



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

[REDACTED]
Cortez J.,¹
Complainant,

v.

James N. Mattis,
Secretary,
Department of Defense
(National Geospatial-Intelligence Agency),
Agency.

Appeal No. 0120180964

Agency No. NGA-W0017-2017

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated December 27, 2017, dismissing a formal 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., 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.

BACKGROUND

During the period at issue, Complainant worked as an Aeronautical Analyst at the Agency's Aeronautical Division in Arnold, Missouri.

On June 10, 2015, Complainant filed an EEO complaint ("Complaint 1"), identified as Agency No. NGAW-15-S07, claiming that, in February 2015, he was forced to transfer from Production Lead of the U.S. Branch to an entry-level position as Graphic Compiler. On October 12, 2016, Complainant and the Agency entered into a written agreement to settle this matter. The October 12, 2016 settlement agreement of Agency No. NGAW-15-207 provided, in pertinent part, that:

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.

(3) Complainant Consideration to Agency Stated:

Dismissal with Prejudice and Release: Complainant releases NGA, its officers, agents and employees from all EEO complaints, appeals, claims, causes of action and liability for all acts and omissions asserted in the above referenced complaint. He agrees not to file any *appeal, claim or action in any forum based on the matters raised in the above appeal and complaint*. Complainant agrees to waive [his] right to pursue administrative or judicial action in any forum concerning matters raised in this complaint under any and all applicable statutes and regulations, including but not limited to the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act, as amended, the Equal Pay Act, the Older Workers' Benefits Protection Act (OWBPA), or any other Federal or state statute or subject discrimination complaint and the parties' signatures on this agreement constitute full and complete settlement of this complaint. He agrees to waive his right to pursue administrative or judicial action against NGA in any forum concerning the matters raised in this complaint and that the complaint will not be made the subject of future litigation against NGA. (emphasis added)

On April 25, 2017, Complainant filed a second EEO complaint ("Complaint 2"), identified as Agency No. NGA-W0017-2017, which is the complaint at issue in the current appeal. Complainant alleged that he was subjected to harassment/a hostile work environment based on disability, age, and in reprisal for prior EEO activity when:

1. in December 2016, management blocked his request for an assignment external to the Aeronautical Division;
2. in October 2016, he was assigned an unreasonably low Defense Civilian Performance System (DCIPS) rating derived from tainted metrics;
3. in September 2016, he received an oral admonishment for sleeping, SBU usage, having his feet on the desk, and for having too many news programs on his NGA.net. In addition, management elevated the oral admonishment to a permanent record status by emailing the summary of the incidents and placing the information in his DCIPS rating;
4. in August 2016, the metrics used to rate performance were interpreted to his disadvantage by lowering his production numbers;
5. from March 2016 through August 2016, he was assigned to a FAA assignment despite his supervisors' admission that he had not succeed in the assignment in the past;

6. in 2016 and 2017, management moved his cubicle four times to include reassigning him to an inferior workstation with smaller monitors and programs that did not work on April 10, 2017;
7. on April 20, 2017, his production levels were declared unacceptable and he was threatened with an Opportunity for Improvement Plan (OIP), forced to end his participation in the Advantage Fitness Program, officially removed from working overtime and forced to change his work schedule to meet the production lead's work schedule;
8. on April 10, 2017, lead positions were assigned to two other team members. Complainant alleged management had created extra requirements for him to become a lead (Quality Control (QC)); and
9. on April 7, 2017, management induced new measures by adding a new unique requirement of keeping a daily diary of his work, actions, time spent, number of changes, type of assignments, airfields, and procedures worked. On April 20, 2017, the requirement was modified to include adding what he learned and what he accomplished as Quality Control (QC) and emailing the information to the production leader and supervisor.

On December 27, 2017, the Agency issued a final decision dismissing Complaint 2 as barred by Complainant's waiver in provision 3 of the October 12, 2016 settlement agreement.

The Agency also dismissed allegations 2 – 6 on the alternative grounds of untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2), noting these events occurred between March and October 2016, and could have been raised in Complaint 1.

The instant appeal followed. Complainant, on appeal, argued that the instant final decision “is arbitrary and unwarranted since I raised serious harassment and discrimination charges about NGA management and the latest dismissal is an erroneous technicality...again, the fact I previously filed an EEO complaint is the only factor in this complaint that is related to the 2016 settlement agreement for the 2014 and 2015 discrimination that I claimed.”

ANALYSIS AND FINDINGS

The clear language of provision 3 of the October 12, 2016 settlement agreement states that Complainant waived his right to pursue, or continue to pursue, any claims “raised in **this complaint** [Complaint 1] under any and all applicable statutes and regulations [emphasis added].”

As already noted, it is undisputed that Complaint 1, filed on June 10, 2015, concerned a claim that Complainant was involuntarily transferred in February 2015 from Production Lead of the U.S. Branch to an entry-level position as Graphic Compiler. As such, Complainant waived his right to file any further challenge to this 2015 involuntary transfer.

However, a fair reading of Complaint 2 shows that some of the allegations involve incidents that occurred *after* the signing of the October 12, 2016 settlement agreement and involved actions and management officials in Complainant's *post-transfer* workplace. These claims are not barred by the waiver in the settlement agreement as they were not, and could not, have been raised in Complaint 1. Allegation 1 of Complaint 2 involves Complainant's assertion that, in December 2016, he was denied a request to go on a temporary one-year assignment outside the division. Allegations 6² – 9 also concern events that occurred subsequent to the October 2016 settlement agreement and are alleged by Complainant to be part of a pattern of harassment by his post-transfer management. The Agency erred in dismissing these allegations.

With regard to allegations 2 – 5 (and that portion of 6 occurring prior to the signing of the settlement agreement), we again find that a fair reading of these allegations indicate they occurred subsequent to Complainant's February 2015 transfer (the subject of Complaint 1) and, again, concerned allegations involving his post-transfer management. We find that these allegations were independent of the matter that was the subject of the settlement agreement, even if purportedly occurring prior to the settlement agreement's execution. The settlement agreement cannot be read to preclude Complainant from raising claims about incidents that occurred in his post-transfer workplace. It only precludes him from attempting to litigate the transfer decision itself, as that was the sole claim in Complaint 1. Accordingly, we do not find that allegations 2 – 5 are barred by Complainant's waiver in the settlement agreement.

We find that the allegations raised in Complaint 2, viewed together, are sufficient to state a viable claim of discriminatory or retaliatory harassment/hostile work environment. As such, the Agency's dismissal of some of the allegations as untimely raised is also in error. The Supreme Court has held that a complainant 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 National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002). Such is the case here.

We REVERSE the Agency's dismissal of Complaint 2, defined as a harassment/hostile work environment claim, and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

² In allegation 6, Complainant alleged that at least one of the moves occurred in April 2017.

ORDER (E0618)

The Agency is ordered to process the remanded claims (harassment/hostile work environment) in accordance with 29 C.F.R. § 1614.108 et seq. 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.

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 (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)

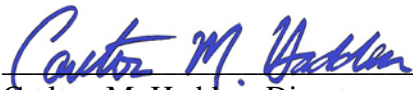
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

December 4, 2018

Date