



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

[REDACTED]
Shae M.,¹
Complainant,

v.

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

Appeal No. 2024004528

Agency No. ARPOM24APR001010

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 19, 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 reverse the Agency's final decision dismissing Complainant's complaint and remand this matter to the Agency for further processing in accordance with the Order below.

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.

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 Assistant Professor, AD-1701-04, at the Agency's Defense Language Institute Foreign Language Center (DLIFLC) facility in Presidio of Monterey, California.

On June 28, 2024, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of sex (female) and reprisal for prior protected EEO activity (Agency No. ARPOM23AUG02582) when:

1. "[Redacted] from the Union has given authorization for teachers to violate the Commandant's Command Policy on Wellness Time. Certain people are allowed to combine Wellness with Flex Time, which, to my understanding, is not allowed. I also know these people falsify their ATAAPS to show Wellness Time when they are simply going home early. Command Policy #41, dated 13 Sep 2021, Annex A, #10 states that 'the 3 hours of Wellness Time cannot be used at the beginning or end of day/shift, and members must report to their workstation before and after each authorized fitness period.' [Director] allows certain members (also on Flex Time) to leave early every Friday for Wellness. By allowing this to occur, not only are individuals falsifying their hours in ATAAPS, but [Director], in her role as a certifying official, is knowingly certifying a false/inaccurate ATAAPS report."
2. "[Director] does not assign DPMAP ratings in a fair and objective manner. She gives 'exceeds expectations' to the people she likes. She punished me, in an act of reprisal for our previous interactions, by rating me as "meets expectations" despite my numerous accomplishments throughout the rating year. I taught over 1,100 hours, and my students are consistently performing above-average on their exams. She shows favoritism by only giving her friends high marks. I am aware of the ability to challenge a DPMAP rating, but that does not address the root of the problem."
3. [Director] constantly talks about my appearance, which violates Command Policy #40, "Prevention of Sexual Harassment and Sexual Assault.¹¹ This Command Policy, paragraph 7.a, states 11 sexual harassment is a form of sexual discrimination...and other verbal conduct of a sexual nature." On more than one occasion, she has mentioned my body, my hair, my clothes, my boots, and the way I

walk- all these comments make me extremely uncomfortable and belittles me as a teacher. She accuses me of "trying to charm my students¹¹ which completely reduces me to a sexual object instead of a professional and a professor."

4. "[Director] retaliated against me on 27 June 2024 by giving me a written counseling that included claims of 'inappropriate behavior and facial expressions' from as far back as September 2023. All of the instances listed in the counseling had been previously discussed and resolved with [Director]."

The Agency dismissed these claims pursuant to 29 C.F.R. § 1614.107(a)(1) finding that Complainant was not aggrieved. The Agency found that "the allegations are deficient in describing discriminatory activities or behaviors, lacking a nexus to discrimination (Reprisal) or descriptive evidence of discrimination, and not identifying distinguishable occurrences or patterns of severe disparities." (Complaint File, p. 164). Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that Director treated her poorly from the start, but after Complainant reported Director's behaviors to the Dean of the school and the EEO office, the verbal attacks increased and Director "retaliated by insulting me, cutting my hours, diminishing my role in the teaching team, issuing unwarranted letters of counseling, asking students and other faculty to write negatively about me, and talking negatively about me to others." She indicated Director continues to harass her.

The Agency contends on appeal that Complainant did not suggest her sex formed a discriminatory animus in the actions alleged to have been taken and she failed to establish a nexus between Director's awareness of the prior EEO complaint (ARPOM23AUG02582) and any personnel action, condition of employment, or work environment.

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 he or she has been discriminated against by that Agency because of race, color, religion, sex, national origin, age or disability. 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). 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.

"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. Thus, a claim of harassment...should not be dismissed for failure to state a claim where the complainant has made factual allegations which, when construed in the light most favorable to the complainant, i.e., when considered together and treated as true, are sufficient to state a claim." Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

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, the 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).

Additionally, reprisal claims are afforded a broad view of coverage under EEO laws. Claims of reprisal and retaliatory harassment claim 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).

Here, we find that the Agency improperly framed the complaint and improperly considered the merits in determining whether Complainant had stated a claim. Claim 2 alleges that Complainant was given a lower performance rating despite her numerous accomplishments. Claim 4 alleges that Complainant was issued a written counseling. We have previously found that a performance appraisal rating that may constitute a harm. Ayesha W. v. Soc. Sec. Admin., EEOC Appeal No. 2020002953 (Sep. 13, 2021). We have found the same regarding written counselings. Complainant v. Dep't of the Navy, EEOC Appeal No. 0120143050 (Jan. 28, 2015). Therefore Claims 2 and 4 clearly state a claim for discrete acts of discrimination. While Complainant does not appear to have alleged any action was taken against her in Claim 1, in Claim 3, she is clearly alleging ongoing harassment in the form of negative comments related to her appearance and allegations that she is trying to charm her students. We have repeatedly admonished that an agency should not ignore the "pattern aspect" of a complainant's allegations and define the issues in a piecemeal manner where an analogous theme unites the matter complained of). By alleging a pattern of harassment, Complainant has stated a cognizable claim under the EEOC regulations. Cervantes v. U.S. Postal Serv., EEOC Request No. 05930303 (Nov. 12, 1993). Here, taking Claims 2-4 together, Complainant has clearly stated a claim for hostile work environment because the allegations, if taken together and proven to be true, would be sufficiently severe and pervasive to alter the conditions of the complainant's employment.

Moreover, while Complainant must show harm or meet the severe and pervasive level regarding her claims of sex discrimination, in regard to her claims of retaliation, she need only show that she was treated in a manner likely to dissuade a reasonable employee from engaging in the EEO process. Here, Complainant has alleged that she previously filed an EEO complaint and has since faced a lower performance appraisal, negative comments about her appearance and accusations she is charming students, and was issued a written counseling. Such acts are indeed likely to dissuade an employee from engaging in the EEO process.

On appeal, the Agency cites to Complainant v. Dep't of Justice, EEOC Appeal No. 0120073281 (Nov. 6, 2007) for the proposition that Complainant "did not suggest that sex formed a discriminatory animus in the actions alleged to have been taken by Management" and that [t]o support her claim of reprisal, [Complainant] must provide evidence that adverse treatment was motivated by the Agency's awareness of Appellant's protected activity." (Agency Appeal Brief, pp. 1-2). However, that case was examining the merits of the complainant's sex and reprisal claims. Here, the Agency dismissed the claims on procedural grounds finding that Complainant had not stated a claim because Complainant had not established a nexus between her protected status and the alleged acts of discrimination. This is addressing the merits of the claim without a proper investigation and is irrelevant to the procedural issue of whether Complainant has stated a justiciable claim under Title VII. Dominica H. v. Dep't of the Treasury, EEOC Appeal No. 2024002413 (Jul. 22, 2024) (citing Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991)).

While Complainant ultimately bears the burden to prove discrimination, it is the burden of the Agency to have evidence or proof in support of its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991). The Agency has not met its burden here.

We agree with the Agency that Claim 1 does not state a claim as a discrete act of disparate treatment because Complainant did not allege any adverse action was taken against her. However, we find that Claims 2 and 4 state claims for discrete acts of disparate treatment and Claims 2-4 state a claim for ongoing harassment, and investigation is required to determine whether Complainant can prove her claims on their merits.

CONCLUSION

Based on the foregoing, we REVERSE the Agency's final decision dismissing Complainant's complaint, 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 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

January 14, 2025

Date