



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

[REDACTED]
Tera B.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 20200005079

Agency No. 200H-0561-2020102579

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a July 24, 2020 final Agency decision (FAD), 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 served the Agency as a volunteer at the Veterans Affairs New Jersey Health Care System, East Orange Campus, Spinal Cord Injury Recreation Sports Clinic in East Orange, New Jersey. She helped paraplegic spinal cord injured veterans in the sports gym by talking to them to boost their morale while helping them with their workout routines, as well as assisting them on day trip experiences.

On June 8, 2020, Complainant filed an equal employment opportunity (EEO) complaint alleging that an Agency Recreation Therapist, her first line supervisor (S1), subjected her to a hostile work environment based on her race (Black) and sex (female) from August 2019 through February 4, 2020. As examples of the discriminatory harassment, Complainant offered the following:

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.

1. S1 was flirtatious with her, such as offering the use of his Netflix account, offering his seat, and in a conversation about cooking told her "I would not mind if your food put a spell on me."
2. S1 made comments on her appearance almost every day she volunteered.
3. S1 repeatedly told her that Patient 1 liked her (romantic interest) and spread rumors to that effect.
4. On September 19, 2019, S1 orchestrated a situation by leaving her alone which resulted in Patient 1 passing by her in the gym where he grabbed her and tried to kiss her on the mouth but landed on her cheek, an unwanted invasion. While the kiss was non-sexual in nature because Patient 1, an innocent and confused veteran who was religiously observant and interpreted passages from the Bible to mean greet one another with a "holy kiss," S1 continued to spread the rumors about Complainant and Patient 1.
5. S1 repeatedly told her he watched and saw everything in the gym.
6. On the evening of September 19, 2019, after the kiss occurred, S1 called her and said he would not address the situation with Patient 1 unless she put Patient 1 in his place first, saying no one could do that but her.
7. S1 asked her to come to the gym on September 25, 2019, her day off, to witness him confront Patient 1 about the kiss, and when she did he instead used her to embarrass Patient 1, resulting in him crying out loud, pleading, and apologizing in front of the whole gym, something she can't get out of her mind.
8. Patient 1, who rarely went to the gym on her volunteer days after the above incident was there on February 4, 2020, and at his behest, Complainant, Patient 1, S1, and Volunteer 2 met in a private room. There, Patient 1 confronted S1, expressed outrage because of rumors spread by S1 that he had a romantic interest in Complainant which could damage his marriage and religious position, and made veiled threats to shoot, possibly kill and set someone on fire by saying these things happened in the parking lot outside the building.

Complainant also alleged she was subjected to unlawful retaliation for engaging prior protected EEO activity under Title VII when:

9. On February 26, 2020, S1 (backed up by the EEO Program Manager who acted as the Harassment Prevention Program investigator, the Chief of Recreation Therapy, and the Voluntary Services Chief) told her she could not go on a day trip she was scheduled to volunteer on. When she responded she had papers and every right to do so, S1 threatened

to call the Agency police three times. He then falsely accused her of being the one who kissed Patient 1.²

The Agency dismissed the complaint for failure to state a claim because Complainant was a volunteer, not an employee of the Agency.

The instant appeal followed. On appeal, regarding the volunteer matter, Complainant argues that she received compensation in the form of free meal ticket to use at the cafeteria when volunteering in the building, and on days she volunteered on day trips she received free transportation, a free meal while there, and paid admission to events.

ANALYSIS AND FINDINGS

In EEOC Compliance Manual Section 2-III.c, “Threshold Issues,” OLC Control No. EEOC-CVG-2000-2 (May 12, 2000), the Commission advises that while volunteers usually are not protected “employees”, an individual may be considered an employee of a particular entity if as a result of the volunteer service, she receives benefits such as a pension, group life insurance, and access to professional certification, even if the benefits are provided by a third party. These benefits constitute significant remuneration rather than merely the inconsequential incidents of an otherwise gratuitous relationship. A volunteer may also be considered an employee for the purpose of utilizing the 29 C.F.R. Part 1614 EEO complaint process if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity. In such situations, discrimination by the employer operates to deny the complainant an employment opportunity. Id.

Here, Complainant volunteered one to two days a week for approximately two hours at the gym, and one to two days a month for 4 – 6 hours when assisting on trips. We find that the compensation to which Complainant refers is the inconsequential incident of an otherwise gratuitous relationship. The type of volunteer work Complainant did was not a prerequisite to regular employment, and there was no evidence that the volunteers receive preferential treatment when they applied for regular employment. Complaint file, Bates Nos. 37 – 40. Accordingly, we find Complainant’s complaint fails to state a claim because she was a volunteer, not an employee.

The FAD is AFFIRMED.

² On appeal, Complainant expresses much concern that the Agency’s definition of her EEO complaint did not do it justice. We agree. Based on a review of Complainant’s complaint and appellate submissions, which clarified the complaint and added detail, we have redefined the complaint as set forth above.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0920)

The Commission may, in its discretion, reconsider this appellate decision if 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, a 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 (S0610)

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. 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

March 2, 2021

Date