



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

[REDACTED]
Jaleesa P.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019001777

Agency No. 2003-0549-2018105307

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated December 11, 2018, dismissing her complaint of unlawful 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Employee and Labor Relations Specialist, GS-12 at the Agency's Dallas VAMC facility in Dallas, Texas.

On October 25, 2018, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Black), age, and reprisal for prior protected EEO activity, raising nine events of alleged discrimination relating to a hostile work environment, occurring between February 19, 2017 and October 22, 2018, the day Complainant was removed from federal service.

The Agency dismissed the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1). In so doing, the Agency noted that, on July 25, 2018, Complainant and the

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.

Agency executed a “Last Chance Agreement” in which the Agency agreed to an abeyance of Complainant’s removal from Federal service for 24 months and Complainant waived her rights to civil and administrative appeal and grievance procedures relating to this matter, including EEOC appeals. The Agency also noted that, in October 2018, Complainant’s removal was reinstated due to her violation of the Last Chance Agreement and found that Complainant’s allegations in the instant complaint are specifically addressed and/or identified in the Proposed Removal, Removal Decision-Abeyance Letter, Last Chance Agreement, and Removal Notice and/or are inextricably intertwined with the charges and provisions contained within those documents.

The instant appeal followed.

ANALYSIS AND FINDINGS

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). When the complainant does not allege he or she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

On appeal, Complainant describes ongoing harassment and discrimination, beginning in the fall of 2016 through October 2018. She alleges that she first made contact with an EEO counselor in August 2017. She notes that in November 2018, she was reinstated with back pay, but the Agency has not expunged her record or removed her “flawed performance appraisal.” She alleges the Agency subjected her to disparate treatment, adverse impact to her employment, and other damages.

In response, the Agency asserts that Complainant waived any potential claims, including such as the instant complaint, she may have had arising out of her employment with the Agency prior to the date of the Last Chance Agreement. The Agency reiterates its findings in its final decision and asks that we affirm it.

At the onset, we find that the Agency properly dismissed the whistleblowing basis of Complainant’s allegations, pursuant to 29 C.F.R. § 1614.107(a)(1), as this does not fall within the purview of the EEO complaint process.

As concerning her age discrimination claims, the Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against individuals age 40 and older because of age. 29 U.S.C. § 623(a). In 1990, Congress amended the statute by passing the Older Workers Benefit Protection Act (OWBPA). OWBPA § 201, 104 Stat. 983. As the Supreme Court has

pointed out, the purpose of the statute is “clear from its title.” Oubre v. Entergy Ops., 522 U.S. 422, 427 (1998). It was “designed to protect the rights and benefits of older workers ... via a strict, unqualified statutory stricture on waivers.” Id.; see also S. Rep. No. 263, 101st Cong., 2d Sess. 31 (1990) (Senate Report) (stating that “the Committee intends that the requirements of [the statute] be strictly interpreted to protect those individuals covered by the Act”), reprinted at 1990 U.S.C.C.A.N. 1509, 1537. In essence, “[t]he OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications.” Oubre, at 427.

In keeping with this purpose, the OWBPA provides that an individual “may not waive” an ADEA claim “unless the waiver is knowing and voluntary.” 29 U.S.C. § 626(f)(1). However, unlike non-age claim waivers, the OWBPA explicitly defines “knowing and voluntary” through a list of required actions that must be undertaken before waiving age claims. Thus, the OWBPA “sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law’s generalized requirements.” Oubre, 522 U.S. at 427. Specifically, the statute explains that waivers “may not be considered knowing and voluntary” unless, “at a minimum,” they satisfy enumerated requirements found at 29 U.S.C. § 626(f)(1)(A)-(G).

The requirements for waiver/release of ADEA claims are:

- A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
- B) the waiver specifically refers to rights or claims arising under this Act;
- C) the individual does not waive rights or claims after the date the waiver is executed;
- D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled;
- E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
- F) (i) the individual was given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; and
- G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

29 U.S.C. § 626(f)(1)(A)-(G).

The Commission has held that OWBPA waiver requirements apply to age discrimination claims that had not yet been filed at the time a waiver/release was executed. Hester S. v. EEOC, EEOC Appeal No. 0120121983 (Oct. 24, 2016). Thus, although Complainant’s formal complaint was filed after the waiver was executed, the waiver at issue here must comply with the requirements

of the OWBPA to validly waive age claims involving matters that occurred before the execution of the agreement.

Applying OWBPA's requirements to this waiver, we note that the waiver fails to meet the requirement of specifically referring to rights or claims arising under the ADEA. Additionally, the waiver does not state that Complainant was advised in writing to consult with an attorney prior to executing the agreement. The agreement also does not state that Complainant was given adequate time to consider the agreement, or advised her that she had at least seven days to revoke the agreement. Therefore, all OWBPA requirements were not met in this case. As such, we find that the waiver does not constitute a valid waiver of Complainant's age discrimination claims. See Daniels v. U.S. Postal Serv., EEOC Appeal No. 0120103252 (May 31, 2012) (agreement purporting settlement of age claim void where it did not mention Complainant's rights or claims under the ADEA, there was no indication that he was advised in writing to consult with an attorney, there was no indication that he was given a reasonable period of time in which to consider the agreement, and it did not state that complainant had seven days to revoke the agreement after he signed the agreement); see also Oubre, 522 U.S. at 428 (failure to comply with the OWBPA's stringent waiver safeguards will void the settlement agreement only with regard to the ADEA claims); Sheehy v. National Security Agency, EEOC Request No. 0520100403 (Feb. 27, 2012). Therefore, we find that Complainant's age-based claims of ongoing harassment and discrimination were improperly dismissed as relating to the Last Chance Agreement.

In addition, while we find that Complainant waived her claim as to harassment due to race up to the Last Chance Agreement, to the extent that she alleges the race-based harassment continued after the execution of the Last Chance Agreement, we find this claim was also improperly dismissed.

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The complaint is hereby REMANDED to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

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)

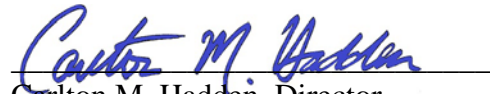
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 14, 2019

Date