



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

[REDACTED]
Evelina M.,¹
Complainant,

v.

Matthew G. Whitaker,
Acting Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 0120171018
Hearing No. 510-2014-00160X
Agency No. BOP20130246

DECISION

On Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's April 4, 2017, final decision concerning her equal employment opportunity (EEO) complaint alleging 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. For the following reasons, the Commission AFFIRMS the Agency's final decision.

ISSUES PRESENTED

1. Whether the Agency's final decision (FAD) correctly found that Complainant failed to establish that she was subjected to discrimination based on reprisal (prior EEO activity) when on or about December 31, 2012, she was informed that her contract position with Bureau of Prisons (BOP) was not going to be renewed.
2. Whether the Agency should be sanctioned for issuing its FAD in an untimely manner without providing a good cause.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Contract Medical Assistant employed by a private contract health care provider (the Company) working at the Agency's Federal Correctional Institution facility located in Miami, Florida (FCI-Miami). On February 8, 2013, Complainant filed an EEO complaint alleging that the Agency discriminated against her:

1. On the basis of sex (female) when beginning in approximately March 2012, she was subjected to a harassing work environment; and
2. In reprisal for raising the allegations set forth in claim 1, when on or about December 31, 2012, she was informed that her contract position with BOP was not going to be renewed.

In its FAD, the Agency found that Complainant failed to establish that she was subjected to harassment based on her sex; and that Complainant was not subjected to retaliation as alleged. Rather, the Agency argued that her contract was not renewed because her Medical Assistant contract expired and could not have legally been renewed after December 31, 2012.

Complainant stated that the Acting Health Services Administrator (S1), a coworker (the Nurse), and the Medical Director (S2) treated her disrespectfully, gave her conflicting work instructions, and treated her inappropriately in front of other employees. Complainant stated that she complained orally and in two memoranda to S1, one of which was to the Supervisory Contract Specialist through S1, about the Nurse's conduct towards her. Complainant also alleged that the Agency intentionally terminated the Medical Assistant contract with the Company in retaliation against her for reporting the harassment. She claimed that S1 had told her that the Nurse would be completing the paperwork for the renewal of her contract in approximately October 2012; and that the contract was going to be renewed in either November or early December 2012.

Complainant stated that, on December 27, 2012, the Company's Project Director (S3) told her he received an e-mail from S1 stating that the contract with Seaborn was not being renewed. She stated that S3 told her that S1 made negative comments about her performance, including that she did not perform certain requested tasks such as drawing blood, and assisting with wound care and dressing changes. Complainant stated that S1's statements were false, noting that S1 had issued her an evaluation with all "Superior" ratings in February 2012.

S1 stated that the non-renewal of the Medical Assistant contract had nothing to do with Complainant's allegations of harassment but was based on S2's determination that he did not need Complainant's services any longer, and that S1 was not involved in the determination. S1 stated that he may have told S3 that there were concerns regarding Complainant's performance, noting that S2 had indicated that her performance was "lacking in professionalism and understanding of the duties." He added that the contract was terminated for two reasons – S2's belief that he could do the job himself, and concerns regarding Complainant's performance.

S3 stated that S1 had alluded to the fact that Complainant refused to perform certain duties, but he added he had no reason to believe Complainant's performance had anything to do with the non-renewal of the contract. S3 stated that Complainant's employment was terminated on December 31, 2012, after the contract between the Company and the Agency was not renewed upon reaching its maximum duration. He added that the contract "ran its course and could not be renewed by law". The Agency noted that the contract had already been extended once and was scheduled to expire in December 2012.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge. Complainant timely requested a hearing but subsequently withdrew her request. On March 23, 2017, 197 days after her request for a FAD, Complainant filed a premature appeal with the Commission and moved for sanctions against the Agency for failure to timely issue a FAD on her allegations. As a sanction, Complainant sought a default judgment against the Agency with the amount of damages and other remedies to be determined. On April 4, 2017, the Agency issued its FAD, i.e., 294 days after Complainant withdrew her hearing request and asked for a final decision. The FAD concluded that Complainant failed to prove that the Agency subjected her to discrimination with respect to claims 1 and 2.

CONTENTIONS ON APPEAL

Complainant indicates that she accepts the Agency's conclusions regarding claim 1, her harassment claim, and that her appeal is limited only to claim 2. Therefore, this decision will only address claim 2. Complainant contends that the Agency erred in finding that she was not subjected to an adverse action when her contract was not renewed, nor subjected to discrimination based on reprisal. She also maintains that the Agency's FAD limited her reprisal claim to her contract not being renewed but did not consider other matters like: 1) her duties being changed, 2) her being assigned to another job, 3) her being treated unprofessionally by colleagues, and 4) her reports to her supervisors not being forwarded to S1. Furthermore, she argues that the Agency provided "shifting reasons" for the nonrenewal of her contract which she believes shows pretext.

The Agency asserts, in pertinent part, that Complainant's argument does not warrant the reversal of its FAD.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

Disparate Treatment Claim

In the absence of direct evidence of discrimination, the allocation of burdens and order of presentation of proof in a Title VII cases alleging discrimination is a three-step process. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); see Hochstadt v. Worcestor Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1976), aff'd 545 F.2d 222 (1st Cir. 1976) (applying McDonnell Douglas to retaliation cases). First, Complainant must establish a prima facie case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination; i.e., that a prohibited consideration was a factor in the adverse employment action. McDonnell Douglas, 411 U.S. at 802. Next, the Agency must articulate a legitimate, nondiscriminatory reason(s) for its actions. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If the Agency is successful, then Complainant must prove, by a preponderance of the evidence, that the legitimate reason(s) proffered by the agency was a pretext for discrimination. Id. at 256.

Assuming, arguendo, Complainant established a prima facie case of reprisal; we find that the Agency articulated legitimate, nondiscriminatory reasons for its actions. B1, the Agency's Supervisory Contract Specialist, stated that Complainant's contract had reached its maximum duration, and could not be renewed. B1 testified that the contract was for one (1) base year; that it had been granted four (4) option years; and a six (6) month extension. After the contract expired, B1 stated that there was nothing more that could be done. B1 stated that he, "[c]ontacted the Medical Department numerous times letting them know that their contract will be expiring on a certain date and that after this date I cannot extend the contract any further." The record indicates that, afterward, the contract was put up for rebid, but the Company was not the successful bidder on the new contract. S2 and S1 did provide somewhat confusing explanations for why they thought the contract might not have been renewed, but the record does not indicate that they played any role in the contract procurement process. Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we affirm the Agency's finding of no reprisal discrimination with regard to claim 2.

Violation of EEOC's Part 1614 Regulation

The record indicates that Complainant requested a final decision on June 14, 2016. EEOC Regulation 29 C.F.R. § 1614.110(b) provides that "[t]he agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency" Here the final decision was not issued until April 4, 2017, which was 294 days after the request. The Agency has not provided a reason for the untimely issuance of the final decision. Therefore, the Commission finds that the Agency did not comply with its obligation to issue a final decision in accordance with the time frames set forth at 29 C.F.R. § 1614.110(b).

As noted by the Commission in Mach v. Dep't of Defense, EEOC Appeal No. 0120080658 (Nov. 30, 2010), "the procedures contained in the Commission's regulations are no more or no less than the necessary means to eliminate unlawful employment discrimination in Federal employment." Accordingly, we find that a sanction in this case is appropriate.

Sanctions

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Several factors are considered in "tailoring" a sanction and determining if a particular sanction is warranted: 1) the extent and nature of the non-compliance, and the justification presented by the non-complying party; 2) the prejudicial effect of the non-compliance on the opposing party; 3) the consequences resulting from the delay in justice; and 4) the effect on the integrity of the EEO process. Gray v. Dep't of Defense, EEOC Appeal No. 07A50030 (Mar. 1, 2007).

In the case at hand, we find that the Agency failed to comply with EEOC's regulations in this case, and did not show good cause for its noncompliance, when it issued its untimely final decision. We also note that, regarding the fourth factor, the effect on the integrity of the EEO process should not be underestimated when tailoring a sanction. Cox v. Soc. Sec. Admin., EEOC Appeal No. 0720050055 (Dec. 24, 2009). "Protecting the integrity of the 29 C.F.R. Part 1614 process is central to the Commission's ability to carry out its charge of eradicating discrimination in the federal sector." Id. The Commission must ensure that all parties abide by its regulations and orders.

Based on the specific facts of this case, we find that the most appropriate sanction to address the Agency's conduct is to order the Agency to: (1) provide training to its EEO personnel who failed to comply with our regulatory timeframes; (2) consider taking disciplinary action against these EEO personnel; and to (3) pay attorney fees, if any, incurred by Complainant for filing the appeal in this case. Our decision to sanction the Agency in this matter will effectively emphasize to the Agency the need to comply with the Commission's regulations in a timely manner. Our sanctions do not include a monetary award for Complainant, nor does it grant a default judgment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's FAD as indicated above. The Agency shall comply with the ORDER below.

ORDER

Unless otherwise indicated, the Agency is ordered to complete the following remedial actions **within one hundred and twenty (120) days** of the date this decision is issued:

1. The Agency shall provide training to its management officials in its Complaint Adjudication Office regarding their responsibilities concerning case processing.
2. The Agency shall consider taking appropriate disciplinary action against the management officials in its Complaint Adjudication Office responsible for the failure to comply with the Commission's regulations in this case. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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 any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
3. As a sanction, the Agency, **if applicable**, shall provide Complainant attorney's fees for filing this appeal in accordance with the procedures set forth below in Paragraph H.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Complaint Adjudication Office located in Washington, DC 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 (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she 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 the date this decision was issued. 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 (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)

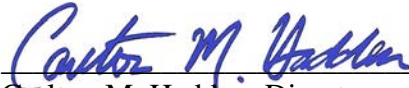
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

December 11, 2018

Date