



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

[REDACTED]
Latoyia B.,¹
Complainant,

v.

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

Appeal No. 2023000217

Agency No. ARJACKSON22JUN02676

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 1, 2022, dismissing her complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a GS-0303-11 Casualty Operations Coordinator in the Agency's Directorate of Human Resources in Fort Jackson, South Carolina.

Complainant initiated contact with the Agency's EEO Office by email on July 8, 2022. On August 22, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of disability (mental) when:

1. On April 26, 2022, the Supervisory Casualty Operations Coordinator (Supervisor) stated that telework was off the table for Complainant's reasonable accommodation and that she would offer Complainant the same office that was offered to her coworker (212A);
2. On April 28, 2022, the Supervisor provided Complainant an office that 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.

- usable due to safety concerns (208A);
3. On April 28, 2022, Complainant was not offered the option to telework five days per week due to her disability;
 4. On May 5, 2022, the Supervisor provided Complainant an office that was dirty, not painted, and did not have a desk (212A);
 5. On May 21, 2022, the Supervisor asked Complainant to notify her when she arrived at work since she was no longer in the same office;
 6. On May 25, 2022, the Supervisor did not consider Complainant's other accommodation solutions (i.e., telework, Alternate Work Schedule, or Compressed Schedule), instead just asking Complainant's coworker not to slam the door when she used it;
 7. On June 3, 2022, the Supervisor did not address Complainant's concerns about office 212A not being adequate for her reasonable accommodation since it did not address all of her concerns;
 8. On June 15, 2022, the Supervisor asked Complainant about her conversation with the Deputy Garrison Commander; and
 9. On June 17, 2022, the Supervisor did not respond to Complainant's email regarding her concerns with reviewing her position description and trying to see if telework could be added to it before addressing her reasonable accommodation concerns.

On September 1, 2022, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. Citing Army Regulation 690-12, Appendix C-3 (i),² the final decision stated that the Agency had offered Complainant an alternate reasonable accommodation and that offering an alternate accommodation amounted to a decision to grant the request for accommodation.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that her complaint states a claim of discrimination and asks that the Commission reverse the final decision and order the Agency to conduct an EEO investigation. Complainant argues that the Agency's alternate reasonable accommodation was not effective. Complainant also requests that the Commission impose sanctions on the Agency for dismissing her EEO complaint without conducting even a basic inquiry about her allegations, asking the Commission to order the Agency to pay the attorney's fees she incurred filing the instant appeal.

² There is not a copy of this document in the record. We note that it is the burden of the Agency to have evidence or proof in support of its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991).

In response to Complainant's appeal, the Agency contends that the final decision dismissing Complainant's complaint should be affirmed because Complainant did not timely initiate EEO contact. According to the Agency, Complainant was notified that her request for five days of telework per week was denied on April 28, 2022, and she acknowledged the Agency's offer to move to a private office space on May 17, 2022. The Agency asserts that Complainant waited until July 8, 2022, to initiate contact with an EEO Counselor, which is more than 45 days after the Agency denied her request for full-time telework as a reasonable accommodation and after she acknowledged the move to the private office. The Agency contends that the final decision dismissed Complainant's complaint in good faith and "vehemently disagrees" that sanctions are warranted.

ANALYSIS AND FINDINGS

The Agency dismissed Complainant's complaint for failure to state a claim. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has 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 (Apr. 21, 1994).

Upon review, Complainant alleges that she was subjected to an ongoing hostile work environment including, but not limited to, the Agency's failure to reasonably accommodate her disability. The final decision found that her complaint failed to state a claim because the Agency offered her an alternate accommodation. After a review of the final decision, the Commission finds that the Agency's reason for dismissing the complaint improperly addressed the merits of Complainant's complaint without a proper EEO investigation as required by the regulations. See Liza B. v. Dep't of the Army, EEOC Appeal No. 2022003214 (Oct. 31, 2022); Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991). Accordingly, the Agency improperly dismissed Complainant's complaint for failure to state a claim.

On appeal, the Agency argues for the first time that Complainant's complaint should be dismissed for untimely EEO Counselor contact. The Agency, however, was responsible for supporting its reasons for dismissal in its final decision, and to allow it to now provide new evidence or change its arguments after Complainant has filed her appeal would be unfair to Complainant. See Chasity C. v. Dep't of the Army, EEOC Appeal No. 2019000440 (Dec. 18, 2018); Woods v. Dep't of Vet. Aff., EEOC Appeal No. 0120091027 (May 7, 2009). We therefore reverse the Agency's final decision dismissing Complainant's complaint.

Finally, we decline to sanction the Agency as requested by Complainant. The Commission has the inherent power to control and prevent abuse of its orders, processes, and procedures. The Commission can and will impose sanctions for Agency malfeasance. See Turner v. Dep't of the Interior, EEOC Petition No. 04980037 (Aug. 5, 1999). Although we are reversing the Agency's final decision, the Agency's dismissal Complainant's complaint for failure to state a claim does not warrant the imposition of sanctions.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The complaint, defined herein as a hostile work environment claim and a denial of reasonable accommodation claim, is hereby REMANDED to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claims (harassment/hostile work environment and ongoing denial of reasonable accommodation) 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

December 5, 2022

Date