



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

[REDACTED]
Kristen C.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120182622

Agency No. ARLEWIS18APR01406

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's June 25, 2018 dismissal of 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., the Age Discrimination in Employment Act of 1967 (“ADEA”), as amended, 29 U.S.C. § 621 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 an Administrative Support Specialist, GS-09, Directorate of Personnel and Family Readiness (“DPFR”), at the Agency’s Joint Base Lewis McChord, in Lakewood Washington.

On May 24, 2018, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (African-American), age (53), disability (relationship/association),² and reprisal (engaging in protected EEO activity) 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.

² Complainant did not include disability discrimination in her Formal Complaint. However, in statements made during the pre-complaint inquiry, her June 22, 2018 Response to the EEO

- (a) In or around December 2017, the Director, DPFR (“D1”) denied her request to be detailed into the position of Exceptional Family Member Program (“EFMP”) Coordinator, GS-11.
- (b) On March 8, 2018, she was berated during a staff meeting.
- (c) On January 29, 2018, she was detailed by D1 to perform a set of duties under the Outreach Coordinator, GS-09, position description for a period of one year during a vacancy.
- (d) On May 29, 2017, she was detailed by D1 to perform a set of duties under the EFMP Information and Referral Coordinator GS-09, position description for a period of 120 days during a vacancy.
- (e) On January 8, 2018, she was issued a Memorandum for the Record (“MFR”) for Absence Without Leave (“AWOL”).
- (f) On March 13, 2018, she met with D1 to discuss how the job detail affected her relationship with staff members, based on staff members’ comments, not receiving an email, and being uninvited to a meeting.

The Agency dismissed the complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1) and, alternately, for untimely contact with an EEO Counselor, pursuant to 29 C.F.R. § 1614.107(a)(2).

ANALYSIS AND FINDINGS

Failure to State a Claim - Harassment

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an 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).

Counselor’s Report, and on appeal to this Commission, she repeatedly connects alleged harassing and discriminatory actions to instances where she had to care for her chronically ill daughter, who was hospitalized during the relevant time frame. The Commission has held, pursuant to 29 C.F.R. § 1630.8, and the “association provision” of the Rehabilitation Act, that it is unlawful to "exclude or deny equal jobs or benefits to, or otherwise discriminate against "an individual based on his or her association with an individual with a known disability.” Polifko v. OPM, EEOC Request No. 05940611 (Jan. 4, 1995).

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. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If complainant cannot establish that he or she is aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

The Commission has held that a claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

In her Formal Complaint, Complainant repeatedly describes the claims of alleged discrimination in Claims (b) through (f) as comprising a "hostile work environment" and "harassment." She also alleges that D1 made it clear that she did not want to work with her, and that the alleged discriminatory actions were part of an ongoing effort by D1 to remove her from her position in favor of Complainant's predecessor (age not specified, Caucasian).

While the word "detail" in Claims (c) and (d) implies discrete assignments, Complainant convincingly argues that in the context of her complaint, the actions constitute harassment.³ According to Complainant, "detailed to perform a set of duties" meant that the assignments were not treated as "details" in a manner that would provide her with professional credit or advancement for taking on new assignments, but rather, were described as "tasks" in her evaluation. These "details" isolated Complainant from coworkers, since she was excluded from meetings and emails. She was also subjected to a schedule with less flexibility for caring for her daughter. Moreover, the individual assigned to Complainant's position while Complainant was on "detail" was Complainant's predecessor.

When Complainant made attempts to return to her position, she was allegedly treated differently by coworkers and customers. During the meeting described in Claim (f), Complainant felt "threatened and fearful of losing her job" when she discussed the matter with D1. Likewise, the instances in Claims (e) and (b) contributed to Complainant's overall experience of fear for her job and experience of a hostile work environment.

Claims (b) through (f) taken together, state an actionable claim of harassment. By alleging a pattern of harassment, Complainant has slated a cognizable claim under the EEOC regulations. See Cervantes v. United States Postal Serv., EEOC Request No. 05930303 (Nov. 12, 1993).

³ Regarding Claim (c), even though record contains documentation that Complainant filed a grievance on February 20, 2018 (prior to initiating EEO Contact) on the same matter, the Agency did not dismiss Claim (c) for stating the same claim as a previously filed grievance. See 29 C.F.R. § 1614.301(a) and 29 C.F.R. § 1614.107(a)(4).

Timeliness

In relevant part, 29 C.F.R. § 1614.107(a)(2) provides that the agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

The Commission has held that "[b]ecause the incidents that make up a hostile work environment claim collectively constitute one unlawful employment practice, the entire claim is actionable, as long, as at least one incident that is part of the claim occurred within the filing period." EEOC Compliance Manual, Section 2, Threshold Issues at 2 - 75 (rev. July 21, 2005) referencing Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002).

The record reveals that Complainant made initial contact with an EEO Counselor on April 24, 2018. Of the allegations, Claim (f) occurred within the 45-day limitation period. Claim (a), which alleges denial of a specific detail request, references a discrete act, as opposed to ongoing harassment, and must be dismissed as untimely. However, a fair reading of the record indicates that Complainant alleged an ongoing hostile work environment based on the allegations in Claims (b) through (f).

Additional Claims Raised on Appeal

On appeal, Complainant reiterates allegations contained in her Formal Complaint, which were not addressed by the Agency. For instance, she describes promotion disparities between African-American and White employees, and an instance in May 2018, where a coworker allegedly received telework to care for a sick family member, whereas Complainant did not. While we have considered the documents as background information, these allegations cannot be adjudicated in this complaint because Complainant did not dispute the Agency's letter of acknowledgement, framing her complaint, which omitted the allegations.

Complainant's appellate brief also alleges that the hostile work environment is ongoing, stating, "currently... I encounter harassment, bullying, and intimidation, discrimination, and reprisal." She raises new allegations, such as recounting an instance on April 27, 2018, when, during an evaluation D1 allegedly told Complainant, "I do not feel comfortable with you or trust you." If Complainant wishes to raise additional claims of discrimination or retaliation, she must contact an EEO Counselor pursuant to 29 C.F.R. § 1614.105. See Hall v. United States Postal Serv., EEOC Appeal No. 0120031342 (Apr. 24, 2003).

CONCLUSION

Accordingly, we AFFIRM the Agency's dismissal of Claim (a), and REVERSE the Agency's dismissal of Claims (b) through (f).

Claims (b) through (f) are hereby REMANDED to the Agency for further processing in accordance with this Decision and the following Order.

ORDER (E0618)

The Agency is ordered to process the remanded claims (b – f / harassment) 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.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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)

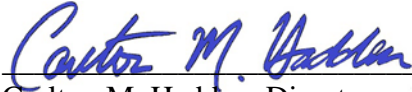
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

February 5, 2019

Date