



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

[REDACTED]
Bernardina N,¹
Complainant,

v.

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

Appeal No. 2019000488

Agency No. 200H-0523-2018103605

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 3, 2018, dismissing a formal 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.

BACKGROUND

During the period at issue, Complainant worked as a Registered Nurse for the Agency in West Roxbury, Massachusetts. On July 12, 2018, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on sex (female-pregnancy).

In a final decision dated August 3, 2018, the Agency determined that Complainant was alleging problems with the processing of a prior EEO complaint and that she was denied official time regarding work related to her prior EEO complaint.

The Agency found that to the extent that Complainant was alleging problems or errors with the processing of her prior EEO complaint, Agency Case No. 200J-0523-2017102027, these matters were dismissed for alleging dissatisfaction with the processing of a prior complaint.

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.

Regarding Complainant's claim that she was denied official time regarding her work on her prior EEO complaint, the Agency dismissed this claim for failure to state a claim and untimely EEO Counselor contact.

The instant appeal followed. On appeal, Complainant reiterates that her leave should be restored for the time she worked on her prior EEO complaint while on maternity leave. Complainant asserts that she had to drive to and from her work facility to use a computer to view and send encrypted information.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a)(8) provides that an agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint. Chapter Five of the EEOC Management Directive 110 (MD-110) (Aug. 5, 2015) defines such a complaint as a "spin off" complaint. MD-110 indicates further that "spin-off" complaints should be referred to the agency official responsible for complaint processing and/or processed as part of the original complaint. See id.; see also Complainant v. Dep't of Health and Human Servs., EEOC Appeal No. 05910159 (Feb. 11, 1991).

We find that to the extent Complainant is alleging problems (i.e. problems with the investigator, being sent the incorrect advisement of rights etc.) with the processing of her prior EEO complaint, the Agency properly dismissed these matters as they constitute spin-off complaints. The record reflects that via memorandum dated March 9, 2018, an Agency official responded to Complainant's concerns regarding the processing of her prior complaint. The Agency found that any errors did not have a material effect on the processing of her prior EEO complaint. Commission records reflect that the Agency issued a final decision on her prior EEO complaint and that Complainant appealed the Agency's final decision to the Commission's Office of Federal Operations (OFO). OFO affirmed the Agency's final decision on her prior EEO complaint. EEOC Appeal No. 2019000361 (Feb. 6, 2019).

To the extent, however, that the Agency dismissed Complainant's claim that she was denied official time for work on her prior EEO complaint, Agency Case No. 200J-0523-2017102027, we find that the Agency's dismissal was not proper. Claims of denial of official time under 29 C.F.R. § 1614.605(b) may be adjudicated by the Commission. The question of whether such an alleged denial is discriminatory is irrelevant to whether there is a violation of 29 C.F.R. § 1614.105(b). Thus, the Agency's procedural dismissal of Complainant's denial of official time claim was not appropriate. See O'Brien v. Dep't of the Army, EEOC Appeal No. 01A35297 (July 20, 2004).

The record reflects that on January 8, 2018, the Agency issued a memorandum regarding Complainant's request for official time for work performed on her prior EEO complaint. The Agency granted her eight hours of official time. The Agency in its January 8, 2018 memorandum noted that "employees are required to request official time in writing from the supervisor prior to actually taking any official time to work on his/her EEO complaint." The

Agency found that Complainant did not get approval in advance of performing her EEO activity. In addition, the Agency found that Complainant was not in duty status during this time but was in an approved FMLA status.

The Agency also addressed the reasonableness of Complainant's request for official time. Specifically, the Agency in its January 8, 2018 memorandum stated, "[r]egarding the reasonableness of your request it appears that 264 hours of official time is an excessive amount." However, the Agency noted miscommunication between the EEO investigator and Complainant. Specifically, the Agency stated that, "it does appear there may have been some miscommunication between you and the EEO investigator, who engaged you a day after giving birth, upon which the two of you determined that it was in your best interest to proceed during your maternity leave to complete the investigation on time." Based on the foregoing, the Agency approved eight hours of official time.

We find that based on the specific and unique circumstances of this matter, Complainant should be awarded 16 hours of official time. EEOC Regulation 29 C.F.R. § 1614. 605(b) provides, in pertinent part, that "[i]f the complainant is an employee of the Agency he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information." A complainant and an agency should reach an agreement about the amount of official time to be used prior to the complainant's use of such time. EEO Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 6 VII(C) (rev. Aug. 5, 2015).

Complainant, on appeal and below, asserts that she was engaged by the EEO Investigator shortly after giving birth via C-section. Complainant states that the EEO Investigator should have held her investigation in abeyance until after her maternity leave. Complainant, on appeal, asserts that management was aware that she was working on EEO matters at her work facility during her maternity leave. However, we concur with the Agency's determination that the record does not reflect that Complainant was actually approved for a *specified amount* of official time *before* working on her prior EEO case. However, we also concur with the Agency that there seems to have been some miscommunication between Complainant and the EEO Investigator regarding a pressing need for Complainant to complete the EEO investigation prior to her return from maternity leave.

The actual number of hours to which a complainant is entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis. Because investigations are conducted by agency or Commission personnel, the above regulation does not envision large amounts of official time for preparation purposes. Consequently, "reasonable" with respect to preparation time is generally defined in terms of hours, not in terms of days, weeks, or months, although what is reasonable depends on the individual circumstances of each complaint. EEO Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 6 VII(C) (rev. Aug. 5, 2015). The record reflects that Complainant, in pertinent part, completed an affidavit, reviewed the report of investigation, and completed a rebuttal. We find Complainant's request

for over 200 hours of official time to be excessive. Based on the foregoing, and the specific and unique circumstances of this matter, we find that 16 hours represents a reasonable amount of official time.

Accordingly, we AFFIRM the Agency's dismissal regarding her claim that her prior EEO complaint was not properly processed. However, we REMAND this matter to the Agency for further processing as set forth in the ORDER below regarding the claim of the denial of official time.

ORDER

To the extent it has not already done so, the Agency is ordered to:

1. Within 60 (sixty) calendar days from the date this decision is issued, the Agency shall restore 16 (sixteen) hours of leave to Complainant.

The Agency shall provide documentation that it has restored 16 hours of leave to Complainant in accordance with the paragraph entitled "Implementation of the Commission's Decision."

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 (T0610)

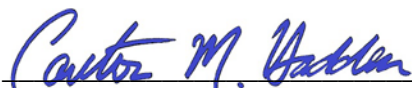
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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 15, 2019

Date