



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

[REDACTED]
Mellissa F.,¹
Complainant,

v.

Marcia L. Fudge,
Secretary,
Department of Housing and Urban Development,
Agency.

Request No. 2022003871

Appeal No. 2021003459

Agency No. HUD-00148-2018

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in EEOC Appeal No. 2021003459 (June 8, 2022). EEOC regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

On October 19, 2018, Complainant filed a formal EEO complaint alleging that the Agency subjected her to discrimination, sexual harassment, and a hostile work environment on the bases of sex (female) and reprisal for prior protected EEO activity when:

1. In April 2018, the Acting Associate General Deputy Assistant Secretary (AAGDAS) told her she would have to perform a sexual act the next time he gave her a ride to her car.
2. On April 18, 2018, a cross-like symbol was drawn on her door with an oil-like substance.

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.

3. On April 26, 2018, she was moved to an office away from her staff.
4. In May and July 2018, the AAGDAS made disparaging remarks about her performance to senior management and other staff.
5. From May 16, 2018, through September 25, 2018, she was excluded from meetings concerning processes and assignments within her program office.
6. On or about July 18, 2018, she learned that the AAGDAS spoke of her EEO activity to other staff and stated “[Complainant was] not afraid to sue HUD;”
7. On October 1, 2018, the AAGDAS incited an employee to make an EEO allegation against her.
8. On October 9, 2018, she was instructed not to email her second-line manager [the AAGDAS] regarding her assignments or work conditions; and
9. On March 18, 2019, she was detailed to the Philadelphia Homeownership Center.

In our prior decision in EEOC Appeal No. 2021003459 (June 8, 2022), we found that the AJ erred when he found that there were no genuine issues of material fact in dispute and granted summary judgment in favor of the Agency. We determined that the EEO investigation into Complainant’s complaint only inquired into a single incident of sexual harassment, while Complainant clearly alleged numerous instances in support of her claim of sexual harassment; as such, we determined that the record was not sufficiently developed and there were genuine issues of material fact in dispute.

In its request for reconsideration, the Agency contends that the prior decision improperly stated that the Agency did not file a response in opposition to Complainant's appeal. The Agency further argues that Complainant’s allegations of a decade-long history of sexually inappropriate statements could not, even if true, give rise to Agency liability because it is undisputed that none of these alleged events were ever reported to management. The Agency maintains that it was clear error to deem these allegations material to liability. In addition, the Agency claims that as the prior decision did not address the incidents listed in the formal complaint, claim 1 is not a part of an ongoing pattern of harassment and therefore was reported to the EEO Counselor outside of the prescribed time limits.

In response, Complainant argues that the Commission undertook a thorough *de novo* review of the facts and arrived at the self-evident conclusion that there were numerous genuine issues of disputed material facts. Complainant also argues that the Agency's appeal brief was considered in essence in the prior decision as the Agency incorporated its Motion for Summary Judgment and Reply into its July 23, 2021, appeal brief.

We emphasize that a request for reconsideration is not a second appeal to the Commission. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, § VILA (Aug. 5, 2015). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so.

Here, the record reflects that the Agency filed an appeal brief on July 23, 2021. It was erroneously stated in the prior decision that the Agency did not file a response to Complainant's appeal. While we acknowledge that the prior statement was in error, we find that the arguments presented by the Agency in opposition to the appeal were fully considered as the Agency's response incorporated the Agency's Motion for Summary Judgment and Reply, which were considered by the Commission in rendering the prior decision. Although the Agency argued that Complainant failed to present sufficient evidence in support of her claim, the Commission found that the record was incomplete. Due to the nature of the claims, the Commission determined that a hearing was necessary to fill the evidentiary gaps and that credibility determinations were needed in order to properly adjudicate the claims at issue. Consequently, we find that the erroneous statement that the Agency did not file a response does not alter the outcome of the prior decision.

In addition, we disagree with the Agency's argument that the inclusion of claim 1 is untimely because the prior decision did not individually consider the claims in the formal complaint. Despite the fact that the prior decision declined to individually consider each of the claims in the formal complaint, there was no finding or suggestion that there was not a pattern of harassment which would include prior incidents such as claim 1. The Agency's argument in this regard is baseless. Moreover, the Agency failed to assert that claim 1 was untimely prior to its request for reconsideration.

Regarding the Agency's contentions as to liability and the inclusion of incidents of harassment not raised with management, we note that these arguments are prematurely addressing the merits of the case. A determination of liability was not made in the prior decision, and therefore, we will not address it herein. Insofar as the Agency claims that the prior decision failed to consider liability, we note that the decision found that the record was incomplete, and a decision could not properly be made on the merits. The Commission finds that the Agency has addressed the merits of Complainant's complaint without a proper investigation as required by the regulations. We find that a determination of liability, goes to the merits of Complainant's complaint, and is irrelevant to the procedural issue of whether they have stated a justiciable claim under Title VII. See 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).

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request.

The decision in EEOC Appeal No. 2021003459 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC Hearings Unit within fifteen (15) calendar days of the date this decision becomes final. 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 Washington Field Office 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.

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

February 8, 2023
Date