



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

[REDACTED]
Tena C.,¹
Complainant,

v.

Xavier Becerra,
Secretary,
Department of Health and Human Services
(Food and Drug Administration),
Agency.

Appeal No. 2023004005

Agency No. HHS-FDACDER-003-23

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 6, 2023, dismissing her complaint alleging 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., 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 a Supervisory Biologist, GS-15, in the Agency's Center for Drug Evaluation Research (CDER).

On January 18, 2023, Complainant filed a formal complaint alleging that the Agency subjected her to hostile workplace discrimination on the bases of sex, disability, and in reprisal for prior protected EEO activity. In support of this claim, Complainant raised the following allegations:

1. In August 2020, upon her official arrival to the Agency, Complainant was asked to submit an employee biography for the office, as is typical for new employees. Complainant explained that, as is also typical with biographies, she included family information and language about having a wife. Complainant

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.

recalled that this information was removed and was not in the version that she sent to the organization. She stated that the revision of her biography made her uncomfortable and unwelcome, as if being gay was considered something to be ashamed of in CDER, Office of Generic Drugs (OGD).

2. During the Fall of 2020, Complainant requested leave prior to her wife's December 2020 surgery and was asked by her supervisor, the Director, Office of Generic Drugs Center for Evaluation and Research, what was the purpose of the leave. When Complainant told her supervisor the leave was for her wife's surgery, the supervisor continuously and inappropriately clapped. From that moment forward, Complainant noticed that she was treated distinctly different.

3. During the Summer/Fall of 2021, during a 1:1 meeting with her supervisor and after the supervisor learned of Complainant's sexual orientation, the supervisor began stating that Complainant was not what she wanted in the role as Deputy Director of Operations. When Complainant asked her supervisor for specific feedback on instances or examples of performance, none were given by the supervisor. Complainant's Performance Management Appraisal Program (PMAP) on record indicated a Satisfactory Performance. However, after not receiving any feedback on poor performance, the supervisor gave Complainant an ultimatum in June 2021 and July 2021 to decide whether she wanted to remain on her team as Deputy Director of Operations or voluntarily leave. Complainant was repeatedly told that she was not what her supervisor wanted for the position, but she was not given actionable feedback, and Complainant began to have mental and physical symptoms of stress. On or around July 14, 2021, during a 1:1 meeting with her supervisor, the symptoms were overwhelming, and Complainant suffered another mental condition.

4. During July 2021, the supervisor's special assistant scheduled an in-person lunch with OGD Senior Leadership for July 28, 2021. Because the thought of physically being with her supervisor caused her to suffer a mental medical condition, Complainant sent a note to the team stating that she could not attend due to medical reasons. The supervisor's special assistant again reached out to Complainant in an effort to ensure that she attended the lunch meeting further harassing her and demonstrating actions of ongoing harassment. Complainant then told her supervisor that she would be pursuing other opportunities.

5. During July 2021, Complainant applied for a detail in CFSAN, but because she is a Title 21 Cures Act employee, she was unable to go on the detail. Because of the medical conditions she endured that were caused by her supervisor, Complainant requested and was approved for sick leave, including the maximum allowable under the Family and Medical Leave Act (FMLA) from October 13, 2021, to June 30, 2022.

6. On March 23, 2022, knowing that her sick leave would expire on June 30, 2022, Complainant scheduled a meeting with her supervisor to discuss what possibly mutually agreeable options there were. The supervisor asked whether the Human Resources Specialist, Office of Operations, Office of Human Capital Management, Division of Employee and Labor Relations [OO/OHCM/DELR]), could join the meeting and Complainant agreed. During the meeting, Complainant asked whether she could go on a detail in her office, including that her supervisor had been supportive of details in the past. Complainant's supervisor made it clear to her that going on a detail would not be an option. Neither the supervisor nor the HR Specialist mentioned Complainant's right to file an EEO complaint with the FDA/OEEO or file a complaint of harassment with Human Resources' Anti-Harassment Program-Civility, Respect, and Education (AHP-CREW) Office. Prior to Complainant going on sick leave and her participation in the investigation, her supervisor was open to her going on a detail and her refusal is retaliation because of Complainant's participation in her supervisor's harassment investigation. The Agency's failure to notify Complainant of her right to file a complaint before September 29, 2022, constitutes ongoing retaliation.

7. On March 25, 2022, Complainant received a letter that threatened her removal despite her sick leave being approved for medical reasons, that a detail had been announced for her position, and the person selected may have started the detail.

8. On July 3, 2022, Complainant's asserted that her approved sick leave expired on June 30, 2022, and because of the purported workplace harassment and hostile work environment that the Agency allowed to occur in OGD, Complainant knew that she could not return to OGD. Because of the impact of a hostile work environment, Complainant took a position of a lower grade and a significant loss in compensation.

9. On September 27, 2022, after participating in a DELR investigation of her supervisor and stating in her affidavit that she was also a victim of workplace harassment by her supervisor, Complainant reached out to the Program Analyst with the Office of Management Division, CDER, the Agency point of contact for DELR's Administrative Investigation of her supervisor. The purpose of reaching out to the Program Analyst was to find out what options were available, as Complainant understood that the aggrieved would be informed of the conclusion of the investigation. Even though she had made it clear to the Agency that she was a victim of workplace harassment and workplace bullying, Complainant was not advised of her right to file an EEO complaint (or a complaint of harassment and hostile work environment) until the Program Analyst responded to her September 27, 2022, e-mail, on September 29, 2022.

The Agency issued a decision dismissing the complaint for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2).

The Agency noted that Complainant had been previously informed by the EEO Office on how to timely proceed with the EEO process but instead opted to pursue an internal resolution process, thereby delaying her EEO contact beyond the 45-day regulatory timeframe. The Agency maintained that Complainant, as a manager, who was partly charged with enforcing EEO principles in the workplace, had not only received numerous management communications and trainings on how to proceed with a claim of harassment discrimination but had also received many trainings on how to navigate the EEO complaint process.

ANALYSIS AND FINDINGS

Untimely EEO Counselor Contact (Claims 1 – 8)

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 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.

EEOC regulations provide that the agency or the Commission shall extend the time limits when the individual shows that she was not notified of the time limits and was not otherwise aware of them, that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

Here, the record discloses that the most recent alleged discriminatory event occurred on July 3, 2022, but Complainant did not initiate contact with an EEO Counselor until October 3, 2022,² which is beyond the forty-five (45) day limitation period. Complainant's appeal statement and the record reflect that she delayed contacting the EEO Office and instead pursued resolution through the Agency's non-EEO, administrative process (claim 9) involving the investigation of her supervisor. However, the Commission has consistently held that the utilization of agency procedures, union grievances, and other remedial processes does not toll the time limit for contacting an EEO counselor. See Ellis v. United States Postal Service, EEOC Appeal No. 01992093 (November 29, 2000). Complainant has not provided sufficient justification for extending or tolling the time limit. Therefore, we find that the Agency properly dismissed claims 1-8 of the complaint for untimely EEO counselor contact.

² The Agency's final decision noted October 20, 2022, as Complainant's initial EEO Counselor contact. However, the record reflects that Complainant made e-mail contact with the Agency's EEO Office on October 3, 2022 (See Complainant's Brief at Ex. A).

Collateral Attack on Separate Agency Process (Claim 9)

Also, with respect to claim 9, the Agency correctly noted in its appeal response that complaints involving other administrative/adjudicatory proceedings do not state a claim within the meaning of EEOC regulations. Even though Complainant asserts that she made the investigator(s) aware that she was a victim of harassment by her supervisor within the context of the DELR investigation of her supervisor, this claim is viewed as a collateral attack on the DELR process. The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. See Hannon v. Dep't of the Treasury, EEOC Appeal No. 05A01149 (May 8, 2003); Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994).

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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. 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 their 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

January 25, 2024
Date