



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Detra S.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2021004619

Agency No. 200J-0583-2021103960

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 10, 2021, dismissing a formal 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

During the period at issue, Complainant worked as an Advanced Medical Support Assistant, GS-6, at the Agency's VA Medical Center in Indianapolis, Indiana.

On May 27, 2021, Complainant initiated EEO counselor contact. Informal efforts to resolve her concerns were unsuccessful. During counseling, Complainant claimed that she was subjected to discriminatory harassment based on disability and race (bi-racial). Specifically, Complainant alleged that she was subjected to a hostile work environment from March 25 through June 11, 2021, when:

- On March 25, 2021, her co-worker (CW1), a Registered Nurse, responded to [National Football League quarterback] Colin Kaepernick's protest (kneeling during the National Anthem) by posting the following comment on CW1's Facebook page:

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<sup>1</sup> 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.

“if you cannot stand for the flag than you should give your legs to a veteran . . .” Complainant explained that when she replied to CW1’s Facebook post, CW1 responded, “By the way, thank you for your service, we’re coming for your legs like you’re trying to come for our guns.” Complainant further explained that she believed that CW1’s remarks were disparaging regarding of people of color and mixed-race individuals such as Mr. Kaepernick for taking a political stance by kneeling during the National Anthem.

- On May 22, 2021, another co-worker sent Complainant screen shots of CW1’s Facebook page indicating that CW1 had commented on Facebook that “[Complainant], mousy looking bitch who leaves her methadone laying [sic] around in the break room because she is too high at work to remember to take that home? You honey are a fake waste of human flesh . . .” Complainant acknowledged that she had left a concealed prescription bag in the break room while CW1 and staff were present, and she believed that CW1 opened this bag before Complainant had returned to the breakroom.
- On May 26, 2021, Complainant reported CW1’s Facebook post to CW1’s supervisor (RMO1). However, RMO1 responded, “I’m sorry I don’t have social media.”
- On May 27, 2021, Complainant stated that she witnessed CW1 laughing about the Facebook post and stated that, “[Complainant] was ‘big mad’ and had turned [CW1] into the 9<sup>th</sup> floor (Human Resources)” in front of other employees.
- On May 28, 2021, Complainant stated that she contacted her immediate supervisor (RMO2) about CW1’s Facebook post and RMO2 acknowledged that RMO1 had informed her of the incident. RMO2 informed Complainant that “[RMO1] needs to be nipping it in the bud.”
- On June 11, 2021, Complainant stated that CW1 continued to make disparaging remarks about her to her coworkers and continued to harass her by disclosing to her employees directly and via Facebook that CW1 has been reported to Human Resources. Specifically, Complainant stated that CW1 responded “Guilty” after posting a picture which cited, “Told a joke so good at work I got to talk to HR.”

On June 21, 2021, Complainant filed a formal EEO complaint. According to the Agency, Complainant claimed that she was subjected to a hostile work environment based on race and disability when on May 22, 2021, a co-worker sent her screenshots of CW1 making disparaging remarks about Complainant on Facebook. Specifically, CW1 had posted, “[Complainant], mousy looking bitch who leaves her methadone laying around in the break room because she is too high at work to remember to take that home? You honey are a fake waste of human flesh.”

In its August 10, 2021 final decision, the Agency dismissed the formal complaint on several grounds. First, the Agency dismissed all claims identified during informal counseling for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1), finding that these claims were abandoned because they were not raised in the formal complaint.

Second, the Agency dismissed the March 25, 2021 alleged incident involving CW1's comment regarding Mr. Kaepernick's protest for untimely EEO counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2). The Agency found that Complainant initiated EEO counselor contact on May 27, 2021, which it found beyond the 45-day limitation period.

Finally, the Agency dismissed Complainant's harassment claim (May 22, 2021 incident) for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1). The Agency determined that the claim was not sufficiently severe or pervasive enough to constitute an actionable harassment claim.

The instant appeal followed.

### ANALYSIS AND FINDINGS

#### *Abandoned Claims*

The Agency contends that Complainant abandoned claims she mentioned during EEO counseling, occurring before and after May 22, 2021, when she failed to include those claims in the formal complaint. However, a fair reading of the EEO Counselor's report, formal complaint, as well as Complainant's statements on appeal, reflect that Complainant has alleged that she was subjected to ongoing harassment by CW1 since March 25, 2021, that included all the incidents discussed during counseling.

The formal complaint reflects that Complainant raised mental and physical disability as the basis for her harassment complaint. Notably, Complainant identified the alleged harassing incidents as occurring on March 25, 2021 and May 22, 2021. Consequently, Complainant has demonstrated an intent to include the March 25, 2021 harassment claim regarding CW1's reaction to Complainant's comment responding to CW1's Facebook post about protests involving kneeling during the National Anthem, as well as the claim involving CW1's Facebook post regarding Complainant taking Methadone (a medication used to treat drug addiction).

We further note that the additional claims Complainant raised during EEO counseling, aside from the March 25, 2021 incident, are like and related to the May 22, 2021 and support Complainant's overall ongoing harassment claim. Specifically, these claims reflect that Complainant reported the May 22, 2021 incident on May 26, 2021, management did not take corrective action, and subsequently, CW1's alleged harassment continued on May 27, 2021, May 28, 2021, and June 11, 2021. Therefore, we find that the Agency improperly determined that Complainant abandoned these claims mentioned during EEO counseling.

### *Untimely EEO Counselor Counseling*

The Agency improperly dismissed the March 25, 2021 incident for untimely EEO Counselor contact. The record reflects that Complainant initiated EEO Counselor contact on May 27, 2021. The Commission has held that “[b]ecause the incidents that make up a hostile work environment claim collectively constitute one unlawful employment practice, the entire claim is actionable, as long, as at least one incident that is part of the claim occurred within the filing period. This includes incidents that occurred outside of the filing period that the [Complainant] knew or should have known were actionable at the time of their occurrence.” EEOC Compliance Manual, Section 2, Threshold Issues at 2 – 75 (revised July 21, 2005) (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)).

The May 22, 2021 incident comprising part of Complainant’s hostile work environment claim occurred within the 45-day time period preceding Complainant’s May 27, 2021 EEO Counselor contact, as discussed above.<sup>2</sup> Because a fair reading of the record reflects that the matters identified in the March 25, 2021 incident are part of that harassment claim, we find that the Agency improperly dismissed this claim on the grounds of untimely EEO Counselor contact. Therefore, we reverse the Agency’s dismissal of the March 25, 2021 incident for untimely EEO Counselor contact.

### *Failure to State a Claim*

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief. The trier of fact must consider all of the alleged harassing incidents and remarks and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim. Cobb v. Dep’t of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

We view the alleged incidents collectively and determine that Complainant has set forth an actionable claim of harassment. Because Complainant raises a hostile work environment claim, all alleged harassing incidents must be considered.

Here, Complainant has alleged that she has been subjected to harassment by CW1 since March 25, 2021. A copy of the EEO counselor’s report reflects that not only did CW1 make a Facebook post regarding Complainant’s use of Methadone and insinuate that she arrived to work high on drugs, the EEO Counselor’s report further reflects that CW1 continued to boast to co-workers that Complainant had reported her to Human Resources. We note that on appeal, Complainant also alleges that she has been subjected to ongoing harassment.

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<sup>2</sup> Consequently, the May 27, 2021, May 28, 2021, and June 11, 2021 incidents are also timely and are part of Complainant’s overall harassment claim.

Complainant states that CW1 has “actively continued to talk about [her/her addiction]” to her co-workers to the point where Complainant states that she requested to be removed from her evening shift and assigned to another floor. Complainant further states that “so many co-workers” have come to her to inform her that they saw CW1’s posts about her and she feels “humiliated” at work. Given these circumstances, we do not find that the instant complaint fails to state a claim. Instead, Complainant has alleged an injury or harm to a term, condition, or privilege of employment for which there is a remedy which requires further investigation and processing. See Diaz v. Dep’t of the Air Force, EEOC Request No. 05931049 (April 21, 1994).

### CONCLUSION

We REVERSE the Agency’s final decision dismissing the formal complaint on the procedural grounds discussed above. We REMAND this matter to the Agency for further processing in accordance with the ORDER below.

### ORDER (E0618)

The Agency is ordered to process the remanded claims (ongoing 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

January 13, 2022

Date