



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

[REDACTED]
Darius C.,¹
Complainant,

v.

Kirstjen M. Nielsen,
Secretary,
Department of Homeland Security
(Customs and Border Protection),
Agency.

Appeal No. 0120182651

Agency No. HSCBP006242018

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (Dismissal) dated June 29, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant had been terminated from his position as an Officer, 1895, GS 12, at the Agency's Field Office, Office of Field Operations facility in Laredo, Texas.

On January 15, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of reprisal for prior protected EEO activity under an EEO statute that was unspecified in the record when:

1. On November 23, 2017, while in a non-employee status, Complainant learned he was not included in the bid-rotation list at the Laredo Port of Entry;
2. As of December 8, 2017, the Agency failed to reinstate Complainant to his Officer position as was ordered by union grievance arbitration;

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. As of December 8, 2017, the Agency failed to provide Complainant with back-pay as ordered by union grievance arbitration;
4. On December 26, 2017, Complainant received notice of the removal proposal;
5. On December 26, 2017, Complainant was placed on administrative leave;
6. On December 26, 2017, Complainant learned that the Agency referred him to the United States Attorney's Office for a determination that he was *Giglio* impaired;
7. On January 25, 2018, Complainant learned he did not receive Foreign Language Award Pay for years 2016 and 2017 while he was in a non-employee status.

The Agency dismissed the claims for a number of reasons. With regard to claims 1, 2, 3, and 7, the Agency found that these claims were either addressed in, or were inextricably intertwined with, claims addressed in a union grievance and hence the claims constituted an impermissible collateral attack against the negotiated grievance procedure. With regard to claims 4, 5, and 6, the Agency found that the matters should be dismissed because they were not raised before the EEO counselor and are not like or related to matters raised before the counselor.

ANALYSIS AND FINDINGS

The record shows that Complainant was terminated effective January 27, 2016, but that, pursuant to a grievance, an Arbitrator found, on July 30, 2017, that Complainant should be reinstated and his termination reduced to a 60-day suspension. Complainant was further awarded entitlement to back pay and other benefits. The record further reveals, however, that the Union filed an Unfair Labor Practice Charge against the Agency on December 12, 2017 on the grounds that, as of that date, Complainant had not yet been reinstated or received any back pay. The Agency's Dismissal found that claims 2 and 3 constituted a collateral attack on the adjudicatory process that will decide the December 2017 Unfair Labor Practice Charge filed by the Union and that claims 1 and 7 were inextricably intertwined with the termination addressed by that proceeding. The Agency further noted that Complainant was eventually reinstated on December 26, 2017, and received the back pay owed on February 8, 2018.

The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Department of Defense, EEOC Request No. 05970596 (July 30, 1998); Kleinman v. United States Postal Service, EEOC Request No. 05940585 (September 22, 1994); Lingad v. United States Postal Service, EEOC Request No. 05930106 (June 25, 1993). Following a review of the record we agree with the Agency that claims 1, 2, 3, and 7 constitute a collateral attack on the grievance proceedings. The proper forum for complainant to raise his challenges to the delay in implementing the Arbitrator's findings is generally within the grievance process itself, as the Union apparently did on December 12, 2017. Hence, we find that claims 1, 2, 3, and 7 do not state a claim appropriate for adjudication in the EEO complaint process.

Regarding claims 4, 5, and 6, the Agency dismissed these matters on the grounds that they were not raised by Complainant during EEO counseling, and are not like or related to matters raised in counseling.

Under 29 C.F.R. § 1614.107(a)(2), the Agency shall dismiss a claim that has not been brought to the attention of an EEO Counselor and is not like or related to matters brought before the Counselor. On appeal, Complainant argues that his complaint:

Includes an overall claim of harassment in retaliation for Complainant engaging in protected activity. Claims 4-6 are part and parcel of this harassment claims, in addition to being discrete acts of retaliation. In addition, claims 4-5 represent a further effort by the Agency to keep [Complainant] from returning to the workplace and providing him with full pay and benefits, which are closely related to the allegations at issue in claims 1-3. Moreover, one of the same management officials involved in complaints 1-3 . . . also is involved in claim 6. Accordingly, these allegations are like or related to those claims already raised with the EEO Counselor.

Following a review of the record we agree that claims 4, 5, and 6 are like or related to matters raised in counseling. Complainant is alleging that, in retaliation for Complainant seeking counseling in the underlying complaint, the Agency sought to keep Complainant “from returning to the workplace and providing him with full pay and benefits, which are closely related to the allegations at issue in claims 1-3.” Hence we find that these matters should not have been dismissed.

CONCLUSION

We therefore AFFIRM the Agency’s Final Order in part and REVERSE in part, and we REMAND claims 4, 5, and 6 to the Agency to take action in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims 4, 5, and 6 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.

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 (T0610)

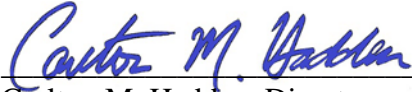
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 13, 2018

Date