



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

[REDACTED]
Danita S.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2022004997

Agency No. ARCARLI22JUN02654

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated August 18, 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 a Firefighter, GS-0081-07, at the Agency's US Army Garrison (USAG) Carlisle Barracks, Department of Emergency Services (DES) facility in Carlisle, Pennsylvania.

On August 4, 2022, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination and a hostile work environment on the basis of reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 (prior EEO Complaint ARCARLI21JUL02211) when:

1. Complainant was not offered like or similar voluntary training at another facility when compared to similarly situated employees;

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. On May 10, 2022, voluntary training was approved regardless of her prior EEO complaint; and
3. Each time voluntary training is conducted at the Letterkenny Army Depot Fire Department where the sexual harasser in her previous EEO complaint is employed.

The Agency dismissed these claims pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency found that Claims (a) and (c) did not allege a direct harm suffered by Complainant in regard to her employment and that Claim (b) raised the same claim as a previous complaint. Complainant filed the instant appeal.

On appeal, Complainant contends the Agency's dismissal omitted or misrepresented facts. Complainant states the "voluntary" training is actually part of a series of mandatory minimum training that must be completed and thus a failure to offer it directly impacts Complainant's certification. She contends that in comparison to her peer-level coworkers, Complainant has not been afforded the same equal opportunities for voluntary training and that it is unfair to hold training at the Letterkenny Army depot. In regard to Claim (b), Complainant states this dismissal is based on false and misleading information. In regard to Claim (c), Complainant contends an Agency investigation report proves Complainant had an apprehension of harm.

The Agency contends on appeal that Complainant's appeal brief does not present a basis to alter the Agency's decision and instead appears to attempt to litigate issues not a part of the complaint filed, which might also be currently pending before the EEOC. The Agency contends Complainant has failed to establish that she was in fact damaged or injured in some fashion by the Agency, she has not suffered any loss of pay or benefits, and she has not shown any disparity between her and other members of the fire department. The Agency further notes Complainant did not apply to attend the training and that only four spaces were available.

ANALYSIS AND FINDINGS

Failure to State a Claim – No Harm Alleged/Suffered

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition, or in retaliation. 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 (Apr. 21, 1994). When the complainant does not allege they are aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

The only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether complainant is an aggrieved employee; and (2) whether complainant raises employment discrimination on a basis covered by EEO statutes. If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its judgment of the merits. See Odoski v. Dep't of Energy, EEOC Appeal No. 01901496 (Apr. 16, 1990).

Additionally, reprisal claims are afforded a broad view of coverage under EEO laws. Claims of reprisal and retaliatory harassment claim, the alleged retaliatory actions need not impact a term, condition, or privilege of employment. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). A complainant need only show that a materially adverse action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Id. 548 U.S. at 68. The Commission's guidance states if the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016).

At the outset, we note that both the Agency and Complainant have improperly addressed the merits of Complainant's complaint when the only question before us is whether the formal complaint is sufficient to state a claim of employment discrimination on a basis covered by EEO statutes.

A fair reading of Complainant's complaint shows she is alleging she was subjected to retaliation (both as a discrete act and as part of a continuing hostile work environment) for a prior EEO complaint involving (among other things) sexual harassment by a coworker when the Agency approved a May 10, 2022 training and failed to provide for Complainant to attend the training (or similar) at another facility where her admitted sexual harasser does not work or instruct. We find that employee training provided at the facility where the harasser in a previous EEO complaint is located and instructs training courses could dissuade a reasonable person from making or supporting a charge of discrimination.

Failure to State a Claim – Stating the Same Claim as a Prior Complaint

The Agency dismissal indicated that Claim (b) stated the same claim as a prior EEO complaint filed by Complainant with the Agency. The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides that the agency shall dismiss a complaint that states the same claim that is pending before or has been decided by the agency or Commission. The Commission has consistently held that in order for a complaint to be dismissed as identical, the elements of the complaint must be identical to the elements of the prior complaint in time, place, incident, and parties. See Jackson v. Dep't of the Air Force, EEOC Appeal No 01955890 (Apr. 5, 1996), rev'd on other grounds, EEOC Request No. 05960524 (Apr. 24, 1997).

Following a review of the record, the Commission finds that the record in this case contains insufficient evidence that a portion of the instant claim is the same as a previously-filed claim.

The dismissal found that the instant claim stated the same claim as a prior complaint filed by Complainant. The Agency, however, has not included any copies of this earlier complaint (or related documents) showing the exact elements of that complaint.

We note that in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also Gens v. Dep't of Defense, EEOC Request No. 05910837 (Jan. 31, 1992). Because the Agency has not provided evidence to support its finding that Complainant previously filed the same claim, the Agency has failed to substantiate the basis for its final decision and the dismissal of the claim was improper. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991).

CONCLUSION

Accordingly, the Agency's dismissal is REVERSED, and the matter is REMANDED in accordance with 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 21, 2023

Date