



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

[REDACTED]
Bonny R.,¹
Complainant,

v.

Merrick B. Garland,
Attorney General,
Department of Justice
(U.S. Marshals Service),
Agency.

Appeal No. 2022004406

Agency No. USM-2022-000251

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 14, 2022, dismissing her 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as the Chief of the Office of Program Services, GS-15 at the Agency's headquarters in Arlington, Virginia.

On January 28, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discriminatory hostile work environment harassment on the basis of her sex (female) when:

1. On August 12, 2021, Complainant was placed under investigation for alleged sexual misconduct, but the male employee with whom she engaged in the misconduct was not.

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. On August 26, 2021, as part of the Agency's investigation, Internal Affairs (IA) personnel required Complainant to explicitly describe her sexual encounter(s) with the male employee.

The Agency dismissed Complainant's complaint in its entirety pursuant to 29 C.F.R. 1614.107(a)(2), for untimely EEO Counselor contact. In addition, allegation 2 was dismissed pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim.

The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of the EEO counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. The Commission has adopted a "reasonable suspicion" standard to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

According to the Agency, the events in the formal complaint (allegations 1 and 2) occurred in August 2021, but Complainant did not contact an EEO Counselor until January 3, 2022, which is beyond the 45-day time limit.

As a preliminary matter, we find the Agency improperly bifurcated Complainant's claim into its supporting allegations and dismissed them on separate grounds. However, a fair reading of the complaint and related EEO counseling report shows that the complaint is comprised of one claim – that Complainant was subjected to discriminatory harassment when she was investigated for misconduct and the more senior male employee who she engaged in the alleged misconduct with was not similarly investigated.² We therefore determine that the instant formal complaint is more accurately described as a single claim of ongoing discriminatory harassment.

On appeal, Complainant, through her legal counsel, and citing the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002), argues the Court has held that a hostile work environment/harassment claim will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. She asserts that, although the IA investigation started in August 2021, it was still ongoing at the time she made EEO counselor contact in January 2022, which rendered her entire ongoing harassment claim timely raised.

² On appeal, Complainant alleged that she learned that the male employee was not questioned or subjected to investigation at all and retired from the Agency in good standing on November 18, 2021. She also alleges he was employed by another agency in February 2022.

In support of the *ongoing* nature of the investigation, Complainant points to the EEO Counselor's report, where the counselor confirms a discussion with an official in the Agency's Office of Professional Responsibility (OPR) that, as of January 11, 2022, "the investigation [concerning Complainant] is currently still being processed." As such, we are persuaded by Complainant's argument that the actions comprising her ongoing harassment claim continued through her initial EEO counseling contact and, therefore, that contact was timely made.

We also are unpersuaded by the Agency's attempt to dismiss this matter for failure to state a claim. Complainant has clearly alleged that she was being subjected to an offensive and harassing investigation for sexual misconduct because she was a woman, while the more senior male employee with whom she engaged in the alleged misconduct, was treated far more favorably. She has expressly argued that "the pending sexist and overly intrusive investigation was intimidating and affecting the conditions of her employment." These allegations are sufficient to state a viable claim of sex discrimination that requires investigation and further processing.

As a final matter, we note that in response to the appeal, the Agency has argued, among other things, that it had legitimate, non-discriminatory reasons for its actions. However, in making this argument, the Agency has addressed the merits of the complaint without a proper investigation as required by the 29 C.F.R. Part 1614 regulations. At this point in the processing of the complaint, the Agency's articulated reasons for the matters in dispute are irrelevant to the procedural issue of whether Complainant has stated a justiciable claim under Title VII. See Osborne v. Department of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. United States Postal Service, EEOC Request No. 05930220 (August 12, 1993); Ferrazzoli v. United States Postal Service, EEOC Request No. 05910642 (August 15, 1991).

CONCLUSION

Accordingly, the Agency's final order dismissing Complainant's complaint is REVERSED, and the complaint is REMANDED for further processing pursuant to the following Order.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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:



Carlton M. Hadden, Director
Office of Federal Operations

December 6, 2022
Date