



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Colene M.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2024003874

Agency No. AREUBENEL24APR000474

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 21, 2024, dismissing her complaint of unlawful employment discrimination in violation of 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 properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

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 Marketing Manager, NF-1101-04, in Family and Morale, Welfare, and Recreation at the Army Garrison Benelux in Brussels, Belgium. On May 10, 2024, Complainant filed a formal equal employment opportunity (EEO) complaint alleging that the Agency subjected her to discrimination on the bases of disability (musculoskeletal condition), age (60), and reprisal for prior protected EEO activity (prior protected activity and reasonable accommodation request) when:

1. about January 18, 2024, a Human Resources Officer (HRO) “tried to coerce [Complainant] into retiring by completing AF-2391 Termination Information telling [Complainant she] would not be approved for disability retirement, the Air Force needed to run [Complainant’s] benefit estimate, and it is more beneficial;”²
2. HRO “improperly and intentionally mishandled [Complainant’s] disability retirement paperwork from August 2023 through April 2024;” and
3. on August 8, 2023, the Agency approved Complainant’s reasonable accommodation request and, on August 10, 2023, while Complainant was participating in an event at another facility, “[HRO] commented about [Complainant] driving no more than 30 minutes per [her] doctor . . . and failed to process [Complainant’s] 776r timely.”

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. The final decision stated that Complainant’s claim, the incidents alleged in claim (2), was a collateral attack on the disability retirement process administered by the Office of Personnel Management (OPM). The instant appeal from Complainant followed.

² Form 2391 Termination Information is a form used to provide information for the Air Force Non-Appropriated Fund Retirement Plan.

CONTENTIONS ON APPEAL

On appeal, Complainant stated that the Agency did not consider all of her claims, and that she is a non-appropriated fund (NAF) employee, so her disability retirement application is reviewed and approved by the Agency, not OPM. Further, Complainant stated that her disability retirement application was not declined.

In opposition, the Agency acknowledged that it erroneously cited OPM as the reviewer for Complainant's disability retirement and stated that NAF has its own adjudicatory proceeding which allows for appeal. The Agency stated that Complainant's claim is a collateral attack on the NAF disability retirement process. Further, the Agency stated that Complainant does not allege actions that rise to the level of hostile work environment harassment.

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 regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age, disabling condition, genetic information, or reprisal. 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 (April 21, 1994).

The Commission has held that where a complaint does not challenge an agency action or inaction regarding a specific term, condition, or privilege of employment, a claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Where, as here, a complainant has asserted that she was subjected to unlawful retaliation for her prior protected activity, the Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process); see also Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999) (citing EEOC Compliance Manual, No. 915.003 (May 20, 1998)). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Id.

In the instant case, the Commission agrees with Complainant that the Agency did not address all her allegations, specifically, incidents (1) and (3). Notwithstanding, we find that the Agency properly dismissed the complaint for failure to state a claim.

As an initial matter, the alleged incidents did not involve any adverse action against Complainant. See Backo v. United States Postal Service, EEOC Request No. 05960227 (June 10, 1996) (finding that the Commission has repeatedly found that remarks unaccompanied by "concrete action" fail to state a harassment claim under Title VII). Furthermore, the Commission finds that Complainant's allegations, even if true, do not rise to the level of being sufficiently severe or pervasive to assert a claim of hostile work environment discrimination. See, e.g., Banks v. Dep't of Health and Human Services, EEOC Request No. 05940481 (February 16, 1995) (finding that a supervisor allegedly throwing a file onto a complainant's desk and loudly berating her in front of other employees did not state a harassment claim); Omer P. v. Dep't of the Army, EEO Appeal No. 2019002814 (July 25, 2019) (finding allegations that a supervisor undermined Complainant's authority insufficient to state a claim when the supervisor held secret meetings without complainant, promised to reinstate the complainant's subordinate

without the complainant's permission, and used derogatory language when describing complainant's supervisory role).

We find that Complainant's allegations describe isolated incidents, in which a Human Resources Officer, HRO, informed Complainant that she would not qualify for disability retirement and began completing a regular retirement form for Complainant, stating that would reap the better benefit. Complainant also alleged that HRO took a long time processing her disability retirement and did so improperly, and made a comment about her reasonable accommodation restrictions as to driving distance when she attended an off-site event.

There is no evidence that these incidents affected a term, condition, or privilege of employment for which there is a remedy; were so severe or pervasive as to alter the conditions of Complainant's employment; or were reasonably likely to deter EEO activity. Accordingly, we find Complainant's complaint was properly dismissed for failure to state a claim and deemed technically insufficient to proceed in the administrative process.

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

November 12, 2024
Date