



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

[REDACTED]
Junior T.,¹
Complainant,

v.

Alex M. Azar II,
Secretary,
Department of Health and Human Services,
Agency.

Appeal No. 0120182287

Agency No. HHS-OS-0069-2017

DECISION

On June 23, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated May 25, 2018, 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., 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

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an Investigations Analyst, GS-1801-13, at the Agency's Office of Investigator General, Hotline Staff in Washington, D.C.

On June 23, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected him to harassment based on his race/color (African-American/Black), sex (male), disability, age (54), and reprisal for prior protected EEO activity under Title VII, the Rehabilitation Act, and the ADEA when the following examples occurred:

1. He received a performance appraisal with which he did not agree.
2. His supervisor denied his request for reasonable accommodation on August 17, 2017.

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. He received a Removal letter on September 8, 2017.

The Agency dismissed the entire complaint because Complainant elected to pursue the matters therein with the Merit Systems Protection Board (MSPB). 29 C.F.R. § 1614.107(a)(4). Additionally, the Agency dismissed allegations 1 and 2 because they were identical to previously filed EEO complaint HHS-OS-0047-2017, which was pending before an EEOC Hearings unit under Hearing No. 570-2018-00362X. The instant appeal followed.

Complainant, represented by counsel, concedes that he appealed his removal to the MSPB on September 19, 2017, prior to filing his EEO complaint on November 16, 2017. He argues that total dismissal of the EEO complaint is improper because the MSPB limited his affirmative defenses to disability and reprisal discrimination, and the MSPB did not agree to address his unfavorable performance rating. Complainant concedes that he raised the “issue[s]” of denial of reasonable accommodation and his removal in both his MSPB appeal and the instant EEO complaint, and argues that in accordance with EEOC Regulation 29 C.F.R. § 1614.302(c)(2)(ii), “both issues” (in his EEO complaint) should be held in abeyance.

ANALYSIS AND FINDINGS

In an Order and Summary of Prehearing Conference dated April 3, 2018, an MSPB Administrative Judge (AJ) wrote that Complainant raised the affirmative defenses of disability discrimination and retaliation for previous EEO activity, and she would only hear the issue of Complainant’s removal and these affirmative defenses.

Hence, we agree with Complainant that regarding his appraisal, he did not elect the MSPB forum. But we affirm the Agency’s dismissal of the appraisal rating claim because he alleged the identical issue in prior EEO complaint HHS-OS-0047-2017X, which was pending before an EEOC Hearings unit under Hearing No. 570-2018-00362X. Specifically, in the prior complaint Complainant alleged that on April 5, 2017, he received an overall rating of Unacceptable for 2016. 29 C.F.R. § 1614.107(a)(1).

We disagree with Complainant’s implicit argument that because the MSPB is only hearing his disability and reprisal bases on his removal claim, his remaining bases of discrimination in his complaint (race, color, sex, and age) on his removal allegation should go forward. The Agency’s September 6, 2017 Removal letter to Complainant contained his election rights, including to the EEO and MSPB forums, and advised that he could not challenge his removal both before the MSPB and the “Commission.” Complainant elected the MSPB process on his removal claim when he filed his appeal first therewith. 29 C.F.R. § 1614.107(a)(4). He was obligated to raise all the bases of discrimination he wished to pursue in the forum he elected - the MSPB.

Complainant concedes that he raised his denial of reasonable accommodation claim with the MSPB, and does not contend, like he did with his appraisal rating, that the MSPB declined to hear this matter.

We take this to mean that Complainant's denial of reasonable accommodation claim in his complaint was intended to be encompassed within his removal claim, i.e., he was removed because he was not reasonably accommodated.

We disagree with Complainant that under 29 C.F.R. § 1614.302(c)(2)(ii), part of his EEO complaint should be held in abeyance. This regulation only applies where the agency or MSPB AJ questions the MSPB's jurisdiction over the appeal. Complainant writes that the MSPB held a hearing on his removal on April 11, 2018, and he is awaiting the MSPB AJ's decision. The holding of a hearing indicates the MSPB AJ is not questioning the MSPB's jurisdiction over Complainant's appeal.

Accordingly, the FAD is AFFIRMED.

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).

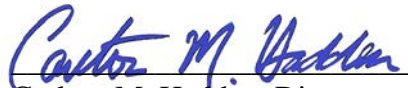
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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:



Carlton M. Hadden, Director
Office of Federal Operations

December 18, 2018

Date