



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

[REDACTED]
Krysten M.,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2019002133

Agency No. 200J05782019100918

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 7, 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., and 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 Healthcare Tech, GS-06, at the Agency's Veterans Health Administration, Edward Hines Jr. VA Hospital facility in Hines, Illinois.

On January 9, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the bases of disability ("mental") and reprisal for protected EEO activity under Section 501 of the Rehabilitation Act of 1973, when:

1. since 2017, the Agency failed, or refused, to act on Complainant's request for a reasonable accommodation and denied her request for Family Medical Leave Act (FMLA) leave for herself; and

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. since 2017 to December 18, 2018, the Agency has subjected her to a hostile work environment that caused her disability.

Complainant noted the dates of occurrence of the most recent discrimination were specified in her complaint as the "Reports of Contacts" which she turned in from October 2017 to December 18, 2018. In support of her hostile work environment claim, she gave the following examples:

- 1) The Agency ignored or failed to act on Complainant's July 10, 2017 reasonable accommodation request to Human Resource and her July 13, 2017 request for a reasonable accommodation of a telework position;
- 2) On an unspecified date, her former Supervisor pulled her out of a training class to embarrass her and falsely accused her of causing a veteran to complain about the Agency;
- 3) Her supervisor threatened Complainant, after pulling her out of the training class, by telling Complainant, "it's going to get worse before it gets better;"
- 4) On May 8, 2017, her supervisor read an instant message that Complainant sent to a coworker;
- 5) During July 2017, in response to her telework request as an accommodation, Complainant was told that the Agency did not have any telework for her;
- 6) On August 8, 2017, Complainant's supervisor sent Complainant an email about Complainant being out of her assigned work area; (Complainant's documentation 3A);
- 6) Around August 30, 2017, her request for 38 hours of advance leave, 36 hours of advanced sick leave and 240 hours of LWOP was denied;
- 7) On an unspecified date, management threatened Complainant with AWOL;
- 8) On September 27, 2017, Complainant's leave request was sent to Human Resources for action. On that same date, September 27, 2017, the Chief denied Complainant's request for Advance Annual Leave request (Complainant's Documentation 2E);
- 9) On October 12, 2017, Complainant again complained that she had not received an approval or denial of her leave requests;
- 9) On October 31, 2017, Complainant's supervisor told Complainant, "I need to do a Weingarten on you. Please see above for date / time / location. You may bring a Union Representative" (Complainant's Documentation F5);
- 10) Around February 1, 2018, Complainant was asked to sign a self-certification and incorrectly told Complainant (a Schedule A employee) that she had to undergo a physical before she could start a new reassignment;
- 11) On February 2, 2018, Complainant was told someone would be contacting her for a physical for her new position;
- 12) In July 2018, Complainant was told that she had to submit medical documentation to support her FMLA request and the medical documentation needed to go to her acting supervisor;

- 13) In October 15, 2018, Complainant was subjected to harassment and a hostile work environment; and
- 14) As of December 18, 2018, Complainant had not received a response to her FMLA requests.

The Agency framed the claims as alleging harassment and hostile work environment on October 15, 2018 and denial of FMLA on December 18, 2018.

Complainant submitted supplemental documentation that showed her reports of contact that detail the basis for her complaint. The record shows that Complainant first requested a reasonable accommodation around July 13, 2017. She requested to be allowed to telework. She followed up repeatedly asking about the status of her request. Complainant was reassigned to a new position, in order for her to move away from her previous supervisor, whom Complainant believed had subjected her to a hostile work environment.

After Complainant started her new assignment, while Complainant was in training for her new position, Complainant received a phone call from her new supervisor, in front of the class. Complainant's new supervisor told her that Complainant's former supervisor wanted Complainant to immediately check her email. The training class interruption pertained to an inquiry that the Agency received from a United States Senator, whose secretary was asking Complainant to give her (the Senator's secretary) a call. Complainant averred that, upon hearing that, the class gasped. Complainant was embarrassed. The Senator's secretary had a question about a patient complaint. After Complainant was pulled out of the training class, her former supervisor told Complainant, "It's going to get worse, before it gets better."

In June of 2018, Complainant submitted a FMLA request on her own behalf. The Agency granted FMLA for her son. In July of 2018, Complainant was told that she would have to submit medical records to the acting supervisor. Complainant explained that she was not comfortable submitting her medical information. Complainant submitted another FMLA request for herself in August of 2018 and turned in her paperwork. Complainant claims no action was taken. The paperwork "was sitting in the HR office." As of December of 2018, Complainant had not received an approval or denial of her FMLA request.

Complainant averred that, while she attended EEO training in October 15, 2018, she learned that she had a right to file an EEO complaint against her supervisor. Prior to the training, Complainant averred that she was unaware that she could file an EEO complaint. According to the Counselor's report, Complainant told the EEO Counselor that she was fearful of reprisal if she filed an EEO complaint.

Agency Decision

On February 7, 2019, the Agency issued a final decision dismissing the complaint.

The Agency characterized Complainant's claim as a denial of Family Medical Leave Act (FMLA), which had not been approved. The Agency stated that claim 1 failed to state a claim as this matter is not within the purview of the EEOC. In addition, the Agency dismissed her hostile work environment harassment claim, because it construed the claim as "consisting of one comment and other job-related management conduct." Regarding her claim of a hostile work environment, the Agency reasoned that the one event pertained to her former supervisor, who had Complainant removed from a training class and accused Complainant of being the reason that a "customer / veteran" had complained about the facility and that the Agency ignored her FMLA request. The Agency found that Complainant was not aggrieved and that the alleged events were not severe or pervasive enough to state a claim.

This appeal followed. On appeal, Complainant submitted detailed documentation regarding her allegations, which were delineated in the reports of contact, that she referenced in her complaint. In addition to the claims noted above, Complainant appears to be raising new claims that pertain to incidents that occurred after the period at issue.

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, disability, genetic information, or retaliation. See 29 C.F.R. § 1614.103(a) and § 1614.106(a).

We understand the Agency's characterization of the individual incidents cited by Complainant as alleging dissatisfaction with the inaction on her FMLA request, which is usually subject to dismissal as an independent claim.

Here, however, Complainant alleges, among other things, that the Agency discriminated against her on the basis of her disability, when she was denied the accommodation of telecommuting, denied FMLA leave, threatened, and was subjected to ongoing harassment, based on her disability after she requested a reasonable accommodation. Those claims were specifically referenced in her complaint that mentioned her reports of contact from 2017.

Therefore, a fair reading of the complaint shows that Complainant is alleging that she has been subjected to an ongoing series of related incidents by her former supervisor and the Chief in Human Resources, designed to interfere with her pursuit of her rights to contest the alleged denial of a reasonable accommodation, denial of leave, and the ongoing hostile work environment. In so alleging, we find that she has stated a viable claim of being denied a timely reasonable accommodation and the benefits and privileges provided to other employees in violation of the Rehabilitation Act and, potentially, the anti-retaliation prohibition of Title VII, due to her former's supervisor's remark, "things are going to get worse before they get better." Her complaint states a claim.

Further, the Commission has found that any action by an Agency manager that has the effect of intimidating or chilling the exercise of those rights under the EEO statutes, constitutes a violation of the statutory protection against retaliation. See Binseel v. Dep't of the Army, EEOC Request No. 05970584 (October 8, 1998); Yubuki v. Dep't of the Army, EEOC Request No. 05920778 (June 4, 1993); Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

To the extent that Complainant wishes to bring new claims of discrimination or reprisal regarding incidents that occurred after December 18, 2018, she may contact an EEO Counselor to pursue those claims.

After a review of the record, we find that her 2017 to 2018 claims were improperly dismissed pursuant to 29 C.F.R. § 1614.107(a) (1) for failure to state a claim.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint. We REMAND the complaint 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 (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).

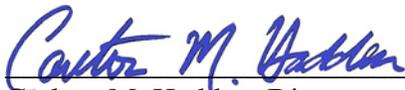
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

August 22, 2019
Date