



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

[REDACTED]  
Simone J.,<sup>1</sup>  
Complainant,

v.

Barbara Barrett,  
Secretary,  
Department of the Air Force  
(National Guard Bureau – Wyoming Air National Guard),  
Agency.

Appeal No. 2020001944

Agency No. M-WY-F-01-19-O

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated November 19, 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Psychological Health Program Specialist, functioning as the Director of Psychological Health, at the Agency's Wyoming Air National Guard Bureau facility in Cheyenne, Wyoming.

On June 4, 2019, Complainant contacted an EEO Counselor. On October 15, 2019, Complainant filed a formal EEO complaint alleging that the Agency had subjected her to an ongoing discriminatory hostile work environment on the basis of disability (fibromyalgia, ADHA and

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<sup>1</sup> 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.

depression), as well as unlawful retaliation for engaging in prior protected EEO activity under Title VII,<sup>2</sup> when:

1. On or about July 15, 2018, after she reported sexual harassment, the Colonel told Complainant to stop acting like “chicken-little” and stop being overdramatic, which Complainant interpreted “as a clear message to stop reporting and filing complaints.”
2. On January 27, 2019 Complainant reported that she was the victim of a sexual assault to the Captain, who on January 28, 2019, disclosed her restricted report of a sexual assault to leadership and without Complainant’s consent.
3. On or about January 30, 2019, after reporting a sexual assault to the Captain, the Colonel and the Chief accused Complainant of being an alcoholic, discussed her mental and physical health history, and attempted to direct her to go to the hospital.
4. On February 5, 2019, the Colonel questioned her mental health and placed her on immediate preventative health leave/administrative paid leave and questioned her claims that she had a covered disability.
5. On February 11, 2019, the Colonel and the Major informed Complainant that she would be placed on an additional preventative health/administrative paid leave period, required her to turn in her “on-call phone” to them, and she was forbidden from seeing any Airmen or work on base.
6. On February 25, 2019, when she returned from leave, Complainant was restricted in her duties and meetings.
7. Complainant lost pay, her approved professional development training was cancelled, and she lost her vacation and sick leave time for two pay periods, when the administrative paid leave was put into the system as leave without pay.
8. On an unspecified date, her laptop was seized, and the hard drive copied.

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<sup>2</sup> The record also shows, that, on January 27, 2019, Complainant contacted a management official to file a Sexual Assault report, where Complainant was the victim. Complainant had also filed an Inspector General Report and a May 14, 2019 “complaint with the National Guard Bureau Sexual Assault Program Response Office.” In addition, she alleged that she had assisted others in with EEO and sexual harassment complaints.

9. In March 2019, the Captain participated in “an illegally ordered Command Directed Investigation inquiring into the nature of Complainant’s calls for help after the sexual assault” and allegedly disclosed protected sexual assault information to others.
10. On or about April 16, 2019, Complainant was denied representation by a union representative, a support person or legal counsel, and the civilian EEO process was not explained.
11. On May 14, 2019, Complainant filed a complaint with the National Guard Bureau Sexual Assault Program Response Office and, the following day, the Captain input Complainant’s sexual assault report into the database.
12. On May 20, 2019, the Captain reprised against her by providing a memo to the Colonel informing the Colonel that she had lost confidence in Complainant’s ability to discharge her duties.
13. On June 4, 2019, the Colonel issued Complainant a “Proposed Adverse Action Letter,” in which the Colonel proposed to remove Complainant from her employment.
14. On June 6, 2019, after Complainant told management of her intention to file a formal EEO and IG complaints, she was not allowed to use her computer to make the complaints without supervision and was told that if she “would just resign that this would all go away and there would not be any negative consequence for [Complainant] and her employment in the federal government system would not be negatively impacted.”<sup>3</sup>
15. On July 1, 2019, Complainant claims she was subjected to discrimination during a meeting with the EEO manager.
16. On or about November 7, 2019, Complainant’s SF-50 were changed twice to move her from permanent to temporary and changing her “union rights and competitive designation.”
17. Her vehicle was searched and she was questioned on the day she was scheduled to file her EEO complaint.

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<sup>3</sup> The Notice of Removal was later replaced with a Letter of Reprimand on August 28, 2019. The record also indicates that Complainant has since left the Agency and is employed by another federal agency.

18. The Agency EEO Manager “deliberately mislead” Complainant and obstructed the EEO process, when she attempted to process her claims through the EEO process.

The Agency issued a final decision dismissing the entire complaint. The Agency reasoned that many of the allegations were untimely made and the complaint as a whole failed to state a claim under the employment discrimination statutes.

This appeal followed. Complainant contends that she stated a claim because she is alleging that she was aggrieved based on her disability and protected EEO activity.

In response, the Agency contends that Complainant is no longer an employee because she transferred to the Department of Veterans Affairs, effective November 10, 2019. The Agency also contends that there was no adverse action taken against her because the Notice of Removal was not executed. Regarding the disability claims, the Agency reasoned that she did not request any accommodations during her employment with the Agency through the approved Agency processes.

### ANALYSIS AND FINDINGS

#### *Failure to State a Claim*

Under the regulations set forth at 29 C.F.R. Part 1614, 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).

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings 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 the complainant's employment. Here, Complainant has alleged an ongoing pattern of discriminatory harassment that included, but was not limited to, being placed on an extended administrative leave, having her work duties sharply restricted and being issued a proposed removal after she participated in the EEO process by assisting others with their EEO complaints, as well as reported being sexually harassed in July 2018, and later reporting her own sexual assault on January 27, 2019. She also alleges that she was perceived as an alcoholic and, as a result, was treated harshly by management and her complaint of sexual assault was not taken seriously. We conclude that Complainant's allegations are sufficient to state a viable claim of discrimination based on perceived disability (perceived as an alcoholic and unstable) and retaliatory harassment which requires further investigation and processing. The fact that Complainant now works for another federal agency does not render moot her claim of ongoing harassment while she was at the Agency.

Moreover, while the Agency claims that Complainant has failed to establish a nexus between any prior EEO activity and/or disability and the alleged harassment, this is addressing the merits of the claim without a proper investigation and is irrelevant to the procedural issue of whether Complainant has stated a justiciable claim under Title VII or the Rehabilitation Act. See Osborne v. Department of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. United States Postal Service, EEOC Request No. 05930220 (August 12, 1993); Ferrazzoli v. United States Postal Service, EEOC Request No. 05910642 (August 15, 1991).

We also note that the Agency has asserted that Complainant's allegation concerning the proposed removal should be dismissed because she was not actually removed. EEOC Regulation 29 C.F.R. § 1614.107(a)(5) does allow an agency to dismiss a complaint that alleges that a proposal to take a personnel action is discriminatory. However, the regulations also make clear that the exception to this general rule is when the complaint alleges the proposal is retaliatory. Here, retaliation is at the essence of Complainant's allegation about the proposed removal, so it cannot be dismissed as a proposed personnel action.

Accordingly, we find that Complainant's complaint, defined as a claim of an ongoing discriminatory and retaliatory hostile work environment, was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

#### *Untimely EEO Counselor Contact*

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action.

Here, Complainant first sought EEO counseling on June 4, 2019, more than 45 days from some of the allegations proffered to support her hostile work environment claim. However, other allegations raised by Complainant were within 45 days of her first EEO counselor contact or were events that occurred later. The Supreme Court has held that a complainant alleging a 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). Here, we conclude that all Complainant's allegations are sufficiently inter-related that together they form the basis of her claim of a hostile work environment. As such, the Agency also erred in dismissing the complaint for untimely EEO counselor contact under 29 C.F.R. § 1614.105(a)(1).

#### CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND the complaint 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 claim (ongoing discriminatory and retaliatory hostile 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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the complainant or the agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.** A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless complainant files his or her request via the EEOC Public Portal, in which case no proof of service is required.

**Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request.** Any supporting documentation must be submitted together with the 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

December 9, 2020

Date