



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

██████████
Annalee D,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Great Lakes Area),
Agency.

Appeal No. 2020001076

Agency No. 4J-630-0149-19

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final 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., 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.

BACKGROUND

During the period at issue, Complainant worked for the Agency as a Mail Carrier in St. Louis, Missouri. On September 20, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on race (African-American), sex (female), disability, age, and in reprisal for prior protected EEO activity.

In its final decision, the Agency determined that Complainant's complaint was comprised of the following claims:

1. On January 28 and February 19, 2019, [Complainant was] placed on Emergency Placement.

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.

2. On February 23, 2019, [Complainant] received a letter that instructed [her] to report for a Fitness for Duty (FFD) examination or be fired. Subsequently, on February 26, 2019, [she was] sent for a FFD exam, and management violated [her] American Health Insurance Portability and Accountability Act (HIPPA) rights by insinuating to the doctor that [she was] a danger in the workplace;
3. On April 19, 2019, [her] request for information concerning PS Form 1767 Report of Hazard in the workplace [she] had submitted due to harmful chemicals small was not responded to.

The Agency dismissed the entire formal complaint for untimely EEO Counselor contact. The Agency reasoned that Complainant initiated EEO Counselor contact on June 11, 2019, outside of the applicable time period.

The Agency also dismissed claim (3) on the alternate grounds of failure to state a claim. The Agency reasoned that this matter is exclusively within the jurisdiction of the Office of Safety and Health Administration (OSHA).

The instant appeal followed. On appeal, Complainant requests that we reverse the Agency's final decision dismissing her complaint. Complainant reiterates the alleged incidents comprising her claim and asserts that Agency management is seeking to have her removed.

ANALYSIS AND FINDINGS

Dismissal for Untimely EEO Counselor Contact

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 days of the effective date of the action.

The Agency improperly dismissed Complainant's complaint for untimely EEO Counselor contact. As an initial matter, we find that Complainant is alleging an ongoing hostile work environment claim including, but not limited the following matters: being placed on emergency placement, being sent for a fitness for duty exam, not being allowed to return to active work status, and Agency management not responding to her Forms 1767s, Reports of Hazard in the Workplace.

Complainant's alleged hostile work environment continued up to the time she sought EEO counseling. The record contains an Information for Pre-Complaint Counseling Form dated June 23, 2019. Therein, Complainant, in pertinent part, is seeking as resolution for her claim to be returned to active duty status. The record also contains an Information for Pre-Complaint Counseling Form dated August 4, 2019.

Therein, Complainant asserts that she has been in LWOP status for over six months and she has not been allowed to return to work. Thus, we find that some of the incidents comprising her hostile work environment claim are ongoing.

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 period that the [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)).

As set forth above, we find that Complainant is alleging in part that she was placed in an off-duty work status that continued up until the time she initiated EEO Counselor contact. Thus, her overall hostile work environment claim is timely raised with an EEO Counselor.

Dismissal for Failure to State a Claim

The Agency improperly dismissed claim (3) for failure to state a claim. This matter is not a collateral attack on the OSHA process. Complainant is alleging that Agency management failed to respond to her reports that she was working in an unsafe work environment (chemical fumes) based on her protected classes. Complainant is not challenging an OSHA determination or investigation conducted by OSHA.

We further find that the Agency improperly fragmented Complainant’s hostile work environment claim with respect to claim (3). As set forth above, Complainant is alleging an ongoing hostile work environment claim which included Complainant being placed on emergency placement, being required to undergo a fitness for duty examination, not being allowed to return to active work status, and Agency management not responding to her requests that she is working in a hazardous environment. Upon reviewing these incidents collectively, we find that these matters are sufficiently severe or pervasive to set forth an actionable claim of harassment.

We REVERSE the Agency’s final decision dismissing the formal complaint and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claims (defined herein as a hostile work environment) 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, 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 C.F.R. § 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

January 29, 2020

Date