



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Shantel H.,¹
Complainant,

v.

Chad F. Wolf,
Acting Secretary,
Department of Homeland Security
(Federal Emergency Management Agency),
Agency.

Request No. 2019005185
Appeal No. 0120181619
Agency No. HS-FEMA-01125-2014

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 0120181619 (June 25, 2019). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c). The Agency's request for reconsideration is **DENIED**. However, the Commission reopens this case on its own motion; **REVERSES** in part and **VACATES** in part the previous decision; and **REMANDS** the complaint in part for further processing.

ISSUES PRESENTED

The issues presented are whether the decision in EEOC Appeal No. 0120181619 should be reconsidered on the grounds that it was based on a clearly erroneous interpretation of material fact or law, or that the decision will have a substantial impact on the policies, practices, or operations of the Agency; and whether the appellate decision should be vacated on the grounds that it was based on a clearly erroneous interpretation of material fact or law.

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.

BACKGROUND

At the time of events giving rise to the underlying complaint, Complainant worked as a Tribal Liaison Specialist, GS-12, with the Agency's Region X office in Bothell, Washington.

On April 4, 2014, Complainant initiated contact with an EEO Counselor. Complainant stated that she was subjected to discrimination and a hostile work environment based on race, disability, and opposition to what she believed to be discriminatory practices directed toward her assigned tribes. On April 24, 2014, Complainant alleged that she was subjected to a hostile work environment based on race, disability, and prior EEO activity when she was demoted from working in the field, excluded from meetings, and limited in her email communications.

Formal Complaint

On May 23, 2014, Complainant filed an EEO complaint alleging discrimination on the bases of race, color, religion, national origin, sex, age, disability, and reprisal. Complainant added a handwritten notation stating, "AI/AN and tribes." In a narrative attached to her complaint, Complainant alleged that she reported her concerns regarding tribal barriers to accessing FEMA services, aid, and benefits to ensure compliance with Title VI of the Civil Right Act and the Americans with Disabilities Act. Complainant further alleged that she passed along reports of discrimination against American Indian/Alaska Native tribes. Complainant stated that her reports resulted in a hostile work environment and retaliation.

First Partial Acceptance

On July 31, 2014, the Agency informed Complainant of its partial acceptance of her EEO complaint. The Agency stated that it had accepted Complainant's claims of discrimination on the basis of retaliation (EEO activity/opposition). In a footnote, the Agency explained that "Complainant identifie[d] her EEO activity as opposition for reporting discriminatory practices involving issues surrounding American Indian/Alaska Native (AI/AN) tribal communication, trust, and access to reported tribal barriers to FEMA services, aid, and benefits during FEMA-4168-DR-WA." The accepted claims were as follows:

1. On July 16, 2014, Complainant learned that she was not on the list of those interviewed for position FEMA-14-LDC-37217-DEU, for which she applied. In May 2014, the Director of External Affairs, Complainant's supervisor, discouraged her from applying for the position and raised obstacles to her being considered as a qualified individual by changing the position description to remove skills related to tribal work;
2. On July 5, 2014, Complainant learned that her supervisor denied her Within Grade Increase;
3. On June 24, 2014, in a meeting with her supervisor and the Deputy Regional Administrator (DRA), Complainant was asked to sign a six-page memo related to her Q1 performance

review, without initially being given the opportunity to read or discuss it. After some discussion, the DRA permitted Complainant to take 45 minutes to read the memo, which indicated that Complainant's performance was "less than expected," and that she was no longer proficient in any of the required competencies;

4. On May 15, 2014, during her performance review, Complainant's supervisor told her that she was not performing the core competencies of her position, although he had not discussed this with her previously. When Complainant asked why she was being denied access to the tribal community, he responded that someone asked him to "pull [Complainant] out," although he declined to reveal who made that request; and
5. From April 2014 and ongoing, Complainant claimed repeated harassment by her supervisor, and cited the following incidents, including but not limited to, when he:
 - a. Subjected her to heightened scrutiny such as: requiring her to copy him on all emails, and when he increased his examination of her work products;
 - b. Demoted her from working in the field; isolated and excluded her from internal and external working partners, including denial of access to, and communication with, American Indian/Alaska Native tribal community; excluded her from participating in tribal field meetings, from portions of her work, and from discussions and problem solving with others;
 - c. Failed to communicate and address her work and the restrictions he placed upon her, which negatively impacted her effectiveness and morale;
 - d. Negatively attributed issues raised by two tribes to her;
 - e. Called her back from an approved assignment to return to the Joint Field Office, where he assigned her to assist interns copying papers for briefing packets;
 - f. Isolated her office into a small room apart from other staff when the office staff relocated to another venue; and
 - g. Excluded her from participation in, and attendance at, a visit to the disaster site by the President of the United States, while others were permitted to attend; and attendance at the Tribal Public Health Emergency Management Conference.

In the partial acceptance letter, the Agency informed Complainant that the portions of her complaint related to unfair or discriminatory treatment of other individuals (i.e., AI/AN tribal partners) were dismissed for failure to state a claim, because Complainant failed to show direct personal harm with respect to a term, condition, or privilege of employment as a result of the alleged agency actions with AI/AN tribal partners.

The partial acceptance letter requested that Complainant inform the Agency within seven days if the complaint's allegations had not been correctly identified. Complainant raised no objection to the Agency's description of her allegations.

Second Partial Acceptance

On September 8, 2014, the Agency issued Complainant an additional notice of partial acceptance in response to emails Complainant submitted on July 29, August 25, and August 27, 2014. The Agency informed Complainant that the claims identified as accepted in the July 31, 2014 remained accepted and would be investigated along with the following additional claims:

1. On July 24, 2014, in a staff meeting about fire emergencies in eastern Washington State, Complainant's supervisor excluded her from a disaster assignment. Others on the team, along with FEMA Corps staff, were assigned to the Emergency Management Division, Emergency Operations Center (EMD/EOC) Camp Murray site, although Complainant was available and offered to attend. This ongoing exclusion from internal and external partners denied Complainant training and teambuilding opportunities afforded to others;
2. On July 24, 2014, in a meeting with her supervisors to review Q2 performance, her supervisor continued to withhold training courses, which he had previously agreed to in Complainant's Individual Development Plan (IDP). Complainant's supervisor told her that her EEO complaint had no merit; that Complainant was not really working out; and that Complainant would not work out anywhere in FEMA. Complainant regarded these comments as threats to her employment. When Complainant requested to review the line items on her supervisor's six-page memo, he said, "Do you think I have to justify my decisions to you?";
3. On August 11, 2014, the Director of External Affairs, Complainant's supervisor, removed her from attendance and participation at the National Tribal Emergency Management Conference in Spokane, Washington, when he requested that Complainant's flight departure be changed from Sunday to Tuesday. This caused Complainant to miss out on activities and a tribal emergency management course with tribal partners scheduled for Monday and Tuesday; and
4. On August 11, 2014, Complainant's Q1 and Q2 performance review folders were negatively changed in the online employee review folders.

Third Partial Acceptance

On October 29, 2014, the Agency informed Complainant that it had accepted the following additional claims:

1. On October 2, 2014, Complainant's supervisor issued Complainant a Notice of Termination of Appointment. Additionally, during the previous month, the Deputy Regional Administrator (DRA) did not remove herself from the decision in the termination appeal and in the EEO mediation process; and
2. On or about September 2, 2014, after Complainant discussed her EEO complaint with the DRA during a meeting, and the DRA retaliated against Complainant when her complaints about a hostile work environment were not taken seriously and nothing was done to stop the hostile work environment. During the meeting, the DRA appeared angry and called Complainant "obnoxious." The DRA also told Complainant that she was not loyal because she chose to forward her EEO complaint to Region X. Additionally, the DRA advised Complainant to drop the issue and forgive her supervisor for what he did during and after the reporting of discrimination because Complainant truly could not understand how difficult their jobs were.

Investigation

In each acceptance letter, Complainant was advised to review the accepted claims to be investigated. The Agency informed Complainant that if she was not satisfied with the claims as identified, she would have five calendar days to submit written clarification of her claims. Based upon the three partial acceptance letters, the Investigator investigated a total of 11 claims based on reprisal (EEO activity and opposition). Complainant did not address the exclusion of the additional alleged bases of race, color, religion, national origin, sex, age, and disability. Consequently, those matters were not investigated on these bases.

Administrative Judge's (AJ) Decision

Complainant moved for default judgment based on the length of time the Agency took to complete its EEO investigation. The Agency moved for a decision without a hearing, stating that Complainant could not establish a prima facie case of retaliation and she could not prove that the Agency's legitimate, nondiscriminatory reasons for the termination of her appointment were pretext for retaliation. On March 12, 2018, an AJ issued an Order of Dismissal, making no ruling on the issue of timeliness and dismissing Complainant's complaint on a jurisdictional matter. The AJ noted that while Complainant made EEO contact, she complained of discrimination in the manner FEMA distributed goods toward another group of people and not as a result of any type of employment action or relationship. The AJ determined that this did not qualify as protected activity under Title VII.

Appellate Decision

On appeal, Complainant contended that the AJ erred in failing to find that the Agency improperly framed the basis of her complaint and did not consider additional claims under the basis of association. Complainant maintained that her association with the tribes caused her supervisor to subject her to discrimination. The Commission reversed the dismissal of Complainant's complaint, finding that Complainant alleged harassment and retaliation for reporting claims against American Indian and Alaskan Native tribes receiving FEMA disaster services. The Commission determined that Complainant engaged in protected activity when she raised objections that the Agency's practices allegedly discriminated against American Indians and Alaska Natives.

ARGUMENTS ON RECONSIDERATION

In its request for reconsideration, the Agency contends that the appellate decision failed to explain how opposing allegedly discriminatory practices related to recipients of federal disaster aid qualified as an employment practice under Title VII. The Agency argues that the decision involves a clearly erroneous interpretation of the law, as Complainant's claims of opposition to discrimination do not relate to an employment relationship. The Agency notes that Title VI is the controlling law under which Complainant opposed allegedly discriminatory practices and her claims are protected under federal whistleblower protections and not Title VII. The Agency asserts that Complainant failed to engage in protected EEO opposition because her opposition was informing her supervisor of what she believed to be discriminatory practices directed toward her assigned tribes. According to the Agency, Complainant was aware that the conduct she opposed was not protected by Title VII; moreover, American Indian tribal governments are excluded from the protections of Title VII. The Agency contends that the appellate decision is inconsistent with the Commission's own case law and it provides examples of dismissals of complaints based on whistleblowing activity, refusal to participate in illegal sharing of proprietary information, political views, union membership, and issuance of taxpayer funds. The Agency concludes that the AJ's decision was proper and should be upheld.

In response to the Agency's request for reconsideration, Complainant asserts that the appellate decision was correct in applying a broad application of Title VII. Complainant contends that the Agency relies on caselaw regarding underlying issues unrelated to complaints of discrimination while she complained about the Agency discriminating against members of a protected class. Complainant avers that her claims should be processed as complaints of employment discrimination because of her association with Native American Indians/Alaska Natives.

ANALYSIS

Reprisal Discrimination

The Agency argues that Complainant's complaint should be dismissed on the grounds that Complainant is alleging reprisal for whistleblower activity and not prior protected EEO activity. We do recognize that the record includes overwhelming evidence that Complainant believed the Agency subjected her to discrimination and a hostile work environment once she disputed the Agency's treatment of American Indian/Alaska Native tribes. The previous decision found that raising objections that the Agency's practices discriminated against American Indian/Alaska Native tribes constituted protected activity under Title VII. However, a claim of whistleblowing does not state a reprisal claim over which the Commission has jurisdiction. Only allegations of reprisal due to opposing practices made unlawful by Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, the Rehabilitation Act, the Genetic Information Nondiscrimination Act, or for participating in any administrative or judicial proceedings under those statutes states a claim under these laws. 29 C.F.R. §1614.101(b). As such, the Commission has previously held that whistleblower activities are outside the purview of the EEO complaint process. Giannou v. Dep't of Housing and Urban Development, EEOC Request No. 05880911 (Feb. 13, 1989).

Here, Complainant alleged that the Agency retaliated against her for raising concerns with the distribution of disaster relief funding to American Indian/Alaska Native tribes. The alleged reprisal is not based on Complainant's race, color, religion, sex, national origin, age, genetic information, or disability. To the extent that Complainant alleges that the Agency subjected her to discrimination and a hostile work environment based on her reports of discriminatory conduct against American Indian/Alaska Native tribes, we determine that dismissal was proper. We further agree with the Agency, and Complainant's own assertions, that Title VI of the Civil Rights Act of 1964 is the statute that is applicable to those allegations.

We note, however, that the AJ failed to consider all the investigated claims and improperly dismissed the complaint in its entirety. Regarding Complainant's additional claims, which the AJ did not consider, we recognize that there is an issue regarding whether Complainant engaged in prior protected activity, but this issue goes to the merits of the complaint and does not determine the procedural issue of whether the complaint stated a justiciable claim under the EEO laws. See Tim H. v. U.S. Postal Serv., EEOC Appeal No. 0120180329 (Feb. 7, 2018). A review of the record reflects that Complainant asserted that the reprisal stemmed from both her whistleblower activity (opposition to FEMA practices in relation to distribution to American Indian/Alaska Native tribes) **and** her subsequent EEO activity. Specifically, Complainant asserted that the disputed actions occurred both following her whistleblowing activities and after she filed an EEO complaint. Accordingly, the accepted claims indicated that Complainant alleged reprisal based on both EEO activity and opposition. To the extent Complainant is alleging reprisal for filing the instant complaint, Complainant has engaged in protected activity and has stated actionable claims.

Associational Discrimination

As for Complainant's argument that the Agency failed to consider her allegations of associational discrimination on the bases of race and national origin, we note that the Commission gives broad application to the court's decision in Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465 (5th Cir. 1970). Under Sanchez, complainants are given liberal latitude to clarify the bases of discrimination in their complaint, and to add bases of discrimination after filing their complaint. The Sanchez court explained that there are at least three reasons why a complainant may fail to identify a basis of discrimination in a complaint. First, a complainant may not be aware of an employer's motivation. Second, a complainant may not fully comprehend the distinction between bases. Finally, a complainant may be unschooled and unsophisticated in the use of forms. Applying Sanchez, the Commission has held that a complainant may amend his or her complaint to add or delete bases without changing the identity of the claim. See, e.g., Dragos v. U.S. Postal Serv., EEOC Request No. 05940563 (Jan. 19, 1995).

Here, Complainant initially alleged multiple bases, but failed to correct the Agency within the applicable time period when it did not consider bases other than reprisal. However, on appeal, Complainant alleged that she should have been offered an opportunity to reframe her claims to allege associational discrimination based on her association with American Indian/Alaska Native tribes. Complainant contended that not only was she subjected to harassment based on her opposition on behalf of the tribes, but also due to her personal relationship and association with the tribes. We find that this basis was improperly excluded when considering Complainant's claims. Therefore, we find that not only did the AJ improperly fail to consider Complainant's claims on the basis of reprisal for protected activity, but the AJ failed to consider Complainant's claims on the additional basis of association with American Indian/Alaska Native tribes.

CONCLUSION

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. We reopen the case on our own motion to REVERSE the previous decision with respect to reprisal based on whistleblower activity related to American Indian/Alaska Native tribes, thus affirming the Agency's dismissal of this claim. The remainder of the previous decision is VACATED, and the complaint REMANDED in part to address the claims related to Complainant's own EEO activity and additional bases, in accordance with the ORDER herein. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

Within 30 days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC Seattle Field Office a request for a hearing, along with a copy of the complaint file, and a copy of this decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the request and complaint file have been transmitted to the Hearings Unit.

Thereafter, the EEOC Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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.

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (Q0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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:



Bernadette B. Wilson
Executive Officer
Executive Secretariat

May 27, 2020

Date