



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Cathy V.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Indian Health Service),
Agency.

Appeal No. 0120180641

Agency No. HHSIHS02302017

DECISION

Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's November 9, 2017, final decision concerning her equal employment opportunity (EEO) complaint alleging 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 following reasons, the Commission VACATES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Diagnostic Radiologic Technologist, GS-0647-08, at the Agency's Indian Health Service, Blackfeet Service Unit in Browning, Montana.

On May 23, 2017, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the bases of race (White), national origin (British, Irish, Polish, Czech), sex (female), color (white), and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

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.

1. Beginning in or around May 19, 2016, Complainant was harassed on an almost daily basis by her coworkers even though management had been notified about this but failed to take any action or make it cease;
2. On or about the end of April 2017, after contacting an EEO official, Complainant received a Performance Management Appraisal Program (PMAP) evaluation of 4.4, while her previous PMAP for 2016 was 5.0; and
3. On or about May 1, 2017, Complainant resigned her position due to the hostile work environment, which was a constructive discharge.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and informed Complainant that she would be given appeal rights to the Merit Systems Protection Board (MSPB) following issuance of the final agency decision (FAD).

On November 9, 2017, the Agency issued a FAD concluding that Complainant failed to prove that the Agency had subjected her to discrimination as alleged. Therein, the Agency provided Complainant with appeal rights to the MSPB on her entire complaint. The Agency informed Complainant that if she was dissatisfied with the MSPB's decision on the appeal of the Agency's FAD, she could petition the EEOC to consider the decision.

On December 9, 2017, Complainant filed the instant appeal without comment. The Agency did not submit any appellate arguments in opposition to the appeal.

Additionally, on December 26, 2017, Complainant filed an appeal with the MSPB. On January 24, 2018, a MSPB Administrative Judge (AJ) issued an Initial Decision in MSPB No. DE-0752-18-0110-I-1, dismissing Complainant's appeal. Therein, the MSPB AJ found that the MSPB lacked jurisdiction over Complainant's discrimination claims.

ANALYSIS AND FINDINGS

A review of the record indicates that the Agency processed Complainant's complaint as a mixed case complaint and issued a final decision with appeal rights to the MSPB for all of Complainant's claims, not just for the constructive discharge claim. 5 C.F.R. §1201.3. Complainant filed the instant appeal with the Commission as well as with the MSPB. The MSPB AJ dismissed Complainant's appeal for lack of jurisdiction. As such, this matter will be considered a "non-mixed" case and processed accordingly. See generally Schmitt v. Dept. of Transportation, EEOC Appeal No. 01902126 (July 9, 1990); Phillips v. Dept. of the Army, EEOC Request No. 05900883 (October 12, 1990); 29 C.F.R. § 1614.302(c)(2)(i) and (ii).

The Commission's regulation at 29 C.F.R. § 1614.302(b) states, in relevant part, that "if a person files a timely appeal with the MSPB from the Agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative

judge and an immediate final decision.” Therefore, we shall remand the complaint to the Agency to give Complainant an opportunity to request a hearing.

CONCLUSION

Based on a thorough review of the record, we VACATE the Agency’s final decision dealing and REMAND the matter in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, to the extent it has not already done so, the Agency shall issue Complainant a copy of the Agency’s notice of her right to request a hearing before an EEOC Administrative Judge or to request an immediate Agency decision. 29 C.F.R. § 1614.108(f). The Agency shall notify Complainant that she has thirty (30) calendar days from receipt of the notice to request a hearing or to request an immediate Agency decision. Complainant shall also be notified that if she does not request a hearing or an immediate Agency decision within the required timeframe, the Agency shall issue a decision pursuant to 29 C.F.R. § 1614.110(b).

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled “Implementation of the Commission’s Decision.” The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The report shall include supporting documentation verifying that the corrective action has been implemented.

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

August 6, 2020
Date