



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

[REDACTED]
Tracey M.,¹
Complainant,

v.

Jovita Carranza,
Administrator,
Small Business Administration,
Agency.

Appeal No. 2019003365

Hearing No. 430-2017-00464X

Agency No. 09-16-058

DECISION

On May 4, 2019, Complainant 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 March 18, 2019 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. and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 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 an Information Technology Specialist, GS-2210-12, in the Agency's Division of Customer Service Operations and Engineering at the Office of the Chief Information Officer in Columbia, South Carolina.

On October 26, 2016, Complainant filed an EEO complaint alleging that the Agency discriminated against her and subjected her to a hostile work environment on the bases of race (African-American), color (light-skinned), age (63), and in reprisal for prior protected EEO activity 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. On September 26, 2016, Complainant was excluded from weekly staff meetings;
2. On September 17, and October 14, 2016, management attempted to cancel Complainant's maxi flex schedule;
3. From 2015 to 2017, Complainant was not provided with quarterly performance reviews;
4. In or about August 1, 2016, the department's time keeper said she would stop completing Complainant's time and attendance;
5. In or around June 2016, management threatened to charge Complainant with Absence Without Leave (AWOL);
6. On May 25, 2016, management made an unannounced visit to South Carolina;
7. On May 22, 2016, Complainant was forced to travel to Washington, D.C.;
8. On May 16, 2016, management attempted to make Complainant travel to Washington, D.C.;
9. On February 26, 2016, management insisted that Complainant work a full day;
10. On January 25, 2016, management attempted to make Complainant travel on the day before and the day of her Sabbath;
11. On January 12, 2016, management attempted to make Complainant travel on the Martin Luther King, Jr. holiday;
12. On August 16, 2016, Complainant was reassigned to Washington, D.C.;
13. From May 2016, and ongoing, Complainant was not assigned any new projects;
14. On May 25, 2016, management did not discuss Complainant's Fiscal Year (FY) 2015 with her and accused her of refusing to sign;
15. On or around May 2016, Complainant submitted requests to attend the Managing Office 365 Identities and Services, Core Solution for Microsoft SharePoint Server 2013, Installing and Configuring Windows Service 2012, and Administering Window Server 2012 training, and all were denied;
16. On February 8-12, 2016, Complainant was charged AWOL;
17. On February 11, 2016, Complainant had to edit four Standard Operating Procedure Manuals while out sick;
18. In or around February through March 2016, Complainant's request for official time for union activities was denied;
19. In or around September 2015, Complainant was transferred to another division;
20. On January 19, 2016, Complainant's pay was not deposited into her checking account;
21. On February 19, 2016, and May 19, 2016, Complainant was denied sick leave;
22. On February 4, 2016, Complainant's leave was cancelled;
23. In or around September through October 2015, Complainant's request for official time for union activities was denied; and
24. On February 4, 2016, Complainant was forced to travel to DC from February 8 through February 12, 2016.

On June 2, 2017, the Agency issued a Notice of Partial Acceptance, accepting only Claim (1). The Agency dismissed Claims (2) through (11) for failure to state a claim on the grounds the allegations did not rise to the level of a hostile work environment.

The Agency then dismissed Claims (18) and (23) on the grounds they constituted a collateral attack upon the grievance process, and Claims (12), (16), (19), and (20) through (24) were dismissed because Complainant first grieved these allegations through the Agency's negotiated grievance which permitted discrimination claims, thereby extinguishing her rights to raise them in the EEO forum. Further, Claims (4) through (17) and (21) were dismissed because Complainant did not timely raise these matters with an EEO counselor.

Shortly after the Agency accepted Claim (1) for investigation, Complainant requested a hearing before an EEOC Administrative Judge (AJ). Complainant did not submit an affidavit during the investigation. At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation. On January 23, 2018, the AJ assigned to the matter issued a Notice of Intent to Dismiss the Hearing Request for Complainant's failure to provide an affidavit to the EEO investigator. Subsequently, the AJ dismissed the hearing request and remanded the matter to the Agency for a final decision.

The Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected her to discrimination or reprisal as alleged.

CONTENTIONS ON APPEAL

On appeal, Complainant argues the AJ's decision to dismiss her hearing request was in error. Complainant notes that the Agency's partial acceptance occurred "approximately 228 days" after she filed her formal complaint. Complainant criticizes the Agency's actions with respect to its processing of Complainant's formal complaint and subsequent investigation. Accordingly, Complainant requests that the Commission reverse the final decision.

ANALYSIS AND FINDINGS

As an initial matter, we concur with the Agency that Claims (18) and (23) constitute a collateral attack upon the grievance process and were properly dismissed.

Regarding the Agency's dismissal of the remaining claims comprising Complainant's hostile work environment claim, the Commission notes that a claim refers to an assertion of an unlawful employment practice or policy for which, if proven, there is a remedy under the federal equal employment statutes. EEO MD-110, at Ch. 5, § III. Fragmentation, or breaking up, of a complainant's legal claim often results from a failure to distinguish between the claim a complainant is raising and the evidence (factual information) he is offering in support of that claim. Id. Often, when an agency identifies each piece of factual evidence (usually comprising a single incident) offered by the complainant as a separate and distinct legal claim, it ignores a complainant's real underlying claim of a pattern of ongoing discrimination. Id. The Commission has discouraged this practice because it prevents the statement of a coherent and integrated claim. Id.

Hostile work environment claims are particularly susceptible to improper fragmentation. See Drake v. Dep't of the Air Force, EEOC Request No. 05970689 (Mar. 29, 1999); Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 5 § III (Aug. 5, 2015).

In this case, Complainant set forth 24 claims in support of her hostile work environment claim. The Agency appears to have improperly fragmented many of these claims into discrete claims and viewed them independently of one another. Considered together, with the exception of Claims (18) and (23), the complaint states a viable claim of a discriminatory and retaliatory hostile work environment.

Furthermore, although Claims (13) – (17), (19) – (22), and (24) occurred outside the 45-day regulatory EEO Counselor contact window, the Agency erred in excluding these claims outright. The Supreme Court has held that a complaint 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. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The Court recognized that allegations of harassment and the existence of a hostile work environment involve, by their nature, a series of incidents linked by a pattern of conduct. This is contrasted with claims involving discrete acts such as a promotion or termination which are clearly defined. In those instances, the Court held that “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.” Id. Untimely discrete acts may be used as background evidence in support of a timely claim, however. Id. Accordingly, the Agency improperly fragmented Complainant's hostile work environment claim and should have accepted Claims (1) – (12), along with Claims (13) – (17), (19) – (22), and (24) as evidence in support of Complainant's hostile work environment claim.²

Without a proper investigation of these claims, the complaint cannot now be adjudicated on appeal. Accordingly, we remand the matter to the Agency for an investigation.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we VACATE the Agency's final order and REMAND the matter to the Agency for processing in accordance with the Order below.

² We note the Agency additionally dismissed Claims (12), (16), (19), and (20) – (24) on the grounds Complainant raised them in a negotiated grievance process that allows for the resolution of discrimination claims. However, the Agency did not provide evidence demonstrating that its negotiated grievance process permitted claims of discrimination to be raised in the negotiated grievance process. Therefore, the Agency did not properly support its dismissal. It is the burden of the agency to provide evidence or proof in support of its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991).

ORDER

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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

September 16, 2020

Date