



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

[REDACTED]
Drucilla Y.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024002491

Agency No. 200H-306-2023-150685

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 6, 2024, 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1).

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

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

At the time of events giving rise to this complaint, Complainant worked as a Rating Veterans Service Representative (VSR), GS-12, in the Agency's Regional Office in New York, New York. On February 24, 2023, Complainant initiated equal employment opportunity (EEO) contact alleging that the Agency subjected her to hostile work environment harassment based on national origin (Hispanic) and disability (broken arm) when:

1. on July 12, 2022, after Complainant notified management of computer problems, she felt threatened when management requested her call log to prove that she was at work at the start of her shift and threatened to contact Information Technology (IT) to confirm Complainant's statement;
2. between September 26, 2022, and November 10, 2022, management sent Complainant seven text messages asking her to perform work duties while she was on FMLA, without pay;
3. on December 30, 2022, management informed Complainant that her leave request had not been properly updated and subsequently denied Complainant's pre-approved leave;
4. on January 2, 2023, management issued Complainant a written counseling for failure to make up an in-office date based on a policy of which Complainant had no knowledge;
5. on January 4, 2023, management issued Complainant a written counseling after repeatedly instant messaging her to complete mandatory training then informing her that she completed the incorrect training;
6. on January 6, 2023, management verbally counseled Complainant and threatened her with a performance improvement plan (PIP) if she did not bring her performance up to standards;
7. on January 10, 2023, management contacted Complainant to request monthly meetings on camera;
8. on January 20, 2023, management informed Complainant that she was denying her sick leave for January 19 and 20, 2023, because Complainant "did not look sick;" and
9. effective January 20, 2023, Complainant was forced to resign (constructive resignation).

On May 30, 2023, Complainant filed a formal EEO complaint alleging that the Agency subjected her to harassment on the bases of race (unspecified), national origin (Puerto Rico), sex (female), religion (Catholic), color (unspecified), disability, and age (year of birth: 1981) based on incidents (1) through (9) articulated above. Complainant alleged further that management failed to respond to her reports of harassment, failed to conduct an exit interview following her resignation, failed to provide Complainant with seating when she came into the office, and questioned her use of her previously approved computer equipment.

On October 18, 2023, the Agency issued a Notice of Partial Dismissal, dismissing incidents (3) through (5) as discrete acts, for untimely EEO contact, and accepting incidents (8) and (9) as discrete acts. The Agency accepted incidents (1) through (9) as a timely claim of harassment. The Agency investigated the accepted claims.

On February 6, 2024, the Agency issued a final decision dismissing Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. Specifically, the Agency stated, during the EEO investigation, it discovered that, on April 14, 2023, Complainant emailed the EEO Counselor of record ("Counselor") stating that she wanted to withdraw her pre-complaint.² The Agency stated, during the investigation, Complainant stated that she informed the responsible management official that she withdrew her pre-complaint in April 2023. The Agency stated, Complainant abandoned her pre-complaint and could not reinstate it at the formal complaint stage. Summarily, the Agency stated that Complainant did not show that she was not clear about her withdrawal decision or that it was otherwise non-voluntary or coerced. The instant appeal from Complainant followed.

² The record contains an email chain between Complainant and Counselor, dated April 14, 2023. Complainant stated, "I do not want to pursue an eeo complaint against my former supervisor. At this point, I would like to withdraw my complaint." Counselor responded, "Ok, thank you for letting me know. I will get your paperwork drafted for withdrawal." Complainant thanked Counselor. Counselor sent the Withdrawal form on April 17, 2023, but did not receive a completed and signed form.

CONTENTIONS ON APPEAL

On appeal, Complainant stated that she contemplated withdrawal because she was anxious about sitting across from her former supervisor to mediate her pre-complaint, and she feared reprisal and she wanted to work at a different Agency Regional Office. Complainant stated that she did not formally withdraw and did not sign a withdrawal. Complainant added that she called the responsible management official on April 17, 2023, and mentioned withdrawing the complaint, to establish communication. Complainant stated that she decided against it. Complainant stated that the Agency's continued processing of her complaint shows that she did not formally withdraw it.

The Agency opposed Complainant's appeal, stating there is no evidence that Complainant was in a diminished capacity or was coerced or misled into withdrawing her complaint, hence, the dismissal is proper.

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

EEOC Regulation 29 C.F.R. §1614.107(a) authorizes the agency to dismiss a complaint or portion thereof that states the same claim that is pending before, or has previously been decided by the agency or the Commission. The Commission has previously affirmed an agency's decision to dismiss a complaint as stating the same claim as that raised previously where the complainant had earlier withdrawn the matter at the informal counseling stage. Puissegur v. U.S. Postal Service, EEOC Request No. 05920650 (April 15, 1993).

Specifically, the Commission stated that, by knowingly and voluntarily withdrawing an allegation from EEO counseling, and expressly waiving the right to further administrative processing, the complainant forfeited his right to subsequently file a complaint on the same matter.

Here, we agree with Complainant's contention on appeal. The record contains an email, dated April 14, 2023, from Complainant to Counselor stating, "I do not want to pursue an eeo complaint against my former supervisor. At this point, I would like to withdraw my complaint." The Counselor responded, "Ok, thank you for letting me know. I will get your paperwork drafted for withdrawal." In an email dated April 17, 2023, Counselor sent the Withdrawal form, but never received a completed and signed withdrawal form from Complainant. The Agency conducted an investigation of Complainant's claim of harassment, denial of sick leave, and constructive resignation until January 2024, when Complainant mentioned that she told an RMO that she withdrew her complaint. Based on the record, the Agency sought a completed and signed withdrawal form to process the pre-complaint withdrawal, but it never received one. Complainant filed a formal complaint on May 30, 2023, and the complaint was at the Agency investigation stage for about seven months.

Based solely on the specific circumstances herein, we find that Complainant did not formally withdraw her pre-complaint. A completed and signed withdrawal form would help convey that Complainant fully understand that she was withdrawing, would no longer have rights in the EEO process as to this matter, and that she was not coerced.

CONCLUSION

Accordingly, we REVERSE the Agency's February 6, 2024 final decision dismissing Complainant's complaint and REMAND the complaint to the Agency for further processing consistent with this decision and the Order below.

ORDER (E0224)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. 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, or a copy of the final agency decision ("FAD") if Complainant does not request a hearing.

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 (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 (R0124)

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 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. **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, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

November 21, 2024

Date