



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

[REDACTED]
Gloria L.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2023000439

Agency No. 22-00070-01188

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated September 23, 2022, dismissing a formal 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., 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 Secretary, Grade GS-8, in the Office of the Commander, U.S. Pacific Fleet, at the Agency's Joint Base Pearl Harbor-Hickam, Hawaii. At the relevant times, the Deputy Director, Logistics, Fleet Supply and Ordinance, supervised Complainant.

On August 25, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination based on color and age when:

- a. In mid-April 2022, the Deputy Director questioned Complainant about checking her personal phone while on a bathroom break;

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.

- b. On April 25, 2022, the Deputy Director directed Complainant to request permission when she leaves her desk, including going to the bathroom, after Complainant had emailed him requesting clarification of his expectations on April 23, 2022, and provided a medical note related to bathroom usage;
- c. On May 3, 2022, the Deputy Director issued Complainant a memorandum for record (MFR) as a “final warning” directing Complainant to not unilaterally change her work hours without supervisor approval, even though she is approved to work a maximum flexibility schedule; and
- d. On May 11, 2022, the Deputy Director questioned and yelled at Complainant about status of the Director’s lodging and rental car arrangements, and accused, “this is not your first rodeo, so why are you acting like it is?”

On September 23, 2022, the Agency issued a final decision dismissing the formal EEO complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). The final decision reasoned that the four isolated events had occurred over an eight-month period and therefore, the Agency determined that Complainant’s discrimination claims were insufficiently severe and insufficiently pervasive to qualify as harassment.

The instant appeal followed.

ANALYSIS AND FINDINGS

Under the Commission’s regulations at 29 C.F.R. §§ 1614.103, 1614.106(a), the Agency must accept a justiciable claim that an aggrieved employee has been subjected to discrimination based on EEO-protected characteristics or because of EEO-protected activity. EEOC Regulation 29 C.F.R. § 1614.107(a)(1) provides that the Agency shall dismiss a complaint that fails to state a claim. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Complainant cannot prove a set of facts in support of the claim which would entitle her to relief. In order to state claim, the Complainant must articulate that she has suffered a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy under EEOC Regulations. Diaz v. Dep’t of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

The instant formal complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

Here, a fair reading of the record suggests that the “last warning” MFR that the Deputy Director purportedly issued to Complainant on May 3, 2022, was both formal and disciplinary in nature, as opposed to merely instructive or cautionary.² Brown v. Dep’t of Def., EEOC Appeal No. 01993885 (Feb. 16, 2001) (holding that a negative MFR that went into Complainant’s personnel file was disciplinary for purpose of stating a claim). We further examined these alleged harassing incidents and remarks together, and in the light most favorable to Complainant, as a result, we concluded them sufficient to allege a viable claim of a hostile work environment that merits an EEO investigation. Fernanda H. v. U.S. Postal Serv., Appeal No. 2022003026 (Sept. 6, 2022) citing Cobb v. Dep’t of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED. The complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

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 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 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 Complainant’s request for a hearing, a copy of Complainant’s request for a final Agency decision, 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. 29 C.F.R. § 1614.403(g).

² We note that neither party provided a copy of the actual MFR which Complainant claimed to be discriminatory.

The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to Complainant and her representative.

If the Agency does not comply with the Commission's order, Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). 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. 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, 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 Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** 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. 29 C.F.R. § 1614.405; EEO Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Ch. 9 § VII.B (Aug. 5, 2015).

Complainant should submit her request for reconsideration, and any statement or brief in support of her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit her request and arguments to the Director, OFO, EEOC, via regular mail addressed to P.O. Box 77960, Washington DC 20013, or by certified mail addressed to 131 M St. NE, Washington DC 20507. In the absence of a legible postmark, 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. 29 C.F.R. § 1614.604.

The Agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). 29 C.F.R. § 1614.403(g). Either party's request or statement or brief in opposition must also include proof of service on the other party, unless Complainant files 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. 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 15, 2022

Date