



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

[REDACTED]
Anne C,¹

v.

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

Appeal No. 2024003303

Agency No. 200I-508-2024-156486

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated April 1, 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 below, we REVERSE the Agency's final decision dismissing Complainant's complaint.

ISSUE 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), and the matters that occurred prior to July 1, 2023, failed to be like or related to the allegations that were the subject of EEO counseling pursuant to 29 C.F.R. § 1614.107(a)(2).

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 as an Advanced Medical Support Assistant at the Agency's Joseph Maxwell Cleland Atlanta Veterans Affairs Medical Center in Decatur, Georgia.

On January 11, 2024, Complainant initiated EEO Counselor contact. Complainant underwent EEO counseling regarding a claim that on December 2, 2023, Complainant was not selected for a Medical Support Assistant (MSA) position for which she had applied in July 2023. The pre-complaint documents included a note identified as follows: "Note: [Complainant] had eight previous non-selection applications from 2021-2023." Informal efforts at resolution were not successful.

On February 16, 2024, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination based on age and in reprisal for prior protected activity when:

1. On April 2, 2021, Complainant was not selected for the Lead Assistant MSA – Covid 19 position, Vacancy Announcement CBCZ-11072190-21-RAA.
2. On April 9, 2021, she was not selected for the Lead MSA position, Vacancy Announcement CBTB-11055462-21-RAA.
3. On September 29, 2021, she was not selected for the Lead MSA position, Vacancy Announcement CBSR-11221036-21-SDG.
4. On October 25, 2021, she was not selected for the Lead MSA position, Vacancy Announcement CBTB-11273327-22-SH.
5. On June 30, 2022, she was not selected for the Lead MSA position, Vacancy Announcement CBTB-11430024-22-SSH.
6. On January 17, 2023, I was not selected for the Lead Medical Support Assistant position, Vacancy Announcement CBSY-11781792-23-KW.
7. On March 2, 2023, she was not selected for the Lead MSA position, Vacancy Announcement CBTB-11880295-23-KI.
8. On December 2, 2023, she was notified by an employee that

someone other than Complainant had been selected for the Lead MSA position, Vacancy Announcement CBBJ-12032907-23-JP, in the Rome and Cobb County, Georgia clinics. Complainant asserted that she had not received an official notification that she was not hired, but that she only received a USAJOBS referral status on October 12, 2023, indicating that she was referred to the hiring manager.

On April 1, 2024, the Agency issued a final decision dismissing Complainant's complaint. The Agency provided two explanations for why Complainant's formal complaint was dismissed. First, the Agency determined that Complainant had undergone EEO counseling solely for "**matter(s) during the time period July 1, 2023 to December 2, 2023.**" (emphasis in the original). Next, the Agency found that matters that occurred prior to July 1, 2023, were not like or related to the allegations that were the subject of EEO counseling.

Second, the Complainant failed to allege an actionable claim of discrimination because she was not aggrieved.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that both of the Agency's reasons for dismissing Complainant's Formal Complaint represent inadequate rationales that outright disregard the Commission's jurisprudence. Complainant further argues that her non-selections that occurred prior to July 1, 2023, are like and related to the oldest event that was the subject of the EEO counseling. Complainant asserts that the alleged non-selections Complainant experienced are an ongoing pattern of discrimination.

In response, the Agency asserts that the Agency's final decision is factually and legally correct.

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

Like or Related Dismissal

The regulation set forth at 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint which raises a matter that has not been brought to the attention of an EEO Counselor, and is not like or related to a matter on which the complainant has received counseling.

A later claim or complaint is "like or related" to the original complaint if the later claim or complaint adds to or clarifies the original complaint and could have reasonably been expected to grow out of the original complaint during the investigation. See Mannon v. U.S. Postal Serv., EEOC Appeal No. 0720070074 (Apr. 4, 2012); Scher v. U.S. Postal Serv., EEOC Request No. 05940702 (May 30, 1995).

We find that in the instant case, during Complainant's counseling period, it is clear that Complainant discussed that she experienced at least eight instances of non-selections (including the most recent one in December 2023), and she provided documentation on related to the non-selections on as requested by her counselor prior to the conclusion of the informal counseling period. Additionally, in the Counselor's Report on this matter, the Counselor made note of non-selections that were discussed with Complainant as referenced above. Taken together, Complainant's non-selections that occurred prior to July 1, 2023, are like and related to the oldest event that was the subject of the EEO counseling. A fair reading of Complainant's formal complaint shows that the non-selections Complainant experienced are an ongoing pattern of discrimination based on her age and reprisal.

In addition, Complainant is asserting that she was subjected to a hostile work environment due to her protected classes of age and retaliation.

Harassment often involves more than one incident and often doesn't occur on a particular day. See National R.R. Passenger Corp. v. Morgan, 102 LRP 13910, 536 U.S. 101 (U.S. 2002). Any incident prior to this incident can be accepted as evidence of harassment so long as a related act was raised in a timely manner. Claims 1-7 are like and related to claim 8, which was raised timely, and thus all eight claims should be included in Complainant's formal EEO complaint. Complainant has already demonstrated that each of her non-selections were like and related to the oldest event that was the subject of EEO counseling and should be properly considered to be acts of harassment. Therefore, the Agency improperly dismissed Complainant's formal EEO complaint on these grounds.

Failure to State a Claim Dismissal

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an aggrieved employee or applicant for employment who believes that they have 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. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If the complainant cannot establish that they are aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

Moreover, the factual allegations as raised by Complainant must be taken in the light most favorable to the Complainant to determine whether or not they are sufficient to state a claim. Cobb v. Dept. of Treas., EEOC Appeal No. 05970077 (Mar. 13, 1997). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief." Conley v. Gibson, 355 U.S. 40, 45-46 (1957). For acceptance purposes, the only issue is whether the complainant has alleged harm, not whether the complainant can ultimately prove harm. Knight v. Postmaster General, 01971125 (1998).

Here, we disagree with the Agency's conclusion that the Complainant failed to allege an actionable claim of discrimination because she was not aggrieved. A fair reading of the entire record, nevertheless, shows that Complainant has identified at least one incident in her formal complaint that would qualify her

as an aggrieved individual and thus Complainant has articulated a legally cognizable claim of discrimination and retaliation against the Agency. Considering the facts in the light most favorable to Complainant, we therefore find Complainant has provided sufficient evidence to rebut the Agency's proffered reason for dismissing Complainant's formal EEO complaint. We conclude Complainant has sufficiently alleged an injury or harm to a term, condition, or privilege of employment for which there is a remedy. Accordingly, the Agency improperly dismissed Complainant's complaint for failure to state a claim.

CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED for the reasons discussed above. The case is REMANDED 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

December 11, 2024
Date