



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

[REDACTED]
Kim S.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2024004073

Agency No. 2003-756-2024-157606

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 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. For the reasons set forth below, we AFFIRM 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).

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 a Licensed Vocational Nurse, with the Department of Veterans Affairs, Veterans Health Administration, South Central VA Clinic, in El Paso, Texas.

On March 13, 2024, On March 13, 2024, Complainant made initial contact with an EEO counselor, alleging that he was subject to a hostile work environment on the basis of sex and reprisal when:

On March 11, 2024, Complainant's wife received an anonymous letter addressed to her that read; "It would be a very good idea to ask your husband about Connie at work. He is not who you think."

On April 5, 2024, Complainant was sent a final interview letter.

On April 10, 2024, Complainant filed a formal complaint. In filing the Complaint, he sought to add the basis of "defamation" to his Complaint. Complainant also sought to amend the formal complaint to add the following event:

"From March 4 - March 8, 2024, the Nursing Manager would mutter about me in the hallway. I was not able to understand what she was saying."

Complainant also wrote, "As for myself I've had problems with pay while on Active Duty which has caused me to acquire a debt. Along with being ridiculed by the payroll department and the Department Secretary, who has retired now."

Complainant alleges that the basis for his reprisal claim is that, "On March 4, 2024, the Behavioral Nursing staff, had a meeting with the Chief of Staff and the VA Director at the El Paso VA regarding the behavior of the Nursing Supervisor."

On June 7, 2024, the Agency issued a final decision. The Agency dismissed the formal complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, finding that Complainant had not stated a claim of harassment.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant offers no new arguments, except that Complainant submitted a proposed amendments alleging that that the Nurse Manager muttered unintelligibly in the hallway, and that Complainant encountered payroll issues while on Active Duty.

In response, the Agency asserts that the proposed amendments neither add to or clarify the original complaint, nor could they have been reasonably been expected to have grown out of the original claim that was raised during counseling. The Agency specifically notes that the proposed amendments allege that the Nurse Manager muttered unintelligibly in the hallway; and that Complainant encountered payroll issues while on Active Duty. The Agency asserts, however, that the proposed amendments do not involve the same Nursing Manager, and that there is no nexus between the original claim and the proposed amendments.

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

Failure to State a Claim Dismissal

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 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 (April 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).

To the extent that Complainant alleges that the event in the complaint states a claim of discriminatory harassment, we disagree. In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. Thus, not all claims of harassment are actionable. As noted by the Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998): "isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'."

We carefully considered Complainant's claim, with regard to an anonymous letter sent to his wife, in the context of discriminatory hostile work environment. In this case, there is claim reflecting that any action was purportedly taken by the Agency, and the matter occurred at Complainant's personal residence which does not affect the term, condition, or privilege of his employment. Harassment consists of conduct which is inappropriate in the work environment, and which is unnecessary to the proper functioning of the work unit. Although Complainant may have experienced displeasure or aggravation, the anonymous letter addressed to Complainant's wife was an isolated event, and therefore does not meet the "severe or pervasive" test for actionable harassment under EEOC laws and regulations.

Finally, the record is devoid of any evidence establishing that the anonymous letter was followed by any concrete action affecting the terms or conditions of Complainant's employment. When viewed as a whole, the conduct complained of is insufficient to render him aggrieved within the meaning of EEO law and does not have the potential to substantially affect the work environment of a reasonable person.

Defamation is not a Recognized Base

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 or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). To successfully state a claim, a complaint must identify an alleged basis of discrimination (i.e. race, sex, age, national origin, color, religion, disability, and reprisal for prior EEO activity) within the purview of EEO law and regulations. If a complaint fails to clearly identify a covered basis within our jurisdictional purview, then it must be dismissed. See Emmanuel L. v. Dep't of the Air Force, EEOC Appeal No. 0120171680 (July 11, 2017).

Defamation is not a basis covered under the EEO statues. The Agency's dismissal of this basis was proper.

Proposed Amendments Are Not "Like or Related" to the Original Claim

EEO Regulation 29 CFR 1614.107(a)(2) in part, specifically requires dismissal of a claim that raised a matter that has not been brought to the attention of a counselor and is not like or related to a matter that has been brought to the attention of a counselor. The requirements for deciding if a claim is considered like or related to the original complaint are: 1) do the new claims add to or clarify the original complaint; and 2) could the new claims have reasonably been expected to have grown out of the initial complaint that was raised during counseling. In addition, regulations permit complaints to be amended prior to the conclusion of the investigation.

Complainant's original claim related to an anonymous letter purportedly addressed to Complainant's wife was delivered to their home, urging his wife to ask Complainant about his relationship with a co-worker. The proposed amendments, however, do not add to or clarify the original complaint, nor could they have been reasonably been expected to have grown out of the original claim that was raised during counseling. Specifically, the proposed amendments allege: (1) that the Nurse Manager muttered unintelligibly in the hallway; and (2) that Appellant encountered payroll issues while on Active Duty. The proposed amendments do not involve the same Nurse Manager, nor is there any line between the original claim and the proposed amendments. Therefore, the proposed amendments were properly dismissed.

Reprisal

For claims based on reprisal, adverse actions need not qualify as "ultimate employment actions" or materially affect the terms, conditions or privileges of employment to constitute unlawful retaliation. Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120122790 (Dec.13, 2012). Instead, it is Commission policy to consider reprisal claims with a broad view of coverage to protect the complainant from any retaliatory discrimination that is reasonably likely to deter protected activity. Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Here, Complainant raised reprisal as one of the bases for his complaint. Although we considered Complainant's reprisal claim broadly, we nevertheless determine that Complainant did not establish he was aggrieved. When asked during EEO counseling to describe his prior protected activity that resulted in the alleged reprisal, Complainant stated that the Agency was retaliating against him for previously reporting the Nurse Manager inappropriate behavior to senior leadership. Complainant did not allege, however, that he raised claims of discrimination with regard to the Nurse Manager's actions. Complainant does not have any prior EEO activity. Further the basis for reprisal as described by Complainant does not show that he "opposed" discrimination. Moreover, because the letter was anonymous, there is no proof that it was sent by the Nurse Manager, and therefore Complainant's claim does not represent an employer action that has the potential to deter a reasonable person from participating in the EEO complaint process.

Consequently, the Agency properly dismissed the instant formal EEO complainant for failure to state a claim in accordance with 29 C.F.R. 1614.107(a)(1).

CONCLUSION

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

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

January 8, 2025

Date