



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

[REDACTED]
Felicidad S.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Army & Air Force Exchange Service),
Agency.

Appeal No. 2023001011

Agency No. AAFES No. 22.045

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated October 21, 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 an Office Associate at the Agency's Mountain Home Air Force Base in Idaho.

On August 30, 2022, Complainant filed a formal EEO complaint alleging that the Agency subjected her to unlawful retaliation. The Agency accepted the formal complaint and framed Complainant's claim as follows:

1. On or about May 17, 2022, the Office of General Counsel (OGC) sent Complainant an email regarding a litigation hold.

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. The Associate Equal Employment Opportunity Diversity & Inclusion (EEODI) Officer overstepped Complainant's boundaries by sharing too much information with the OGC.

A fair reading of the record indicates that Complainant is alleging that the Agency retaliated against her for participating in a prior EEO case as a witness. In an attachment to her formal complaint, Complainant wrote: "I have been working with a former employee on a case that is still ongoing as a witness on her behalf." Complainant explained that the Agency officials who were identified as the discriminating officials in the prior EEO case retaliated against her by finding fault in her work, acting cold, and placing her on a "do not talk to list." In addition, she described she experienced retaliation from the OGC and the Agency's EEO personnel, which included the EEODI Officer. Complainant contended that after she shared confidential information with the Agency's EEO office, the EEODI Officer breached confidentiality by sharing her information with the OGC. Complainant revealed that the OGC sent her a letter threatening her with termination which she found to be hostile and informed her that a litigation hold was placed on her computer. Complainant argued that the litigation hold was done under the "false guise" that OGC was preserving information. She also argued that the Agency's EEO office should not have jurisdiction over the instant complaint because a conflict of interest exists.

On September 16, 2022, the Agency sent Complainant a Notice of Intention to Dismiss her formal complaint (Notice). The Agency informed Complainant that it required further information to process her complaint. Specifically, the Agency requested information on how she experienced harm to a term, condition, or privilege of employment. Complainant was informed that her failure to respond within 15 days of receipt of the Notice may be grounds for dismissal.

On October 21, 2022, the Agency issued a FAD. The Agency dismissed the complaint for failure to cooperate, reasoning that Complainant failed to respond to the Notice. In addition, the Agency dismissed the complaint for failure to state a claim, reasoning that Complainant did not experience harm to a term, condition, or privilege of employment. The FAD was signed by the EEODI Officer, and it did not address the conflict-of-interest issue.

The instant appeal followed. Complainant did not submit a statement or brief with her appeal. The Agency filed a brief opposing her appeal, arguing that its dismissal should be upheld.

ANALYSIS AND FINDINGS

Conflict of Interest

EEOC Management Directive (MD-110), Chapter I, (August 5, 2015) provides that, “Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts.” It is a conflict of interest “on its face for an EEO investigator or a complaints manager to be responsible for processing a complaint in which they have been charged with participating in the discrimination against the complainant.” See Smith v. United States Postal Service, EEOC Request No. 05920962 (September 7, 1993); Schultz v. Department of the Navy, EEOC Appeal No. 0120063798 (November 16, 2007).

The Commission finds that under the principles set forth in Smith there was a conflict of interest when the EEODI Officer issued the FAD because, she was charged with participating in the retaliation against Complainant.

Failure to State a Claim

The Agency dismissed the complaint for failure to state a claim, reasoning that Complainant did not experience harm to a term or condition of employment. The anti-retaliation provisions of the employment discrimination statutes seek to prevent an employer from interfering with an employee’s efforts to secure or advance enforcement of the statutes’ basic guarantees and are not limited to actions affecting employment terms and conditions. Burlington Northern & Santa Fe Railroad. Co. v. White, 548 U. S. 53, 126 S. Ct. 2405 (2006). To state a viable claim of retaliation, Complainant must allege that: 1) she was subjected to an action which a reasonable employee would have found materially adverse, and 2) the action could dissuade a reasonable employee from making or supporting a charge of discrimination. Id. See also EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (August 25, 2016); Carroll v. Department of the Army, EEOC Request No. 05970939 (April 4, 2000). Here, Complainant alleged that Agency officials, after she testified in another employee’s EEO case, retaliated against her by finding fault in her work, acting cold, and placing her on a “do not talk to list.” She also alleged her computer was placed on a litigation hold and she was threatened with termination. We find that Complainant alleged a viable claim of retaliation that requires further investigation.

Failure to Cooperate

EEOC Regulation 29 C.F.R. 1614.107(a)(7) provides that the agency may dismiss a complaint, when a complainant fails to respond to its written request to provide relevant information within 15 days of its receipt. The regulation further provides that, instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available. Generally, the Commission has held that an agency should not dismiss a complaint when it has sufficient information upon which to base an adjudication. See Ross v. United States Postal Service, EEOC Request No. 05900693 (August 17, 1990); Brinson v. United States Postal Service, EEOC Request No. 05900193 (April 12, 1990).

It is only in cases where the complainant has engaged in delay or contumacious conduct and the record is insufficient to permit adjudication that the Commission as allowed a complaint to be dismissed for failure to cooperate. See Card v. United States Postal Service, EEOC Request No. 05970095 (April 23, 1998); Kroeten v. United States Postal Service, EEOC Request No. 05940451 (December 22, 1994).

In the instant case, we find that although Complainant responded to the Agency's request for additional information more than 15 days after she received the Notice, there is insufficient evidence to support a conclusion that she purposely engaged in delay or contumacious conduct. Instead, we find that there was sufficient information in the record to have permitted the Agency to have processed the complaint. Complainant's complaint described that she had been subjected to retaliation, it identified the specific actions she is concerned with, and the responsible officials. Consequently, we find that the Agency's dismissal for failure to cooperate was improper.

CONCLUSION

Accordingly, the Agency's decision dismissing the complaint is REVERSED. We REMAND the complaint for further processing in accordance with this decision and applicable regulations. On remand the Agency must ensure that the individuals responsible for processing the remanded allegations are not individuals charged by Complainant as participating in the harassment or retaliation that she was subjected to.

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

March 2, 2023

Date