



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, DC 20507**

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Justin R.,<sup>1</sup>  
Complainant,

v.

Janet Dhillon,  
Chair,  
Equal Employment Opportunity Commission,<sup>2</sup>  
Agency.

Appeal No. 0120162687

Agency No. 2016-0011

**DECISION**

This decision responds to Complainant’s August 2, 2016 request for a hearing before an Equal Employment Opportunity Commission (EEOC) Administrative Judge (AJ), and August 16, 2016, Motion for Sanctions against the Agency regarding his equal employment opportunity (EEO) complaint, Agency No. 2016-0011, which alleges 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., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

**ISSUE PRESENTED**

The issue presented is whether the Agency properly processed Complainant’s entire complaint as a mixed-case complaint and therefore did not provide him notice of his right to request a hearing with an EEOC AJ.

**BACKGROUND**

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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.

<sup>2</sup> In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority. The Commission’s adjudicatory function is housed in an office that is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term “Commission” or “EEOC” is used when referring to the adjudicatory authority and the term “Agency” is used when referring to the respondent party to this action.

At the time of events giving rise to this complaint, Complainant worked as a GS-11 Paralegal Specialist at the Agency's Los Angeles, California District Office.

On February 3, 2016, Complainant filed an EEO complaint in which he alleged that the Agency discriminated against and harassed him on the bases of race (Caucasian), sex (male), disability, age (43), and in reprisal for prior protected EEO activity when:

1. On or about September 23, 2014, Federal Protective Services searched Complainant's backpack;
2. From May 2015 through October 2015, the Agency obstructed Complainant's return to work when it refused to accept a second opinion that Complainant could return to the workplace;
3. On July 31, 2014, the Regional Attorney for the Los Angeles District Office proposed Complainant's removal from his position;
4. In August 2015, the Agency claimed it needed information about "other conduct-related issues;"
5. In September 2015, the Agency used the memorandum of a doctor who never personally examined Complainant to justify his removal from employment with the Agency; and
6. On October 15, 2015, the Assistant General Counsel issued a Decision on Notice of Proposed Removal and removed Complainant from federal service.

#### *MSPB Appeal of Removal*

The Agency investigated Complainant's complaint from May 4, 2016, until July 25, 2016. On August 11, 2016, Complainant appealed the Agency's decision to remove him to the Merit Systems Protection Board (MSPB) in MSPB Numbers SF-0752-16-0689-I-1 and SF-0752-16-0689-I-2.<sup>3</sup> On September 12, 2016, Complainant filed a joint request for dismissal of his MSPB appeals without prejudice, with an automatic refiling of July 24, 2017, to accommodate mediation. Accordingly, through two decisions, the MSPB dismissed Complainant's removal claim without prejudice, subject to automatic refiling.

#### *Complainant's Request for a Hearing before an EEOC AJ*

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<sup>3</sup> It is unclear from the record what rights were given by the Agency to Complainant after it gave him a copy of the investigative report.

On August 2, 2016, Complainant submitted a request for a hearing before an EEOC AJ with the Commission's Office of Federal Operations (OFO). In that request, Complainant stated that, although his EEO complaint contained mixed-case allegations, it also contained non-mixed-case allegations. Consequently, Complainant requested a hearing before an EEOC AJ on all but the claims "related to his removal."

#### *Complainant's Motion for Sanctions*

On August 16, 2016, Complainant submitted a Motion for Sanctions to OFO in which he requested sanctions for the Agency's failure to develop an "impartial and appropriate factual record" in accordance with 29 C.F.R. § 1614.108(b). Complainant maintained that the Agency's EEO investigator failed to obtain basic information about his complaint, interview key witnesses, and ask follow-up questions when witnesses provided inadequate answers. Complainant asks that the Commission sanction the Agency by ordering the Agency to pay all his attorney's fees and costs associated with written discovery and depositions, as well as attorney's fees and costs associated with filing his Motion for Sanctions.

The Agency has not responded to Complainant's request for a hearing before an EEOC AJ or Motion for Sanctions.

### ANALYSIS AND FINDINGS

After reviewing the record, we determine that Complainant appealed his removal to the MSPB, which remains an active mixed case matter before the MSPB. In so finding, we determine that Complainant's proposed removal essentially merges with his effectuated removal, and the claim that the Agency justified his removal by using a memorandum of a doctor who never personally examined Complainant is essentially evidence regarding his removal rather than an independent claim. Further, Complainant also challenged his suspension in claim 2. His suspension ultimately lasted more than 14 days, which makes it a mixed-case action appealable to the MSPB pursuant to 5 U.S.C. §§ 7512(2) and 7513(d). Therefore, we find that claims 2, 3, 5, and 6 are mixed-case claims.

We note that the MSPB does not have jurisdiction over Complainant's remaining harassment claims (claims 1 and 4) because, unlike a removal or suspension for more than 14 days, such matters are not appealable to the MSPB. See Geraldine B. v. Dep't of Veterans Affairs, EEOC Appeal No. 0120090181 (Oct. 13, 2015). However, we find that claims 1 and 4 fail to state a claim because they do not allege sufficient harm or loss to the conditions, privileges, or terms of Complainant's employment to render him aggrieved. Moreover, the alleged actions do not rise to the level of stating a claim of harassment. Even if true, they are not severe or pervasive enough themselves to rise to an actionable claim of creating a hostile work environment. Therefore, we dismiss claims 1 and 4 for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1).<sup>4</sup>

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<sup>4</sup> To the extent that Complainant alleges that claims 1 and 4 are related to his removal, he may raise these matters with the MSPB as background evidence regarding this removal.

Finally, to the extent that Complainant contends that the Agency conducted an inadequate EEO investigation, Complainant should raise this matter before the MSPB if he desires to pursue it. If MSPB does not address his dissatisfaction, then Complainant may raise it with the Commission should he file a petition for consideration by EEOC from the MSPB's decision. Consequently, we deny Complainant's Motion for Sanctions regarding the investigation.

### CONCLUSION

Accordingly, the Commission **DISMISSES** claims 1 and 4 for failure to state a claim. The Commission also finds that claims 2, 3, 5, and 6 are mixed-case claims properly within the purview of the MSPB.

### 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 (S0610)

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. 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:

/s/ Bernadette B. Wilson  
Bernadette B. Wilson  
Acting Executive Officer  
Executive Secretariat

November 27, 2019  
Date