



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

[REDACTED]
Reita M.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Appeal No. 2019001791

Agency No. 2018-27888-FAA-02

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated November 14, 2018, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Historian at the Agency's Federal Aviation Administration Headquarters in Washington, D.C.

On April 20, 2018, Complainant contacted the EEO Counselor. On September 24, 2018, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of race (Caucasian), color (white) and age (59) when she was subjected to ongoing pattern of harassment based on actions of her supervisor and the supervisor's deputy. In support of her claim, Complainant included a 38-page typed document including events from August 17, 2016, when someone else was promoted to the K-band, to September 18-20, 2018, when she attended crisis response working group meetings where very little of substance happened.

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.

She argued that she was denied training, renewal of her research databases, changes in her job duties, promotions, and assignments. Complainant then included a list of dates from June 2015 to September 18-20, 2018. In addition, she noted that in March 2018, management called an all-hands meeting, but she was not invited. She noted additional days where management did not provide her with information regarding her assignment, her detail, or her termination. At the end of March 2018, she met with the Deputy Supervisor regarding her performance and new performance standards and workloads. Complainant continued to list events through September 2018.

The Agency took Complainant's submission and reduced the 38-pages of entries and events into two separate claims of discrimination and identified them as follows:

1. She alleged that she was subjected to disparate treatment when:
 - a. On October 14, 2016, Complainant was denied a promotion from Agency Historian, FG-0170-J to the FG-0170-K band level.
 - b. On September 23, 2016, Complainant's job duties were changed due to an Office of General Counsel (AOC) reorganization.
 - c. In 2016, her training requests and research database renewals were denied.
 - d. In 2016, Complainant was denied cash awards.
 - e. On November 27, 2016, Complainant was detailed to the Office of Finance and Management's Regions and Property Management (ARO) from the Office of General Counsel (AOC).
 - f. On February 25, 2018, she was reassigned from the Office of Finance and Management's Regions and Property Management (ARO) back to the Office of General Counsel (AOC).
2. She alleged that she was subjected to harassment and in support of her claim, the following events occurred:
 - a. In June 2015, the Supervisor did not open emails Complainant sent to her.
 - b. On August 17, 2016, the Supervisor did not open an email she sent about a promotion.
 - c. On September 23, 2016, Complainant was told that she would work 20% of her time for the Supervisor and Deputy Supervisor doing administrative tasks.
 - d. On October 14, 2016, Deputy Supervisor denied her request for promotion.
 - e. On November 26, 2016, Complainant was detailed to ARO.
 - f. On February 25, 2018, her detail to ARO ended and she was assigned to AGC-10.
 - g. On March 27, 2018, Complainant received her Performance Management Plan (PMP)/performance standards.
 - h. On April 5, 2018, Complainant was given an assignment to prepare the Emergency Plan/Continuity of Operation Plan (COOP) plan.

The Agency dismissed claim (1), pursuant to 29 C.F.R. §1614.107(a)(2), for untimely EEO Counselor contact. The Agency noted that Complainant contacted the EEO Counselor on April 20, 2018. However, the events alleged in claim (1) occurred most recently in December 2017, when she was informed of the move effective February 25, 2018. As such, the Agency found that Complainant's contact with respect to claim (1) was beyond the 45-day time limit.

The Agency then dismissed claim (2), pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The Agency held that the events alleged in claim (2) were sporadic, isolated incidents that were not sufficiently severe or pervasive to rise to the level of stating a claim of harassment. As such, the Agency dismissed the matter.

This appeal followed. On appeal, Complainant argued that the Agency must have been confused or failed to read her narrative attached to her formal complaint. She indicated that she alleged timely events and that she had been subjected to a hostile work environment.

ANALYSIS AND FINDINGS

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 he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age, disabling condition, genetic information, or reprisal. 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). If Complainant cannot establish that she is aggrieved, the Agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

In her complaint, Complainant alleged a series of events which allegedly occurred from August 17, 2016 through September 20, 2018. Specifically, Complainant alleged that she was subjected to ongoing harassment which created a hostile work environment. Instead of treating all the alleged incidents as evidence proffered by Complainant in support of her hostile work environment claim, the Agency considered some of the incidents individually as a claim of disparate treatment and others as part of the claim of harassment. Thus, we find that the Agency acted improperly by treating matters raised in Complainant's complaint in a piecemeal manner. See Meaney v. Dep't of the Treasury, EEOC Request No. 05940169 (Nov. 3, 1994) (an agency should not ignore the "pattern aspect" of a complainant's claims and define the issues in a piecemeal manner where an analogous theme unites the matter complained of). We also note that the Agency only looked at some of the events out of 38 pages of events offered by Complainant in support of her claim of harassment. Consequently, when all the incidents alleged by Complainant are viewed in the context of Complainant's hostile work environment complaint, together they state a viable claim and the Agency's dismissal for failure to state a claim was improper.

Therefore, we turn to the Agency's dismissal pursuant to 29 C.F.R. §1614.107(a)(2). EEOC Regulation 29 C.F.R. §1614.107(a)(2) states that the Agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §1614.105, §1614.106 and §1614.204(c), unless the Agency extends the time limits in accordance with §1614.604(c). EEOC Regulation 29 C.F.R. §1614.105(a)(1) provides that an aggrieved person must initiate contact with an 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. However, the Supreme Court of the United States held that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002). The Court further held, however, that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. The Court defined such "discrete discriminatory acts" to include acts such as termination, failure to promote, denial of transfer, or refusal to hire, acts that constitute separate actionable unlawful employment practices. Id. Finally, the Court held that such untimely discrete acts may be used as background evidence in support of a timely claim. Id.

Upon review, we find that Complainant, as part of her hostile work environment claim, has alleged discrete acts that occurred outside of the 45-day time limit (those the Agency characterized as claim 1). However, while these events are untimely as individual claims of discrimination, and cannot be remedied as such, they should be properly considered as evidence in support of Complainant's timely claim of ongoing discriminatory harassment.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the matter for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claim (ongoing harassment/hostile work environment) 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 (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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).

All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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)

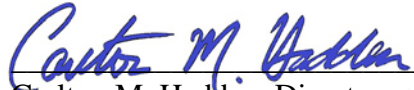
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

June 4, 2019

Date