



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Barbara S.,¹
Complainant,

v.

Thomas W. Harker,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2021001824

Agency No. 20-67004-02432

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated December 31, 2020, dismissing her complaint alleging 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 was a former employee of the Marine Corps Logistics Base in Albany, Georgia. Complainant held a term appointment, which was consistently extended, with the Agency between 2004 and 2012.

On December 3, 2020, Complainant filed a formal equal employment opportunity (EEO) complaint alleging that the Agency unlawfully retaliated against her for prior protected EEO activity. Complainant stated, in 2011, she complained to her Supervisor (S1) about sexual harassment by an Agency Gunnery Sergeant (GS). She alleged that the complaint resulted in retaliation by GS and his acquaintances, which included S1. Complainant alleged that the retaliation included non-extension of her appointment in 2012 and adverse incidents while she subsequently worked for contractors on base.

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.

Complainant stated, on June 11, 2020, a private contractor (PC) offered her a position and, when S1 learned of her selection, he contacted PC and made negative comments about Complainant², which resulted in PC withdrawing the offer of employment on June 26, 2020. PC cited “customer concerns” as the reason for the withdrawal.

In its December 31, 2020 final decision, the Agency dismissed Complainant’s complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency stated that Complainant is not a current employee or applicant for employment with the Agency, and that a private company withdrew her offer of employment. The instant appeal from Complainant followed, stating an Agency employee took steps to interfere with her employment with a private entity.

ANALYSIS AND FINDINGS

The Agency dismissed Complainant’s claim pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency stated that Complainant was a former employee and not a current employee or applicant for Agency employment. 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, disabling condition, genetic information, or reprisal. 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 (April 21, 1994).

First, the Agency’s assertion that Complainant failed to state a claim because she is no longer employed by the Agency is incorrect. A former employee may state a viable retaliation claim for protected activity that arose from her employment with an agency, even if the disputed agency action occurred after the termination of the employment relationship. In Robinson v. Shell Oil Co., 519 U.S. 337 (1997), a case involving a claim of retaliation when a former employer gave an employee a negative job reference, the Supreme Court clarified that the term “employee” as used in the anti-retaliation provision of Title VII, includes former employees. See also Doyle v. Dep’t of Justice, EEOC Request No. 0520070207 (October 12, 2007) (Complainant stated a viable claim of retaliation when, as a former employee who had engaged in protected EEO activity, he was not selected for a contract position with the Agency after his retirement); Maclin v. U.S. Postal Service, EEOC Appeal No. 0120070788 (March 29, 2007) (Complainant stated a viable claim of retaliation when, as a former employee who had engaged in protected EEO activity, he was not selected for a contract position with the Agency).

² In a September 14, 2020 letter, S1 stated that he informed an Agency Facility Manager that Complainant was not a “good fit” for an embarkation position because she has a “poor work ethic.” S1 stated that he did not communicate with the hiring company, PC.

In the instant case, Complainant alleged, on the basis of unlawful retaliation, in June 2020, an Agency Supervisor, S1, contacted an official at the private contractor who offered her employment at the Agency facility and made negative remarks about Complainant. We find that Complainant has a viable claim and the Agency's dismissal was not appropriate.

In addition, to the extent that the Agency asserted that Complainant failed to show that she was subjected to harm, we disagree. Complainant alleged that she was subjected to unlawful retaliation for her prior protected activity. Where, as here, a complainant has asserted that she was subjected to unlawful retaliation for her prior protected activity, the Commission has stated that adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U. S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found “materially adverse,” which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process); see also Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999) (citing EEOC Compliance Manual, No. 915.003 (May 20, 1998)). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Id.

Complainant alleged, following her prior EEO activity, her former supervisor (who is an acquaintance of GS who she filed a harassment complaint against) called her new employer to provide negative information about Complainant. We find that such action is reasonably likely to deter Complainant or others from engaging in protected activity. Therefore, upon review, we further find that the Agency's dismissal was not appropriate.

CONCLUSION

We REVERSE the final agency decision and REMAND the matter to the Agency for further processing consistent 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. 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 (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

June 8, 2021

Date