



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

[REDACTED]  
Farah S.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2020005487

Agency No. 200J-0589-2020102637

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 8, 2020, 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 Medical Support Assistant - Supervisor, GS 8, at the Agency's Medical Center facility in Kansas City, Missouri.

On March 20, 2020, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of race (African American) and in unlawful retaliation for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. on February 21, 2020, Complainant was temporarily detailed from her position pending an internal fact-finding investigation, resulting in her hours being changed;
2. on March 11, 2020, Complainant received an email with a performance appraisal with a rating of "Unacceptable";

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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.

3. on March 11, 2020, the Associate Chief of Nursing, gave Complainant a Performance Plan with her prior performance appraisal that had a rating of "Unacceptable" attached without consideration of Complainant's self-assessment; and
4. since March 13, 2020, Complainant has been denied leave.

The Agency dismissed the claims for various reasons. Claims 1 and 4 were dismissed on the grounds that they constituted collateral attacks on internal administrative proceedings and on decisions by the Department of Labor. Claim 2 was dismissed for untimely EEO Counselor contact and Claim 3 was dismissed for failing to state a claim of harassment.

### ANALYSIS AND FINDINGS

We note initially that the Agency on appeal argues that Complainant's appeal should be dismissed as untimely filed. The Agency notes that its dismissal decision was issued on April 8, 2020, but that Complainant's appeal was not filed until September 9, 2020, which is beyond the 30-day time limit. Complainant, however, has submitted two sworn affidavits, one by herself and one by a colleague, who both aver that Complainant faxed her appeal to the EEOC on April 14, 2020. Given these sworn affidavits, we will find that Complainant's appeal was timely filed.

With regard to Claims 1 & 4, we note that an employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. See Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's adjudicatory proceeding or decision, such as the grievance process, the workers' compensation process, or state or federal litigation. See Fisher v. Dep't of Defense, EEOC Request No. 05931059 (July 15, 1994).

Here, a fair reading of the complaint and related EEO counseling report, as well as Complainant's brief submitted on appeal, shows that Complainant alleged that Agency officials, not an outside adjudicatory body, were motivated by discriminatory and retaliatory animus when she was placed on a temporary detail and when her requests for annual and sick leave were denied. With regard to Claim 4, we note that neither the Informal nor the Formal complaints indicate that Complainant is referring to FMLA leave. Instead, in her Formal complaint, Complainant refers simply to "sick leave and annual leave" and alleges that her requests were denied by the Associate Chief of Nursing, not the Department of Labor. Similarly, with regard to Claim 1, Complainant alleges that the Associate Chief of Nursing placed her on a temporary detail. There is no argument by the Agency that anyone other than Agency officials were involved in the decision-making process at issue. We conclude that these allegations state a viable claim under the 29 C.F.R. Part 1614 EEO complaint process and should not have been dismissed.

With regard to claim 2, we note that EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination 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. The record discloses that Complainant was issued her performance appraisal on January 7, 2020, but she did not initiate contact with an EEO Counselor until February 28, 2020, which is beyond the forty-five (45) day limitation period.

EEOC regulations provide that the agency or the Commission shall extend the time limits when the individual shows that she was not notified of the time limits and was not otherwise aware of them, that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. Complainant maintains in her Formal and informal complaints that she did not receive her evaluation until March 11, 2020 “via Outlook Message.” On appeal, Complainant maintains she was not given her performance appraisal until January 31, 2020, while also stating, “I did not receive that until after January 31.” Whether received on January 31, “after January 31”, or on March 11, Complainant argues that her Counselor contact was therefore timely. We note, however, that the performance appraisal is dated January 7, 2020 and contains a notification that Complainant refused to sign it on that date. Complainant denies that she refused to sign the document on that date and maintains she did not receive the document until a later date. Complainant, however, has not included a copy of the “Outlook Message” dated March 11, 2020 confirming that she received the evaluation on that date. Similarly, with regard to January 31, 2020, Complainant has not presented any supporting evidence to establish that she received the evaluation on that date. We note that the evaluation was not signed by Complainant with a date of January 31, 2020, nor was it signed by her with a date of March 11, 2020. We therefore find that Complainant has not shown that she received the evaluation at some date after the January 7, 2020 date indicated on the evaluation itself. We further find that on appeal, Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for initiating EEO Counselor contact. We therefore find that the Agency appropriately dismissed Claim 2 for untimely Counselor contact.

While the Agency dismissed Claim 3 for failure to state a claim, we find that it was not an independent claim, but rather a part of Claim 2 concerning the performance appraisal. As such, we conclude that it was also untimely raised with the EEO counselor and should be dismissed along with Claim 2. Accordingly, the dismissal of Claim 3 is affirmed.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Dismissal in part and REVERSE in part, and we REMAND claims 1 & 4 for further processing in according with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims (Claims 1 and 4) 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 CFR § 1614.503(f) for enforcement by that agency.

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 (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

March 2, 2021

Date