



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Ranae P.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2021005034

Agency No. ARFTCAMP21JUL02478

DECISION

Complainant timely appealed to the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's November 10, 2021 dismissal of 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, a contract employee, worked as a Dental Assistant at the Adkins Dental Clinic (“DENTAC”) in Fort Campbell, Kentucky.

On August 16, 2021, Complainant filed a formal EEO complaint alleging that the Agency subjected her to a hostile work environment/harassment on the bases of race (African American) and sex (female) when:²

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.

² The Commission edited Complainant’s complaint for clarity and to include sex as a basis for discrimination. While Complainant did not expressly allege discrimination based on sex, the nature of her claims inherently alleges sex discrimination and sexual harassment.

- a. On June 4, 2021, around 8:30 am, an incident occurred where Complainant was “verbally and emotionally assaulted” by her coworker (“C1”) (white/Caucasian) and C1 falsely accused Complainant of “threatening” her.
- b. On June 4, 2021, the Practice Manager (“PM”) (white/Caucasian) interviewed and obtained Memoranda for the Record (“MFR”) from C1 and two other coworkers (“C2” and “C3”) who witnessed the incident but did not approach or request an MFR from Complainant.
- c. On June 4, 2021, around 6:30 pm, a DENTAC Dentist (“D1”) informed Complainant, in front of C2 and C3, that he could not join them for dinner due to the investigation about the incident between Complainant and C1.
- d. On June 4, 2021, D1 told Complainant privately that C1 was spreading rumors that they (Complainant and D1) were engaging in improper sexual conduct, and that PM held a private meeting to discuss the rumors and other aspects of Complainant’s personal life in an effort to “build a case” for Complainant’s termination.
- e. On June 11, 2021, Complainant’s supervisor, an Agency employee, informed Complainant that her contract with the Agency had been terminated.

The Agency dismissed the matter, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The instant appeal followed.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. §1614.107(a)(1) an agency shall dismiss a complaint that fails to state a claim within the meaning of 29 C.F.R. §1614.103. In order to establish standing to proceed a Federal EEO Complaint, a complainant must be either an employee or an applicant for employment of the agency against which the allegations of discrimination are raised, and their claims must concern an employment policy or practice which affects the complainant in their capacity as an employee or applicant for employment. 29 C.F.R. §1614.103.

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that they have been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §1614.103; §1614.106(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 (April 21, 1994). If a complainant cannot establish that they are “aggrieved,” the agency shall dismiss their complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

It is the burden of the Agency to provide evidence or proof to substantiate its final decision. See Complainant v. Dep't of Commerce, EEOC Appeal No. 0120142525 (Nov. 25, 2014) quoting Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991).

In reaching its decision, the Agency reasoned that Complainant lacked standing under 29 C.F.R. §1614.103, because she was not a federal employee. In the alternative, the Agency reasoned that Complainant failed to state a claim because she did not establish that she was “aggrieved,” finding that her complaint did not identify a present harm or loss with respect to a term, condition, or privilege of employment.

Complainant has Standing (Joint Employer)

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission recently reaffirmed its long-standing position on “joint employers” and noted it is found in numerous sources. See, e.g., EEOC Compliance Manual Section 2, “Threshold Issues,” Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual); EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (Enforcement Guidance), “Coverage Issues,” Question 2; Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

The term “joint employer” refers to two or more employers that each exercise sufficient control of an individual to qualify as the worker's employer. EEOC Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control to be a “joint employer,” the EEOC considers factors derived from common law principles of agency. See EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (“Enforcement Guidance”), “Coverage Issues,” Question 2, Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos. 01962389 & 01962390 (May 29, 1998). Such factors may include (but are not limited to) the extent of an agency's right to control when, where, and how a contracted worker performs their job. See Ma. For instance, we have considered whether an agency has the authority to assign a contracted worker additional projects, or control their schedule, and whether the workspace, materials and equipment needed in order to perform the job are provided by the agency. *Id.*

The Agency asserts that it is not a “joint employer” because Complainant self-identified as a contract employee, and her contractor employer was responsible for her compensation, including benefits, and withholding social security. Yet, we have repeatedly found that “it is not at all surprising” for a complainant raising an EEO Complaint to be a contractor, compensated by a separate organization, and such factors in themselves are not dispositive of whether the Agency is a “joint employer.” Emil Z. v. Dep't of Commerce, EEOC Appeal No. 2020001713 (Aug. 16, 2021)) citations omitted.

The EEO Counselor's Report contains a statement from Complainant's supervisor ("S1") that he, PM and other Adkins Dental Clinic Management, all Agency employees, provided Complainant with her assignments, and there was no onsite supervisor from Complainant's contractor employer for her to report to. S1 confirms that while performing her job as a dental assistant, Complainant worked only for the Agency's Clinic, on Agency property and used dental equipment and supplies provided by the Agency. S1 states that Complainant's work schedule and lunch hour were based on "set dental clinic hours for all GS and civilian dental employees at Fort Campbell," (emphasis added) and PM was responsible for granting or denying Complainant's leave requests. In addition, the EEO Counselor's Report contains an email exchange between Adkins Dental Clinic management and the contractor employing Complainant, which reveals that Complainant's employment was effectively terminated at PM's request, indicating sufficient control over Complainant's employment. We conclude that the Agency is a "joint employer" and Complainant has standing to proceed her federal EEO complaint.

Complainant is "Aggrieved" - Claim (e)

Claim (e) states an independent viable discrimination claim because Complainant's June 11, 2021 termination, constitutes "a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy." Diaz.

Complainant States a Claim of Harassment - Claims (a), (b), (c), (d) & (e)

The Commission has held that a claim of discriminatory harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). Generally, isolated incidents of alleged harassment are insufficient to state a claim. See Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996), Banks v. Health and Human Serv., EEOC Request No. 0594081 (Feb. 16, 1995). Here, claims (a), (b), (c), and (d) describe events that occurred within the span of one day and thus do not appear to be pervasive. However, in the words of the Agency, the events alleged in these claims "culminated in" Complainant's termination, which is also part of her complaint. Therefore, we conclude that Complainant's claim of harassment is sufficiently "severe" to state a viable claim of harassment, especially when considered in concert with the nature of the alleged statements concerning highly personal and professionally damaging rumors. In sum, when considered together and in context of the termination claim, Complainant has stated a viable discriminatory harassment claim.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. We hereby REMAND the matter for further processing in accordance with this Decision and the following Order.

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 (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

January 24, 2022
Date