



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

[REDACTED]
Mary B.,¹
Complainant,

v.

Samantha Power,
Administrator,
U.S. Agency for International Development,
Agency.

Appeal No. 2021002184

Hearing No. 570-2017-00910X

Agency No. OCRD-014-16-F

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's January 13, 2021 final decision concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission's review is de novo. For the following reasons, the Commission REVERSES in part and AFFIRMS in part the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Management Analyst, GS-0343-13, in the Office of the Inspector General (OIG) at the Agency's Headquarters in Washington, D.C.

On June 3, 2016, Complainant filed an EEO complaint alleging that the Agency subjected her to discrimination and a hostile work environment on the bases of disability (scoliosis) and in reprisal for prior protected EEO activity when Agency management:

1. Moved Complainant to a smaller cubicle;

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. Placed Complainant's medical records on the OIG public shared drive;
3. Reverted Complainant's Career appointment to a Schedule A appointment;
4. Provided erroneous information to the Department of Labor;
5. Changed Complainant's work hours to medical leave;
6. Failed to accept completed work assignments and assign new work;
7. Questioned Complainant continuously about her whereabouts;
8. Failed to provide Complainant with an Annual Evaluation Form by the end of the year; and
9. Issued Complainant an official memorandum regarding not performing work.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of her right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing but subsequently withdrew her request on November 16, 2020. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). In the decision, the Agency found that Complainant was not subjected to discrimination or reprisal as alleged.

On appeal, Complainant contends that the only issue she is raising on appeal is the alleged medical records violation. She argues the fact that the medical records were on the shared drive, accessible to anyone, constitutes a per se violation of the statute's requirement that agency must protect confidential medical records. She also asserts that the medical records were accessible to others on the Agency's shared drive and that Complainant was able to access the medical record, absent a protective mechanism of any sort.

Complainant testified that she experiences complications from scoliosis, a physical impairment that affects her lower back. Complainant testified that she self-identified as having a disability when she was hired under the Schedule A authority in 2012. Complainant claimed that management officials were aware of her medical condition as she had requested prior reasonable accommodation. She also had other prior EEO activity.

On or about February 9, 2016, Complainant met with her supervisor (S1-2) and second-level supervisor (S2) to discuss her performance plan and annual appraisal. Complainant testified that while she was researching and seeking her position description and last year's performance plan, she searched for her name on the OIG public shared drive. Complainant claimed that she was able to view her confidential personnel file. Complainant testified that the personnel file contained information concerning her Schedule A appointment and medical paperwork documenting her past history of Alcoholism. Complainant provided several screen shots that she contends show that her medical information was actually on the Agency's shared drive in February 2016. She averred she was able to access private documents for other Agency employees that should not have been accessible on the public drive. Complainant contacted the Disability Coordinator to inform her that her private medical information was openly accessible to the public on the Agency's drive. ROI at 123-124. According to Complainant, the Disability Coordinator told Complainant "if that happened, it's a violation."

Complainant averred that she “took photographs and offered screenshots” of a folder, that contained the files relating to Complainant, including a Schedule A Letter Certification and a document entitled “Schedule A [Complainant].” One of the documents contained a physician’s assessment that revealed Complainant had a past medical history of alcohol dependency. When she checked back two or three weeks later, the information was no longer visible on the shared drive. Complainant believed the records had been uploaded in July 2015. Complainant blamed the Employee Relations Specialist (ERS), who she averred “steps in to protect the Agency and OIG against complaints against senior leaders. “She deals with people, if you will.” Complainant further claimed that this is not the first time that there had been an issue regarding the safeguarding of her medical information.

All of the management officials deny releasing Complainant’s medical information and denied accessing or posting the information. Complainant’s supervisor from February 2016 to October 2016 (S1-2) averred that she did not have access to Complainant’s medical records and did not upload them to the shared drive. Complainant’s supervisor from November 2014 to January 2016 (S1-1) testified that the Agency may have improperly maintained hard copies of Complainant’s medical documents in her physical personnel file. S1-1 testified that Complainant’s medical records should not have been available to view on the shared drive and he did not believe this occurred. He stated that medical records should never be placed in a shared drive and that such records should be located in the employee’s personnel file, which was kept in a secured room.

The record shows that the Investigator requested documentation from ERS as to the “reason to place Complainant’s medical records on the public shared drive of the Agency’s computer on or around February 2016.” The record notation states, “No responsive documents maintained.”

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

Under the Rehabilitation Act, information “regarding the medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.” 29 C.F.R. § 1630.14(c)(1); see 42 U.S.C. § 12112(d)(4)(C). This requirement applies to all medical information, including information that an individual voluntarily discloses. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000).

Employers may share confidential medical information only in limited circumstances: (i) supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations; (ii) first aid and safety personnel may be told if the disability might require emergency treatment; and (iii) government officials investigating compliance with the ADA and Rehabilitation Act must be given relevant information on request. 29 C.F.R. §1630.14(c)(1). The Commission has previously stated that the disclosure of medical information pertaining to an employee in a manner that does not conform to the conditions prescribed in the regulations is a per se violation of the Rehabilitation Act. Valle v. USPS, EEOC Request No. 05960585 (Sept. 5, 1997).

In this case, Complainant discovered her medical records on an Agency shared drive on or around February 9, 2016, and she provided screenshots in support. The Agency does not deny that her medical information was visible on the shared drive. However, the Agency notes that Agency officials all denied releasing Complainant's medical information or authorizing the information to be posted on the Agency's shared drive. We are unpersuaded by the Agency's arguments. It is undisputed that medical records were accessible, and that Complainant was able to access them, absent a protective mechanism of any sort. Complainant's testimony, along with the screenshot evidence that her medical records were visible on the Agency's shared drive.

The plain language of the statute and regulation expressly states that medical information must be maintained on separate forms and in separate medical files. The Agency's failure to maintain Complainant's medical information in a separate medical file constitutes a violation of the Rehabilitation Act.

Accordingly, we find that Complainant provided sufficient proof to establish that the Agency violated the Rehabilitation Act when Complainant's confidential medical information was accessible and available for viewing on the Agency's shared drive and that Complainant is entitled to relief. Further, we caution the Agency that, to the extent that it is the Agency's practice to place medical information on its shared drives, the Agency should revise its practices to ensure compliance with the Rehabilitation Act and ensure that confidential medical information is kept securely and separate from non-medical information.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we find that the Agency violated the Rehabilitation Act as to claim (2) when it failed to maintain the confidentiality of her medical information. Accordingly, the Commission AFFIRMS in part and REVERSES in part the Agency's Final Decision. The Commission REMANDS this matter for further remedial action in accordance with this decision and the ORDER below.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 30 days of the date this decision is issued, the Agency shall expunge all medical information concerning Complainant from the public shared drive and from non-medical files, including personnel files and files on the shared drive, and shall ensure that Complainant's medical information is maintained in a separate and appropriate medical file;
2. Within 90 days of the date this decision is issued, the Agency shall conduct a supplemental investigation concerning Complainant's entitlement to compensatory damages and equitable relief. The Agency shall allow Complainant to present evidence in support of her claimed entitlement. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision on compensatory damages and equitable relief no later than 90 calendar days of the date this decision is issued. The Agency shall pay Complainant the compensatory damages, and provide her with equitable relief, as determined by the Agency within 30 days from the date of the Agency's final decision. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth herein.
3. Within 90 days of the date this decision is issued, the Agency shall provide a minimum of four hours of EEO training on the requirements related to the confidentiality of medical records under the Rehabilitation Act to the management officials in the Office of Inspector General at the Agency's Headquarters and the Human Resources personnel responsible for the maintenance of confidential personnel files.

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Office of the Inspector General (OIG), Headquarters facility in Washington, DC, copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period.

The report must be in digital format and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of receipt of this decision. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

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

September 6, 2022
Date