



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

[REDACTED]
Deborah C.¹
Complainant,

v.

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

Appeal No. 2020003082

Hearing No. 410-2019-00561

Agency No. 200I-0508-2019102832

DECISION

On April 10, 2020, Complainant filed an appeal, pursuant to 29 C.F.R. § 1614.403(a), from the Agency's March 6, 2020 final order concerning her equal employment opportunity (EEO) complaint alleging 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. For the following reasons, the Commission VACATES the Agency's final decision, and REMANDS the matter for further processing.

ISSUE PRESENTED

Whether the investigation of Complainant's complaint complied with the requirements of 29 C.F.R. 1613.216(a).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Registered Nurse, VN2, in the Acute Mental Health Unit, at the Agency's Atlanta Medical Center in Decatur, Georgia.

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.

On May 20, 2019, Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of religion (Afro-Centric Pentecostal) and reprisal for prior protected EEO activity (Case No. 200I-0508-2016-103628) when: on February 21, 2019, she was sent home for wearing unauthorized religious headgear.

The complainant was accepted for investigation. The record reflects that the Agency's Uniform Dress Code Policy (Policy) required all nursing employees who have contact with patients to be in proper uniform while on duty. Due to the nature of the patients in the mental health units, staff were not allowed to wear "dangling earrings, scarves, neckties, head wraps, or shawls, as these items can be used to choke the individual." The Policy stated that deviations may be authorized. In addition, the Agency had issued a memorandum to employees regarding headwear that stated that "[h]eadwear of any kind is not to be worn inside the building, unless related to the performance of an occupational task, established religious or cultural practice, or health/safety reasons." The memorandum also stated that requests for deviation regarding uniform must be made in writing.

While Complainant has worked at the Atlanta Medical Center since at least 2016, the record is unclear as to how long she has been assigned to the Acute Mental Health Unit. The record is also silent regarding when Complainant began wearing her head garment.

On August 23, 2018, Complainant requested a religious accommodation, to wear a head garment in the Acute Mental Health Unit, of her second line supervisor, the Associate Nurse Executive (RMO2²) (Pentecostal, prior EEO activity). RMO2 informed Complainant of the Agency's Policy on head garments and the need to provide documentation of her established religious practices from her Imam or Minister, which would then be submitted to the Medical Director for review and exception. RMO2 noted that the request had the potential to pose a hardship for the Agency because Complainant worked in a unit with highly volatile, psychotic, delusional, and physically aggressive patients. The record does not indicate that further immediate action was taken by Complainant.

There is no information regarding whether Complainant was wearing a head garment at that time, and if she was, whether she continued wearing such garment while working in the Acute Mental Health Unit.

On February 21, 2019, Complainant asserted that she was sent home, without pay, by her immediate supervisor, the Nurse Manager, (RMO1) (Roman Catholic, prior EEO activity) for wearing an unauthorized religious head garment. RMO1 denied that Complainant was sent home that day. According to RMO1, RMO2 required documentation and, consequently, RMO1 asked Complainant for the documentation. RMO1 believed Complainant would go home to retrieve it and return to work. Instead, noted RMO1, Complainant left work on February 21, 2019 and did not return.

² Responsible Management Official (RMO).

RMO2 did not comment on whether she provided this instruction and denied sending Complainant home. Rather, RMO2 stated that she was informed by RMO1 that Complainant had left for the day for a medical appointment. The record contains Complainant's time record for February 21, 2019, which included a note stating that Complainant called out "to have her foot x-rayed."

The Staff Chaplain (unknown EEO activity) stated that he witnessed the exchange between Complainant and RMO2 on that day. According to the Staff Chaplain, RMO2 informed Complainant that she had to obtain a letter from her religious leaders or otherwise go home.

On April 1, 2019, Complainant provided a note from her minister, which requested a religious accommodation for Complainant's head garment. Complainant was approved and wore her desired head garment at work.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On February 28, 2020, the AJ issued a decision without a hearing in favor of the Agency. The AJ determined that Complainant failed to establish a prima facie case of religious discrimination for failure to accommodate, as she did not demonstrate that she had a religious belief that required the modification of an Agency policy. The AJ noted the Agency's clear policy prohibiting the wearing of any kind of head gear, as well as its process for seeking an exception for religious beliefs. The AJ found that, while Complainant made her religious accommodation request on August 23, 2018, she did not provide a note until April 1, 2019. Based on the record, the AJ determined that Complainant was asked to retrieve documentation, related to her religious request to wear her head garment, and return to work. The AJ did not find evidence supporting Complainant's claim that she was sent home without pay. Regarding Complainant's reprisal claim, the AJ determined that Complainant failed to establish a prima facie case for retaliation as she could not establish a nexus between her asserted EEO activity and the Agency's actions.

The Agency subsequently fully implemented the AJ's decision finding no discrimination or retaliation.

CONTENTION ON APPEAL

On appeal, Complainant, through her counsel, submits an appeal brief that does not relate to the matter at hand. There are no other submissions from Complainant in the instant record.

In response, the Agency argues that Complainant's prior EEO activity is too remote in time from the February 21, 2019 incident to establish an inference of retaliation.

Moreover, the Agency argues that, as to the claim of discrimination based on religion, there is no evidence that calls into question the Agency's policy regarding headwear and the method through which to obtain a religious accommodation. The Agency notes that Complainant did not provide a letter until April 1, 2019, which was about a month after the February 21, 2019 incident.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

Summary Judgment

We must determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

In this matter, Complainant asserted that she was sent home, without pay, because she was wearing her religious head garment. The record contains conflicting statements from Complainant, the responsible management officials, and a witness, as to what transpired on February 21, 2019. For example, RMO1 alternated between stating that Complainant was not sent home to RMO2 sent her home to obtain a document from Complainant's religious institution stating that her head garment was religious. Contrastingly, RMO2 asserted that no one sent Complainant home. It is evident that findings of fact need to be made by assessing witness credibility and weighing conflicting evidence.

In addition to the existence of genuine issues of material fact, we find that the requirement for a thorough investigation was not met. 29 C.F.R. 1613.216(a). An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). A review of the record indicates that not all relevant information was included in the investigative file. For example, the record does not address when Complainant began wearing a head garment. Further, it is unclear what actions or inactions occurred between her August 23, 2018 religious accommodation request and the February 21, 2019 incident. The record is also silent on whether Complainant wore her head garment between February 21, 2019, and April 1, 2019, the time between the Agency's request for documentation and when Complainant eventually submitted a letter from her religious organization.

Moreover, the Agency's policy on head garments/wear was also not properly investigated. On appeal, the Agency noted that there was no question about its policy regarding headwear and the method through which to obtain a religious accommodation. However, the policy is key to Complainant's main argument: that she was discriminatorily treated when she desired to wear her religious head garment. During the investigation, Complainant shared concerns that she was targeted due to her religious head garment while other similarly situated employees were not. Specifically, that she noticed others wearing supposed religious head gear without issue, and employees wearing non-religious head gear, such as baseball hats, without issue.

Additionally, we note there is scant information on Complainant's prior protected EEO activity that serves as the foundation of her reprisal allegations. While Complainant contends that she was harassed due to her "prior EEO case" and RMO1 attested she was aware of this protected activity in 2018, the instant record does not reflect adequate information regarding of this earlier case, *e.g.*, its status, the named RMOs, and if/when the matter was resolved. Such gaps in the record must be resolved on remand.

Based on the record, we find that summary judgment was not appropriate, and the Agency was not entitled to a grant of summary judgment as a matter of law.

CONCLUSION

Accordingly, the decision of the Equal Employment Opportunity Commission is to VACATE the Agency's decision, and to REMAND the case for further processing in accordance with this decision and the Order of the Commission, below.

ORDER

Within 30 calendar days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's Atlanta District Office a request for a hearing on this complaint, the complaint file, and a copy of this appellate decision.

The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision in accordance with 29 C.F.R. §1614.110.

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).

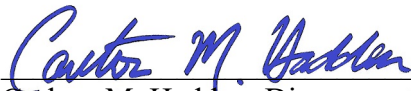
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

September 13, 2021

Date