



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

████████████████████
Glenna O.,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2019005222

Agency No. FTWAIN19APR01985

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 3, 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 Strategic Planning Specialist at the Agency's U.S. Army Installation Management Command, U.S. Army Garrison Alaska ("USAG Alaska") Plans, Analysis & Integration Office in Fort Wainwright, Alaska.

On April 16, 2019, Complainant initiated EEO Counselor contact. Informal efforts to resolve her concerns were unsuccessful.

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.

On May 22, 2019, Complainant filed the instant formal complaint. Complainant claimed that the Agency subjected her to discrimination on the bases of race, national origin, sex, and color when:

1. between November 19, 2018 and April 13, 2019, she experienced incidents and was not given equal employment opportunities by key leadership at USAG Alaska when:
 - a. she stated comments were made to her by other employees regarding getting her position back at USAG Alaska;
 - b. she was involved in a Financial Liability Investigation of Property Loss (“FLIPL”) that exonerated her;
 - c. on November 19, 2018, she went on Leave Without Pay (“LWOP”) and was contacted on December 6, 2018 by her supervisor and asked when she was coming back to work, and that leadership wanted her off of LWOP;
 - d. she stated that she had limited computer access upon her return;
 - e. she was placed in another position which she stated was beneath the position she was in. However her pay did not change;
 - f. in January 2019, she was assigned to a special project, meetings were scheduled but cancelled, and her supervisor attended meetings instead;
 - g. in February 2019, she requested a pay inquiry and never received a response;
 - h. on March 18, 2019, while attending a meeting regarding the Leader Transition Packet, she claimed that the DCG did not make eye contact with her and that she only spoke to her supervisor;
 - i. on March 20, 2019, she did not receive an email from the Garrison Commander regarding an ACOE award;²
 - j. on March 28, 2019, she observed three employees in the hall and she stated that overheard a conversation including the question posed in a demeaning tone, “what is she doing up here?”;
 - k. on March 29, 2019, she learned that “all of the Alaska leadership was upset because someone from ‘above’ advised them to stop the harassment;” and
 - l. on April 9, 2019, she went to the doctor and was put on sick leave.

² The ACOE abbreviation is not identified in the record.

Complainant stated that on June 22, 2008, she was promoted to the position of Army Community Services Division Chief, GS-0101-13, at WSAG Alaska. She held this management position for over 9 years and supervised approximately 11 to 17 employees.

Complainant claimed that on February 5, 2018, she was terminated from her position and “was told by a USAG-Alaska employee that I was terminated because I punched someone. These types of comments continued into August 2018 with comments that ‘I stole money, hit someone, and sexually harassed someone.’” According to Complainant, she stated that on September 26, 2018, Complainant was reinstated to her position at USAG Alaska by a federal judge who determined that there was no legal basis for her termination except a personal opinion. On October 9, 2019, the Director of Director of Family Morale Welfare and Recreation prepared a pre-employment Memorandum of Record. Complainant viewed the content and tone of the memorandum suggested it was disciplinary in nature which lead to injure Complainants prospects for future employment opportunities at USAG-Alaska and kept Complainant from being reinstated as ACS Chief.”

In its June 3, 2019 final decision, the Agency dismissed the formal complaint for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency determined that Complainant’s initial EEO Counselor contact was on April 16, 2019, which it found to be beyond the 45-day limitation period regarding these claims.

Further, the Agency dismissed the complaint for failure to pursuant to 29 C.F.R. § 1614.107(a)(1), finding Complainant was not aggrieved.

The instant appeal followed.

ANALYSIS AND FINDINGS

Failure to state a claim

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an Agency shall dismiss a complaint that fails to state a claim. An Agency shall accept a complaint from any 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). 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. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994).

The Agency improperly dismissed the complaint for failure to state a claim. Along with the manner in which the formal complaint was identified in the final decision, the instant formal complaint and EEO Counselor’s Report reflect a more detailed series of alleged incidents. Specifically, Complainant stated that she was subjected to ongoing harassment.

For instance, Complainant stated that from April 9-12, 2018, she was on sick leave “due to stress.” She asserted that on October 30, 2018, she was notified she would be placed in a non-supervisory position as a Strategic Planning Specialist which was outside of her expertise, and on November 15, 2018, she was notified that leadership had ordered an investigation into missing equipment.

Further, Complainant stated that on November 19, 2018, she had to use LWOP due to a family matter and three weeks later, her supervisor advised her that leadership wanted her off LWOP status and to report to work the following week “even though she had limited computer access and could do very little work.” She stated that the week of December 17, 2018, she was informed she would be moved again “but this time to a lower grade SPS position...this was the second unjust move to a non-supervisory position within a period of a month, each time reducing Complainant’s responsibility and self-worth.”

Complainant stated that she was excluded from all planning meetings, and overheard several employees commented “‘what is she doing up here’ in a demeaning tone.” She asserted that she was forced to retire as a result of the harassment. By alleging a pattern of harassment, Complainant has stated a cognizable claim under the EEOC regulations. See Cervantes v. USPS, EEOC Request No. 05930303 (November 12, 1993).

Untimely EEO contact

The Agency also improperly dismissed the complaint on the grounds of untimely EEO Counselor contact. Complainant initiated EEO Counselor contact on April 16, 2019. 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) (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)).

The various incidents comprising Complainant’s hostile work environment claim occurred within the 45-day time period preceding Complainant’s April 16, 2019 EEO Counselor contact, as discussed above. Because a fair reading of the record reflects that the matters which the Agency identified in claims 1.a - 1 are part of that harassment claim, we find that the Agency improperly dismissed these claims on the grounds of untimely EEO Counselor contact.

We REVERSE the Agency’s final decision dismissing Complainant’s formal complaint, defined herein as a harassment claim, and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claim (harassment/hostile work environment) 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 (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

October 25, 2019

Date