



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

[REDACTED]
Natalie F.,¹
Complainant,

v.

Dr. Mark T. Esper,
Secretary,
Department of the Army,
Agency.

Appeal No. 2019002021

Agency No. ARMEADE08NOVR2018

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated January 11, 2019, 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

On December 12, 2018, Complainant filed a formal complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity when her Supervisor (S1) interfered with the EEO process, denied Complainant official time to respond to EEO Investigator inquiries, and treated her disparately. Specifically, Complainant alleged:

- a. on October 24, 2018, S1 denied Complainant's request to use four hours of official time on October 25, 2018 to respond to a 17-page investigative inquiry for Agency Number ARMEADE17DEC04591,
- b. S1 continued to deny Complainant official time although Complainant explained that she was entitled to official duty time and that she received the 17-page investigative inquiry on October 23, 2018 and her response was due October 30, 2018,
- c. on October 25, 2018, Complainant received a copy of the written denial of

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.

- official time, S1 stated that eight hours of official time had already been granted and instructed Complainant to use annual leave instead of additional official time, and Complainant had to request an extension with the Investigator, who granted an extension until November 1, 2018,
- d. on October 26, 2018, Complainant followed S1's instructions and requested four hours of annual leave,
 - e. on November 29, 2018, Complainant received investigative declarations from five supervisors totaling 83 pages and it was obvious that the managers were not required to use annual leave instead of official time and S1 denied Complainant official time to respond to the supervisory declarations by December 5, 2018, and
 - f. on November 30, 2018, an EEO Counselor informed Complainant that the Agency did not want to mediate her complaint and issued the formal complaint form.

On January 22, 2019², the Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(8), for alleging dissatisfaction with the processing of a previously-filed EEO complaint. The Agency identified the specific incidents as "spin-off" claims that should be placed in the administrative file of the underlying complaints (Agency Numbers ARMEADE17DEC04591 and ARMEADE18AUG03332).

The instant appeal from Complainant followed. On appeal, Complainant stated that she attempted to add the claims herein to the underlying complaint of ARMEADE17DEC04591, but the EEO Counselor would not allow her to do so because ARMEADE17DEC04591 was remanded to the Agency for investigation.³ Complainant stated that the newly dismissed claims are not related to ARMEADE18AUG03332.

ANALYSIS AND FINDINGS

A fair reading of Complainant's claim (incidents (a) to (e)) is, between October 24, 2018 and December 5, 2018, the Agency denied her a reasonable amount of official time to respond to investigative inquiries for Agency Number ARMEADE17DEC04591. We will refer to that as claim 1. For incident (f), Complainant alleged that the Agency did not agree to participate in mediation of the instant matter and informed Complainant of the right to file a formal complaint in the EEO process. We now identify that matter as claim 2.

Our regulations provide that employees shall have a reasonable amount of official time, if otherwise on duty, to prepare their complaints and respond to requests for information.

² The Agency originally issued the final decision on January 11, 2019 but re-issued it due to an error in Agency number listed.

³ On August 15, 2018, in Natalie F. v. Dep't of the Army, EEOC Appeal No. 0120181202, this Commission reversed and remanded ARMEADE17DEC04591 to the Agency for further processing.

See 29 C.F.R. § 1614.605(b). The Commission has the authority to remedy a violation of official time claims without a finding of discrimination. See Holefield v. United States Postal Service, EEOC Appeal No. 01A23840 (Jan. 2, 2003); Edwards v. United States Postal Service, EEOC Request No. 05960179 (December 23, 1996)(citation omitted). In such cases, the Commission's focus is not the Agency's motivation, but whether Complainant was denied a reasonable amount of official time. Therefore, under 29 C.F.R. § 1614.605(b), claim (1) states a justiciable claim.

We acknowledge that Claim (1) concerns a previously-filed complaint. However, the essence of Claim 1 is whether Complainant was denied a reasonable amount of official time. See Genaro D. v. United States Postal Service, EEOC Appeal No. 0120152495 (December 2, 2015).

It is well established that when an Agency denies a request for official time, either in whole or in part, it must include a written statement, deciding on the merits whether Complainant was improperly denied official time in violation of § 1614.605(b). See Avillan v. United States Postal Service, EEOC Appeal No. 0120101801 (August 12, 2010); Complainant v. United States Postal Service, EEOC Appeal No. 0120141627 (October 9, 2014), reconsideration denied 0520150070 (April 23, 2015); Unganisha v. Dep't of the Treasury, EEOC Appeal No. 01A21628 (May 7, 2002). A determination must now be made whether Complainant was improperly denied a reasonable amount of official time.

Conversely, we find that Claim 2 was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(8). In (2), Complainant alleged dissatisfaction with EEO processing regarding the Agency's decision to not resolve the matter informally and instead inform Complainant of the right to file a formal complaint.

Based on the above, we MODIFY the final agency decision. As to claim (1), we reverse the final agency decision and remand the matter to the agency for further processing in accordance with this decision and the Order below. Regarding claim (2), we affirm the final agency decision.

ORDER

The Agency, within forty-five (45) calendar days of the date this decision is issued, shall issue a written determination on whether or not Complainant was denied a reasonable request for official time as alleged to work on EEO-related matters and provide appeal rights to the Commission. If Complainant was improperly denied official time, the Agency shall also determine if she took personal leave instead. If so, the Agency shall reimburse Complainant for any leave that she incurred. A copy of the Agency's determination and reimbursement action, if necessary, shall be provided to the Compliance Officer as set forth below.

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 (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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

June 28, 2019

Date