



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

[REDACTED]
Sammy R.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services
(Food and Drug Administration),
Agency.

Appeal No. 2019005737

Agency No. HHS-FDAOC-037-19

DECISION

On September 12, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 26, 2019,² dismissing his 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. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an employee of the Agency.³ On May 6, 2019, Complainant filed a formal complaint alleging that the Agency

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 According to the record, Complainant's then-attorney received the final decision on August 12, 2019.

³ The Agency's final decision stated that Complainant filed his EEO complaint against the Office of the Commissioner, but it did not specify Complainant's position or where he worked. The Agency did not provide a copy of Complainant's formal complaint or the EEO counselor's report.

subjected him to discrimination on the bases of sex (male), color (Light), disability (physical and mental), and reprisal for prior protected EEO activity (prior EEO activity) when:

1. On December 13, 2018, Complainant learned that a management official (M1) disclosed and made fun of Complainant's disabling medical condition to multiple staff members on an ongoing basis from fall 2017 through fall 2018. M1 also disclosed details of Complainant's EEO activity, stating, "all we gave that man [Complainant] was \$6,000 dollars and a chair."

On July 26, 2019, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(1).⁴ The Agency found that Complainant was not aggrieved because he alleged "actions by Agency personnel who are not in his supervisory chain of command, and whose alleged actions did not cause a concrete effect on his employment status." Final Agency Decision (FAD) at 2. The Agency further noted that, although an agency could "be liable for harassment by non-supervisory employees over whom it has control, it must be alleged that the employer knew or should have known about the harassment and failed to take prompt and appropriate corrective action. The claim in this complaint does not expressly allege that to be the case." Id.

The instant appeal followed. Neither Complainant nor the Agency make any contentions on appeal.

ANALYSIS AND FINDINGS

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant 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 or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(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 Request No. 05931049 (Apr. 21, 1994).

We find that Complainant's complaint states actionable claims of harassment and discrimination. Complainant alleged that, over the course of a year, M1 discussed Complainant's disability to his coworkers, made fun of Complainant's disability, and disclosed the details of Complainant's protected EEO activity to his coworkers. We find that Complainant has alleged sufficient facts that, if proven true and considered together, would constitute an actionable hostile work environment claim.⁵

⁴ The Agency's final decision erroneously stated that it was dismissing the complaint pursuant to 29 C.F.R. § 1614.103 for failure to state a claim.

⁵ Additionally, Complainant alleged reprisal as one of the bases for the harassment. Under the Commission's broad view of reprisal, any adverse treatment that is based upon a retaliatory

The reasons cited by the Agency in its final decision were improperly based on the merits of Complainant's complaint. Whether M1 was in Complainant's supervisory chain of command and whether the Agency "knew or should have known about the harassment and failed to take prompt and appropriate corrective action" improperly consider the merits of Complainant's complaint, and these issues are irrelevant to the procedural issue of whether he stated a justiciable claim. See Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991).

Moreover, Complainant alleged that M1 disclosed his disability to coworkers and referred to "a chair" the Agency provided to Complainant, possibly as a reasonable accommodation for his disability. The Commission's regulations implementing the Rehabilitation Act provide for the confidentiality of medical information. Specifically, 29 C.F.R. § 1630.14(c)(1) provides, in pertinent part, that: "Information obtained... regarding the medical condition or history of any employee shall ... be treated as a confidential medical record, except that: (i) [s]upervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodation." By its terms, this requirement applies to confidential medical information obtained from "any employee," and is not limited to individuals with disabilities. See Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (April 13, 2000). Although not all medically-related information falls within this provision, documentation or information of an individual's diagnosis is without question medical information that must be treated as confidential except in those circumstances described in 29 C.F.R. Part 1630. Therefore, we find that Complainant has alleged a viable claim of unlawful medical disclosure, a per se violation of the Rehabilitation Act, which must be investigated.

We find that Complainant has shown a harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. The Agency therefore erred in dismissing Complainant's complaint for failure to state a claim.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The complaint is hereby REMANDED 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. The Agency shall acknowledge to the Complainant that it has received the remanded claims

motive and is reasonably likely to deter Complainant or others from engaging in protected activity, states a claim. See Lindsey v. U.S. Postal Serv., EEOC Request No. 65980410 (Nov. 4, 1999); EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016).

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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted together with the 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

November 3, 2020

Date