



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Theresa B,¹
Complainant,

v.

Pete Hegseth,
Secretary,
Department of Defense
(Defense Logistics Agency),
Agency.

Appeal No. 2024002937

Agency No. DLAN-24-000058

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated March 7, 2024, 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons set forth herein, we REVERSE the Agency's final decision dismissing Complainant's complaint.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed the formal complaint on various procedural grounds.

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 period at issue, Complainant worked for the Agency as a Distribution Process Worker in Albany, Georgia. On December 15, 2023, Complainant initiated EEO contact. Informal efforts to resolve her concerns were unsuccessful.

On February 16, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (not specified), national origin (not specified), sex (not specified), religion (not specified), color (not specified), age (not specified), and in reprisal for prior protected EEO activity (opposing and reporting allegations of sexual harassment). Complaint File at 3-4.²

In its final decision dated March 7, 2024, the Agency determined that Complainant's complaint was comprised of the following claims:

1. On October 13, 2022, Complainant received a Letter of Warning for failure to attend a required meeting and failure to notify her supervisor.
2. On December 7, 2022, Complainant received a Letter of Instruction for failure to adhere to Agency's Standard Operating Procedures.
3. On February 3, 2023, Complainant received a Letter of Warning for failure to maintain professionalism during an incident with her supervisor.
4. On October 19, 2023, Complainant was notified she failed to properly perform Kind, Condition, and Count Inspection.
5. On October 26, 2023, Complainant attended a two-hour meeting on the topic of the employment termination process perceived as a threatening session during which a management official used 'scare tactics,' and told Complainant and other employees that their probationary period could end for no reason at all without [human resources] review.

² Our citations to the Complaint File reference the page number of the pdf document before us on appeal.

6. On November 13, 2023, [Complainant was] issued a Notice of Probationary Termination.³ Complaint File at 53-54.

The Agency dismissed Complainant's complaint on various procedural grounds. The Agency dismissed Complainant's complaint, in its entirety, for failure to state a claim. The Agency reasoned that Complainant did not properly allege a basis or bases of discrimination. Specifically, the Agency stated while Complainant checked the protected bases of race, color, religion, national origin, age, and sexual harassment, on her formal complaint form, Complainant did not specify her particular race, color, religion etc. Complaint File at 54.⁴

The Agency also dismissed claims (1)-(4), (6) on the grounds that Complainant previously raised these matters in an MSPB appeal. The Agency reasoned that Complainant indicated, on her formal complaint form, that she raised these matters in an MSPB appeal (identified as MSPB Docket No. AT-315H-24-0167-I-1). The Agency set forth that MSPB Docket No. AT-315H-24-0167-I-1 reflects that Complainant previously appealed these claims to the MSPB. Complaint File at 54.

Finally, the Agency dismissed claim (5) for untimely EEO Counselor contact. The Agency reasoned that Complainant initiated EEO contact on December 15, 2023, more than 45 days after the alleged discriminatory incident on October 26, 2023. *Id.*

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant asserts that she thought she provided additional information to the EEO Specialist who conducted her EEO Counseling. Complainant asserts, however, that her computer was having technical problems and the EEO Counselor appears not to have received her revised information.

³ The claims are re-numbered herein to place them in chronological order.

⁴ Our citations to the Complaint File reference the page number of the pdf document before us on appeal.

In response, the Agency requests that we affirm its final decision. The Agency reiterates that Complainant did not self-identify her specific protected EEO classes. Finally, the Agency reasserts that Complainant previously raised some of the same incidents in an appeal to the MSPB.

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

Claims at Issue

As an initial matter, we find that Complainant is alleging that she was subjected to a hostile work environment comprised of incidents (1)-(6). In addition, we find Complainant is also alleging that she was subjected to sexual harassment. On her formal complaint form, Complainant specifically, checked the box for "sexual harassment." Complaint File at 3. Furthermore, in her complaint form, Complainant states that she was sexually harassed by two named supervisors and that their behavior included: "unwelcome[d] verbal abuse, unwanted sexual advances, unwanted requests for sexual favors, [and] offensive jokes." Complaint File at 4. Complainant states after confronting her supervisors and reporting the allegations of sexual harassment, she received disciplined and was subjected to retaliation. Id.

Dismissal for Failure to State a Claim-Claims (1)-(6)

The only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether complainant is an aggrieved employee; and (2) whether complainant raises employment discrimination on a basis covered by EEO statutes.

If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its judgment of the merits. See Odoski v. Dep't of Energy, EEOC Appeal No. 01901496 (April 16, 1990).

We find that the Agency improperly dismissed Complainant's complaint for failure to state a claim. Complainant, on her formal complaint form, checked the following bases for her EEO complaint: race, color, religion, national origin, sex, age, and reprisal.⁵ Complaint File at 3. We acknowledge that Complainant did not specify, on her formal complaint form, her particular race, color, religion, national origin, sex, and age. See Kelly v. Dep't of the Army, EEOC Appeal No. 0120121242 (Jan. 18, 2013) (OFO finding that agency's dismissal for failure to state a claim was improper reasoning that while complainant did not specify his particular race, he did check the "race" box on his formal complaint form). In the instant matter, Complainant has alleged that the Agency took various actions including, but not limited to, letters of warning, letter of instruction, removal etc., based on various protected EEO bases (race, sex etc.); thus, we find she has set forth an actionable claim.⁶

In addition, Complainant clearly sets forth reprisal as a basis, in her formal complaint, and states that her prior EEO activity included opposing and reporting sexual harassment.⁷ Complaint File at 4. Based on the foregoing, we find that the Agency's dismissal for failure to state a claim was improper.

Dismissal for Previously Raising Same Matters in an Appeal to the MSPB-Claims (1)-(4), 6

A mixed case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1).

⁵ Complainant also checked the basis of "sexual harassment" on her formal complaint form. Complaint File at 3.

⁶ Complainant may specify her particular race, sex, religion, etc., during an investigation on the merits of her complaint.

⁷ The EEO Counselor's Report also sets forth regarding the basis of reprisal, that Complainant's prior EEO activity included reporting allegations of supervisory sexual harassment. Complaint File at 8.

An aggrieved person may initially file a mixed case complaint with an agency or file a mixed case appeal directly with the MSPB, pursuant to 5 C.F.R. § 1201.151, but not both. 29 C.F.R. § 1614.302(b). 29 C.F.R. § 1614.107(a)(4) provides that an agency shall dismiss a complaint where the complainant has raised the matter in an appeal to the MSPB and 29 C.F.R. § 1614.302 indicates that a complainant has elected to pursue the non-EEO process. However, if the MSPB finds that it does not have jurisdiction over the matter, the Agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint. 29 C.F.R. § 1614.302(c)(2)(ii).

We find that the Agency improperly dismissed the above referenced claims on the grounds that Complainant previously raised these matters in an MSPB appeal. We acknowledge that Complainant, on her formal complaint form, sets forth that she filed an appeal on these matters identified as MSPB Docket No. AT-315H-24-0167-I-1. Complaint File at 4. While the Agency's final decision references Complainant's MSPB appeal (Complainant File at 53, 57), the record, before us on appeal, does not contain any documentation related to Complainant's MSPB appeal. However, we have reviewed the MSPB's Administrative Judge's (AJ's) decision in MSPB Docket No. AT-315H-24-0167-I-1 (Feb. 29, 2024).⁸ Therein, the MSPB decision set forth that Complainant filed her MSPB appeal on November 29, 2023, regarding her removal (identified herein as claim (6)). The MSPB AJ dismissed Complainant's appeal for lack of jurisdiction reasoning that Complainant was in her probationary period.⁹ Based on the foregoing, we find that the Agency improperly dismissed these matters on the grounds Complainant previously filed an appeal with the MSPB.

Dismissal for Untimely EEO Counselor Contact-Claim (5)

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.

⁸ The MSPB AJ's decision was issued on February 29, 2024, prior to the Agency's final decision dated March 7, 2024.

⁹ The MSPB decision sets forth that the initial decision will become final on April 4, 2024, unless a petition for review is filed by that date. The record is devoid of evidence that a petition for review has been filed in this matter.

The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

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.

As set forth above, Complainant alleges that she was subjected to a hostile work environment by Agency supervisors. 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 of the filing period that [Complainant] knew or should have known were actionable at the time of the occurrence." EEOC Compliance Manual, Section 2, Threshold Issues at 2-75 (rev. July 21, 2005) (citing National Railroad Passenger Corp v. Morgan, 536 U.S. 101, 117 (2002)). In the instant matter, at least one of the incidents at issue, Complainant's removal (claim (6)), was effective November 13, 2023, within the 45 days preceding Complainant's EEO contact on December 15, 2023. Thus, we find that incident (5) was timely raised as part of Complainant's overall hostile work environment claim.

CONCLUSION

For the reasons discussed above, we REVERSE the Agency's final decision dismissing Complainant's complaint and we REMAND this matter to the Agency for further processing in accordance with 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:



Carlton M. Hadden, Director
Office of Federal Operations

February 18, 2025
Date