



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

[REDACTED]
Anglea Y.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Health Agency),
Agency.

Appeal No. 2023001599

Agency No. DHAHIW 22-0127

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated December 16, 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. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Public Affairs Specialist at the Agency's Tripler Army Medical Center in Honolulu, Hawaii.

On August 2, 2022², Complainant initiated equal employment opportunity (EEO) contact alleging that the Agency discriminated against her when the Public Affairs Director (Director) subjected her to a hostile work environment based on disability (neuropsychological condition – atypical migraines).

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 EEO Counselor's Report stated that Complainant's initial contact was delayed because she contacted Fort Shafter on June 30, 2022. Later, on July 18, 2022 she was instructed to contact a Defense Health Agency link to file a complaint.

Specifically, Complainant stated, on May 2, 2022, she submitted a Family Medical Leave Act (FMLA) request, and Director suggested her request was a “sham” and then falsely claimed that Complainant was making mistakes in her job performance due to her disability. Complainant alleged that Director began treating her hostilely.

On November 11, 2022, Complainant filed a formal EEO complaint alleging that the Agency subjected her to harassment on the basis of disability when:

1. on June 6, 2022, Director sent Complainant an email stating that she sympathized with Complainant’s disability but felt that she was not representing the office in a calm manner and was acting unprofessionally;
2. on May 27, 2022, Director stated that Complainant was having difficulty performing her duties due to her disability, and that Director would walk out of her office if a third party was brought into the discussion between the two of them;
3. on May 26, 2022, prior to Complainant’s FMLA leave, Director asked Complainant to remove everything from view on her workstation and offered to go get Complainant a box from the post office;
4. on May 8, 2022, Director thanked Complainant for performing a great job and then stated, “Isn’t it wonderful that you can do such great work when you’re so ill;” and
5. on May 3, 2022, Director stated that there was a contradiction in Complainant’s FMLA documentation and spoke negatively about Complainant requesting FMLA but going to Atlanta for vacation and questioned whether Complainant truly planned to return to work in three months.

The Agency issued a final decision dismissing Complainant’s complaint pursuant to 29 C.F.R. § 1614.107(a). The Agency dismissed incidents (1) and (2) for failure to state a claim and incidents (3) through (5) for untimely EEO contact. The Agency stated that Complainant was not aggrieved by the actions alleged in (1) and (2) and that her August 2, 2022 initial EEO contact was outside of the statutory timeframe for incidents (3) through (5). The instant appeal from Complainant followed.

On appeal, Complainant stated that Director also contacted her physician about her medical condition and improperly documented her opinions about Complainant’s medical condition in a record. Complainant alleged that Director continued to be “toxic” when she returned from FMLA, including reprimanding her for alleged gossip in September 2022. Complainant stated that she could no longer work in the hostile work environment and retired effective October 30, 2022. In opposition, the Agency stated that the entire complaint fails to state a claim.

ANALYSIS AND FINDINGS

The Agency shall accept an EEO complaint from any aggrieved employee or applicant for employment who believes that they have been discriminated against by that Agency because of race, color, religion, sex, national origin, age or disabling condition or in reprisal for EEO-protected activity. 29 C.F.R. §§ 1614.103, 1614.106(a). This 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).

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides that the Agency shall dismiss a complaint that fails to state a claim. In this case, the Agency incorrectly concluded that the formal complaint failed to state a claim. Here, Complainant alleged that the Agency subjected her to a hostile work environment, between May 2022 and September 2022 (after she submitted an FMLA request due to her disability), which ultimately resulted in her constructive retirement in October 2022. We find Complainant aggrieved. Further, as to timeliness, the Supreme Court has held that a complaint alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The Court recognized that allegations of harassment and the existence of a hostile work environment involve, by their nature, a series of incidents linked by a pattern of conduct.

CONCLUSION

Accordingly, we REVERSE the final agency decision and REMAND the instant matter to the Agency for further processing consistent with this decision and the Order below.

ORDER

The Agency is ordered to process the remanded claims (hostile work environment resulting in constructive retirement) 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

July 18, 2023

Date