal the FAD until August 4, 2018, which considerably more than 30 days after the presumed date of delivery. However, given Complainant's claim that she did not receive the FAD until July 5, 2018, we will deem her appeal to be timely filed.

EEOC Regulation 29 C.F.R. § 1614.504(a) provides that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. The Commission has held that a settlement agreement constitutes a contract between the employee and the Agency, to which ordinary rules of contract construction apply. See Herrington v. Dep't of Def., EEOC Request No. 05960032 (December 9, 1996). The Commission has further held that it is the intent of the parties as expressed in the contract, not some unexpressed intention, that controls the contract's construction. Eggleston v. Dep't of Veterans Affairs, EEOC Request No. 05900795 (August 23, 1990). In ascertaining the intent of the parties with regard to the terms of a settlement agreement, the Commission has generally relied on the plain meaning rule. See Hyon O v. U.S. Postal Serv., EEOC Request No. 05910787 (December 2, 1991). This rule states that if the writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. See Montgomery Elevator Co. v. Building Eng'g Servs. Co., 730 F.2d 377 (5th Cir. 1984). Additionally, 29 C.F.R. § 1614.504(a) requires that if the complainant believes that the agency has failed to comply with the terms of a settlement agreement or decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance.

In the instant case, Complainant resigned from the Agency on October 17, 2017; therefore, Complainant knew or should have known as of October 17, 2017 that she would not be teaching an ASL class in 2017.² Complainant's inability to teach the ASL class was the triggering event for her alleged breach of settlement agreement. Therefore, Complainant had 30 days from October 17, 2017 to inform the Agency's EEO office, in writing, of the alleged breach. Instead, Complainant did not contact the EEO office in writing until December 5, 2017, which was 50 days after she no longer could have taught the ASL class. Complainant was required to give notice to the Agency's EEO counselor of the alleged breach of the settlement agreement within 30 days.

Complainant's contact with the Agency's EEO counselor was untimely, nevertheless the Agency addressed the alleged breach of settlement in its FAD, and the Commission agrees with the Agency's evaluation of the matter and does not find a breach of settlement. Ongoing attempts were made from May through September 2017 to schedule an ASL class for Complainant to teach. It was Complainant who continued to push back the date or failed to respond to inquiries about teaching the course until eventually the window in which that could occur closed on September 21, 2017, when Complainant was placed on administrative leave and denied unescorted building access for assaulting a coworker.

² Complainant states that she resigned on October 3, 2017 and provides an email. However, the email does not make it clear that she is resigning as of October 3, 2017. The email instead states that if certain actions are not taken within two weeks that Complainant views the lack of action as constructive discharge. The Agency's FAD uses October 17, 2017 as the date that Complainant resigned. We will use the latter of the two dates, as that gives Complainant more time to have notified the Agency of the alleged breach of settlement agreement.

Following a notice of proposed removal, she resigned from the Agency on October 17, 2017. We find that her resignation from the Agency terminated the Agency's obligation under the SA to allow Complainant to teach an ASL course in 2017.

CONCLUSION

The Commission AFFIRMS the Agency's finding that Complainant's contact alleging breach of the SA was untimely, and that the Agency was not in breach of the terms of the settlement agreement.

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 (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

September 30, 2019

Date