



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

[REDACTED]

Chau O.,¹
Complainant,

v.

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

Appeal No. 2019005519

Agency No. 200P-0691-2019102576

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 2, 2019, dismissing her complaint of unlawful employment discrimination, apparently alleging a 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 an Advanced Medical Support Assistant, GS-6, at the Agency's VA Greater Hospital Greater LA facility in West Los Angeles, California. She started in her position on March 18, 2018, subject to a one-year probationary period.

Three weeks before the end of her probationary period, Complainant had an unplanned absence due to the hospitalization of her infant child. She missed three hours of work on February 6, 2019, and eight hours on February 11, 2019. Complainant's stated that she kept her supervisor updated, and she offered medical documentation to support her request for authorized leave for the eleven-hour absence. She alleged she was told that, because she was on probation, "the doctor's notes really didn't matter" and that "they could get rid of her for any reason." Complainant stated that she was told she was terminated due to the unauthorized absence without official leave (AWOL).

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.

On April 19, 2019, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination when, on February 15, 2019, management removed Complainant from federal service during her probationary period, due to having two days of unauthorized leave when her infant child was in the hospital. The box provided on the complaint form for the “basis” of the alleged discrimination, Complainant handwrote “Parental Status”.²

On July 2, 2019, the Agency issued a final decision dismissing the complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The Agency reasoned that “parental status is not a protected basis.” The Agency found that “the record is devoid of any nexus to any protected base or discriminatory animus or perceived stereotype of a parent.”

The instant appeal followed. On appeal, Complainant argues that the dismissal should be reversed. She claims that the Agency terminated her employment because of her sex (female) as a result of her caregiving role as a parent of a disabled child. She claims the Agency’s refusal to accept the documentation to authorize leave or consider her responsibility as a mother caused her to be charged with being AWOL that was then used to justify her termination.

In addition, Complainant states she was misinformed and misled by the EEO Counselor, who advised Complainant to use “parental status,” and discouraged her from pursuing the sex (female) claim that she initially raised. She also asks for consideration of her allegation on the basis of associational disability, “because her child[’s] disability also counts.” She noted that she offered a doctor’s statement, which management refused to accept.

In response, the Agency asserts that the complaint was properly dismissed, because parental status is not a recognized basis of discrimination under the administrative EEO complaint process.

ANALYSIS AND FINDINGS

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an 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, genetic information, or retaliation. See 29 C.F.R. 1614.103(a) and 1614.106(a).

Here, the initial EEO counseling contact and interview sheet documents that Complainant was alleging sex discrimination during her initial contact with the EEO Counselor, in response to the questions: “How have you been harmed? What alleged adverse employment matters have you experienced? The EEO Counselor’s report documented that Complainant specifically listed the issue as “Termination” and the basis: “Sex (female) parental”. She also identified the date of the alleged violation as February 22, 2019 (which was the effective date of her termination), although she noted the date that she was informed on February 15, 2019.

² The Agency’s formal complaint form does not appear to have check boxes for the bases of alleged discrimination. Rather, the complainant is required to write in the alleged basis in a box provided.

Although the cited basis noted in the EEO Counselor's report was "sex (female), parental," the Agency's Notice of Right to File listed only "parental status". Complainant also claims she was misinformed and misled by the EEO Counselor, who advised Complainant that she should claim discrimination on the basis of parental status.

Complainant is a lay person who may have been confused in the wording of her claim. However, a fair reading of her complaint in conjunction with the EEO counseling record shows that she is alleging that she was unlawfully terminated on the basis of her sex (female), as well as her association with her disabled infant child, after requesting authorized sick leave to fulfill caregiving responsibilities linked to her sex and child's medical condition. She further asserts that her supervisor would not accept her offer of medical documentation to justify the absence or authorize leave.

For these reasons, we conclude that Complainant has provided sufficient allegations to state a viable claim of sex discrimination and or disability discrimination, which requires further investigation and processing. While the Agency claims that Complainant has failed to establish a nexus between her termination and her sex or disability association, we find that argument is addressing the merits of the claim without a proper investigation and is irrelevant to the procedural issue of whether Complainant has stated a justiciable claim under Title VII or the Rehabilitation Act. 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).

For the reasons stated above, we find that Complainant's complaint was improperly dismissed, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND the complaint to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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 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)

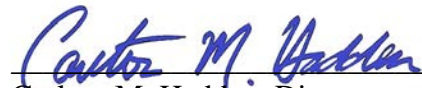
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

September 9, 2020
Date