



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

████████████████████
Michael V.,¹
Complainant,

v.

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

Appeal No. 2019002562

Agency No. 200H05622018106312

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 his 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 Physician, GS-15, at the Agency's Erie VA Medical Center (VAMC) facility in Erie, Pennsylvania.

On December 21, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Black) and national origin (USA), when from August 1, 2018 until September 29, 2018, he was placed on a 60-day monitoring program, which subjected him to increased scrutiny and continuous monitoring, and was treated differently from his peers, resulting in his decision to transfer to another Agency facility. Complainant alleged that he was placed under monitoring for purportedly not performing to certain new performance measures. However, he stated he was the only physician required to meet the new performance measures.

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.

The Agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(5), for raising a preliminary action, and pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. The Agency reasoned that the 60-day monitoring period was neither an adverse disciplinary action nor an event of present employment harm. As such, it argues, it should be viewed as a preliminary action subject to dismissal. The Agency further decided that, to the extent Complainant was raising a harassment/hostile work environment claim, the monitoring alone was not sufficiently severe or pervasive to state a viable claim.

The instant appeal followed. On appeal, Complainant asserts that the Agency improperly framed the issue and the dismissal was improper.

In response, the Agency asserts that Complainant's appeal is untimely, asserting that its final decision was dispatched to Complainant on February 7, 2019, and UPS tracking results show Complainant received it on February 11, 2019. Therefore, in order to be considered timely, Complainant needed to file his appeal no later than March 13, 2019. The Agency asserts that Complainant filed his complaint on April 11, 2019, which is 29 days late, and has offered no explanation or justification for an extension of time. The Agency asks that we dismiss the appeal.

Complainant agrees that the filing deadline was March 13, 2019. However, he asserts that the Notice of Appeal was postmarked on March 12, 2019 and was, therefore timely submitted.

ANALYSIS AND FINDINGS

Timely Appeal

EEOC Regulation 29 C.F.R. §1614.402 provides that appeals to the Commission must be filed within 30 calendar days after Complainant receive notice of the Agency's decision. The regulation further provides that a document shall be deemed timely if it is received or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark, if it is received by mail within five days of the expiration of the applicable filing period. 29 C.F.R. § 1614.604(b). We note that the Agency's final decision was issued on February 7, 2019 and UPS tracking results show Complainant received it on February 11, 2019. Complainant's appeal was postmarked March 12, 2019. Therefore, we find that Complainant's appeal was filed well within 30 calendar days.

Review of Dismissal Decision

EEOC Regulation 29 C.F.R. § 1614.107(a)(5) provides for the dismissal of a complaint that "alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory." The Commission has stated, however, that a complaint may not be dismissed under this section when the complainant alleges, as in the present case, that the preliminary step was taken for the purpose of harassing the individual for a prohibited reason. In

such a case, the agency's action has already affected the employee. Rodriguez-Soto v. Army, EEOC Request No. 05960646 (October 8, 1998).

A claim of harassment 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. Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Here, a fair reading of the complaint indicates that Complainant has alleged that, because of his race, he was placed on new performance measures. He claims that his colleagues, who were not black, were not required to work under the same measures. As a result of his purported failure to meet these measures, he asserts he was placed on the 60-day monitoring period, which resulted in increased scrutiny and monitoring of his work. All of this, Complainant alleges, was designed to harass him because of his race.

Based on this characterization of the complaint, we disagree with the Agency and conclude that Complainant's allegations are sufficient to state a viable claim of discriminatory racial harassment. By alleging a pattern of harassment, Complainant has stated a cognizable claim under the EEOC regulations. See Cervantes v. USPS, EEOC Request No. 05930303 (November 12, 1993).

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED. The complaint is hereby REMANDED 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)

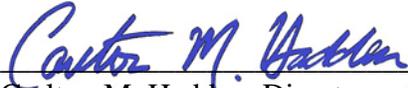
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 16, 2019

Date