



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Gaye A.,¹
Complainant,

v.

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

Appeal No. 2021003765

Agency No. 200J-636D-2021102338

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 13, 2021, dismissing a formal complaint alleging unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Social Services Assistant, GS 7, at the Agency's Des Moines Veterans Affairs Medical Center in Des Moines, Iowa.

On April 7, 2021, Complainant filed a formal complaint. Therein, Complainant claimed that the Agency subjected her to discrimination based on disability when she was subjected to discriminatory harassment by a (CW1) and her first-line supervisor allowed CW1's harassment of Complainant to continue.

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 13, 2021, the Agency issued a final decision dismissing the formal complaint, pursuant to 29 C.F.R. §§ 1614.107(a)(1) and (7), for failure to state a claim, as well as Complainant's failure to prosecute.

The instant appeal followed. On appeal, Complainant, through counsel, submits numerous statements and documentation.

ANALYSIS AND FINDINGS

Dismissal pursuant to § 1614.107(a)(1)

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an 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 or disabling condition. 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 (Apr. 21, 1994). An agency may dismiss a claim where a complainant has failed to state a claim under 29 C.F.R. § 1614.107(a)(1).

The Agency stated that Complainant's April 7, 2021 formal complaint did not provide details about the claims, or the date(s) of the event(s) that occurred, and that it did not provide essential elements of the harm Complainant allegedly endured. We acknowledge that the instant formal complaint lacks dates. The formal complaint, however, contains a partial narrative explaining Complainant's concerns. Additionally, Complainant's EEO counseling initial contact and interview sheet was detailed and included dates regarding specific incidents of alleged harassment from CW1, and S1's failure to intervene in what Complainant alleged was CW1's ongoing harassment. Moreover, the EEO Counselor's report also contains extensive details of Complainant's allegations and dates. Therefore, we conclude the Agency erred in dismissing the complaint for failure to state a claim.

Dismissal pursuant to § 1614.107(a)(7)

EEOC Regulation 29 C.F.R. § 1614.107(a)(7) provides for the dismissal of a complaint where the Agency has provided the Complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the Complainant has failed to respond to the request within fifteen days of its receipt, or the Complainant's response does not address the Agency's request, provided that the request included a notice of the proposed dismissal. The regulation further provides that, instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available.

On April 20, 2021 the Agency sent an email to Complainant's counsel that stated that Complainant's formal complaint lacked dates and/or allegations.

The Agency requested a response no later than May 4, 2021 and warned that Complainant's complaint could be dismissed for a failure to provide the requested information. As stated above, Complainant's initial contact and interview sheet and EEO Counselor's report both have detailed allegations and dates.

Generally, the Commission has held that an Agency should not dismiss a complaint when it has sufficient information upon which to base an adjudication. See Ross v. United States Postal Service, EEOC Request No. 05900693 (August 17, 1990); Brinson v. United States Postal Service, EEOC Request No. 05900103 (April 12, 1990). It is only in cases where the Complainant has engaged in delay or contumacious conduct and the record is insufficient to permit adjudication that the Commission has allowed a complaint be dismissed for failure to cooperate. See Card v. United States Postal Service, EEOC Request No. 05970095 (April 23, 1998); Krotten v. United States Postal Service, EEOC Request No. 05940451 (December 22, 1994).

Based on the record here and the above criteria, we find that the Agency improperly dismissed Complainant's claim of harassment for failure to prosecute. We find that the record, consisting in part of Complainant's detailed initial contact and interview sheet, EEO Counselor's report, and formal complaint, contains sufficient information regarding Complainant's concerns in order to adjudicate the complaint. In its final decision, the Agency failed to indicate how failure to respond to the request for a more detailed formal complaint had an impact upon its ability to make a decision regarding Complainant's claim of discrimination. While we reverse the Agency's dismissal, Complainant is nevertheless advised to cooperate in the future processing of her complaint, or risk future dismissal for failure to do so.

CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED. The complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER

The Agency is ordered to process the remanded claims 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 15, 2021

Date