



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

[REDACTED]  
Teresa D.,<sup>1</sup>  
Complainant,

v.

Robert Wilkie,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2019002187

Agency No. 200P06482011103963

**DECISION**

On February 20, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) concerning a purported Agency breach of an April 23, 2014 settlement agreement. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.402; 29 C.F.R. § 1614.504(b); and 29 C.F.R. § 1614.405.

**BACKGROUND**

During the relevant time, Complainant worked as a Program Support Assistant, GS-7, at the Agency's Portland VA Healthcare System facility in Vancouver, Washington.

Believing that she was subjected to discrimination based on disability, Complainant filed a formal complaint in August 2011<sup>2</sup>. The parties resolved the matter by executing a settlement agreement on April 23, 2014. The agreement provided, in relevant part:

1. As of the date of execution of this Agreement and for the remainder of Complainant's employment with the Agency, Complainant shall be allowed the use of a service animal as a reasonable accommodation; and,

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<sup>1</sup> 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.

<sup>2</sup> Agency Case No. 200P-0648-2011103963.

2. For the duration of Complainant's employment as a Program Specialist Assistant in FMS [Facilities Management Services]:
  - a. The Agency shall code Complainant's tour of duty to a Compressed Work Schedule (CWS), wherein each pay period she will work eight 9-hours days, one 8-hour day, and will have one day off. Complainant must work with her supervisor to complete a written CWS agreement regarding the details/expectations of this schedule, the details of which are subject to modification by mutual written agreement. The Agency shall code this change within a week of execution of this Agreement; and
  - b. The Agency shall authorize Complainant to utilize a flexible telework schedule whereby she can telework up to two days per week. Complainant may begin teleworking within two weeks of completing a telework agreement and must work with her supervisor regarding the details/expectations of telework, the details of which are subject to modifications by mutual written agreement. In the event Complainant's preexisting personal equipment does not meet the specifications to enable her to telework, the Agency shall reimburse Complainant up to \$1,000 within two weeks for the costs of purchasing equipment compatible with the Agency's telework system

On May 13, 2014, Complainant and her then-supervisor (hereafter "Supervisor-V") created a telework agreement in accordance with the settlement agreement. In approximately January 2016, Supervisor-V was promoted and a new individual ("Supervisor-H") became Complainant's supervisor. In September 2016, Supervisor-H began making changes to Complainant's telework agreement. Additional changes were made in October and November 2016. Believing that the modifications to the telework agreement, as well as other actions by Supervisor-H, were discriminatory and created a hostile work environment, Complainant filed an EEO complaint on August 1, 2017. Specifically, Complainant addressed the following matters:

1. Supervisor-H continues to "make changes to my reasonable accommodations even though I keep reminding her that the telework agreement and equipment came through an EEO [settlement] May 13, 2014 . . ."
2. Supervisor-H does not arrange for staff to cover my position on my days off.
3. Supervisor-H harasses me regarding my leave; and,
4. Supervisor-H blames her mistakes on me.

On October 13, 2017, the Agency issued a “Notice of Partial Acceptance.” Specifically, the Agency accepted for investigation claims (2) through (4), as a claim of hostile work environment. The Agency, however, deemed the telework issue as a possible breach of the April 23, 2014 settlement agreement. The Agency therefore advised Complainant file a new, separate allegation of breach with the Agency if she wanted to pursue the matter. Complainant did so, on January 31, 2018.

Complainant filed the instant appeal, on February 20, 2019, contending that the Agency has yet to issue a determination on her breach allegation. The instant record does not contain an Agency final decision, nor correspondence, addressing the breach claims. EEOC Regulations provide that where an Agency has not responded to a complainant’s written breach allegation, within thirty-five days of receipt, the complainant may file an appeal with the Commission. 29 C.F.R. § 1614.504 (b). Therefore, we shall consider herein whether the settlement has been breached.

#### ANALYSIS AND FINDINGS

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 (Dec. 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 (Aug. 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. United States Postal Serv., EEOC Request No. 05910787 (Dec. 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); Complainant v. United States Postal Serv., EEOC Appeal No. 0120140143 (Feb. 20, 2014).

As an initial matter, we note that throughout the record the telework agreement is referred to as a “reasonable accommodation”. For example, in the August 1, 2017 formal complaint, Complainant alleges that Supervisor-H “continued to make changes to my reasonable accommodations”. On appeal, Complainant explains that the agreement terms “provided [her] with a reasonable accommodation for her disabilities<sup>3</sup>.” Moreover, in all three versions of the “Telework Request/Agreement” (VA Form 0740) contained in the record, “Section VI – Disability and Medical Conditions”, which provides for three choices (“Not Applicable”,

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<sup>3</sup> Complainant has identified her disabilities as Multiple Sclerosis (MS), Post-Traumatic Stress Disorder (PTSD), and Major Depressive Disorder.

“Qualified Disability”, and “Temporary Disability/Temporary Medical Reasons”), has “Qualified Disability” as marked. The designation is plainly defined as: “The employee is using telework as a reasonable accommodation for a qualified disability.” As for the settlement agreement language itself, the provision immediately preceding (2)(b) states: “Complainant shall be allowed the use of a service animal as a *reasonable accommodation*; and . . . .” While we acknowledge that provision (2)(b) does not specifically cite the term “reasonable accommodation,” the documents used to execute the Agency’s obligations under the agreement reflect that telework was being provided to accommodate Complainant’s disabilities. As such, we find that provision (2)(b) is void for lack of consideration.

Generally, the adequacy or fairness of the consideration in a settlement agreement is not at issue, as long as some legal detriment is incurred as part of the bargain. However, when one of the contracting parties incurs no legal detriment, the settlement agreement will be set aside for lack of consideration. See MacNair v. U.S. Postal Service, EEOC Appeal No. 01964653 (July 1, 1997); Juhola v. Department of the Army, EEOC Appeal No. 01934032 (June 30, 1994) (citing Terracina v. Department of Health and Human Services, EEOC Request No. 05910888 (March 11, 1992)). Where an Agency is not required to do anything more than that it was already legally obligated to do, the provision will be voided for lack of consideration. See Steinmetz v. United States Postal Service, EEOC Appeal No. 01A34038 (Nov. 21, 2003)(settlement provision requiring the Agency to maintain complainant’s EEO file in a confidential manner was void for lack of consideration).

Here, Complainant alleges the agreement was violated when her ability to telework, “as needed dictated by health” and as a “reasonable accommodation,” was curtailed. Provision (2)(b) simply obligates the Agency to provide Complainant with a reasonable accommodation, of occasional telework, as it is already required to do under the law.<sup>4</sup> See Complainant v. United States Postal Service, EEOC Appeal No. 2019002659 (July 19, 2019)(settlement provision obligating Agency to “accommodate” Complainant to only eight hours based upon her “current medical documentation” voided for lack of consideration). Since there was consideration exchange through the other provisions, we shall not void the entire agreement but rather reform it without the terms of provisions (1) and (2).

As noted above, Complainant indeed initially raised the modifications to her telework as part of a *new* complaint of harassment. We note further that the Agency instead instructed Complainant to raise the issue as an allegation of breach. To address Complainant’s allegations (i.e. that Supervisor-H denied her an effective reasonable accommodation, and subjected her to harassment, when she repeatedly modified/reduced Complainant’s telework agreement), the

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<sup>4</sup> Agencies are required to provide a reasonable accommodation for the known physical and mental limitations of a qualified individual with a disability, absent undue hardship. 29 C.F.R. 1630.2(o); 29 C.F.R. 1630.2(p); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002).

matter shall be remanded to the Agency for further processing as a new complaint of discrimination.

### CONCLUSION

Complainant's claim regarding the denial of a reasonable accommodation (as defined herein) is REMANDED to the Agency for further processing in accordance with the ORDER below.

### ORDER (E1016)

The Agency is ordered to process the remanded claims (Supervisor-H denied her an effective reasonable accommodation, and subjected her to harassment, when she repeatedly modified/reduced Complainant's telework agreement) in accordance with 29 C.F.R. § 1614.108. 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.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

### 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

August 13, 2019

Date