



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Cami C,¹
Complainant,

v.

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

Appeal No. 2024004407

Agency No. 200H-632-2024-157616

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 23, 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., 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. For the reasons set forth herein, we MODIFY the Agency's final decision dismissing the formal complaint.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's complaint for failure to state a claim.

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 Registered Nurse at the Agency's facility in Northport, New York. On April 4, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Black), national origin (Haitian), disability, age, and in reprisal for prior protected EEO activity (prior EEO cases).

In its final decision, the Agency framed Complainant's claims in the following fashion:

Whether Complainant was subjected to a hostile work environment based on age, disability, national origin, race, and reprisal when:

1. On February 26, 2024, March 4, 2024, and March 6, 2024, Complainant was requested to participate in an internal investigation.

The Agency dismissed this matter for failure to state a claim. The Agency reasoned that the alleged incidents are not sufficiently severe or pervasive to set forth an actionable claim of harassment. The Agency further found that internal investigations are collateral attacks on those proceedings. Finally, regarding the basis of reprisal, the Agency found that the alleged incidents would not deter a reasonable person from participating in the EEO process.

CONTENTIONS ON APPEAL

On appeal, Complainant, through her attorney, requests that we reverse the Agency's final decision and remand this matter for an investigation. Complainant asserts that, at the time of the instant matter, she had two prior EEO cases pending before an EEOC Administrative Judge (AJ), Agency Case No. 200H-632-2022-144314, EEOC Hearing No. 520-2023-00084X, and Agency Case No. 200H-632-2023-152230, EEOC Hearing No. 520-2024-00196X. Complainant alleges that the instant matter is a continuation of the hostile work environment set forth in her prior EEO complaints. Complainant requests that the instant matter be consolidated with the matters in her prior complaints.

The Agency does not submit a statement or brief in opposition to Complainant's appeal.

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

Under 29 C.F.R. § 1614.107(a)(1) an agency shall dismiss a complaint that fails to state a claim. The Commission has generally held that complaints involving other administrative proceedings, including those involving internal investigations, do not state a claim. See Heard v. Dep't of Justice, EEOC Appeal No. 0120092680 (Aug. 27, 2009).

Regarding the bases of age, disability, national origin and race in the instant matter, we find that the Agency properly dismissed these matters for failure to state a claim.

We find, however, that the Agency improperly dismissed the basis of reprisal. The Commission has a policy of considering reprisal claims with a broad view of coverage. Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity. See EEOC Enforcement Guidance on Retaliation and Related Issues, No 915.004 (Aug. 25, 2016), at Section II(B).

In the instant matter, Complainant alleges a named Facility Director initiated the investigative interview in reprisal for her prior EEO cases. Complaint File at 8.² The alleged retaliatory investigative interview is reasonably likely to deter future protected activity.

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

Therefore, regarding the basis of reprisal, Complainant has stated a cognizable claim under the EEOC regulations. See Hants v. U.S. Postal Serv., EEOC Appeal No. 0120103092 (Jan. 4, 2011).

To the extent that Complainant is seeking for this matter to be consolidated with her prior EEO cases currently pending before an EEOC AJ, she may file a motion with the AJ requesting that her prior EEO cases be amended to include the instant claim.³ See EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chapter 5, III(B) (rev. Aug. 5, 2015).

CONCLUSION

Accordingly, we AFFIRM the Agency's dismissal of Complainant's complaint regarding the bases of age, disability, national origin, and race. However, we REVERSE the Agency's dismissal of this matter on the basis of reprisal 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 (basis of reprisal) 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.

³ The AJ has the discretion of whether to grant or deny such a motion to amend.

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 (T0124)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 18, 2024
Date