



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

[REDACTED]
Cathy V.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Health Agency),
Agency.

Appeal No. 2024004175

Agency No. DHA-202401-0254

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 4, 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. For the reasons presented below, we AFFIRM the Agency's final decision dismissing Complainant's complaint.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's formal complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim and 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact.

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 Registered Nurse, GS-11, at the Agency's DD00203 NATTC NBHC NAS facility in Pensacola, Florida.

On February 16, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and harassment on the bases of race (Caucasian), age (YOB: 1961), and reprisal for prior protected EEO activity when:

- a. On 12 October 2023, Clinic Manager placed Complainant on administrative leave due to an investigation into alleged misconduct and a possible ethics complaint;
- b. On or about April 2023 to October 2023, Clinic Manager excluded Complainant from emails, important clinic information for daily work, and refrained corpsman from interacting with Complainant;
- c. On or about April 2023 to May 2023, Clinic Manager lowered Complainant's performance rating;
- d. Throughout 2022 to 2023, Clinic Manager harassed Complainant and created a hostile work environment by ignoring Complainant, displaying intimidating, offensive, abusive behavior and racial disparities;
- e. On or about March 2022 to April 2022, Clinic Manager spoke to Complainant in an offensive manner when Complainant called to advise the front desk staff that Complainant called out sick.

The Agency dismissed these claims pursuant to 29 C.F.R § 1614.107(a)(2) for untimely EEO counselor contact. Complainant then sought to amend her complaint, specifically Claim (a), to read "On October 12, 2023 to present, Complainant was placed on administrative leave due to an investigation and a possible ethics complaint" (emphasis added).

The Agency subsequently issued another decision dismissing the complaint as amended. The Agency dismissed amended Claim (a) pursuant to 29 C.F.R § 1614.107(a)(1) for failure to state a claim finding that Complainant was not aggrieved within the meaning of the regulations when she was placed on administrative leave pending an investigation.

The Agency dismissed Claims (b)-(e) pursuant to 29 C.F.R § 1614.107(a)(2) for untimely EEO counselor contact. Complainant then filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the actions in Claim (a) do render her aggrieved and therefore it states a claim. She further notes that Claim (a) would still be adequate to justify a legal cause of action as part of her hostile work environment claim and that under her alleged basis of retaliation, there is a lower threshold to constitute an adverse action. Complainant also contends that all her claims were timely raised with an EEO counselor because a hostile work environment claim is timely so long as one of the claims is timely. She asserts that the Agency improperly fragmented her claim to dismiss Claim (a) because Claim (a) is timely and was ongoing at the time she made EEO counselor contact.

The Agency contends on appeal the Claim (a) is also untimely because Complainant should have developed a reasonable suspicion of discrimination on October 12, 2023 when she was placed on administrative leave. The Agency also asserts that Complainant cannot amend her complaint after it was already dismissed. The Agency then argues that Complainant has failed to demonstrate a harm or loss for which there is a remedy because Complainant has retired and therefore there is no remedy for placing and keeping her on annual leave. Lastly, the Agency argues that Complainant has not established prior protected EEO activity.

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

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that 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). An “aggrieved employee” is 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). 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.

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. The Court explained that an “objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive” and the complainant subjectively perceives it as such. Harris, *supra* at 21-22. Thus, not all claims of harassment are actionable. Where a complaint does not challenge an agency action or inaction regarding a specific term, condition or privilege of employment, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment.

Reprisal claims are afforded a broad view of coverage under EEO laws. For claims of reprisal and retaliatory harassment claims, the alleged retaliatory actions need not impact a term, condition, or privilege of employment. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). A complainant need only show that a materially adverse action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Id. 548 U.S. at 68. The Commission's guidance states if the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016).

The Commission acknowledges that under certain circumstances, placement on paid administrative leave for a brief period does not state a justiciable claim.

However, as noted by Complainant in her appeal brief, in situations where a complainant is placed on forced administrative leave for an indefinite period lasting several months pending an investigation, we have found a complaint to be aggrieved. See Miranda B. v. U.S. Postal Serv., EEOC Appeal No. 2024002356 (Jul. 17, 2024) (complainant stated a claim where she was placed on a long period of forced paid administrative leave, which appeared to continue at least four months through the filing of her formal complaint, and possibly longer); Randy G. v. U.S. Postal Serv., EEOC Appeal No. 0120161627 (July 28, 2016) (complainant stated a claim where he was placed on administrative leave pending an investigation for over three months); Watt v. Dep't of the Navy, EEOC Appeal No. 0120082308 (June 26, 2008) (complainant placed on extended paid administrative leave for an indefinite period pending an investigation regarding a charge of serious misconduct. This stated a claim of a personal loss or harm regarding a term, condition, or privilege of employment). Therefore, we find Complainant was aggrieved by the actions in Claim (a) and Claim (a) therefore states a claim.²

However, we also find that Complainant's EEO counselor contact in Claim (a) was untimely. EEOC Regulation 29 C.F.R. §1614.105(a)(1) provides that an aggrieved person must initiate contact with an EEO 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. EEOC Regulation 29 C.F.R. § 1614.107(a)(2) provides for the dismissal of complaints where the complainant did not initiate contact with an EEO 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 45 days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the 45-day limitation period is triggered. See Junior T. v. U.S. Postal Serv., EEOC Appeal No. 2023002297 (Apr. 27, 2023) (citing 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.

² We are not persuaded by the Agency's arguments that Complainant should not have been allowed to amend her claim after her complaint was initially dismissed. The Agency acknowledged receipt of Complainant's amendment and then issued a new dismissal including the amendment. That is the dismissal that Complainant has appealed and it is therefore properly before us.

Given that Complainant has alleged discrimination and harassment dating back to 2022, she should have reasonably suspected discrimination when she was placed on administrative leave on October 12, 2023. However, she did not contact an EEO counselor until 83 days later on January 3, 2023. This is well more than 45 days after the effective date of the personnel action placing her on administrative leave. We are not persuaded by arguments that the administrative leave was ongoing. Therefore we find that Claim (a) should be dismissed pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact.

Complainant is correct that 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 their 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)). Because Claim (a) is untimely, it cannot serve as a timely act to make Complainant’s claims of harassment/hostile work environment timely. Therefore we find that the Agency properly dismissed Claims (b)-(e) pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact.

CONCLUSION

For the foregoing reasons, we AFFIRM the Agency’s dismissal of the formal complaint.

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

December 30, 2024

Date