



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

[REDACTED]
Diane Y.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(National Geospatial-Intelligence Agency),
Agency,

and

Avril D. Haines,
Director,
Office of the Director of National Intelligence,
Agency.

Appeal No. 2023002976

Agency No. NGA-0086-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated March 16, 2023, 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.

BACKGROUND

During the period at issue, Complainant was employed by the National Geospatial-Intelligence Agency (NGA) as a Safety and Occupational Health Officer, GS-13.

On July 27 and 28, 2022, Complainant attended a work conference sponsored by another federal agency, the Office of the Director of National Intelligence (ODNI). Complainant, as well as

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.

other NGA management officials, attended the conference. During the conference, Complainant alleged that she was sexually assaulted and raped by an ODNI employee.

On November 30, 2022, Complainant filed a formal complaint with NGA claiming that she was subjected to sexual harassment based on sex (female and sexual orientation) when, from July 27-28, 2022, the ODNI employee subjected her to sexual harassment in the form of unwelcomed sexual comments and conduct, including sexual assault and rape.² Complainant also alleges that NGA officials were aware of at least some of the misconduct of the ODNI employee but did nothing to protect her.

On March 16, 2023, NGA issued a final decision dismissing the formal complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. NGA found that Complainant identified an ODNI employee as the responsible official who allegedly sexually assaulted and raped her. NGA further found that it was not responsible for the alleged actions of the ODNI employee because NGA had no control over the ODNI employee. NGA reasoned that: (1) the ODNI employee was not an NGA employee, (2) the ODNI employee did not have any relationship with the NGA, and (3) the alleged assault did not occur on NGA facilities. Therefore, NGA determined that it could not be held liable for the alleged actions of the ODNI employee.

The instant appeal followed. Complainant, through counsel, argues that the dismissal was improper. Complainant asserts that NGA management, present at the same conference, failed to protect Complainant from sexual harassment of a third party (the ODNI employee) when NGA management officials observed events leading up to the alleged assault and took no action. Therefore, Complainant argues that the formal complaint states a claim regardless of whether NGA had any direct control over the ODNI employee. Complainant further argues that liability for the alleged sexual harassment would need to be determined by examination of the actions and decisions by both agencies – NGA and ODNI.

ANALYSIS AND FINDINGS

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). The regulation 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.

² In her brief on appeal, Complainant asserts that on December 20, 2022, she also filed a formal EEO complaint with ONDI. The present record does not indicate an identification number for this complaint or its status.

Here, Complainant has alleged that she was sexually assaulted while attending a work conference as part of her NGA duties. She stated the official responsible for the alleged harassment and assault was an employee of ONDI, but also alleged that NGA officials at the conference knew at least some of what was occurring and did nothing to protect her. Agencies may be liable for discriminatory harassment perpetuated by individuals other than its own employees where the agency knew or should have known of the conduct and failed to take immediate and appropriate corrective action. See, e.g., Silas T. v. Dep't of the Air Force, EEOC Appeal No. 2021003822 (Feb. 22, 2022) ("We find that the Agency clearly failed to take reasonable care to protect Complainant, a restaurant Bar Manager, from C3's [a patron's] discriminatory harassment."); Caroline B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020000978 (Sept. 16, 2021) (nurse entitled to protection by employing agency from racial harassment by patient's family). Consequently, in the instant case, we conclude Complainant has met the definition of an aggrieved employee for the purpose of stating a claim in the administrative EEO complaint process.

29 C.F.R. § 1614.106(a) states that a complaint must be filed with the agency that allegedly discriminated against the complainant. Here, Complainant is alleging that *both* ONDI and NGA are responsible for the discrimination. As such, liability for the alleged discriminatory harassment must be determined by examining the actions and decisions made by management at both agencies and we find that this complaint should be processed jointly by both ONDI and NGA. See Carol K. v. Dept. of Air Force, EEOC Appeal No. 2019004395 (Sept. 17, 2019) (liability for the discriminatory harassment allegedly resulted from actions of management at two agencies so the complaint should be jointly processed by both); Beverly v. Dep't of Justice, EEOC Appeal No. 01A23746 (Oct. 11, 2002) (three agencies ordered to jointly process complaint where complainant and allegedly discriminating supervisor were employed by different agencies while both serving at a third agency); Fauntroy v. Dep't of the Treasury, EEOC Appeal No. 01980259 (Sept. 15, 1998) (finding that Treasury employee allegedly harassed by security guard employed by General Services Administration should be jointly processed by both agencies).

CONCLUSION

Based on a review of the entire record and, for the foregoing reasons, the Commission VACATES NGA's dismissal of the formal complaint for failure to state a claim. The complaint is REMANDED for further processing in accordance with this decision and the Order below.

By this decision, Office of the Director of National Intelligence (ONDI) is notified of its joinder to this matter. The two agencies (NGA and ONDI) are directed to comply with the Commission's Order set forth below.

ORDER

Within thirty (30) calendar days of the date this decision is issued, NGA shall contact the Office of the Director of National Intelligence (ONDI) and begin jointly processing this case. The agencies are ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The two agencies shall issue to Complainant a copy of the jointly processed 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 two agencies shall jointly issue a final decision within sixty (60) calendar days of receipt of the request.

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 24, 2023
Date