



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

[REDACTED]
Sacha K.,¹
Complainant,

v.

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

Appeal No. 2022001593

Hearing No. 450-2017-00511X

Agency No. 2003-0519-2016102305

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 July 22, 2021 decision of an EEOC Administrative Judge² concerning an equal employment opportunity (EEO) complaint claiming 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 a Physician at the Agency's West Texas VA Healthcare System - Ambulatory Care Unit in Big Springs, Texas.

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 record does not indicate that the Agency issued a final order indicating that it would fully implement the Administrative Judge's decision. Pursuant to EEOC Regulation 29 C.F.R. § 1614.109(i), the Administrative Judge's decision became the final Agency action.

On June 6, 2016, Complainant filed a formal EEO complaint, subsequently amended on July 25, 2016, October 28, 2016, and January 17, 2017, claiming the Agency subjected her to an ongoing discriminatory hostile work environment based on sex (female), disability, and in reprisal for prior protected EEO activity.³ In support of this claim, Complainant proffered the following allegations:

1. on September 17, 2015, the Assistant Chief of Staff (ACS) directed Complainant to spend 50 percent of her time working primary care and clinical duties;
2. on October 2, 2015, the ACS denied Complainant's "in lieu" day for the holiday on October 12, 2015;
3. on November 16, 2015, the Chief of Staff (CS) denied Complainant's October 17, 2015 request for reasonable accommodation;
4. on December 21, 2015, the ACS sent an email alleging Complainant's performance measure charts for employees were unsatisfactory;
5. on December 21, 2015, when Complainant returned to work from extended sick leave, the CS had reassigned 80 percent of Complainant's duties and did not give her a work assignment;
6. on December 23, 2015, the ACS directed Complainant to work a half day in Primary Care on December 24, 2015;
7. on or about December 30, 2015, the ACS denied Complainant's request to begin her tour of duty at 7:30am instead of 8:00am, and work through lunch so she could leave an hour early to go to physical therapy;
8. on or about January 4, 2016, the CS directed Complainant to start working 50 percent of her clinical time in Urgent Care;
9. on January 7, 2016, during a meeting with the CS and the Assistant Director, the CS asked Complainant to explain her new duties;
10. on January 19, 2016, the CS directed Complainant to complete approximately 70 primary care consults;
11. on February 2, 2016, the CS and the ACS directed Complainant to review and write 2000 consults;

³ The record indicates that Complainant first raised reprisal as a basis in her second and third amendments to her formal complaint, referenced as allegations 15 – 24.

12. on February 8, 2016, the ACS assigned Complainant on-call duty in Primary Care for one week;
13. on February 10, 2016, the CS accused Complainant of refusing to see patients;
14. on February 12, 2016, the ACS did not reply to Complainant's email request regarding chart review, and did not provide example templates for Complainant's use;
15. on March 28, 2016, Complainant was required to see four patients at the Abilene Clinic via teleconference between 8:15am and noon;
16. on or about April 5, 2016, the ACS documented Complainant's pay for performance which violated her reasonable accommodation, and resulted in her receiving a reduced amount of performance pay;
17. on April 27, 2016, the ACS required Complainant to work in urgent care beginning at 12:30;
18. during the week of May 16, 2016, the ACS did not authorize a laptop for Complainant to use during the weekend;
19. during the week of July 4, 2016, Complainant was placed on call for one week in August 2016;
20. on July 8, 2016, the ACS directed Complainant to meet with him on July 11, 2016;
21. on July 25, 2016, the ACS called Complainant into his office and interrogated her;
22. on October 26, 2016, Complainant was issued a 6-day suspension;
23. on November 2, 20216, the Human Resources Specialist forced Complainant to discuss her suspension; and
24. on November 2, 2016, the ACS made a comment to Complainant implying she did not know what "patient care" meant.

The Agency accepted the complaint for investigation. While noting that allegations 1 – 3 and 5 – 8 were untimely discrete acts, the Agency determined these matters should be included as part of Complainant's overall hostile work environment claim.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of the right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing.

On February 3, 2021, the AJ issued a notice of proposed summary judgment (Notice) in favor of the Agency. In the Notice, the AJ identified a total of fourteen allegations,⁴ and determined that Complainant had alleged that the Agency subjected her to a discriminatory hostile work environment based on sex and disability. Complainant, through counsel, responded opposing the proposed summary judgment.

On July 22, 2021, the AJ issued a summary judgement decision, pursuant to 29 C.F.R. § 1614.109(g), finding no discrimination was established and incorporating by reference her findings in the February 3, 2021 Notice, as well as the Agency's response in support to the Notice. The AJ determined that there were no genuine issues of material fact regarding Complainant's disparate treatment and hostile work environment/harassment claims based on sex or disability. In pertinent part, the AJ noted that the ACS testified that Complainant did not have a disability and did not provide medical documentation to support of her claims of disability discrimination. Additionally, the AJ also found that the Agency articulated legitimate, non-discriminatory reasons for its actions identified in the fourteen allegations and, consequently, Complainant failed to demonstrate that the Agency's actions involved discriminatory animus towards her. Therefore, the AJ concluded summary judgment in favor of the Agency on all fourteen matters was justified.

The instant appeal followed.

ANALYSIS AND FINDINGS

The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

⁴ The record indicates that the AJ did not address allegations 3, 5, 8 – 10, 13, and 21 – 24 and reprisal as a basis in her Notice.

Our review of the record, including Complainant's March 5, 2021 response to the AJ's Notice, support Complainant's arguments that summary judgment was not appropriate in this case because there are genuine issues of material fact that require resolution through a hearing. These issues include: (1) whether the AJ adjudicated *all* claims identified in Complainant's formal complaint which were accepted by the Agency for investigation, and (2) whether Complainant is a qualified individual with a disability. We address each of these issues separately.

Claims at Issue and Bases Raised

The record reflects that Complainant filed a formal complaint, subsequently amended, that included a total of 24 allegations of discriminatory harassment based on sex, disability, and reprisal for prior protected EEO activity, all of which were accepted by the Agency. However, the AJ's Notice did not include all the allegations raised by Complainant or the basis of unlawful retaliation. Specifically, the Notice omitted, without explanation, the matters raised in 3, 5, 8 – 10, 13, and 21 – 24, as well as Complainant's claim of retaliatory harassment. These omitted claims allege that the Agency denied Complainant's reasonable accommodation request; failed to assign Complainant work within terms of her accepted accommodation; issued Complainant a 6-day suspension; and harassed Complainant by making accusations regarding her work performance and interrogating Complainant about her work knowledge.

We acknowledge that the AJ briefly, without any specific detail, indicated in her July 22, 2021, decision that Complainant failed to establish a *prima facie* case of discriminatory harassment, disparate treatment, or unlawful retaliation. However, the AJ provided no clarification of the claims being adjudicated in the final decision. Additionally, there is no indication that the AJ issued a revised Notice encompassing all allegations and bases raised. Consequently, there is no explanation for the discrepancy of the *identified allegations and bases in the Notice* compared to the allegations and bases *accepted by the Agency* for investigation. In this instance, we find that the AJ's incorporation by reference of the Agency's response in support of the AJ's notice of proposed summary judgment is not adequate to resolve the unacknowledged discrepancies in the AJ's Notice. Therefore, we find that all of Complainant's allegations, as they are all included as part of her overall hostile work environment/harassment claim, should be remanded to the AJ for a hearing in accordance with our Order below.

Reasonable Accommodation/Disability

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual based on disability and is required to provide reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. §§ 1614.203(b) and 1630.2(o),(p); EEOC's *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, EEOC Notice No. 915.002 (Oct. 17, 2002).

To establish that she was denied a reasonable accommodation, Complainant must show that: (1) she is an individual with a disability, as defined by 29 C.F.R. § 1630.2(g); (2) she is a “qualified” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide her with a reasonable accommodation. See EEOC’s *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (Enforcement Guidance), EEOC Notice No. 915.002 (Oct. 17, 2002). A qualified person with a disability is an individual who can perform the essential functions of the position with or without an accommodation.

In the Notice, the AJ cited testimony from the ACS indicating that Complainant did not have a disability and failed to provide the ACS with medical documentation in support of her claim of a disability. However, our review of the record indicates that there is evidence establishing that Complainant had a disability that was recognized by the Agency. Specifically, Complainant stated, in her affidavit and in her opposition to the AJ’s Notice, that in October 2015 she was diagnosed with angina pectoris and because of this cardiac condition, she requested a reasonable accommodation, but was denied. Subsequently, Complainant explained that she again applied for a reasonable accommodation that was approved. The record includes a determination which reflects that the Agency provided Complainant a reasonable accommodation, effective December 21, 2015, to work “10% clinical duties.”

We note that the essence of Complainant’s arguments in her opposition to the AJ’s Notice centers on the argument that she was a qualified individual with a disability and that the Agency violated the terms of her approved reasonable accommodation, in pertinent part, by assigning her to work more than 10% of clinical duties; reducing her pay when she requested to be assigned work within the parameters of her reasonable accommodation; and placing her on call for one week which Complainant asserted violated the terms of her reasonable accommodation. The record includes a physician’s note stating “no direct patient care” as a restriction of her duties, even though Complainant asserts that on April 27, 2016, the ACS required her to work in urgent care. The record also includes a January 6, 2016, email from the CS requesting approval to terminate Complainant’s reasonable accommodation which Complainant asserts in her oppositional statement was retaliatory.

Complainant further argues in her opposition to the AJ’s Notice that she sustained a serious neck injury from a car accident in October 2015, which required her to take three months of medical leave. Complainant asserts that the Agency failed to provide her an accommodation for this injury when it denied her request to modify her work schedule to attend physical therapy sessions.

Consequently, the record includes evidence supporting that Complainant was an individual with a disability within the meaning of the Rehabilitation Act which was recognized by the Agency through the approval of at least one reasonable accommodation request. Thus, there is sufficient evidence to support a finding that there is a genuine issue of fact concerning whether the Agency violated the terms of Complainant’s approved reasonable accommodation.

CONCLUSION

In sum, after a careful review of the record, we find that a decision by summary judgment should not have been granted in this case and a hearing is required. Therefore, the AJ's summary judgment decision is VACATED, and the matter is REMANDED to the Agency in accordance with this decision and the ORDER below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, the Agency shall submit a renewed request for a hearing on this complaint on behalf of Complainant, a copy of the complete complaint file, and a copy of this appellate decision to the EEOC Hearings Unit of the EEOC's San Antonio District Office. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

November 28, 2022
Date