



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

[REDACTED]
Kasi J.,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2020000915

Agency No. ARLEWIS19AUG02891

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated October 9, 2019, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Pharmacist at the Agency's Madigan Army Medical Center in Joint Base Lewis-McChord, Washington.

On August 6, 2019, Complainant initiated EEO counseling and on September 27, 2019, filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Asian), national origin (Korean), sex (female), and age (64) when she was involuntarily reassigned from the inpatient pharmacy to the outpatient pharmacy (hereinafter referred to as "claim 1"). In its dismissal decision, the Agency characterized this claim as when, "on August 5, 2019, Complainant was issued an SF-50 which falsely stated she agreed with the Management-Directed reassignment."

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.

In addition, Complainant alleged that she had been subjected to ongoing discriminatory harassment (hereinafter referred to as “claim 2”) that included the August 5, 2019 involuntary reassignment as well as the following:

- (a) on May 14, 2019, her supervisor threatened to discipline her for insubordination;
- (b) on May 9, 2019, her supervisor ordered her to move to Outpatient Pharmacy by June 1, 2019;
- (c) on April 26, 2019, her supervisor informed her that she would be reassigned to the Outpatient Pharmacy; and
- (d) beginning in or around April 2019, her supervisor repeatedly told her that she should retire.

The Agency dismissed claim (1) for failure to state a claim and claim 2 for failure to contact an EEO counselor in a timely manner. The instant appeal followed.

ANALYSIS AND FINDINGS

Claim (a)

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. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). When the complainant does not allege he or she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

In its dismissal decision, the Agency summarily concluded Complainant failed to allege she was aggrieved by the directed reassignment. In its brief in response to this appeal, the Agency further argued that Complainant is not aggrieved because management has “legitimate non-discriminatory reasons for reassignment.” Specifically, the Agency asserts that management based the reassignment on “mission requirements as well as professional development needs” (the need for cross-training between the inpatient and outpatient pharmacies). The Agency also argues that management has the right to reassign an employee from one position to another without demotion.

Here, we find the Agency erred in dismissing this claim for failure to state a claim. We find that the Agency’s focus in supporting its dismissal decision on management’s reasons for the disputed action improperly addresses the merits of Complainant’s claim without a proper investigation as required by the regulations and is irrelevant to the procedural issue of whether she has stated a justiciable claim under Title VII or the ADEA. See Osborne v. Department of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. United States Postal Service,

EEOC Request No. 05930220 (August 12, 1993); Ferrazzoli v. United States Postal Service, EEOC Request No. 05910642 (August 15, 1991). Based on a review of the complaint and related EEO counseling report, Complainant has alleged that she was reassigned to the outpatient pharmacy, a less desirable job, from her long-held position as Chief of the inpatient pharmacy in order to push her into retirement and make room for the placement of a younger white male in her position. This states a viable claim of discrimination which requires further investigation and processing.

As such, we reverse the Agency's dismissal of Complainant's claim concerning the decision to involuntarily reassign her to the outpatient pharmacy.

Claim 2

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity 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.

It is undisputed that Complainant first sought EEO counseling on August 6, 2019, alleging she was subjected to ongoing discriminatory harassment by her supervisor in order to push her out of her position. She alleged the harassment started in or around April 2019 when her supervisor repeatedly told her she should retire and continued through her reassignment to the outpatient pharmacy. The Supreme Court has held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002). Here, all the allegations provided by Complainant are part of the same claim (that she was being pushed out of her position to make room for a younger white male) and at least one of the allegations occurred on August 5, 2019, the day before she first sought EEO counseling. Therefore, we find her claim of ongoing discriminatory harassment was timely raised and should not have been dismissed.

CONCLUSION

Accordingly, for the reasons discussed above, the Agency dismissal of the complaint is REVERSED and it is REMANDED to the Agency for further processing pursuant to the following Order.

ORDER (E0618)

The Agency is ordered to process the remanded complaint (as defined in this decision to include the decision to involuntarily reassign Complainant, as well as subject her to harassment) in accordance with 29 C.F.R. § 1614.108 et seq. 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, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

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 CFR § 1614.503(f) for enforcement by that agency.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

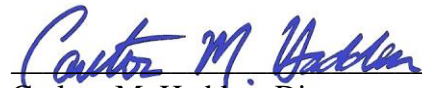
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 his or her 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

March 12, 2020
Date