



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

[REDACTED]

Brian R.,¹
Complainant,

v.

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

Appeal No. 2021003474

Agency No. 2004-0659-2019105511

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 4, 2021, dismissing his 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 worked as a Plastic Surgeon, GS-15 at the Agency's W.B. Bill Hefner VA Medical Center in Salisbury, N.C.

On December 9, 2019, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Asian), national origin (Hispanic), and religion (Catholic). The Agency characterized the complaint as a single incident that took place on August 28, 2019, where the Chief of Surgery notified Complainant that his tour of duty would be changed from a ten-hour workday to an eight-hour workday.

The Agency dismissed the complaint for failure to state a claim under 29 C.F.R. § 1614.107(a)(1), and because it alleged a single proposed action pursuant to 29 C.F.R. § 1614.107(a)(5).

The instant appeal followed.

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.

ANALYSIS AND FINDINGS

The matter before us is whether the Agency properly dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

To establish a claim of harassment, a complainant must show that: (1) they belong to a statutorily protected class, (2) they were subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class, (3) the harassment complained of was based on their statutorily protected class, (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment, and (5) there is a basis for imputing liability to the employer. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). Further, the incidents collectively must have been "sufficiently severe or pervasive to alter the conditions of [complainant's] employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

In its final decision, the Agency determined that Complainant's sole allegation was a proposed action that had not gone into effect. Specifically, the Agency found that the August 28, 2019 proposal to change Complainant's tour of duty was insufficient to create a direct and personal deprivation that would make Complainant an "aggrieved" employee within the meaning of the Commission's regulations.

On appeal, Complainant, argues the Agency misidentified his harassment claim by only including the single incident on August 28, 2019, and not including the Chief of Surgery's prior act of changing his tour of duty on March 1, 2018. To support this contention, Complainant submitted an affidavit where he explains that he was initially a fulltime employee, but on March 1, 2018 he was changed to a "fixed salary part-time employee," which reduced his salary by 25%. (ROI, pp. 160, 161). Complainant further contends the Agency misidentified his claim by not addressing the continuous threats and scrutiny that Chief of Surgery subjected him to. Complainant describes that the Chief of Surgery scrutinized his schedule and demanded that he park in the patient parking lot and enter the patient main entrance so security cameras could capture his arrival and departure time. (ROI, p. 148). Complainant further contends that the Chief of Surgery misled him to believe that he was under OIG investigation to coerce him to reduce his working hours. In addition, the Chief of Surgery sent Complainant's direct supervisor a text message to remind him "of the 2017 OIG investigation" and "get him to" reduce his work hours. These threats prompted Complainant to do a FOIA request for a copy of OIG's investigation. However, Complainant states that when he received a response from OIG, he was informed that he was never under investigation. To further support his allegation of ongoing harassment, Complainant contends that the Chief of Surgery abused his power by having him "perform inappropriate activities" and threatening him with termination. (ROI, p. 4).

At a minimum, we disagree with the Agency that Complainant failed to allege a viable claim of harassment that requires further investigation. The totality of the actions taken by the Chief of Surgery *as alleged by Complainant* could create a hostile work environment.

Furthermore, the complaint involved more than a single proposed action. The action taken on March 1, 2018 to change Complainant from a fulltime employee to a “fixed salary part-time employee” with the accompanied 25% salary reduction made Complainant an “aggrieved employee” who suffered harm or to a term or condition, or privilege of employment. While, in response, the Agency has challenged Complainant’s version of events, we find this addresses the merits of the complaint without a proper investigation as required by the regulations. These merits-based arguments are irrelevant to the procedural issue of whether Complainant has stated a justiciable claim under Title VII. 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). As such, we conclude that the Agency erred in dismissing the complaint for failure to state a claim under 29 C.F.R. § 1614.107(a)(1), and because it alleged a single proposed action pursuant to 29 C.F.R. § 1614.107(a)(5).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, the Agency’s dismissal of Complainant’s complaint is REVERSED, and the matter is REMANDED for further processing in accordance with the following Order.

ORDER (E0618)

The Agency is ordered to process the remanded complaint (claim of ongoing discriminatory harassment/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 (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 9, 2021

Date