



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

[REDACTED]
Zenia M.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019002305

Agency No. 200J05502019100135

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated January 10, 2019, 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 at the Agency's Danville VA Medical Center in Danville, Illinois.

On November 20, 2018, Complainant filed a formal complaint. The Agency defined Complainant's complaint as whether Complainant was subjected to a hostile work environment (sexual and non-sexual) based on her sex (female) and reprisal for prior protected EEO activity when:

1. beginning in 2015, and continuing to October 2018, Complainant was subjected to unwelcoming touching and sexual comments from a co-worker;

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. in October 2018, the co-worker yelled at Complainant regarding a patient; and
3. since October 2108, management has not addressed Complainant's sexual harassment allegations.

On January 10, 2019, the Agency issued a final decision. The Agency dismissed the formal complaint on two procedural grounds.

First, the Agency dismissed Complainant's complaint, pursuant to 29 C.F.R. § 1614.107(a)(5), finding that the complaint was moot because the Agency reassigned the co-worker to a different department, the co-worker subsequently resigned from the Agency on November 30, 2018, and there was no expectation that the alleged violation would recur.

The Agency also dismissed Complainant's complaint for failure to state a claim, pursuant to 29 C.F.R. § 1617.107(a)(1), finding that the alleged incidents were not sufficiently severe or pervasive enough to set forth an actionable claim of harassment.

The instant appeal followed. On appeal, Complainant argues, through counsel, that the Agency improperly dismissed her complainant for mootness and for failure to state a claim. Complainant states that the co-worker "regularly subjected [her] to unwelcome touching and comments of a sexual nature" from 2015 to October 2018. Specifically, Complainant states that the co-worker "touched her, attempted to kiss her, and asked [her] to go to a hotel with him to have intercourse." Complainant further states that, in October 2018, "after her opposition to the sexual harassment [the co-worker] began retaliating against [her]" by "constantly berat[ing] her." Complainant argues that these claims are severe and pervasive enough to constitute an actional hostile work environment claim. Complainant further argues that her complaint is not moot because she "continues to suffer harm resulting from the harassment through [the present]."

ANALYSIS AND FINDINGS

Failure to State a Claim (Harassment)

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief. The trier of fact must consider all of the alleged harassing incidents and remarks and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

We view the alleged incidents collectively and determine that Complainant has set forth an actionable claim of harassment. Because Complainant raises a hostile work environment claim, all alleged harassing incidents must be considered.

Thus, the Agency improperly limited the scope of Complainant's harassment claim to incidents occurring after October 1, 2018 – the day Complainant notified the Agency of the harassing incidents.²

In this case, Complainant alleges that she has been subjected to ongoing harassment. Complainant states in her formal complaint that “from 2015 through the present, she was subjected to unwelcome touching and comments by a co-worker.” Complainant further states in her formal Complaint that she was “subjected to continuous touching of her breasts, buttocks, attempts to kiss her and requests for intercourse.” Complainant also states that the co-worker interrupted her and was rude to her after she requested that the co-worker cease harassing her. We do not find that the instant complaint fails to state a claim. Instead, Complainant has alleged an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994).

Mootness

To the extent that the Agency determines that the subject claim was rendered moot because the alleged co-worker was reassigned to a different department and retired from the Agency on November 30, 2018, we note that a fair reading of Complainant's formal complaint indicates that she is seeking compensatory damages. Therefore, the Agency's reassignment and the co-worker's subsequent retirement from the Agency does not render Complainant's complaint moot. Should Complainant prevail in the complaint, the possibility of an award of compensatory damages exists, and her complaint is not therefore moot. See Glover v. USPS, EEOC Appeal No. 01930696 (Dec. 9, 1993).

Finally, the Agency, argues for the first time on appeal, that Complainant's formal complaint should also be dismissed, pursuant to 29 C.F.R. § 1614.105(a)(1), for untimely EEO Counselor contact. This procedural ground was not raised in the Agency's final decision, Complainant had not been put on notice that this was a dismissal grounds in the Agency's final decision, and in the interest of due process, we decline to address this matter. Moreover, if we were to have considered this dismissal ground, we would have found that Complainant alleges discriminatory actions which were encompassed in the regulatory limitation period preceding initial EEO contact.

² In the decision, the Agency states that it could avoid liability for a hostile work environment by showing that it reasonably tried to prevent and promptly correct the harassing behavior. The Agency implies that it corrected the alleged harassing incidents occurring after October 1, 2018, when it was placed on notice and, therefore, argued that the alleged harassing incidents after October 1, 2018 were only at issue. However, a discussion of the Agency's liability goes to the merits of Complainant's claim and is irrelevant to the procedural issue of whether Complainant has stated a justiciable claim. See Ferrazzoli v. USPS, EEOC Request No. 05910642 (Aug. 15, 1991).

The Agency's final decision to dismiss the formal complaint for failure to state a claim 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. 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

May 7, 2019

Date