



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

Crystal Robinson,
Complainant,

v.

John M. McHugh,
Secretary,
Department of the Army,
Agency.

Appeal No. 0120111526

Agency No. ARAPG10SEP04263

DECISION

Complainant filed a timely appeal with this Commission from the Agency's decision (FAD) dated December 9, 2010, 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 Administrative Technician at the Agency's Aberdeen Proving Ground facility in Aberdeen, Maryland. On November 3, 2010, Complainant filed a formal complaint¹ alleging that the Agency subjected her to discrimination on the basis of sex (female) and reprisal under Title VII when:

1. Between November 2009 and September 17, 2010 Complainant has been subjected to sexual harassment from her supervisor (S: male); and
2. On November 13, 2010, S filed a civil suit against Complainant.

The Agency dismissed claim 1 for untimely EEO Counselor contact and claim 2 for failure to state a claim. The FAD found that Complainant first contacted an EEO Counselor on September 22, 2010 but at that time she indicated "she did not wish to initiate an EEO complaint." The Agency further noted that Complainant did not specify a basis for the discrimination at that time. The Agency notes that Complainant did not file a Formal Complaint until November 5, 2010 and from this, the Agency concluded that Complainant was untimely.

¹ The record contains a second Formal Complaint from Complainant dated December 2, 2010 containing the same allegations as the earlier November complaint.

CONTENTIONS ON APPEAL

On appeal, Complainant denies that she was untimely. Complainant alleges that the Agency EEO Specialist erroneously told her that she could not file a complaint and further provided inaccurate information regarding the time frames for filing. Complainant argues that her EEO Counselor contact was timely because in the "summer of 2010" she contacted two Agency officials "logically connected to the EEO process" when she spoke with a senior manager and an "EEO Leader" about harassment that occurred in June 2010. Complainant further argues that she subsequently met with an EEO Specialist (ES) on September 22, 2010 regarding an incident that occurred on September 17, 2010 and that ES incorrectly told her that she could not file a complaint because she had already contacted law enforcement about the harassment. Complainant maintains she was told by ES "I do not think we can handle your case because it is already in criminal hands." In addition, Complainant argues, she was erroneously told by ES she had forty five days to file an EEO complaint but she was not told that the forty-five-day period began running from the date of the most recent incident of discrimination, as opposed to the date of her meeting with ES. Complainant further argues that claims by Agency officials that Complainant did not specify a basis are groundless given the fact that Complainant was describing incidents of sexual harassment. Complainant next argues that the allegations are so serious that, assuming arguendo that Complainant was untimely, such time limits should be waived in this case. Finally, Complainant argues that prior caselaw supports her second claim that alleges that S's defamation suit against her in State Court constitutes an action reasonably likely to deter Complainant or others from engaging in the EEO process and hence states a claim of reprisal.

The Agency argues that, while Complainant met with ES on September 22, 2010, this meeting was an "information inquiry" and Complainant "exhibited no intent to pursue a complaint of discrimination." Such a meeting, therefore, does not qualify as "Counselor contact" for purposes of the forty-five day rule, the Agency argues. The Agency further denies that ES gave Complainant misleading information. Finally, the Agency argues that claim 2 was correctly dismissed for failure to state a claim because S's action in filing a claim against Complainant in State Court does not constitute an adverse action by the Agency, nor was Complainant harmed by S's action. The Agency requests that we affirm the FAD.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity 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. The Commission has adopted a "reasonable suspicion" standard (as opposed to a "supportive facts" standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep't of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not

triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

EEOC Regulations provide that the agency or the Commission shall extend the time limits when the individual shows that she was not notified of the time limits and was not otherwise aware of them, that she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence she was prevented by circumstances beyond her control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

The record establishes that Complainant met with ES on September 22, 2010, just five days after the alleged sexual assault by S. ES has submitted an unsworn and undated statement wherein she maintains that Complainant "was unsure as to whether or not she wanted to pursue a discrimination complaint stating she was interested in pursuing criminal actions" against S. ES further stated:

I advised [Complainant] that she had 45 calendar days from the date of the incident (17SEP10) to return to the EEO office to pursue a discrimination complaint. I counted the days on the calendar in my office. [Complainant] wrote the date on one of the papers she had with her and left my office. (Parentheses in original)

ES's claims are directly contradicted by Complainant, who submitted a sworn affidavit dated November 10, 2010 and who avers that after she told ES that she had reported the September incident to the Agency's Criminal Investigation Command, ES told her "I do not think we can take your case because it is in criminal hands." Complainant further avers that ES "told me there was no basis for an EEO complaint." Based on these statements, Complainant avers "I did not file an EEO Complaint" at the time. Complainant next avers that ES told her that "if I later decided to file an EEO complaint . . . I had 45 days after meeting with her to do so."

We thus have two statements that contradict each other. We note that where, as here, there is an issue of timeliness, "[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness." Guy, v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994) (quoting Williams v. Dep't of Def., EEOC Request No. 05920506 (Aug. 25, 1992)). In addition, in Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993), the Commission stated that "the agency has the burden of providing evidence and/or proof to support its final decisions." See also Gens v. Dep't of Def., EEOC Request No. 05910837 (Jan. 31, 1992). In the instant case we note that ES's statement is not a sworn statement, while Complainant's statement is, which lends Complainant's statement more credibility. We further note that it is clear from the record that Complainant did not intend to abandon her EEO complaint. Instead the record shows that Complainant promptly reported the September 17 assault to management officials and then went to court and obtained a court order against S. Complainant then contacted an EEO Counselor the next day, well within the forty five day period, and within six weeks she obtained the services of an attorney and shortly thereafter

she filed a Formal Complaint. All of these actions fall within the normal time frames for properly initiating an Informal and then Formal EEO complaint. We therefore find that the Agency has not met its burden of establishing that Complainant's EEO Counselor contact was untimely.

With regard to claim 2, we find that Complainant's allegation concerning S's filing of a defamation suit can be viewed as an additional incident in the same claim of harassment raised in claim 1 and hence the incident should not have been dismissed for failure to state a claim. When viewed in this light the issue of Complainant's September 17 Counselor contact becomes moot. The Supreme Court has held that a complaint 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). Thus the November 13, 2010 filing of a civil suit by S against Complainant constitutes "part of the same unlawful practice" as the other alleged acts of harassment, and one that falls within the filing period, making the entire complaint timely.

CONCLUSION

For the above reasons, the Commission REVERSES the FAD and REMANDS the claims to the Agency for further processing in accordance with the ORDER below.

ORDER (E0610)

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 becomes final. 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 becomes final, 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 (K0610)

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 submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 (M0610)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. 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 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 (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

JUL 28 2011

Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

Crystal Robinson
2100 Jacob's Well Ct
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Josh F. Bowers, Esq.
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Spurgeon A. Moore, Director
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JUL 28 2011

Date



Equal Opportunity Assistant