



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

[REDACTED]

Zoila P,¹
Complainant,

v.

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

Appeal No. 2020000395

Agency No. 2003-0554-2019104251

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision, dated September 9, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Human Resources Assistant, GS-6, assigned to work at the VA Medical Center facility in Denver, Colorado and sometimes, at the Agency's Rocky Mountain Regional facility in Colorado Springs, Colorado.

On June 21, 2019, Complainant contacted an EEO Counselor. On August 6, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of sex (female) and to a hostile work environment, when:

1. On April 30, 2019, Complainant was sexually harassed by a male employee ("Employee 1"), who blocked the exit of the VA Outpatient Clinic's "Touch and Go" Room with his body, and said to Complainant, "[l]ift up your shirt and show me your titties." She then alleges he moved towards Complainant, and said, "[c]ome on, I've never seen a caramel titty."

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. On two additional occasions, including one on May 25, 2019, Complainant was subjected to harassment from the same employee, who entered the area in which Complainant was working, stopped, and stared at Complainant for an extended period of time.

The Agency framed the issue as whether the Agency condoned the conduct of the harasser. Complainant alleges that Employee 1 was a known harasser, and the Agency failed to take prompt and corrective action to ensure a discrimination-free workplace by imposing safeguards to protect Complainant.

The Agency accepted the complaint and conducted an investigation. The record developed during the investigation shows that Complainant's work as a Human Resources Assistant requires her to work with coworkers and visit veterans at various facilities, including the Outpatient clinics.

Following the alleged April 30, 2019 incident, Complainant immediately reported what had happened to three management officials – the Patient Advocate, the Human Resources Officer, and the manager who was then Employee 1's supervisor. The supervisor informed Complainant that Employee 1 had engaged in sexually harassing behavior on numerous previous occasions and that "Complainant's report did not come as a surprise." The record shows that Complainant filed a police report after the first incident.

Management confronted Employee 1 about his alleged misconduct and he resigned from his position, effective May 1, 2019. However, Complainant alleged that although he resigned, he is a veteran, who continued to be present at the VAMC unescorted for medical treatment.

Complainant also alleged two other incidents occurred after the Agency continued to allow Employee 1 to be present at the VA Clinic, unescorted. Specifically, she claimed that, on May 25, 2019, Employee 1 entered the area in which Complainant was working, stopped, and stared at Complainant for an extended period of time, which Complainant said caused her fear and anxiety.

On September 9, 2019, the Agency issued a final decision dismissing the complaint for untimely EEO contact and for failure to state a claim. The Agency reasoned that the alleged discrimination pertained only to a single incident (the April 30, 2019 incident) and that Complainant did not seek EEO counseling until 52 days later. The Agency also concluded that the alleged discrimination did not meet the severe or pervasive threshold of a hostile environment claim. The Agency reasoned "the single event of alleged harassment does not show a pattern or behavior that collectively constituted an unlawful employment practice."

This appeal followed. On appeal, Complainant's attorney contends that the EEO contact was timely, because she sought EEO counseling within 45 days of the last incident and she is asserting continuing harassment which the Agency is ineffectively addressing. Complainant also states that the Agency did not inform her of the 45-day requirement for EEO contact. She states that the conduct was sufficiently severe to establish sexual harassment and a hostile work environment

ANALYSIS AND FINDINGS

Timeliness

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall dismiss a complaint that fails to comply with the applicable time limit, requiring an aggrieved person to initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory.

The Agency's dismissal decision is premised on its argument that there was only one alleged incident and that Complainant failed to make EEO contact within 45 days of that April 30, 2019 incident. We note that it is undisputed that Complainant notified Agency officials of the harassment immediately after the April 30 incident. Moreover, both the EEO counseling report and the formal complaint expressly indicate that Complainant alleged that the same individual continued to harass her, the last incident occurring on May 25, 2019. Less than a month later, Complainant initiated contact with an EEO counselor on June 21, 2019. Consequently, we find that she made timely EEO contact from the date of the last alleged harassment incident. The Supreme Court has held that a complainant alleging harassment/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. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002).

Failure to State a Claim

The regulations also state that 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).

We further disagree with the Agency's dismissal, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. Here, a fair reading of Complainant's claim shows she is alleging: 1) she was subjected to sexual harassment by a then co-worker; and 2) although the harasser was no longer an employee, Agency management was aware that he was a frequent visitor to the VAMC clinic and allowed the continuation of the harassment by failing to put in place effective safeguards to prevent his further contact with Complainant. This states a valid claim which the Agency erred in dismissing. As such, Complainant has alleged an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (April 21, 1994).

CONCLUSION

Upon review, we find that Complainant's complaint was improperly dismissed. Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND the complaint to the Agency for further processing pursuant to the following Order.

ORDER (E0618)

The Agency is ordered to process the remanded claims (ongoing sexual harassment/failing to take the steps necessary to ensure a discrimination-free work environment) 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:

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

Carlton M. Hadden, Director
Office of Federal Operations

August 31, 2020

Date