



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Tiffanie S.,¹
Complainant,

v.

W. Thomas Reeder,
Director,
Pension Benefit Guaranty Corporation,
Agency.

Appeal No. 2020002728

Agency No. 20-003-F

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 9, 2020, 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

During the period at issue, Complainant worked as a Management and Program Analyst, GS-9 at the Agency's facility in Washington, D.C.

On February 10, 2020, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Hispanic), national origin (Puerto Rican), disability, and in reprisal for prior protected EEO activity².

The Agency in its March 9, 2020 final decision determined that Complainant's complaint was comprised of the following claims:

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 Complainant, in her formal complaint, asserts that the basis of reprisal pertains to her seeking a reasonable accommodation and reporting her harassment concerns to human resources and EEO.

1. On various dates in October and November 2019, Complainant overheard various individuals talking and assumed they were talking about her. In some instances, Complainant is unable to identify the individual she overheard or who the individual was talking to;
2. On December 13, 2019, Complainant's supervisor, [S1] responded to Complainant's request for a change in her Maxiflex schedule as a reasonable accommodation by referring Complainant to the reasonable accommodation coordinator.

The Agency dismissed claim (1) for failure to state a claim. The Agency reasoned that Complainant did not allege a harm or loss with respect to a term, condition, or privilege of employment. The Agency further found that the alleged incidents were not sufficiently severe or pervasive to set forth an actionable claim of harassment.

The Agency dismissed claim (2) for Complainant not raising this matter during EEO Counseling or not being like or related to a matter which was raised during EEO Counseling.

The instant appeal followed. Complainant does not submit a brief or statement in support of her appeal.

In response, the Agency requests that we affirm its final decision dismissing Complainant's complaint. The Agency reiterates its reasons set forth in its final decision.

ANALYSIS AND FINDINGS

As an initial matter, we find that the Agency improperly fragmented Complainant's claim. A review of the record reflects that Complainant is alleging that she has been subjected to unlawful harassment. The EEO Counselor's Report contains a statement from Complainant dated December 4, 2019 (the date she initiated EEO Counselor contact) that she was being subjected to a hostile work environment and sets forth various conversations she heard from co-workers that the Agency was going to terminate her. Complainant also sets forth that she reached out to human resources with her concerns and human resources informed her supervisor of the conversation. Complainant asserts that her supervisor (S1) called her into her office to discuss confidentiality protocols. EEO Counselor's Report. Complainant asserts that S1 confronted her and stated that she was informed that Complainant went to human resources and that she (S1) stated that she had friends in the Agency as well. EEO Counselor's Report.

Complainant in her December 4, 2019 statement set forth that she had requested a reasonable accommodation which was only partially granted. The EEO Counselor's Report also reflects that the EEO Counselor discussed Complainant's reasonable accommodation request (a specified schedule) with S1. Based on the foregoing, we find that Complainant raised the issue of being denied a reasonable accommodation during EEO Counseling and it is part of her overall harassment claim. Even assuming arguendo that Complainant did not expressly raise her

reasonable accommodation claim during EEO Counseling, we find that this matter is like or related to her overall hostile work environment claim which was raised during EEO Counseling. Thus, we find that the Agency improperly dismissed claim (2), Complainant's denial of a reasonable accommodation claim, for alleging a matter that was not raised during EEO Counseling or is not like or related to a matter raised during EEO Counseling.

We will now address whether Complainant has stated an actionable claim of harassment. In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of a complainant's employment. The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive:" and the complainant subjectively perceives it as such. Harris, supra at 21-22. Thus, not all claims of harassment are actionable. Where a complaint does not challenge an agency action or inaction regarding a specific term, condition or privilege of employment, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief. The trier of fact must consider all of the alleged harassing incidents and remarks, and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

When viewing the alleged incidents set forth above collectively in the light most favorable to Complainant (including Complainant's denial of a reasonable accommodation claim), in conjunction with the allegations set forth in Complainant's formal complaint that she has been subjected to changes "in working conditions (only applicable to [her]), increased scrutiny in [her] work, and the use of intimidation techniques by [her] supervisor and her associates."³ We find that Complainant has set forth an actionable claim of harassment.

We note that the Agency raises various arguments in its brief in opposition to Complainant's appeal that were not raised by the Agency in its final decision. For example, the Agency asserts that there is no nexus between Complainant's protected classes and the incidents at issue. Agency Brief at 9, n.8. In addition, the Agency, in its response brief, asserts that liability cannot be imputed to the Agency regarding Complainant's allegations involving her co-workers "because [Complainant] has made no showing that [S1] or another supervisor knew all the conversations [Complainant] claims to have overheard." Agency Brief at 10, n. 9. We find that these arguments by the Agency goes to the merits of complainant's complaint, and is irrelevant to the procedural

³ To the extent, the Agency, in its brief, asserts that "[Complainant] did not elaborate on any of these alleged consequences", the Agency could have sought clarification from Complainant on these matters prior to issuing its final decision.

issue of whether she has 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).

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and we REMAND this matter, identified herein as a hostile work environment claim, to the Agency for further processing in accordance with 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 **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).

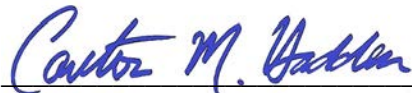
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

August 17, 2020
Date