



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

[REDACTED]
Melani F.,¹
Complainant,

v.

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

Appeal No. 2022002288

Agency No. 2003-660-2022-143033

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 24, 2022,² 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 at the Agency's George E. Wahlen Veterans Affairs Medical Center facility in Salt Lake City, Utah. On January 5, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of sex (female) when:

1. On an unspecified date, Chief, Rehabilitation Services ("Chief"), accused Complainant of misusing a government vehicle.
2. Between April 2020 and May 2021, Chief failed to take appropriate action when Complainant notified her that Supervisor failed to provide her support in creating policy, scheduling/matrix and procedures and/or guidance, in her "unique" position.

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 FAD actually has a date of February 24, 2023. We have assumed that the year is 2022.

3. In October 2020, Chief failed to take appropriate action when Complainant notified her that Supervisor failed to provide her timely updates on the COVID situation so that she could ensure her and patient safety, and Supervisor failed to provide her access to PPE [Personal Protective Equipment].
4. Between May 2021 and August 4, 2021, Chief directed Supervisor to supervise Complainant's work product, even though Supervisor had been reassigned because an investigation concluded that he had created a hostile work environment.
5. Between May 2021 and October 29, 2021, Chief interacted with Complainant in an aggressive manner.
6. On June 4, 2021, Chief reassigned Complainant from a supervisory occupational therapist to a nonsupervisory position doing administrative duties in inpatient care.
7. Between June 2021 and August 4, 2021, Supervisor continued to oversee consults and directed veteran care administratively, even though Complainant requested not to be involved.
8. On October 6, 2021, Chief issued Complainant a proposed removal from federal service.
9. On October 29, 2021, Complainant learned that Chief submitted an affidavit regarding her (Complainant) that contained inaccurate statements and made reference to policies that were not in writing.
10. On October 29, 2021, DNP [Doctor of Nursing Practice] issued Complainant a notice of removal from federal service, effective immediately.

The Agency dismissed the complaint in its entirety, pursuant to 29 C.F.R. § 1614.107(a)(4), on the grounds that Complainant had elected to pursue her removal through a non-EEO process, the Merit Systems Protection Board (MSPB), which rendered an initial decision some three weeks later. The Agency further determined that, although all the actions in Complainant's complaint may not have been specifically mentioned in her appeal to the MSPB, the claims were so intertwined that separating them would fragment the removal claim.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the MSPB does not have jurisdiction over matters arising from a hostile work environment claim and, according to the Commission's most recent guidance, the Commission should retain jurisdiction over those matters not in MSPB's jurisdiction, even when those matters are "inextricably intertwined." Complainant further contends that claims 1-7 and 9 include separate matters that have no bearing on her removal action. Moreover, the MSPB made no ruling on the merits of Complainant's hostile work environment claim, as it does not have the jurisdiction to do so. Complainant concludes that dismissal was improper on all her claims and asks that the Agency's decision be reversed.

The Agency argues that Complainant made an election of remedies choice to contest her removal before the MSPB and the Commission does not have jurisdiction at this juncture over Complainant's allegations concerning her removal. The Agency asks that the claims relating to Complainant's removal be removed from her EEOC claim, which the Agency identifies as claims 8-10, and that the Commission consider only whether it retains jurisdiction over claims 1-7. However, the Agency maintains, claims 1-7 did not occur within 45 days of Complainant's initial EEO Counselor contact or even within 45 days of her appeal to the MSPB. Thus, according to the Agency, Complainant's hostile work environment and discrimination claims were not timely filed. The Agency asks that its dismissal be upheld.

ANALYSIS AND FINDINGS

A mixed-case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1). An aggrieved person may initially file a mixed-case complaint with an agency or may file a mixed-case appeal directly with the MSPB, pursuant to 5 C.F.R. § 1201.151, but not both. 29 C.F.R. § 1614.302(b). 29 C.F.R. § 1614.107(a)(4) provides that an agency shall dismiss a complaint where the complainant has raised the matter in an appeal to the MSPB and 29 C.F.R. § 1614.302 indicates that a complainant has elected to pursue the non-EEO process.

In Equal Employment Opportunity Management Bulletin (EEO-MB) 100-1 (Oct. 24, 2003), the Commission explained that the doctrine of "inextricably intertwined" is no longer applicable in most circumstances because the MSPB generally does not have jurisdiction over non-appealable matters, even if they are related to appealable matters. See Complainant v. Dep't of the Air Force, EEOC Request No. 0520140447 (Jan. 29, 2015); Complainant v. Dep't of Health and Hum. Servs., EEOC Appeal No. 0120130459 (Aug. 28, 2014). Consequently, a complainant's hostile work environment claim is usually properly part of an EEO complaint, even if the hostile work environment claim encompasses incidents that are related to the complainant's ultimate removal from employment which is appealable to the MSPB. See Complainant v. Inter-American Found., EEOC Appeal No. 0120132968 (Jan. 8, 2014); Jones v. U.S. Postal Serv., EEOC Appeal No. 0120110192 (June 10, 2011); Hubble v. Dep't of the Interior, EEOC Appeal No. 0120092453 (Feb. 18, 2011); Thomas v. Dep't of Veterans Affs., EEOC Appeal No. 0120064012 (Dec. 19, 2006). Additionally, the Commission has held that a proposed action merges with the decision on an appealable action, i.e., a proposed removal merges into a decision to remove. Wilson v. Dep't of Veterans Affs., EEOC Appeal No. 0120122103 (Sept. 10, 2012).

Applying the above principles, we note that claim 8, the proposed removal claim, merged with claim 10, the removal claim, and find that both claims were properly dismissed, as the removal was within the MSPB's jurisdiction.

Claim 9 concerns an affidavit that is part of an AIB (Administrative Investigation Boards) investigation. The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding.

See Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993). Thus, claim 9 is not properly before us and is dismissed.

However, we find the Commission has jurisdiction over the hostile work environment harassment claim (claims 1-7) and, therefore, dismissal of these claims was improper.

CONCLUSION

Accordingly, the Agency's final decision dismissing the complaint is AFFIRMED in part and REVERSED in part. The dismissal of claims 8, 9, and 10 is AFFIRMED, for the reasons described herein. Complainant's harassment claim (claims 1-7) is REMANDED to the Agency as set forth in 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

July 19, 2022

Date