



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

████████████████████
Samuel C.,¹
Complainant,

v.

Matthew G. Whitaker,
Acting Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 0120182823

Agency No. FBI-2018-00137

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 23, 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

During the period at issue, Complainant was a former employee of the Agency.² The record reflects that in October 2016, Complainant filed a formal complaint (Agency Case No. FBI-2017-00022, herein referred to as "FBI-2017-00022) in which he challenged certain actions taken within the context of an even earlier EEO complaint (Agency Case No. FBI-2010-00226), and the subsequent civil action it spawned.

One of those actions involved an individual who was a Unit Chief in the FBI's Office of Equal Employment Opportunity Affairs. Because of this potential conflict of interest, by Action Memorandum dated October 20, 2016, the Office of Equal Employment Opportunity Affairs requested that FBI-2017-00022 be processed by another Department of Justice component.

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.

² The record reflects that Complainant retired from Agency employment in 2007.

This request was granted, and FBI-2017-00022 was subsequently processed by the Executive Office for the United States Attorneys.

On August 31, 2017, the Agency dismissed FBI-2017-00022 for failure to state a claim. Although Complainant appealed the dismissal to the Commission, it was only with respect to one claim that in response to a motion Complainant filed in U.S. District Court, the FBI allegedly modified information on its website to make it appear that he had perjured himself in a declaration he gave to the District Court. This issue involved actions allegedly taken by the attorney (the Attorney) representing the FBI before the District Court. By decision dated November 30, 2017, the Commission affirmed the Agency's dismissal. Complainant v. Dept. of Justice, FBI), EEOC Appeal No. 0120173047 (November 30, 2017), req. for reconsideration denied, EEOC Request No. 0520180143 (March 15, 2018).

The Agency Attorney referenced above was assigned to represent the FBI with respect to Complainant's appeal of FBI-2017-00022. In that capacity, on October 6, 2017, he filed a response to the appeal. After Complainant filed the Request for Reconsideration, the Attorney sent him an e-mail on February 2, 2018, stating that he "failed to serve [the Office of General Counsel] with your request for reconsideration and your 'notification' regarding your reconsideration request." The e-mail requested that, to the extent Complainant was aware the Attorney was representing the Agency regarding FBI-2017-00022, he be included "on any future filings or correspondence regarding your EEO complaint."

On February 5, 2018, Complainant initiated EEO Counselor contact. Informal efforts to resolve his concerns were unsuccessful.

On March 8, 2018, Complainant filed the *instant* formal complaint. Complainant claimed that the Agency subjected him to discrimination based on race, sex, and in reprisal for prior EEO activity when:

1. on October 6, 2017, the Attorney filed a response to the brief he filed regarding his appeal of FBI-2017-00022;
2. on February 2, 2018, the Attorney sent him an e-mail requesting that he copy him on future correspondence pertaining to FBI-2017-00022; and
3. although he complained about the Attorney to the FBI's Office of Professional Responsibility (OPR), OPR took no action to stop him from sending the e-mail on February 2, 2018.

On March 12, 2018, Complainant filed what he characterized as an "amendment" to his formal complaint in which he withdrew claim 3. That amendment also sought to add more evidence regarding claims 1 and 2. On March 16, 2018, Complainant filed what he characterized as a "second amendment" in which he sought to define what he described as his "victim's rights."

In its July 23, 2018 final decision, the Agency dismissed claims 1 and 2 pursuant to 29 C.F.R. 1614.107(a)(1), for failure to state a claim. The Agency stated that regarding claim 1, Complainant was not harmed by an Agency response to his appeal brief on October 6, 2017. The Agency determined that it exercised a regulatory right within the context of the federal sector EEO process.

Regarding claim 2, the Agency determined that the February 2, 2018 e-mail merely asked, insofar as Complainant had not copied the Attorney with respect to his request for reconsideration, that he copy him on future correspondence. The Agency asserted that it was entitled to assign the attorney of its choice to litigate FBI-2017-00022, and that the fact it assigned the Attorney was not sufficient to render Complainant aggrieved.

Furthermore, the Agency determined further that claims 1 and 2 were a “spin-off” complaint because it involves the same issues previously in a prior formal complaint (FBI-2017-00022).

The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. 1614.107(a)(8) provides that an agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint. Chapter Five of the EEOC Management Directive 110 (MD-110) (Aug. 5, 2015) defines such a complaint as a “spin-off” complaint. On appeal, Complainant describes dissatisfaction with the federal sector EEO process as well as frustration with the Agency’s attempts not to resolve his concerns. We find Complainant is attempting to raise “spin-off” complaints with respect to *all* the matters raised in the instant formal complaint. The proper forum to raise such allegations would have been with the agency official responsible for complaint processing and/or processed as part of the original complaint (rather than on appeal).

The Agency’s final decision dismissing the formal complaint is **AFFIRMED** for the reasons discussed above.

Because we affirm the Agency dismissal for the grounds discussed herein, we will not address alternative dismissal grounds.

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)

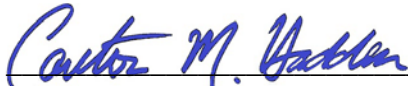
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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:

A handwritten signature in blue ink that reads "Carlton M. Hadden". The signature is written in a cursive style and is positioned above a horizontal line.

Carlton M. Hadden, Director
Office of Federal Operations

November 15, 2018

Date