



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

[REDACTED]
Brandee B.,¹
Complainant,

v.

Sonny Perdue,
Secretary,
Department of Agriculture
(Rural Development),
Agency.

Appeal No. 2019000663

Agency No. RD201601038

DECISION

On October 17, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated September 7, 2018, concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Loan Specialist (Realty) GS-1165-09 at the Agency's United States Department of Agriculture (USDA), Rural Development (RD) facility in Springfield, Missouri.

On December 5, 2016, Complainant filed an EEO complaint, as amended, alleging that the Agency subjected her to discrimination on the bases of sex (female), age (60), and reprisal for prior protected EEO activity when:

1. On September 14, 2016, management informed her she would be either downgraded, moved or dismissed due to her failure of her 120 days "Opportunity

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.

to Improve (OTI)” plan, which prompted her to resign from her GS-1165-09, Loan Specialist position and retire from Federal Service, effective September 30, 2016; and

2. On several dates, she was subjected to various acts of harassment, including, but not limited to:
 - i. Since 2007, the State Office Director subjected her to various acts of harassment and bullying; and
 - ii. Since fall 2015, management delayed its response to her questions, provided her incorrect answers, and required all her work to be reviewed before final action.

Following an investigation of her complaint, Complainant requested a hearing before an EEOC Administrative Judge (AJ).

On August 6, 2018, the AJ dismissed Complainant’s request for a hearing. The AJ reasoned that Complainant’s complaint involved an issue – constructive discharge – which was appealable to the Merit Systems Protection Board (MSPB), and hence her case should be before the MSPB. 29 CFR § 1614.302. The AJ ordered the Agency to issue a FAD with appeal rights to the MSPB. The AJ directed that in the event that the MSPB rules that it lacks jurisdiction over this matter, Complainant would have 30 calendar days from receiving notice of said determination from the MSPB to refile her request for a hearing before the EEOC.

On September 7, 2018, the Agency issued a FAD finding Complainant failed to prove discrimination on issues 1 and 2, with appeal rights to the EEOC, not the MSPB, as ordered. The instant appeal followed.

Meanwhile, on October 15, 2018, Complainant filed an appeal with the MSPB alleging that she was constructively discharged. The MSPB issued an initial decision dismissing the appeal for lack of jurisdiction on November 27, 2018. The MSPB found that Complainant failed to show that her retirement was involuntary. We take administrative notice that Complainant did not file a petition for review to the Board, and the initial decision became final on January 1, 2019.

In her appellate argument to the EEOC, made before the MSPB dismissed her MSPB appeal for lack of jurisdiction, Complainant argued that except for her constructive discharge claim, her EEO complaint should be allowed to proceed in the EEOC hearings process. On appeal, the Agency, which made its argument after the MSPB issued its initial decision, but before it became final, argued that Complainant may refile her request for a hearing before the EEOC on all her claims within 30 calendar days after the MSPB’s initial decision becomes final.

ANALYSIS AND FINDINGS

A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the MSPB. 20 C.F.R. § 1614.302(a)(1). If the MSPB's administrative judge finds that the MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint. 20 C.F.R. § 1614.302(c)(2)(ii). Such is the case here. The plain language of the regulation places the onus on the *Agency* to recommence processing of the mixed case complaint as a non-mixed case EEO complaint if the MSPB administrative judge finds that MSPB does not have jurisdiction over the matter.

In its FAD, the Agency's EEO office erred by giving Complainant appeal rights to the EEOC, instead of MSPB, confusing matters. Complainant's 30-day window to file an appeal after the MSPB's decision became final is hereby tolled. The Agency shall file a request for hearing on behalf of Complainant and it shall be deemed timely.

CONCLUSION

Accordingly, the Agency's September 7, 2018 final decision on the merits of the complaint is VACATED and the matter is REMANDED to the Agency pursuant to the following Order.

ORDER

Within thirty (30) calendar days of the date this decision was issued, the Agency shall submit a renewed request a hearing on behalf of Complainant with the appropriate EEOC Hearings Unit, which shall deem the hearing request to be timely made. With the hearing request, the Agency shall provide the complete complaint file, as well as a copy of this appellate decision.

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

October 10, 2019

Date