



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

[REDACTED]
Tanya D.,¹
Complainant,

v.

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

Appeal No. 0120173031

Hearing Nos. 510-2016-00322X & 510-2016-00427X

Agency Nos. FBI-2015-00205 & FBI-2016-00089

DECISION

On September 7, 2017, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency order dated August 16, 2017, fully implementing the decision of an Equal Employment Opportunity Commission Administrative Judge (AJ) dismissing her two consolidated complaints 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Special Agent at the Agency's FBI, Miami Division, Counterintelligence Branch in Miami, Florida.

On August 27, 2015, Complainant filed equal employment opportunity (EEO) Complaint 1, as amended, alleging that the Agency discriminated against her based on her sex (female) and disability when:

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.

1. On July 14, 2015, she was informed that she was being permanently transferred from her assignment at Miami International Airport (MIA) (since August 25, 2014, she was physically assigned to the Main Office – away from MIA);
2. On July 27, 2015, she was reassigned from the Counterterrorism Branch, Squad T-8 to the Counterintelligence Branch, Squad I-5; and
3. On or about August 27, 2015, she was informed that she could no longer work a flexible schedule to attend therapy and medical appointments; and

whether she was discriminated against based on reprisal for prior EEO activity under Title VII and the Rehabilitation Act when:

4. On October 19, 2015, the Supervisory Special Agent (SSA), Assistant Special Agent in Charge (ASAC), and Special Agent in Charge (SAC) scrutinized her time and attendance records;
5. On October 20, 2015, and October 26, 2015, the SSA, ASAC, and SAC questioned her work product; and
6. On October 26, 2015, the ASAC informed her she may only take twenty-minute breaks during the day.

On March 11, 2016, Complainant filed EEO Complaint 2, as amended, alleging that she was discriminated against and subjected to harassment and a hostile work environment based on her sex (female) and disability (physical), and reprisal for prior EEO activity under Title VII and the Rehabilitation Act when:

7. On December 8, 2015, the Assistant Director, Office of Equal Employment Opportunity Affairs, expressed concerns for both her fitness for duty and that "[she] is not executing the responsibilities of [her] job";
8. As of December 14, 2015, her SAC has still not provided her a reasonable accommodation for her disability;
9. On December 15, 2015, her SSA threatened her with insubordination;
10. The SSA has subjected her to extra scrutiny; and
11. On April 25, 2016, she received notice she was referred to the Inspection Division, Internal Investigations Section, for alleged time and attendance fraud.

Following separate investigations on Complaints 1 and 2, Complainant requested hearings before an AJ thereon. The AJ consolidated the complaints.

The Agency filed a motion to dismiss, arguing in relevant part that Complaints 1 and 2 were moot because Complainant retired on August 5, 2016, so no relief available to her. Complainant opposed the motion to dismiss.

The AJ dismissed Complaints 1 and 2 for being moot. She found that a review of the records on Complaints 1 and 2 showed Complainant did not request compensatory damages, noting “magic words” are not required to do so. Citing Commission cases, the AJ found that a complaint is not moot where there is the potential for additional relief in the form of compensatory damages and the complainant has requested them, but they were not requested. The Agency issued a final order fully implementing the AJ’s decision, and the instant appeal followed.

Complainant argues that while she did not “specifically raise compensatory damages in her complaints,” under Commission case law her description of her harm should be construed as her seeking them. In opposition to the appeal, the Agency argues that the AJ’s dismissal should be affirmed.

ANALYSIS AND FINDINGS

EEOC regulation 29 C.F.R. § 1614.107(a)(5) provides for the dismissal of a complaint when the issues raised therein are moot. To determine whether the issues raised in a complaint are moot, the fact finder must ascertain whether: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged discrimination. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). When such circumstances exist, no relief is available and no need for a determination of the rights of the parties is presented.

If a complainant requests compensatory damages and may be entitled to them, and damages have not been addressed by the Agency, Element 2 above is not met. Osterman v. Army, EEOC Appeal No. 0960910 (Sep. 26, 1996). When this occurs, the Agency must provide the complainant the opportunity to provide some objective proof of the alleged damages. Id.

Accordingly, this case turns on whether Complainant requested compensatory damages. In Complaint 1, Complainant wrote “[d]ue to the stress of being yanked around, I began to have physical ailments....” Complaint 1 Report of Investigation (ROI 1), Exh. 2, typed narrative page 1). In Complaint 2, Complainant wrote that because she was denied reasonable accommodation, “there has been a degradation in my overall fitness and health.” Complaint 2, ROI 2, Exh. 2, at second typed narrative page. Complainant relayed to the EEO counselor for Complaint 2 that due to the denial of reasonable accommodation which prevents her from attending her medical appointments that alleviate her pain, she “is in great pain and discomfort.” ROI 2, Exh. 3, at 5. In her investigatory sworn statement for Complaint 1, Complainant wrote “[s]tress aggravates all of my GI [gastro intestinal] conditions and the disparate treatment to which I have been subjected has... increase[ed] the occurrence and manifestations of my IBS [irritable bowel syndrome] symptoms, to include diverticulitis.” ROI 1, Exh. 9, at 2 – 3.

She also wrote therein that “[s]tress aggravates my disabilities and physical impairments, so [the Agency’s] refusal to grant my RA [reasonable accommodation] request is hurting my health.” Id., at 33. In her investigatory sworn statement for Complaint 2, Complainant wrote “[t]he denial of my RA request has aggravated my health issues because I cannot maintain my health without attending medical appointments and aquatic therapy. In addition, the intimidation and bullying to which I am daily subjected makes for a hostile work environment, which increases my stress level, and exacerbates my medical conditions.” ROI 2, Exh. 9, at 3.

The Commission found that complainant raised compensatory damages by alleging “[m]istreatment has been a constant source of anxiety, depression and much feelings of exhaustion as I continued to try to meet my job expectations.” Miller v. Health and Human Services, EEOC Request No. 05970174 (Aug. 26, 1998). The Commission construed a complainant submitting a clinical report from a psychologist opining that the complainant suffered an emotional breakdown because of her inability to meet her supervisor’s demands as a request for reasonable accommodation. Rittmeister v. Navy, EEOC Appeal No. 01982453 (Mar. 10, 1999). In Reid v. USPS, EEOC Appeal No. 01992856 (Aug. 25, 2000), a complainant wrote in his complaint that his receipt of a notice of removal right before Christmas caused great stress and pain to himself and family. The Commission construed this as being a request for compensatory damages, explaining that a complainant need not use legal terms of art such as “compensatory damages,” but merely use words or phrases to put the agency on notice that either pecuniary or non-pecuniary loss has incurred. More recently, the Commission indicated that the above doctrine is still in force by reciting numerous Commission decisions in support thereof, with brief descriptions of each. Heidi B. v. Department of Health and Human Services, EEOC Request No. 0520170099 (Mar. 7, 2017).

Applying the above, we find that Complainant requested compensatory damages. She repeatedly alleged that discrimination by the Agency caused her stress, which hurt her health and caused her physical pain, at one point characterizing this was great pain and discomfort.

As the issue of damages has not been adequately addressed, we find that the dismissal of Complainant’s complaint for mootness was improper, and is REVERSED. The complaints are REMANDED to the Agency for further processing in accordance with the following Order.

ORDER

Within **thirty (30) calendar days** of the date of this decision, the Agency shall file a request for a hearing on behalf of Complainant on Complaints 1 and 2 with the appropriate EEOC Hearings Unit, along with the complete complaint files. With the request, the Agency shall briefly explain the reason for the request and include a copy of this decision. Thereafter, Complaints 1 and 2 shall be processed in accordance with 29 C.F.R. Part 1614.109 et seq.

A copy of the Agency’s request to the EEOC Hearings Unit must be sent to the Compliance Officer as referenced below.

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

November 20, 2018

Date