



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED], a/k/a
Eryn O.,¹
Complainant,

v.

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

Appeal No. 2021004003

Agency No. 200I-0619-2021103348

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 9, 2021, 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 an Occupational Therapist, GS-12 at the Agency's VA Medical Center in Montgomery, Alabama.

On May 15, 2021, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Black) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. On November 8, 2019, Complainant was issued a temporary detail, effective November 12, 2019, pending a fact-finding of a patient complaint.
2. On November 15, 2019, Complainant was issued a less than favorable FY19 performance evaluation.
3. Complainant was issued a Letter of Expectation.
4. On March 30, 2021, Complainant was notified that the outcome of the fact-

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.

- finding was unsubstantiated.
5. On August 14, 2019, Complainant filed a formal complaint.
 6. On February 12, 2021, the fact-finding concluded.

The Agency dismissed claims (1), (2) and (3) pursuant to 29 C.F.R. § 1614.107(a)(1) on the grounds that Complainant had previously raised the same claims under Case No. 200I-0619-2020100890, which was pending before the Agency. The Agency dismissed claim (4) for failure to state a claim under § 1614.107(a)(1) and untimely EEO counselor contact. Claims (5) and (6) were dismissed for untimely EEO counselor contact.

The instant appeal followed. Complainant submitted a statement arguing that the dismissal was improper. The Agency submitted a statement in response.

ANALYSIS AND FINDINGS

Dismissal of Claims (1), (2) and (3)

EEOC regulation 29 C.F.R. § 107(a)(1) requires an agency to dismiss a complaint that is pending or has been decided by the agency.

Here, the Agency found that the claims (1), (2) and (3) were previously raised in Case No. 200I-0619-2020100890. According to the Agency's acceptance letter for Case No. 200I-0619-2020100890, Complainant, *inter alia*, alleged discrimination on the bases of race and reprisal when she was issued a temporary detail on November 8, 2019 due to a fact finding. We find this claim to be identical to claim (1).

In Case No. 200I-0619-2020100890, Complainant alleged that, on November 15, 2019, her supervisor requested that she sign her FY19 performance appraisal without narratives on performance standards. We find this claim raises a matter identical to that in claim (2).

In Case No. 200I-0619-2020100890, Complainant alleged that she was issued a Letter of Expectation, we find this claim to be identical to claim (3). Therefore, we find the dismissal of claims (1), (2) and (3) was proper as Complainant raised these matters in Case No. 200I-0619-2020100890 which is pending before the Agency.

Dismissal of Claims (4), (5), and (6)

At issue is whether the Agency properly dismissed claim (4) pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The anti-retaliation provisions of the employment discrimination statutes seek to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the statutes' basic guarantees and are not limited to actions affecting employment terms and conditions. Burlington Northern & Santa Fe Railroad. Co. v. White, 548 U. S. 53, 126 S. Ct. 2405 (2006).

To state a viable claim of unlawful retaliation, Complainant must allege that: 1) he was subjected to an action which a reasonable employee would have found materially adverse, and 2) the action could dissuade a reasonable employee from making or supporting a charge of discrimination. Id. See also EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (August 25, 2016); Carroll v. Department of the Army, EEOC Request No. 05970939 (April 4, 2000).

Here, we conclude that Complainant has sufficiently alleged a viable claim of unlawful retaliation. During counseling, Complainant reported that management was motivated by retaliatory animus for her prior protected activity when she was subjected to a formal fact-finding investigation, a materially adverse action. This allegation is sufficient to state a viable claim of retaliation in violation of Title VII, which requires further investigation and processing. Therefore, the Agency erred in dismissing claim (4) for failure to state a claim.

Also at issue is whether the Agency properly dismissed claims (4), (5) and (6) pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely EEO counselor contact. EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. The Commission has adopted a “reasonable suspicion” standard (as opposed to a “supportive facts” standard) to determine when the 45-day limitation period is triggered. See Howard v. Department of the Navy, EEOC Request No. 05970852 (February 11, 1999). Thus, the time limitation is not triggered until a Complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

In its dismissal, the Agency determined that the most recent discriminatory incident took place on February 12, 2021, the date that the Agency concluded its fact-finding investigation. The Agency determined that the 45-day limitation period was triggered on February 12, 2021 but Complainant did not contact an EEO counselor until April 19, 2021, which was beyond the 45-day limitation period. On appeal, Complainant contends that that trigger date for determining timeliness is March 30, 2021 because that was the date that management informed of her of the fact-finding investigation results. At her pre-complaint interview and in her formal complaint, Complainant also identified March 30, 2021 as the date that she became aware of the fact-finding investigation results. Therefore, we find that the time limit for initiating contact with an EEO counselor began to run on March 30, 2021, because that was date that Complainant reasonably suspected discrimination. March 30, 2021 is within the 45-day time-period, therefore claims (4), (5), and (6) are timely.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, the Agency’s dismissal is AFFIRMED in part and REVERSED in part. The Agency’s dismissal of claims (1), (2) and (3) is AFFIRMED. The Agency's final decision dismissing Complainant's remaining claims is REVERSED and REMANDED to the Agency for further processing in accordance 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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

October 19, 2021
Date