



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

[REDACTED]  
Branda M.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2019001869

Agency No. 2018-28013-FAA-01

**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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Program Support Specialist, I-band, at the Agency's National Headquarters located in Washington, D.C.

On July 27, 2018, Complainant initiated EEO contact alleging that the Agency subjected her to discrimination based on sex (female) and reprisal for prior protected EEO activity (2011 EEO complaint) when:

1. On June 13, 2018, management diminished Complainant's duties, including providing her a list of duties that were not related to her skill set (budget work).
2. About May 2018, management denied Complainant's request to "shadow" an employee who planned to retire in March 2019.

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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.

3. On multiple dates, Complainant's supervisor (S1) failed to forward Complainant's request for promotion to the Director (S2) but stated that Complainant's request was not approved.
4. On February 2016, S1 caused S2 to withdraw his verbal offer to promote Complainant to a J-Band position.
5. Approximately August 30, 2012, management reassigned Complainant involuntarily to an Asset Inventory position.
6. Approximately September 25, 2011, management reassigned Complainant involuntarily from a Budget Management and Program Analyst position to a Security position.

On September 21, 2018, Complainant filed a formal EEO complaint reiterating the same.

The Agency issued a final decision dated November 14, 2018, dismissing Complainant's complaint. Specifically, the Agency dismissed allegations 1, 3, and 4 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim, and allegations 2 through 6 pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO counselor contact. The Agency also determined that the allegations together failed to state a claim of harassment.

The instant appeal from Complainant followed.

### ANALYSIS AND FINDINGS

#### Untimely EEO Contact

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

In her brief submitted on appeal, Complainant argues that her allegations, when viewed together, state a claim of an ongoing hostile work environment. She asserts that her initial EEO counselor contact on July 27, 2018, was within 45 days of allegation (1) concerning the June 13, 2018 decision concerning the diminishing of her duties, which was part of her claim of ongoing discriminatory harassment.

The Supreme Court has 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 National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (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.

Here, we are not persuaded by Complainant's arguments on appeal that allegations (3) through (6) do not involve "discrete" acts which are time barred for untimely EEO counselor contact. The record discloses that the adverse actions alleged in (3) through (6) equate to denial of promotion and involuntary reassignment, which are discrete events. The most recent of these allegations occurred in February 2016, but Complainant did not initiate contact with an EEO counselor until July 27, 2018, well beyond the forty-five (45) day limitation period. Additionally, Complainant has not presented adequate information to tie all six allegations together into the same unlawful pattern of harassment. We note, for example, that allegations (4) through (6) occurred many years before Complainant's initial EEO contact, and there appears to be more than a two-gap between these incidents and the other allegations. On appeal, Complainant has presented no persuasive arguments or evidence warranting an extension of the time limit for initiating EEO counselor contact.

The remaining allegations are addressed under Failure to State a Claim below.

#### Failure to State a Claim

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any 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).

A hostile work environment claim is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). As noted by the Supreme Court in Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998): "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'". Here, we conclude that incidents alleged in (1) and (2) fail to state a viable hostile work environment claim. Moreover, Complainant has not sufficiently alleged that she was aggrieved by the incident in allegation (2) when it is considered individually.

However, while not part of a viable hostile work environment claim, we find that allegation (1), which was timely raised, does state a viable claim of discrimination standing alone. In allegation (1), Complainant has alleged that management removed and diminished the complexity of her duties having an adverse effect on her employment. During EEO counseling, Complainant alleged that she was not assigned any work until August 2018, when she was tasked with verifying employees' government-issued equipment, which she characterizes as a non-substantive task.

This allegation is sufficient to render Complainant an aggrieved employee who has allegedly suffered a present harm or loss with respect to a term, condition or privilege of employment for which there is a remedy.

### CONCLUSION

Accordingly, we AFFIRM the Agency's final decision dismissing Complainant's allegations (2) through (6). We REVERSE the dismissal of allegation (1) and REMAND it to the Agency for further processing pursuant to the following Order.

### ORDER (E1016)

The Agency is ordered to process the remanded claim (allegation (1) concerning Complainant's diminished duties) in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claim **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.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 (T0610)

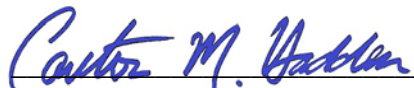
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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

April 23, 2019  
Date