



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Nancy P.,¹
Complainant,

v.

Carlos Del Toro,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2022002855

Agency No. 20-46188-02147

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 6, 2022, dismissing her complaint of 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 a Police Officer at the Agency's Joint Base Pearl Harbor-Hickam Security Department in Pearl Harbor, Hawaii.

On July 15, 2020, Complainant initiated contact with an EEO Counselor. On October 19, 2020, Complainant filed a formal complaint alleging that the Agency discriminated against her on the bases of sex (female) and in reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

- A. On October 28, 2019, Complainant's supervisor (Supervisor): (1) did not refer to her as "Police Officer," (2) recorded a conversation between the two of them; (3) did not permit her to allow others to use her police vehicle;

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.

- B. On or about October 28 or 29, 2019, Supervisor yelled at her when she entered the room to be witness on behalf of another employee;
- C. On or about October 29, 2019, Supervisor: (1) yelled at her, (2) would not let her use the computer nor allow her to relieve a coworker for lunch, (3) accused her of letting another employee use her police vehicle;
- D. On or about October 29, 2019, Complainant notified her second line supervisor of the alleged harassing behavior of Supervisor, and management failed to take action;
- E. When on or about February 26, 2020, Supervisor: (1) conducted a pre-action investigation, (2) did not tell Complainant he was writing the pre-action investigation, (3) did not counsel Complainant about the pre-action investigation, (4) stated that she did not answer written questions in the pre-action investigation, and (5) violated the policy on pre-action investigations;
- F. On June 4, 2020, Supervisor issued Complainant a notice of proposed 21-day suspension; and
- G. On November 3, 2020, Complainant's sixth-line supervisor issued her a 21-day suspension².

On November 16, 2020, Complainant appealed her 21-day suspension to the Merit Systems Protection Board (MSPB). On December 17, 2020, the MSPB dismissed Complainant's appeal, Docket Number SF-0752-21-0079-I-1, without prejudice, in response to the Agency's motion stating that the MSPB lacked authority to adjudicate the appeal under Lucia v. Securities Exchange Commission, 138 S.Ct. 2044 (2018). The MSPB AJ explained that the Lucia matter was pending before the Board and that the appeal would automatically be filed once the MSPB addressed Lucia.

After its investigation into the complaint, the Agency provided Complainant with a copy of the report of investigation and notice of right to request a hearing before an Equal Employment Opportunity Commission (EEOC or Commission) Administrative Judge (AJ). Complainant requested a hearing. The Agency filed a motion for a decision without a hearing, arguing that claims A-E were time-barred and claims F-G were raised in an appeal to the MSPB.

On March 8, 2022, the AJ granted the Agency's Motion to Dismiss, pursuant to 29 C.F.R. §1614.109(b). The AJ determined that Complainant had no right to a hearing before the Commission on claim G because the matter was pending before the MSPB.

² The formal complaint included events A-F. Complainant amended her complaint to add claim G when the suspension became effective.

Although Complainant offered to waive or withdraw the MSPB appeal, the AJ explained that Complainant's initial election prevailed. Additionally, the AJ found that claim F was appropriate for dismissal as well because the proposed suspension merged with the decision to suspend.

With respect to claims A-E, which the AJ noted comprised a hostile work environment occurring from October 28, 2019, to February 26, 2020, the AJ determined that the claims were untimely and appropriate for dismissal. The AJ found that because the last act occurred on February 26, 2020, Complainant failed to initiate contact with an EEO Counselor within the requisite 45-days, pursuant to 29 C.F.R. §1614.105(a)(1).

On appeal, Complainant asserts that she timely initiated contact with an EEO Counselor because she alleged that she was subject to ongoing harassment. Complainant adds that she initiated EEO Counselor upon receipt of the proposed suspension notice, and the suspension should be considered part of her ongoing harassment claim.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of an EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within forty-five (45) days of the effective date of the action.

A hostile work environment claim, however, is comprised of a series of separate acts that collectively constitute one unlawful employment practice. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). Unlike a claim which is based on discrete acts of discrimination, a hostile work environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. Id. at 115. Furthermore, a hostile work environment claim will not be time barred if all acts constituting the claim are part of the same unlawful practice even if some component acts of hostile work environment fall outside the statutory time period so long as an act contributing to the claim falls within the filing period. Id. at 117. Complainant initiated EEO Counselor contact on July 15, 2020. The Commission has held that "[b]ecause the incidents that make up a hostile work environment claim collectively constitute one unlawful employment practice, the entire claim is actionable, as long, as at least one incident that is part of the claim occurred within the filing period. This includes incidents that occurred outside the filing period that the [complainant] knew or should have known were actionable at the time of their occurrence." EEOC Compliance Manual, Section 2, Threshold Issues at 2 - 75 (revised July 21, 2005) (citing National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002)). An incident can be part of a hostile work environment even when it is also a discrete act. See Id.

In this case, claim F, the June 4, 2020, proposed suspension, which ultimately merged into the November 2020 suspension, occurred within the 45-day time period preceding Complainant's July 15, 2020 EEO Counselor contact.

Accordingly, we find Complainant's EEO contact timely with regard to her hostile environment claim comprised of the incidents raised in claims A through F.

While claims F-G should be considered as evidence in support of Complainant's hostile work environment claim, claims F-G are not properly before the Commission, and cannot be considered as independent claims of discrimination on their own. Specifically, the MSPB has not yet issued a decision on the merits of that appeal. While technically the MSPB AJ dismissed Complainant's appeal without prejudice, the record is clear that the appeal will be refiled and considered by the MSPB once the Lucia decision is resolved. The Commission will not accept appeals from MSPB dismissals without prejudice. 29 C.F.R. §1614.303(a). Based on these circumstances, we construe claims F-G as still pending before the MSPB and therefore, the present appeal to the EEOC is premature. Therefore, we affirm the dismissal of these claims pursuant to 29 C.F.R. §1614.107(a)(4), as independent claims.

CONCLUSION

We AFFIRM the Agency's final decision dismissing claims F-G as independent claims for the reasons state above. We REVERSE the Agency's final decision dismissing Complainant's hostile work environment claim, and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded hostile work environment claim 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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, 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

September 26, 2023

Date