



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

[REDACTED]
Dewey R.,¹
Complainant,

v.

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

Appeal No. 2022004466

Agency No. 200H-541GG-2022-1446

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 19, 2022, dismissing his complaint alleging unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Clinical Pharmacist, GS-12/09, at the Agency's Akron VA Outpatient Clinic Annex Building Pharmacy Department in Akron, Ohio.

On April 11, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of age (DOB: 1964) when, on January 24, 2022, Supervisory Pharmacist issued Complainant a Report of Contact (ROC/written documentation of a verbal counseling), instructing him to stop processing orders and leave the premises at the end of this tour.

The Agency dismissed this claim pursuant to 29 C.F.R. §1614.107(a)(1) for failure to state a claim. Complainant filed the instant appeal.

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.

On appeal, Complainant does not address why he believes his complaint stated a claim. Instead, he states that he is “perplexed why it was not determined that age discrimination occurred in my case because I haven’t seen any data that proves the VA has not discriminated. If any data was obtained by EEOC, then please share that data so I can see how your decision was reached. In other words, what factors and data did you collect that made you conclude that my allegation doesn’t meet the threshold for age discrimination. Please produce the data that shows the VA did not discriminate against an older employee like pharmacists in my protected age group.”

The Agency contends on appeal that Complainant has failed to establish that he is an “aggrieved” party under EEOC regulations. The Agency also states Complainant has failed to provide any evidence to support that the report of contact he received is discrimination. Lastly, the Agency states that potential threats of further harm or belief that management may discriminate in the future are not valid claims of present employment harm. Therefore, the Agency asserts the complaint was properly dismissed pursuant to 29 C.F.R. §1614.107(a)(1).

ANALYSIS AND FINDINGS

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, .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 (April 21, 1994). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief. Cobb v. Dep’t of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

The Agency is correct that we have repeatedly found that remarks or comments unaccompanied by a concrete agency action are not a direct and personal deprivation sufficient to render an individual aggrieved for the purposes of Title VII, and that we have applied this concept to instances of verbal counseling where the complaint failed to demonstrate any harm or loss affecting a term, condition, or privilege of employment resulting from the verbal counseling. See Johnson v. Dep’t of the Navy, EEOC Appeal No. 01982397 (Nov. 25, 1998); Hall v. Dep’t of Homeland Security, EEOC Appeal No. 0120121561 (Jan. 8, 2013).

However, in the instant case, the verbal counseling was reduced to writing in a Report of Contact. We have typically not dismissed written counseling for failure to state a claim and have addressed those claims on their merits. See Emanuel W. v. Dep’t of Veteran’s Affairs, EEOC Appeal No. 2022001482 (Nov. 14, 2022); Melani F. v. Dep’t of Veteran’s Affairs, EEOC Appeal No. 2020002090 (Sep. 2, 2020). We have also held that verbal counseling with a written letter of instruction could render a complainant aggrieved. Marjorie J. v. Dep’t of Veteran’s Affairs, EEOC Appeal Nos. 2020002443 and 2020001169 (Sep. 3, 2020).

We have also found that a letter of counseling could be considered an adverse action if it was placed in Complainant's personnel record to be considered for future disciplinary actions. Charles G. v. Dep't of the Air Force, EEOC Appeal No. 2020003207 (Oct. 7, 2020).

The Agency stated in its FAD that "EEOC case decisions have held that...written documentation of verbal counseling lacking an indication that the counseling matter will be included in one's official personnel file or will lead to a possible discipline action, typically do not rise to the level of an employment harm for which there is a remedy." (FAD, p. 1). However, the Agency does not cite to any case law or other authority to support this contention, nor does the Agency provide any evidence to show the Report of Contact issued to Complainant would not be included in his official personnel file or was not a disciplinary action. The Commission has long held that it is well-settled that the agency bears the burden of providing evidence or proof in support of its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (September 1991). Based on the instant record, the Agency has not supported its dismissal here.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The complaint 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 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

February 6, 2023

Date