



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

[REDACTED]
Bettyann B.,¹
Complainant,

v.

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

Appeal No. 2019002089

Agency No. 2004-0688-2018104840

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated December 21, 2018, dismissing 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Program Specialist for the Agency in Washington, D.C.

On June 15, 2018, Complainant initiated EEO counselor contact. During EEO counseling, Complainant alleged that she had been subjected to sexual harassment/a hostile work environment her first line supervisor, the Senior Scientist (hereinafter referred to as “the Supervisor”), for years. Complainant explained that she did not report the harassment earlier because she feared for her job. Complainant detailed a variety of sexually harassing incidents such as being forcibly kissed and being referred by the Supervisor as his “soulmate”. Informal efforts to resolve her concerns were unsuccessful.

On September 27, 2018, Complainant filed a formal complaint alleging that she was subjected to sexual harassment between 2014 and 2018 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) the Supervisor kissed her on the mouth without her consent on dozens of occasions;
- 2) the Supervisor grabbed and squeezed her face tightly to kiss her;
- 3) management did not immediately remove her from the Supervisor's supervision after she complained of the sexual harassment; and
- 4) the Chief of Staff interfered with her rights to report the Supervisor's sexual harassment by instructing her not to tell anyone else.

Complainant also detailed an incident that occurred on May 3, 2018, in which she alleged the Supervisor made a veiled threat that he could get away with harassment because he was a management official. Furthermore, Complainant alleged that on May 29 and June 13, 2018, she and a colleague met with the Chief of Staff, who discouraged the filing of a formal complaint, and was disinterested in resolving their sexual harassment/hostile work environment claims.

On December 21, 2018, the Agency issued its final decision. The Agency determined that Complainant's claim was comprised exclusively of the claim that Complainant was subjected to discrimination and sexual harassment based on national origin (Filipina American) when, on April 7, 2017, the Supervisor held her head and kissed her on the mouth. Based on this sole claim, the Agency determined that Complainant failed to initiate contact with an EEO counselor within the regulatory time frame of 45 days. Therefore, the Agency dismissed the formal complaint on the grounds of untimely EEO counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2).

The instant appeal followed. On appeal, Complainant states that the sexual harassment was not an isolated event. Instead, she alleged the Supervisor had been subjecting her to ongoing sexual harassment from March 2014. Complainant explained her reluctance in coming forward was due to the Supervisor's intimidating threats that he "controlled her employment" and that he would "win" if she reported him. Complainant said she feared retaliation and stayed quiet for years. Complainant notes that her fears were realized when she reported the Supervisor for ongoing sexual harassment and was met with resistance from management instead of aid. She notes that she was forced to continue reporting to the Supervisor, discouraged from filing an EEO complaint, and pressured to provide false information.

Complainant also explains that she was discouraged by the Agency's Chief of Staff from filing an EEO complaint on May 29 and June 13, 2018. Additionally, Complainant notes that the Chief of Staff insisted on attending her confidential meeting with the EEO Counselor on June 15, 2018. Furthermore, despite the EEO Counselor's suggestion that Complainant be removed from the Supervisor's supervision, the Chief of Staff failed to take any actions. Finally, Complainant also detailed how the Supervisor sexually harassed two other female colleagues.

ANALYSIS AND FINDINGS

As a threshold matter, a fair reading of Complainant's complaint, in conjunction with the related EEO counseling record, show that the complaint was not comprised exclusively of the matter identified in the Agency's final decision. Instead, Complainant claimed she was subjected to ongoing sexual harassment through a variety of incidents occurring between 2014 and 2018.

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

The Supreme Court has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See National Railroad Passenger Corp. v. Morgan, 122 S.Ct. 2061 (June 10, 2002). Applying Morgan, 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. This includes incidents that occurred outside the filing period that the [Complainant] knew or should have known were actionable at the time of their occurrence.” EEOC Compliance Manual, Section 2, Threshold Issues at 2 – 75 (revised July 21, 2005).

Here, we conclude that several of the incidents proffered by Complainant in support of her harassment/hostile work environment claim occurred within the 45-day limitation period. Her informal and formal complaints contain numerous incidents of alleged harassing behavior by the Supervisor. Additionally, Complainant detailed a May 3, 2018 incident in her formal complaint in which she stated that the Supervisor made a threat that he could get away with harassment because he was management. Complainant also alleged that on May 29 and June 13, 2018, she and a colleague met with the Chief of Staff, who discouraged the filing of a formal complaint, and was disinterested in resolving their sexual harassment/hostile work environment claims. As at least one alleged incident comprising Complainant’s ongoing hostile work environment claim occurred within the 45-day time period preceding Complainant’s June 15, 2018 counselor contact, we find that it is appropriate to apply the principles enunciated in Morgan to this case. Therefore, we find that the Agency improperly dismissed Complainant’s claim of ongoing sexual harassment by the Supervisor since at least 2014, as well as her claim that upper management did not respond properly after she reported the harassment.²

² We note that one of Complainant’s claims is that management failed to remove her from the Supervisor’s supervision while her allegations were being investigated as suggested by the EEO counselor. As we are reversing the Agency’s dismissal of her complaint, and in light of the serious nature of Complainant’s allegations, we strongly recommend that the Agency remove her from the Supervisor’s supervision during the processing of this complaint.

CONCLUSION

The Agency's final decision dismissing the formal complaint for untimely EEO counselor contact is **REVERSED**. The formal complaint is **REMANDED** to the Agency for further processing in accordance with the **ORDER** below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq.³ 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).

³ Complainant may also amend her complaint, if she wishes, to add sex as a basis in addition to her national origin claim.

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).

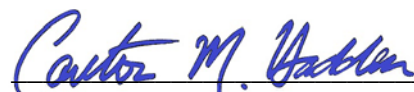
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

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

April 24, 2019
Date