



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 2001

[REDACTED]
Peggie T.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2019002979

Agency No. 2003-0564-2019101724

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 12, 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 *et seq.*

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a RN-N255 at the Agency's Healthcare System of the Ozarks facility in Fayetteville, AR.

On March 18, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of sex (pregnancy), disability (physical) and reprisal for engaging in protected EEO activity when:

1. On January 4, 2019, Complainant was made to work as a float nurse in the Emergency Department when she was having pregnancy related contractions;
2. Complainant's reasonable accommodation request was denied; and

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.

3. Complainant experienced retaliation after reporting safety issues at the facility in 2018.

The Agency dismissed the complaint in its entirety. First, the Agency determined that Complainant's claim of discrimination does not involve the basis of "disability". It noted that "EEOC regulations are clear that claims of discrimination due to pregnancy fall under the Pregnancy Discrimination Act (PDA) of 1978 an amendment to Title VII." Accordingly, the Agency identified "sex" as the basis of discrimination and characterized the claim as, "Whether the complainant was discriminated against based on sex when on January 4, 2019, SP, Registered Nurse Manager, forced the complainant to work in the Emergency Department." The Agency dismissed this claim pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. Finally, the Agency determined the complaint raised an "additional basis of reprisal for reporting safety concerns to management." The Agency dismissed the reprisal allegation pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

On April 12, 2019, via United Parcel Service 2-day Delivery, Complainant received the Final Agency Decision, dismissing her complaint in its entirety. The next morning, Complainant sent an email to the EEO Investigator requesting an opportunity to amend her formal complaint. By letter dated April 15, 2019, the EEO Office advised Complainant that "there is nothing left to amend" and informed her of her right to file an appeal with the Commission.²

The instant appeal followed.³

ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in part, that an agency shall dismiss a complaint that fails to state a claim. 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, disability or genetic information. 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 Appeal No. 05931049 (April 21, 1994).

I. Sex Discrimination (Pregnancy)

Complainant contends that her supervisor (SP) knew Complainant was pregnant and, on January 4, 2019, knew Complainant was having pregnancy-related contractions. Complainant also contends that SP knew Complainant could not perform Advanced Cardiac Life Support (ACLS) because of her medical restrictions.

² The letter also stated that "If you are alleging subsequent discriminatory events that have occurred, you must initiate a new EEO complaint."

³ Complainant filed a copy of her April 13, 2019, email to the Agency, as a supporting document to her appeal with the Commission.

According to Complainant, ACLS is required for RNs working in the Emergency (ER) Unit; ACLS is not required for RNs working in the Medical Surgical Telemetry (Med/Surg/Telemetry) unit. She believes that SP “targeted [her] to float to ER a heavy work load to harm [her] during her pregnancy.” During her shift, Complainant “had worsening contractions [...] causing significant emotional distress.”

The Agency argues that Complainant was not aggrieved by the work assignment. The Agency asserted that Complainant’s claim falls under the purview of “routine employment-related interactions that generally include supervisory discretion and oversight.” Such claims, according to the Agency, “cannot be construed to have injured the Complainant.”

We disagree. The Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), establishes that discrimination on the basis of “pregnancy, childbirth or related medical conditions” constitutes sex discrimination under Title VII. The PDA requires that an employer treat women affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, as other persons not so affected but similar in their ability or inability to do work. Velva B. v. USPS, EEOC Appeal No. 0120181453 (Jan. 20, 2020); 42 U.S.C. § 2000e(k) (1994).

A complainant alleging that the denial of an accommodation for a pregnancy related condition constituted disparate treatment sex discrimination may state a prima facie case by showing that: (1) she belongs to the protected class; (2) she sought accommodation; (3) the agency did not accommodate her; and (4) that the agency did accommodate others “similar in their ability or inability to work.” Young v. UPS, 575 U.S. at 230, 135 S. Ct. at 1354.

A fair reading of the record, and Complainant’s statement on appeal, reveals that Complaint claims discrimination on the basis of sex, under the PDA, when SP assigned her to work in the ER on January 4, 2019. Second, we find that Complainant also states a claim of discrimination based on sex, under the PDA, when S failed to accommodate her inability to work as float nurse because of her pregnancy.⁴ Houck v. Dept. of State, EEOC Appeal No. 01A31888 (Aug. 28, 2003) (finding complainant states a claim of discrimination based on sex, under the PDA, when her supervisor failed to accommodate her inability to carry a full workload because of her pregnancy, just as any other worker with a temporary disability would be accommodated).

Accordingly, we REVERSE the Agency’s determination dismissing Complainant’s claim of discrimination on the basis of sex, and REMAND Complainant’s claim, as framed herein, to the Agency for further processing.

⁴ According to the record, S gave Complainant the “option of going home on CB, or floating to the ED as assigned.”

II. *Disability Discrimination*

We also find that the Agency improperly dismissed Complainant's claim of discrimination on the basis of disability under the Rehabilitation Act.

While pregnancy itself not a disability, "a pregnant employee may be entitled to reasonable accommodation...for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment." Andrea P. V. USPS, EEOC Appeal No. 0120152636 (Jul. 19, 2016); Enforcement Guidance: Pregnancy Discrimination and Related Issues, No. 915.003, at EEOM 626:20.

We note that Complainant in her formal complaint alleged a claim of failure to accommodate on the basis "Disability-Physical."⁵ Complainant also alleges that she had medical waiver from her OB/GYN and that she submitted the waiver to SP in the summer of 2018. Complainant contends that she got a medical waiver because could not meet the physical requirements to be ACLS qualified. Complainant argues that her medical restrictions precluded her from working in the ER.⁶

We find that Complainant's claim that she was made to work beyond the scope of her medical waiver appears to state a claim of disability discrimination. Miller v. USPS, EEOC Appeal 012009373 (Oct. 21, 2010) (finding that an allegation that one is being made to work outside of one's medical restrictions states a valid claim of discrimination based on disability). Therefore, we find that the complaint states a claim of discrimination on the basis of disability when Complainant's request to work in the Medical-Surgical Telemetry unit, as a reasonable accommodation, was denied.

Accordingly, we REVERSE the Agency's determination dismissing Complainant's claim of discrimination on the basis of disability, and REMAND Complainant's claim, as framed herein, to the Agency for further processing.

III. *Retaliation*

As an initial matter, we note that reporting safety violations is not considered protected EEO activity. Complainant in her formal complaint alleges that "my EEO office did a fact-finding mission on this complaint and denies retaliation. I disagree." On appeal, Complainant alleges that she "had been in communication with the EEO since last summer," identified the specific EEO officer she had been in contact with and offered to provide supporting documentation. The agency maintains that Complainant failed to state a claim of retaliation because "the record is devoid of any evidence or indication that Appellant had prior EEO activity."

⁵ While Complainant did not identify her disability, or serious health condition, in her formal complaint, we note that the Agency did not ask Complainant for more specific information.

⁶ Although Complainant did not provide a copy of the medical waiver, we note that the record does not show that Complainant, or the Agency, was asked to provide a copy of the waiver to the EEO Counselor.

EEOC Regulation 29 C.F.R. § 1614.101(b) provides that no person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 USC 2000e *et seq.*), the Age Discrimination in Employment Act (ADEA) (29 USC § 621 *et seq.*), the Equal Pay Act (29 USC § 206(d)) or the Rehabilitation Act (29 USC 791 *et seq.*) or for participating in any stage of administrative or judicial proceedings under those status. Section 704(a) of Title VII (42 U.S.C. § 2000e-3(a)) provides that it shall be unlawful for an employer to discriminate against any of his employees or applicants for employment because “he has opposed any practice made unlawful by this title, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.” Kaul v. DHS, EEOC Appeal No. 01A54163 (Dec. 5, 2005). In addition, when an individual alleges retaliation in a complaint, they do not need to make a showing of adverse employment action. EEOC Management Directive (MD) 110, Ch.5, Sec. IV(A)(3).

A review of the record reveals that Complainant is alleging that, based on retaliatory animus, SP denied her request to work in the Med/Surg/Telemetry Unit and assigned her to work in the ER which has a heavier workload, when she was having pregnancy-related contractions. We find that the Agency’s reason for dismissing the complaint – that the record was devoid of any information indicating Complainant participated in prior EEO activity and the results from the fact finding investigation conducted into her claim of retaliation for reporting safety issues indicated that her allegations were unfounded – goes to the merits of Complainant’s complaint, and is irrelevant to the procedural issue of whether she has stated a viable claim under the 29 C.F.R. Part 1614 regulations. Candi R. V. Dept. of Defense, EEOC Appeal No. 2019001053 (Mar. 08, 2019) (finding that the Agency improperly addressed the merits of the complaint when it determined that Complainant did not engage in prior protected EEO activity when she filed an Inspector General complaint).

Accordingly, we REVERSE the Agency’s determination dismissing Complainant’s claim of retaliation for participating in protected EEO activity, and REMAND Complainant’s claim, as framed herein, to the Agency for further processing.

CONCLUSION

For the above reasons, we find that Complainant states a valid claim of discrimination on the bases of sex, disability, and reprisal for engaging in protected EEO activity. Accordingly, we REVERSE the FAD and REMAND the claims for processing in accordance with the Order set forth below.

ORDER (E1016)

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.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

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 18, 2020
Date