



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

[REDACTED]
Reggie D.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Appeal No. 2019000187

Agency No. 4G-350-0070-18

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 17, 2018, 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.

BACKGROUND

During the period at issue, Complainant worked as a Postal Support Employee, PS-06 at the Agency's Attalla, Alabama Post Office.

On June 13, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to discriminatory harassment based on race and sex.

As summarized by the Agency, Complainant alleged that he was discriminated against when:

1. on February 24, 2018, Complainant's Postmaster ("P1") attempted to terminate Complainant for delaying mail; and

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. on unspecified dates, P1 worked Complainant without training and took further illegal actions towards Complainant.

In its final decision dated July 17, 2018, the Agency dismissed the formal complaint for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1), finding that the alleged incidents identified above were not sufficiently severe or pervasive to set forth an actionable claim of harassment. The Agency further found that Complainant did not suffer a present harm with respect to a term, condition, or privilege of employment and only experienced a preliminary step which may or may result in an adverse personnel action.

On the same day as the issuance of the instant final decision, July 17, 2018, Complainant, through his attorney, submitted a request to amend the formal complaint. On July 23, 2018, the Agency received the request regarding the amended complaint. The Agency notified Complainant, by letter dated August 10, 2018, that the Agency had already issued its final decision after it had received Complainant's amended complaint.

In the amended complaint, Complainant alleges that the Agency subjected him to an ongoing pattern and practice of hostile work environment and disparate treatment discrimination based on his race, sex, and in reprisal for prior protected EEO activity when:

1. on or about February 24, 2018, P1 (African-American, female) yelled at Complainant for informing her that he had found a tub of unworked flats;
2. on or about February 24, 2018, P1 started yelling that Complainant had delayed mail intentionally, Complainant would not be scheduled anymore, and that Complainant would be terminated because P1 "can't trust you because of who you are;"
3. on or about February 24, 2018, P1 ordered Complainant to not take any phone calls from Gadsden supervisors and go home;
4. since on or about March 1, 2018, and continuing until May 23, 2018, P1 treated Complainant in a disparate manner from the other clerk in the office ("C1") (African American, female) including but not limited to the following:
 - a. C1 was allowed to make her own schedule and Complainant was forced to come in and work;
 - b. C1 was allowed to eat and leave the office while on the clock while Complainant was not; and
 - c. C1 was allowed to nap while on the clock on March 9, 2018, and P1 also allowed C1 to nap in P1's office while on the clock.

5. on or about March 6, 2018, P1 created a hostile work environment for Complainant when P1 told a rural carrier that Complainant is a snitch that is trying to get the rural carriers' count thrown out in order to affect their pay by causing them to receive less pay;
6. on or about March 14, 2018, P1 held a meeting with Complainant and his Union Representative to discuss the aforementioned issues that had been taking place in the office, and during this meeting, P1 made the following statements and/or actions:
 - a. P1 called the Manger of Postal Operations and informed him that she wanted Complainant transferred and that Complainant's service was no longer required in Attalla;
 - b. P1 abruptly informed Complainant and his union representative that she was terminating Complainant for cause due to him allegedly delaying first class mail, telling customers bad information, and messing up the registry multiple times; and
 - c. P1 screamed that she was going to call the police if Complainant's union representative did not leave the office immediately and screamed for C1 to call the police.
7. on or about March 16, 2018, P1 informed Complainant that he was no longer a winder clerk due to him being no longer classified as an 81-4;
8. on or about March 20, 2018, P1 retaliated against Complainant for informing P1's supervisor that P1 and C1 were not at the office; P1 and C1 were calling Complainant crazy; P1 told Complainant that she was done with him; P1 asking Complainant what had gotten into him to make him think that he could call P1's boss; and P1 calling in another employee to inform Complainant that he was to leave;
9. on or about March 21, 2018, P1 initiated an investigative interview with the intent to terminate Complainant;
10. on or about March 23, 2018, P1 yelled and screamed at Complainant to get out of the building while the manager of postal operations was there along with three other postmasters;
11. between March 23, 2018, and May 23, 2018, P1 forced Complainant to remain on a limited work schedule that was put in place by P1; and
12. on or about May 23, 2018, P1 constructively discharged Complainant.

The instant appeal followed. On appeal, Complainant, through his attorney, argues that the Agency mischaracterized Complainant's formal EEO complaint by failing to consider that the complaint indicated a case of ongoing EEO harassment. Complainant further argues that the Agency failed to provide Complainant the opportunity to clarify his complaint, and the Agency failed to consider Complainant's journal, submitted with his initial formal complaint, chronicling alleged incidents that occurred from February 3, 2018, through March 20, 2018.

ANALYSIS AND FINDINGS

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief. The trier of fact must consider all of the alleged harassing incidents and remarks, and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

The formal complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. Our review of initial formal complaint as well the EEO Counselor's report indicates that Complainant alleged that he was subjected to continued harassment. Although the initial formal complaint only mentions one incident occurring on February 24, 2018, Complainant also states that P1 "took many further illegal action toward me of which I documented in a journal and provided copies to an investigative team." The record includes a copy of Complainant's journal where he details alleged incidents occurring from February 3 through March 20, 2018. The EEO Counselor's report indicates that P1 allegedly attempted to terminate Complainant on February 24, 2018, after Complainant notified P1 of a tub of undistributed mail. The EEO Counselor's report further indicates that P1 allegedly reduced Complainant's work hours after P1 held a March 14, 2018 meeting with Complainant and his union representative.

The Commission has previously stated that where an individual receives EEO counseling on a proposed action and the agency ultimately effectuates the proposed action, the otherwise premature allegations merges with the effectuated action. See Rose v. Dep't. of Veterans Affairs, EEOC Request No. 05950240 (July 27, 1995). In this case, Complainant sought EEO counseling regarding P1's alleged attempt to terminate his employment. The amended complaint asserts that following P1's alleged attempts at termination, Complainant was indeed constructively discharged on May 23, 2018. Given the facts and circumstances regarding this case, we find that the amended complaint is "like or related" to the original complaint because it adds to, or clarifies, the original complaint, and could have reasonably been expected to grow out of the original complainant during the investigations. See Scher v. U.S. Postal Service, EEOC Request No. 05940702 (May 30, 1995); Calhoun v. U.S. Postal Service, EEOC Request No. 05891068 (Mar. 8, 1990). Therefore, the alleged incidents stated in the initial formal complaint combined with the allegations stated in the amended complaint state a claim and allege an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz

v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). Upon remand, the Agency should consider all allegations provided in the initial and amended complaints.

Moreover, we note that, on appeal Complainant states, in the amended complaint, that he was also subjected to discrimination based on reprisal for prior protected EEO activity. We acknowledge that Complainant did not initially allege reprisal as a basis in his formal complaint. The Commission, however, has held that a complainant may allege discrimination on all applicable bases and may amend his or her complaint at any time to add or delete bases without changing the identity of the claim. Drago v. U.S. Postal Serv., EEOC Request No. 05940563 (Jan. 19, 1995); accord, Sanchez v. Standard Brands, Inc., 431 F. 2d 455 (5th Cir. 1970). Upon remand, the Agency should amend the complaint to include claims of retaliatory discrimination.

We REVERSE the Agency's final decision dismissing the formal complaint. We REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claims, as defined in Complainant's amended complaint, 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).

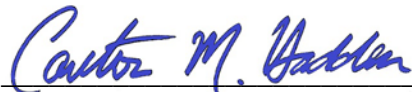
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

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

November 29, 2018

Date