



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Windy H,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2023003956

Agency No. ARREDSTON23DEC00511

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 2, 2023, dismissing a formal 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**

During the period at issue, Complainant worked as a Financial Analyst at the Agency's Redstone Arsenal facility in Alabama. According to Complainant, she entered her civilian position in July 2021, and previously served the Agency in a military position.

On December 6, 2022, Complainant initiated EEO contact. On April 18, 2023, Complainant filed a formal complaint, claiming that the Agency subjected her to discrimination based on race (African-American), color (Black), and in reprisal for prior protected EEO activity.

On June 2, 2023, the Agency issued a final decision. The Agency framed Complainant's claims in the following fashion:

Complainant was subjected to harassment when she was subjected to numerous alleged incidents.

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<sup>1</sup> 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.

In the instant final decision, the Agency dismissed the formal complaint on numerous dismissal grounds. The Agency dismissed the formal complaint in its entirety for untimely EEO Counselor contact. The Agency also dismissed numerous incidents for failure to state a claim, reasoning that incidents involving Complainant's military career should not be addressed in the civilian EEO process. Furthermore, the Agency dismissed other alleged incidents for alleging dissatisfaction with the processing of her complaint. Finally, the Agency also set forth that Complainant had no previous EEO activity and that she did not allege opposition to EEO discrimination.

The instant appeal followed. Complainant submits numerous documents on appeal.

In response, the Agency requests that we affirm its final decision dismissing Complainant's complaint.

### ANALYSIS AND FINDINGS

Upon review of the record, we find that the crux of Complainant's claim is that she was subjected to harassment that had an impact upon *both* her military and civilian careers. To the extent, therefore, that Complainant is alleging that she was subjected to discrimination regarding her military career, we concur that such matters are outside of the Commission's jurisdiction.

We find, however, that the Agency improperly dismissed the formal complaint in its entirety regarding her civilian position. Section 717 of Title VII explicitly covers personnel actions affecting employees or applicants for employment in civilian positions within military departments. 42 U.S.C. § 2000e-16(a-b). EEOC Regulations thus provide that while the federal sector EEO process does not apply to uniformed members of military departments, the process does apply to civilian employees in military departments. See 29 C.F.R. §§ 1614.103(b)(1), (d)(1).

The Agency's final decision sets forth that Complainant had not previously engaged in protected EEO activity or opposed discrimination, we find that Complainant is alleging third-party retaliation. The Supreme Court held in Burlington Northern v. Santa Fe Railway Co v. White, 548 U.S. 53 (2006) that a materially adverse action subject to challenge under the anti-retaliation provisions encompass a broader range of actions than an adverse action subject to challenge under the non-discrimination provisions. Anti-retaliation protection covers any employer action that "might well deter a reasonable employee from complaining about discrimination." Id. at 67. Sometimes an employer takes a materially adverse action against an employee who engaged in protected activity by harming a third party who is closely related to or associated with the complaining employee. EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004, II (B)(4)(a) (Aug.25, 2016) (hereinafter Retaliation Guidance). Where there is an actionable third-party retaliation, both the employee who engaged in the protected activity and the third party who is subjected to the materially adverse action may state a claim. Id. at II(B)(4)(b).

In the instant matter, Complainant asserts that Agency officials initiated an Agency 15-6 investigation against her husband which was found to be unsubstantiated.

Complainant asserted that her husband informed Agency officials that the investigation against him was racially motivated, and that this matter was notated in her husband's investigation. Complainant asserts that after her husband's investigation closed, he was informed by his attorney that Agency officials were now "coming after" his wife. Complainant asserts that she has been subjected to an investigation, not permitted to submit evidence and did not receive the findings until after she filed a complaint.<sup>2</sup> Complainant further asserts that the Agency placed a document in her file which will remain there for 15 years.<sup>3</sup> Based on these specific circumstances, we find that Complainant has set forth an actionable claim of third-party retaliation with respect to her civilian career.

We further find that Complainant is also alleging that she was specifically targeted for the investigation based on her other protected classes: race and color. Complainant states that it is common knowledge that her husband and she are married and are both African-American. Complainant states that the investigation not only occurred but was premeditated. Thus, we find that Complainant is alleging that similar charges under similar circumstances would not have been lodged against employees of a different race and color. Based on the foregoing, we find that Complainant has set forth an actionable claim based on race and color regarding her civilian career. See St. Romain v. Dep't of the Army, EEOC Appeal No. 0120102569 (Sept. 10, 2010) (reversing agency's dismissal for failure to state a claim in which complainant alleged that she was specifically targeted for and the Agency initiated a 15-6 investigation based on her sex).

We further find that the Agency improperly dismissed Complainant's complaint for untimely EEO Counselor contact. Complainant initiated EEO contact on December 6, 2022. She asserts that her EEO contact is not untimely because she did not receive the findings of the investigation or information that it was closed until after she initiated EEO contact in this matter. Specifically, she states that on March 17, 2023, an Agency official provided her with a document that set forth that two of the allegations from the investigation were substantiated. Complainant states that while the letter was created on June 17, 2022, she did not receive it until March 17, 2023, subsequent to her EEO contact. Thus, we find that Complainant timely initiated EEO contact regarding her harassment claim.

To the extent that Complainant is alleging dissatisfaction with the processing of her EEO complaint pertaining to EEO Counseling and mediation, the Agency has a duty to address Complainant's concerns. EEOC MD-110, Ch.5 IV.D. provides, in pertinent part, the following: "[t]he Agency official responsible for the quality of complaints processing must add a record of complainant's concerns and any actions the Agency took to resolve the concerns, to the complaint file maintained on the underlying complaint.

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<sup>2</sup> Complainant submits, on appeal, a copy of an email dated July 6, 2023 from an Agency official. Therein, the Agency official sets forth that "[t]he AR 15-6 investigation was based on [Complainant's actions] as a civilian employee..."

<sup>3</sup> It is unclear from the record what the document is that Complainant is alleging was placed in her file. This matter should be developed upon remand as part of the investigation.

If no action was taken, the file must contain an explanation of the Agency's reason(s) for not taking any action." Thus, we order the Agency to provide Complainant with a report of any actions it took to resolve her concerns regarding the processing of her complaint, or an explanation of its reasons for not taking any action.

Accordingly, we AFFIRM the Agency's dismissal regarding Complainant's claims that the Agency subjected her to harassment impacting her *military* career. However, we REVERSE the Agency's dismissal of the remainder of the complaint, which we define herein as a harassment claim impacting her *civilian* career, and we REMAND these matters for further processing in accordance with the ORDER below.

### ORDER

1. The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to 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 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 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 submit to the Commission in digital format: 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.
2. Within thirty (30) calendar days from the date this decision is issued, the Agency official responsible for the quality of the complaint processing must add a record of Complainant's concerns and any actions the Agency took to resolve the concerns to the complaint file maintained on the underlying complaint. The Agency shall also provide Complainant with a report of any actions taken by the Agency to resolve the concerns, or an explanation for not taking any action. The Agency shall submit a copy of this report to the Commission as referenced below.

### 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:

  
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Carlton M. Hadden, Director  
Office of Federal Operations

October 16, 2023  
Date