



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

[REDACTED]
Bonny R,¹
Complainant,

v.

Douglas A. Collins,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024001702

Hearing No. 443-2023-00002X

Agency No. 200J-568A4-2022-145762

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final order dated December 18, 2023, regarding her 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. For the reasons below, we affirm the Agency's final order.

ISSUES PRESENTED

Whether the Agency's final order properly implemented the decision of an Administrative Judge (AJ) regarding the dismissal of the formal complaint, and the alternative finding of no discrimination.

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.

BACKGROUND

During the relevant time, Complainant worked as a RRTP (Residential Rehabilitation Treatment Programs) Nurse Manager, Level 0610, Step 5, at the Agency's Health Care System (HCS) in Fort Harrison, Montana.

Before working in the subject position in Montana, Complainant was employed in a nursing position at the Agency's VA Hot Springs Campus facility in Hot Springs, South Dakota. After Complainant started her employment in Montana, Complainant alleged an employee, (Privacy Officer), at her prior position in South Dakota reported her to the South Dakota Board of Nursing (SDNB).

On May 10, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on sex (female) and in reprisal for prior protected EEO activity when:

on April 20, 2022, she became aware that Privacy Officer sent a letter to the SDNB, regarding misconduct involving Complainant which resulted in a Letter of Dishonorable Conduct from the SDNB.

After Complainant's claims were investigated, Complainant elected to pursue her claims before an EEOC AJ through the EEOC Hearings Unit. After the parties engaged in discovery, the Agency filed a motion for summary judgment, Complainant submitted a response, and the Agency then replied. The AJ issued "Decision of Administrative Judge Granting Summary Judgment Pursuant to 29 C.F.R. § 1614.109", on December 12, 2023, granting the Agency's summary judgment motion. The AJ found Complainant was not "aggrieved," specifically noting that the EEOC lacks jurisdiction to adjudicate matters relating to administrative processes pertaining to State Nursing Board licensing processes. The AJ also addressed the merits of Complainant's claim, finding Complainant failed to establish a prima facie case of reprisal. Complainant failed to produce any evidence that she engaged in prior EEO activity.

Regarding Complainant's claims of disparate treatment – regarding the Agency's initial decision to report her to the State Licensing Board in the first place, the AJ found she failed to introduce evidence that this decision was a pretext for either discrimination or reprisal. Instead, the results of the Administrative Investigation Board (AIB), the Agency's internal investigative unit, produced a series of findings that relevant management officials believed necessitated reporting.

For example, the AIB found that Complainant hired subordinate employees to perform personal tasks which the AIB found improper based on the inherent power differential. The AIB was also concerned that Complainant enabled a subordinate with alcohol abuse concerns to drink alcohol in Complainant's home (especially in light of her management role in the RRTP which treats addictions). The AIB also found that Complainant oversaw shift processes which had the detrimental impact of limiting access to pain and anxiety medications which the AIB believed could have a negative impact upon patient care. Furthermore, the AIB found Complainant accessed patient medical records without a justifiable need. The AIB gave Complainant the opportunity to justify these charges, which Complainant failed to do, at which point a report to the State's licensing board was deemed necessary.

The Agency issued a final order adopting the AJ's decision on December 18, 2023.

Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant reiterates her arguments made during the Hearings process and maintains the AJ erred in issued summary judgment in favor of the Agency.

In opposition to the appeal, the Agency contends that the AJ's December 12, 2023, decision in this matter accurately articulates the undisputed material facts and applies the law to the facts in concluding the Complainant failed to state a claim in regard to her being reported to the SDBN.

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

The formal complaint fails to state a claim under the EEOC regulations because Complainant failed to show that she suffered harm or loss with respect 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).

An employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum including the Department of Labor's Office of Workers' Compensation Programs. Fisher v. Dep't of Def., EEOC Request No. 05931059 (July 15, 1994).

Regarding the AJ's dismissal, Complainant is challenging the SDBN's Letter of Conduct she was issued. As the AJ noted in the dismissal, the SDNB has sole jurisdiction over the processing and administering of any and all nursing licensing and conduct issues. Addressing these claims by the Commission could constitute an improper collateral attack on a forum outside of the Commission's EEO complaint process. See Walsh v. U.S.P.S., EEOC Request No. 05980369 (Mar. 29, 2001). Accordingly, we find that SDNB is proper forum for Complainant to raise her concerns. Upon review, the Commission finds that Complainant's was properly dismissed pursuant to 29 C.F.R. § 1614.109.

We will now address the AJ's findings on the merits as they relate to the Agency initial decision to report her to the SDBN. The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, *de novo*. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), at Chap. 9, § VI.B. (as revised, August 5, 2015)(providing that an administrative judge's determination to issue a

decision without a hearing, and the decision itself, will both be reviewed de novo).

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus. Here, however, Complainant has failed to establish such a dispute.

Regarding the basis of reprisal, to state a viable claim of unlawful retaliation in the EEO complaint process, an individual must initially assert that they engaged in prior protected activity as defined by 29 C.F.R. § 1614.101(b). Under 29 C.F.R. § 1614.101(b), prior protected activity includes opposing any practice made unlawful by the statutes which the Commission enforces (i.e. Title VII, ADEA etc.), or participating in any stage of administrative or judicial proceedings under the statutes which the Commission enforces.

Formal complaints which fail to identify a purview under EEO laws must be dismissed for failure to state a claim. See Alisa M. v. U.S. Postal Serv., EEOC Appeal No. 2021003515 (July 8, 2021); Almeda B. v. Dep't of Veterans Affairs, EEOC Appeal No 0120162291 (Oct. 16, 2016). Here, Complainant stated that she was discriminated against based on retaliation. A review of the record, including Complainant's request for pre-complaint counseling and formal complaint, reveals no prior EEO activity by Complainant. On appeal, Complainant does not allege she had prior EEO activity or clarify her vague basis for retaliation based on a *protected EEO basis*. The Commission finds that Complainant's claim of retaliation lacks the requisite prior EEO activity necessary for stating a retaliation claim.

Turning to Complainant's claim of disparate treatment based on sex, we find the Agency officials articulated legitimate, nondiscriminatory reasons for Complainant's non-selections for the positions at issue, which Complainant failed to establish were pretextual. The AIB officials delineated the evidence of misconduct they discovered in their internal investigation, and such misconduct warranted reporting to the State licensing board. Complainant failed to point to any evidence that reporting her to SDNB was based on her sex.

Even construing any inferences raised by the undisputed facts in favor of Complainant, a reasonable fact-finder could not find in Complainant's favor.

Upon careful review of the AJ's decision and the evidence of record, as well as the parties' arguments on appeal, we conclude that the AJ correctly determined that the preponderance of the evidence did not establish that Complainant was discriminated against by the Agency as alleged.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint and alternatively granting summary judgment in favor of the Agency 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

February 26, 2025
Date