



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

[REDACTED]
Chanelle B.,¹
Complainant,

v.

Ryan D. McCarthy,
Secretary,
Department of the Army,
Agency.

Appeal No. 2020000394

Agency No. ARLEWIS19JUL03091

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (Dismissal) dated September 16, 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 Social Worker (Clinical), GS-0185-12 at the Agency's U.S. Army Medical Command, Madigan Army Medical Center, facility in Tacoma, Washington.

On September 5, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to unlawful retaliation when:

1. On June 20, 2019, the Chief of Transitional Management Care Services (CTMCS) told Complainant that her work hours were to change from night shift to day shift (8:00- 4:30.), and placed Complainant on a temporary Detail to DCIS administrative duties.

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 June 19, 2019 CTMCS ordered Complainant to return home and use sick leave, and further told Complainant to call and speak to CTMCS for her new assignment on June 20, 2019.
3. On June 19, 2019, Complainant met with CTMCS and a Credential Manager (CM) and was informed by CTMCS that there would be an investigation concerning a standard of care violation, with Complainant's clinical privileges being immediately placed in abeyance. Complainant was no longer permitted to provide patient care, and was restricted to engage in off-duty employment until the investigation had been completed.
4. On June 14, 2019 Complainant received a memorandum entitled Notice of Abeyance of Clinical Privileges, signed by the Chief Medical Officer.

On September 16, 2019, the Agency issued a final decision dismissing the complaint for failure to state a claim and for mootness. Specifically, the Agency found that the abeyance of clinical privileges had been rescinded on or about September 6, 2019, and that Complainant had been returned to full clinical practice. The Agency further cited Agency regulations that required that it conduct a standard of care violation investigation and temporarily suspend Complainant and hold her clinical privileges in abeyance during the course of such an investigation. The Agency noted that the investigation had exonerated Complainant, resulting in the subsequent rescission of the abeyance. The Agency concluded that Complainant had not been harmed by its action and therefore she failed to state a claim and the matter was moot.

The instant appeal followed.

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, .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).

The Commission finds that the Agency has addressed the merits of Complainant's complaint without a proper investigation as required by the regulations. The Agency's articulated reason for the action in dispute - that the investigation was required under Agency regulations for reasons not clearly explained in the Agency's Dismissal, goes to the merits of Complainant's complaint, and is irrelevant to the procedural issue of whether she has stated a justiciable claim under Title VII. 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).

In alleging she was ordered home and told to use sick leave, her clinical privileges were held in abeyance, she was required to engage in off-duty employment until the investigation was completed, Complainant states viable claims to be reviewed on the merits. In addition, we note that the Dismissal does not address claim 1, which also states a viable claim which needs to be reviewed on the merits.

The Agency also stated that the claims were moot. The regulation set forth at 29 C.F.R. § 1614.107(a)(5) provides for the dismissal of a complaint when the issues raised therein are moot. To determine whether the issues raised in complainant's complaint are moot, the factfinder must ascertain whether (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged discrimination. See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), see also Kuo v. Dep't of the Navy, EEOC Request No. 05970343 (July 10, 1998). When such circumstances exist, no relief is available and no need for a determination of the rights of the parties is presented.

In the instant case, however, we note that a fair reading of Complainant's formal complaint indicates that she is seeking compensatory damages. Therefore, the Agency's rescission of the Notice of Abeyance does not render Complainant's complaint moot. Should Complainant prevail in the complaint, the possibility of an award of compensatory damages exists, and her complaint is not therefore moot. See Glover v. USPS, EEOC Appeal No. 01930696 (Dec. 9, 1993).

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 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

May 26, 2020

Date