

NOTICE TO APPLICANTS AND EMPLOYEES POSTED BY ORDER OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This Notice is posted pursuant to an order by the United States Equal Employment Opportunity Commission dated November 8, 2023 which found that the Defense Contract Audit Agency, Department of Defense, did not comply with the Commission's regulations in 29 Code of Federal Regulations Part 1614.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, GENETIC INFORMATION, or DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment. The Defense Contract Audit Agency, Department of Defense, confirms its commitment to comply with these statutory provisions.

The Defense Contract Audit Agency, Department of Defense, supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

A decision fully in favor of an employee was issued as a sanction because the Defense Contract Audit Agency, Department of Defense, failed to timely process and investigate an EEO complaint. The Defense Contract Audit Agency, Department of Defense, has been ordered to post this Notice and provide training regarding complaint processing and timely investigations. The Defense Contract Audit Agency, Department of Defense, will ensure that officials responsible for processing EEO complaints will abide by the requirements of all Federal Equal Employment Opportunity laws and regulations.

The Defense Contract Audit Agency, Department of Defense, will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal Equal Employment Opportunity law.

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Date: 2023.12.06 15:01:44 -05'00'

Terri L. Dilly, Director

Date Posted: 12/8/23

Posting Expires 60 Days from the Date Posted



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

[REDACTED]

Verlie S.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Contract Audit Agency),
Agency.

Request No. 2023003234

Appeal No. 2022000512

Hearing No. 530-2016-00366X

Agency No. MA-16-001

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Verlie S. v. Department of Defense, EEOC Appeal No. 2022000512 (Apr. 6, 2023). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

Complainant, a GS-12 Senior Auditor for the Agency's Mid-Atlantic Region at its Pittsburgh Branch Office in Pennsylvania, filed an EEO complaint in which she alleged that the Agency discriminated against her on the bases of disability (multiple chemical sensitivity (MCS)) and in reprisal for prior protected EEO activity by admonishing her about teleworking, issuing her a performance appraisal rating of "Unacceptable," placing her on a performance improvement plan,

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.

and failing to determine whether or not she needed a reasonable accommodation. Following an investigation, the case was heard by an EEOC Administrative Judge (AJ) who issued a decision finding that Complainant failed to prove that the Agency subjected her to unlawful discrimination. The Agency thereafter issued its final order implementing the AJ's decision and Complainant appealed.

In the appellate decision, the Commission reversed the AJ's decision and remanded the matter for remedial relief. We found that Complainant was a qualified individual with a disability and was consequently entitled to a reasonable accommodation, and that the Agency failed to demonstrate that allowing Complainant to telework, as she had done prior to the arrival of the Supervisor and Branch Manager, would have imposed an undue hardship upon its operations. With respect to Complainant's performance evaluation, we found that the reasons given for her overall rating of "Unsuccessful" and the performance improvement plan resulting therefrom were unsupported by the evidentiary record and were therefore pretext for discrimination.

In its request for reconsideration, the Agency argues, among other things, that the claims pertaining to Complainant's appraisal and performance improvement plan were untimely and were merely preliminary steps to personnel actions. Further, the Agency contends that, in our previous decision, we failed to properly apply the disparate treatment analysis or give sufficient credit to its legitimate and nondiscriminatory explanations for its actions. Finally, the Agency argues that we erroneously interpreted the Rehabilitation Act in finding that Complainant was entitled to a reasonable accommodation.

A request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9 § VI.A (Aug. 5, 2015); Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. Everette C. v. Soc. Sec. Admin., EEOC Request No. 2022004905 (Aug. 10, 2023). The Agency has not done so here. Instead, the Agency is attempting to relitigate the appeal on its merits by raising contentions that were either already considered and rejected or raising new arguments for the first time on reconsideration.²

We note in particular the Agency's argument that a supplemental investigation into compensatory damages is not warranted because it made a good faith but ultimately unsuccessful effort to provide Complainant with a reasonable accommodation. The Commission has held that an agency is not liable for compensatory damages where it engaged in good faith efforts to provide a reasonable accommodation but had fallen short of what was legally required. Cyrus H. v. Dep't of Homeland Security, EEOC Appeal No. 2022000047 (June 15, 2023).

² The Commission has long held that arguments or evidence presented for the first time in a request for reconsideration cannot be considered. Winfred H. v. Dep't of Veterans Affairs, EEOC Request No. 2023002441 (Sept. 5, 2023).

On the other hand, where an agency has failed to provide a reasonable accommodation, compensatory damages may be awarded if the agency fails to demonstrate that it made a good faith effort to provide the individual with a reasonable accommodation for her disability. Gaynell A. v. Dep't of Defense, EEOC Appeal No. 2021005236 (Feb. 8, 2023).

Here, the Agency asserts that it made extensive efforts to accommodate Complainant's disability, including allowing her to take leave or work from home *within limits* (emphasis added), and exploring whether to allow her to work in a private office or at a contractor's worksite. However, as discussed in the appellate decision, the Supervisor admitted that there were no limits on working remotely in the Agency's telework policy and that Complainant's working remotely would not impose an undue hardship. The Supervisor also admitted that Complainant's symptoms would be triggered even if she was working in a private office or at a contractor's worksite. In light of the Supervisor's admissions, we find that the Agency was well aware that unlimited telework was the only viable accommodation given the severity of her allergies. Thus, in not allowing Complainant the telework schedule that she asked for, the Agency failed to demonstrate that it undertook a good faith effort to provide her with a reasonable accommodation. Ultimately, we conclude that the Agency has not presented enough evidence to support reconsideration of the Commission's previous decision.

After reviewing the Agency's request for reconsideration, the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 2022000512 remains the Commission's final decision in this matter. There is no further right of administrative appeal on the decision of the Commission on this request. To the extent that it has not already done so, the Agency shall comply with the order set forth below.

ORDER

Within sixty (60) calendar days from the date this decision is issued, unless another time frame is indicated below, the Agency shall take the following remedial actions:

1. Conduct a supplemental investigation of Complainant's entitlement to compensatory damages. Complainant shall cooperate in the Agency's efforts to determine the amount of compensatory damages due and shall provide all relevant information requested by the Agency. Within sixty (60) days of the completion of the supplemental investigation, the Agency shall issue a final decision, pursuant to 29 C.F.R. § 1614.110(b), addressing the issue of compensatory damages.
2. The Agency shall provide eight (8) hours of EEO training to the individuals identified in the previous decision as Supervisor and Branch Manager with a focus on their obligations under the Rehabilitation Act. If either of these individuals has left the Agency's employ, the Agency shall furnish documentation of their departure dates.

3. The Agency shall consider taking disciplinary action against Supervisor and Branch Manager identified as being responsible for the unlawful discrimination perpetrated in this case. The Commission does not consider training to be a disciplinary action. The Agency shall report its decision to the Commission. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If either of these individuals has left the Agency's employ, the Agency shall furnish documentation of their departure dates.
4. The Agency shall post copies of the attached notice in accordance with the statement entitled "Posting Order."
5. Within ninety (90) calendar days of the issuance of this decision, Agency shall pay Complainant reasonable attorney's fees as set forth in the paragraph below entitled "Attorney's Fees."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Pittsburgh Branch Office copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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 C.F.R. § 1614.503(f) for enforcement by that agency.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (P0610)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. 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.

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

November 8, 2023
Date