



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

████████████████████
Colby S,¹
Complainant,

v.

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

Appeal No. 2020002713

Agency No. 2001-0673-2019105839

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated February 10, 2020, dismissing a formal 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

During the period at issue, Complainant worked for the Agency as a Registered Nurse in Tampa, Florida. On January 2, 2020, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination in reprisal for prior protected EEO activity.

On February 10, 2010, the Agency issued a final decision. In its final decision, the Agency determined that the formal complaint was comprised of the following claims:

Whether Complainant was subjected to a hostile work environment in reprisal for prior EEO activity as evidenced by the following events:

1. Complainant alleged that his spouse's privacy was violated.

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. Since February 4, 2019, Veterans System Integrated Network (VISN) 8 [named Director] refused to conduct an investigation into his spouse's allegations of being harassed.
3. On August 12, 2019, Complainant's spouse was made the subject of a VISN 8 fact-finding investigation.²
4. Agency refused to offer mediation during the informal complaint process.
5. Agency refused to provide an EEO Counselor during the entire counseling period, refused to conduct a final counseling interview, and refused to forward the matters complained of to officials beyond the responding management officials named in the instant complaint.

The Agency dismissed the formal complaint for failure to state a claim. The Agency reasoned that claim (1) should be dismissed because the Commission does not have jurisdiction over Privacy Act violations. Regarding claims (2) and (3), the Agency reasoned that to "allow the processing of a complaint about another person's EEO complaint would have a chilling effect on the processing of EEO complaints. Regarding claim (4), the Agency not offering mediation, the Agency reasoned that a decision not to engage in mediation cannot be made the subject of an EEO complaint. Regarding claim (5), the Agency reasoned that the EEO Counselor met all pre-counseling requirements.

The instant appeal followed. Complainant requests that we reverse the Agency's final decision dismissing his complaint. Complainant asserts that under third party retaliation both him and his wife can file EEO complaints regarding the instant matters.

In response, the Agency requests that we affirm its final decision. The Agency states that Complainant's spouse is the one who has standing to file a claim for being subjected to a fact-finding investigation. The Agency also asserts that Complainant is alleging dissatisfaction with the processing of his complaint.

ANALYSIS AND FINDINGS

The Agency properly dismissed claim (1) claiming the Agency violated Complainant's spouse's privacy. The Privacy Act, 5 U.S.C. § 552(f)(1), provides an exclusive statutory framework governing the disclosure of identifiable information contained in federal systems of records and jurisdiction rests exclusively in the United States District Courts for matters brought under the Privacy Act. See Bucci v. Department of Education, EEOC Request Nos. 05890289, 05890291 (April 12, 1989).

² The record reflects that Complainant's spouse is also an employee (Nurse Manager) of the Agency.

The Agency improperly dismissed claims (2) and (3). The Supreme Court held in Burlington Northern v. Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) that a materially adverse action subject to challenge under the anti-retaliation provisions encompass a broader range of actions than an “adverse action” subject to challenge under the non-discrimination provisions. Anti-retaliation protection covers any employer action that “might well deter a reasonable employee from complaining about discrimination.” Id. at 67. Sometimes an employer takes a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, II, (B)(4)(a) (Aug 25, 2016) (hereinafter Retaliation Guidance). Where there is actionable third-party retaliation, both the employee who engaged in the protected activity and the third party who is subjected to the materially adverse action may state a claim. Id. at II(B)(4)(b).

In the instant matter, Complainant is alleging that Agency officials refused to investigate his spouse’s claims of harassment and subjected his spouse to a fact-finding investigation due to his protected activity. Specifically, in an attachment to Complainant’s formal complaint, Complainant states “immediately after I won a summary judgment against the Agency in my EEO case, the Agency conducted a disparately run investigation into my wife...[and] [t]he action was taken within weeks of her scheduled testimony in my EEO case in federal court.” Complainant asserts that these actions against his wife resulted in him being subjected to a hostile work environment. We find that given these specific circumstances, Complainant has set forth an action reasonably likely to deter him or others from engaging in protected activity.

Finally, we remand claims (4) and (5) to the Agency for further processing. We find that Complainant in claims (4)-(5) is alleging dissatisfaction with the processing of his complaint (that he was not offered mediation, not provided with a final interview, that conflicts of interest existed with the processing of his complaint etc.). The regulation set forth at 29 C.F.R. § 1614.107(a)(8) provides, in relevant part, that an Agency shall dismiss claims alleging dissatisfaction with the processing of a prior complaint. Dissatisfaction with the EEO process must be raised within the underlying complaint, not a new complaint. See MD-110 Ch. 5 § IV.D (as revised Aug. 5, 2015).

However, the Agency has a duty to address Complainant's concerns. EEOC MD-110, Ch. 5 § IV.D provides, in pertinent part, the following: “[t]he Agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the Agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the Agency's reason(s) for not taking any action.”

Thus, regarding claims (4) and (5), we order the Agency to provide Complainant with a report of any actions it took to resolve his concerns regarding the processing of his complaint, or an explanation of its reasons for not taking any action, in accordance with the Order below.

Accordingly, we AFFIRM the Agency’s dismissal of claim (1). However, we REMAND claims (2)-(3), and (4)-(5) for further processing in accordance with the Order below.

ORDER

The Agency is ORDERED to take the following actions:

1. Regarding claims (2) and (3), 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.
2. Within thirty (30) calendar days from the date this decision is issued, the Agency official responsible for the quality of complaint processing must add a record of Complainant's concerns (claims (4)- (5)) and any actions the Agency took to resolve the concerns to the complaint file maintained on the underlying complaint. The Agency shall also provide Complainant with a report of any actions taken by the Agency to resolve the concerns, or an explanation for not taking any action. The Agency shall submit a copy of the report or its explanation to the Compliance Officer as referenced below.

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 (T0610)

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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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

June 16, 2020

Date