



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

████████████████████  
Clinton M.,<sup>1</sup>  
Complainant,

v.

Nancy A. Berryhill,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2019000586

Agency No. DAL-18-0682-SSA

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 24, 2018, dismissing his complaint of unlawful employment discrimination in violation of 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 worked as an Attorney Advisor, GS-13, at the Agency's Office of Hearing Operations (OHO) facility in Metairie, Louisiana.

On August 28, 2018, Complainant filed a formal complaint alleging that the Agency subjected him to harassment and discrimination on the bases of disability, age, and reprisal for prior protected EEO activity when, on or about March 2018, the Agency improperly conducted the hiring process for Complainant's reader assistant and, on May 15, 2018, hired a lesser qualified candidate. His complaint also raises the issue of whether the Agency, in so doing, denied him a reasonable accommodation for his disability.

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<sup>1</sup> 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.

The Agency dismissed the complaint in its entirety on September 24, 2018, pursuant to 29 C.F.R. § 1614.107(a)(1), for stating the same claim that is pending before or has been decided by the Agency or Commission. The Agency found that the instant claim was the same as that raised in Agency Complaint No. DAL-17-0901-SSA. The Agency indicated that, on December 28, 2017, Complainant filed a claim, alleging that the Agency was planning to provide him a reader assistant who was less qualified than the candidates he preferred and was harassing him with respect to that reader selection.

The Agency also dismissed Complainant's allegations of retaliation, pursuant to C.F.R. § 1614.107(a)(1), for failure to state a claim. In so doing, the Agency indicated that Complainant alleged discrimination based on retaliation because he was a whistleblower, having filed a complaint with the Office of Special Counsel. The Agency found this was not protected EEO activity and Complainant, therefore, failed to state a claim of reprisal.

The instant appeal followed.

#### CONTENTIONS ON APPEAL

On appeal, Complainant asserts that the instant claim is not the same as the claim he filed in 2017. In the 2017 claim, he alleged that the Agency was engaging in harassment and retaliation by trying to replace his reader assistant with a lesser qualified person, an effort that began in April 2017 and ended in October 2017. In the current claim, Complainant alleges that the Agency engaged in a new, separate and distinct act of discrimination and retaliation, beginning with the selection process for a new reader assistant, which began on or around March 2018 and resulted in the selection of a new reader assistant on May 15, 2018. He alleges the Agency knew the person selected was a poor candidate with deficient abilities to locate and read information accurately and was the candidate ranked last among those interviewed. He asserts the Agency used the selection to deliberately harm him and retaliate for prior complaints, including DAL-17-0901-SSA.

In response, the Agency asserts that it properly dismissed the instant claim for raising the same issues as Complainant's prior EEO complaint and Complainant has failed to establish that the current claim is different from that prior claim. The Agency acknowledges Complainant has a vision problem, macular degeneration, that impacts his visual acuity and his accommodations include a reader assistant, which the Agency first provided in 2014. This reader assistant's contract was renewed in April 2016 for a 2-year term, but he was limited to 27 hours per week. Complainant officially requested a full-time reader in June 2017. The selection process began in August 2017 and ended in October 2017, when Complainant's reader assistant agreed to complete his contract. The hiring process began again in March 2018 and ended on May 15, 2018, when a new reader assistant was selected. The alleged discriminatory acts stem from Complainant's request for a reasonable accommodation of a full-time reader assistant. Although there was a lapse in the processing of the reasonable accommodation from October 2017 to March 2018, the Agency argues it was a continuing process and the current claim is the same as the prior 2017 complaint. The Agency asks that we affirm its final order.

### ANALYSIS AND FINDINGS

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). When the complainant does not allege he or she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

The regulation set forth at 29 C.F.R. § 1614.107(a)(1) also provides, in relevant part, that an agency shall dismiss a complaint that states the same claim that is pending before or has been decided by the agency or Commission. To be dismissed as the "same claim," the present and prior complaints must have involved identical matters. It has long been established that "identical" does not mean "similar." The Commission has consistently held that for a complaint to be dismissed as identical, the elements of the complaint must be identical to the elements of the prior complaint in time, place, incident, and parties. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01955890 (Apr. 5, 1996), rev'd on other grounds EEOC Request No. 05960524 (April 24, 1997). The regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that states the same claim that is pending before or has been decided by the agency or Commission. To be dismissed as the "same claim," the present and prior complaints must have involved identical matters. It has long been established that "identical" does not mean "similar." The Commission has consistently held that for a complaint to be dismissed as identical, the elements of the complaint must be identical to the elements of the prior complaint in time, place, incident, and parties. See Jackson v. U.S. Postal Serv., EEOC Appeal No. 01955890 (Apr. 5, 1996), rev'd on other grounds EEOC Request No. 05960524 (April 24, 1997).

As an initial matter, we find that an allegation of failing to provide a reasonable accommodation states a claim. Complainant has alleged facts, which, if proven true and considered together, would be sufficiently severe or pervasive to alter the conditions of his employment. His allegation that the Agency improperly conducted a search for a new reading assistant, hired a lesser qualified candidate, and denied him a reasonable accommodation for his disability is an allegation of 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 (April 21, 1994). We note that the Agency, in dismissing the complaint, found Complainant had alleged the Agency acted in retaliation for Complainant's whistleblowing activity, which is not protected EEO activity. However, Complainant has alleged that the Agency acted in retaliation for his prior EEO complaints, including the DAL-17-0901-SSA. Therefore, we find that the Agency's dismissal of the complaint pursuant to 29 C.F.R. §1614.107(a)(1), for failure to state a claim, was not appropriate.

With respect to the Agency's dismissal for stating the same claim that is pending before or has been decided by the Agency or Commission, we find that the current complaint, filed in 2018, is not identical to the prior complaint, DAL-17-0901-SSA, filed in 2017, particularly as the two complaints relate to separate instances that occurred over distinct time periods. Email correspondence between Complainant and his supervisor, dated September 29, 2017, indicates that, on September 26, 2017, Complainant withdrew his request for a full-time reader and was to continue with his part-time reader. This ended the search process that is the subject of the 2017 complaint.

Email correspondence, dated March 2, 2018, indicates that Complainant's reader assistant's term was ending in mid-April and the reader assistant did not plan to continue in that position. Complainant proposed a candidate for the position and Complainant's supervisor indicated that, once there was a firm departure date for Complainant's reader assistant, the Agency would begin the search process for his replacement. This is a separate and distinct search process that resulted the hiring of a new full-time reader assistant in May 2018. Thus, although Complainant alleged discrimination in the hiring of his reading assistant and as a matter of a reasonable accommodation in both complainants, the complaints are not identical, as they relate to two distinct searches, conducted during two distinct time periods.

Accordingly, the Agency's final decision dismissing Complainant's complaint is **REVERSED**. The complaint is hereby **REMANDED** to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

April 2, 2019

Date