



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Bertram K,¹
Complainant,

v.

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

Appeal No. 2023003083

Agency No. 230017400173

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's March 26, 2023 dismissal of his 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mechanical Engineer, ND-IV, at the Naval Surface Warfare Center, Indian Head Division (“NSWC IHD”) in Indian Head, Maryland.

On February 14, 2023, Complainant filed a Formal EEO Complaint alleging that the Agency subjected him to discrimination on the basis of disability (physical) when:

1. In November 2021, July 2022, other unspecified dates, Complainant was subjected to a pattern of ignored requests for reasonable accommodation when the Naval Marine Corps Intranet (“NMCI”) network ignored his requests to fix issues which continue to cause delays in his ability to perform his work duties,

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 October 17, 2022, Complainant's supervisor and NMCI failed to provide him with a shipping label for his laptop transportation repair process and to accommodate his requests for updated software to perform his work duties, and,
3. On December 9, 2022, Management and NMCI have consistently failed to provide Complainant with a working laptop, which has caused more steps to accommodate delays in Complainant's ability to perform his work duties.

The Agency dismissed the matter pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The instant appeal followed.

ANALYSIS AND FINDINGS

Timeliness – Claim 1

In its brief opposing Complainant's appeal, the Agency alternately argued that Claim 1 should be dismissed pursuant to 29 C.F.R. § 1614.107(a)(2), for untimely contact with an EEO Counselor. Under 29 C.F.R. § 1614.105(a)(1), complaints of discrimination should be brought to the attention of the EEO Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. Here, Complainant contacted an EEO Counselor on November 4, 2022, which is over 45 days after November 2021 and July 2022, two of the dates Complainant's requests for IT assistance allegedly went ignored.

A hostile work environment claim, however, is comprised of a series of separate acts that collectively constitute one unlawful employment practice. Nat'l R.R. 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. The Commission has stated 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, Sec. 2, Threshold Issues at 2-75 (rev. July 21, 2005) (citing Morgan).

The alleged discriminatory acts in Claims 2 and 3 were timely raised with an EEO Counselor, therefore, the allegations in Claim 1 may be considered as part of Complainant's overall harassment complaint.

The record is not sufficiently developed to support the Agency's assertion that because the events in Claim 1 occurred 8 months apart, Complainant cannot establish a "pattern" of harassment to warrant inclusion with Claims 2 and 3 as a single claim of harassment.

The duration of time Complainant's requests allegedly went ignored is not specified. EEOC's Compliance Manual, Section 2, "Threshold Issues," p. 2-73, EEOC Notice 915.003 (July 21, 2005), provides that "because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it." See also Harmon v. Office of Personnel Management, EEOC Request No. 05930365 (Nov. 4, 1999); Peacock v. United States Postal Service, EEOC Appeal No. 0120032372 (July 31, 2003).

Failure to State a Claim

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an 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 disability. 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). If the complainant cannot establish that they are aggrieved, the agency shall dismiss their complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

The Agency reasoned that the alleged discriminatory actions did not render Complainant "aggrieved" because they amounted to "IT-related challenges." The Agency explains that NMCI is the internal computer network and information technology ("IT") platform for the entire Agency and that "it is common knowledge that periodic IT related issues are common for all employees." By addressing *why* the alleged discriminatory actions occurred, the Agency improperly addresses the merits of Complainant's allegation, which is irrelevant to the procedural issue of whether he has stated a viable claim under the 29 C.F.R. Part 1614 regulations. See Ray v. United States Postal Serv., EEOC Appeal No. 0120083541 (Jul. 26, 2012) citing Osborne v. Dept. of the Treas., EEOC Request No. 05960111 (Jul. 19, 1996).

In its dismissal and appellate brief, the Agency likened the circumstances of this complaint to those in Karen M. v. Pension Benefit Guaranty Corporation, EEOC Appeal Nos. 2021001675 & 2021001677 (Apr. 14, 2021). Unlike the scenario in Karen M., the alleged "IT difficulties" in the instant complaint result in the alleged denial of a reasonable accommodation. In Karen M., the complainant alleged that the service desk did not respond in a timely manner when she received a new laptop and was unable to access Outlook and Adobe Reader. There is no indication that these programs were a reasonable accommodation for the complainant's disability (deaf) or that the issue was ongoing. In the EEO Counselor's Report for the instant complaint, the limited inquiry characterizes Complainant's allegation as "failure to accommodate his disability (physical) with appropriate accommodation software for his laptop." Additionally, Complainant stated in his precomplaint intake document "I have made several requests for assistive technology to assist with my visual disability." On appeal, Complainant emphasizes that his allegations all involve a denied reasonable accommodation, thereby rendering Complainant aggrieved.

Based on the clarifications provided by Complainant on appeal and in the EEO Counselor's Report, Claim 3 states a claim of denied reasonable accommodation.

Harassment/Hostile Work Environment

The Commission has held that where a complaint does not challenge an agency action or inaction regarding a specific term, condition, or privilege of employment, the claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). We have repeatedly found that a few isolated incidents of alleged harassment usually are not sufficient to state a harassment claim. See Phillips v. Dep't of Veterans Affairs, EEOC Request No. 05960030 (July 12, 1996).

The allegations in Claims 1 and 2, even when considered together, would typically constitute a few isolated incidents, not so severe as to establish a hostile work environment. However, when considered with the allegation in Claim 3, based on the facts and circumstances of this specific case, the allegations meet the requisite severity. If true, the conduct in Claims 1 and 2 could contribute to the denial of reasonable accommodation alleged in Claim 3, and therefore reasonably interfere with Complainant's work performance to create a hostile work environment. See Kenawy v. Dep't of Veterans Aff., EEOC Appeal No. 0120113725 (Jan. 13, 2012).

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED.

The complaint is hereby REMANDED to the Agency for further processing in accordance with this Decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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

October 10, 2023
Date