



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, DC 20507**

[REDACTED]  
Nadine M.,<sup>1</sup>  
Complainant,

v.

Janet Dhillon,  
Chair,  
Equal Employment Opportunity Commission,<sup>2</sup>  
Agency.

Appeal No. 2019003329

Agency No. 2019-0012

**DECISION**

On May 9, 2019, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's May 6, 2019, final decision concerning her equal employment opportunity (EEO) complaint alleging 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., and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission AFFIRMS the Agency's final decision.

**ISSUE PRESENTED**

The issue presented herein is whether the Agency properly dismissed Complainant's EEO complaint.

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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.

<sup>2</sup> In the present matter, the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority. The Commission's adjudicatory function is housed in an office that is separate and independent from those offices charged with in-house processing and resolution of discrimination complaints. For the purposes of this decision, the term "Commission" or "EEOC" is used when referring to the adjudicatory authority and the term "Agency" is used when referring to the respondent party to this action.

### BACKGROUND

Complainant worked with the Agency as an Information Intake Representative (IIR) at its Chicago, Illinois District Office. The Agency informed her on November 25, 2015, that she would be terminated during her probationary period. In response, Complainant resigned from the Agency effective November 25, 2015. Complainant filed an EEO complaint, namely Agency No. 2016-0014, alleging that she was subjected to discrimination when she was constructively discharged when she was denied reasonable accommodations and resigned in lieu of termination. Complainant appealed this matter to the Commission. It has been docketed as EEOC Appeal No. 0120180745.

Subsequent to her resignation, Complainant discovered that the Agency had included on her Standard Form 50 (SF-50), issued on January 5, 2016, the reasons Complainant had given for her resignation. Complainant characterized this information as “sensitive and personal”; it referenced her disability, the Agency’s alleged failure to provide her with reasonable accommodation, her view that she had been constructively discharged, and her intention to file a complaint against the Agency. Complainant contacted the Agency on several occasions to obtain a revised SF-50 omitting this information. The record reflects that Complainant emailed the Agency in July 2017. When she received no response, Complainant submitted additional emails and letters to the Agency in November 2017.

Following her resignation from the Agency, Complainant sought employment with the United States Customs and Border Protection (CBP) under the Department of Homeland Security. The CBP tendered Complainant a conditional offer of employment pending a background investigation. As part of the background investigation, the CBP contacted the Agency. Following her background investigation, the CBP rescinded Complainant’s job offer. Complainant believes that an Agency official provided information which negatively affected her ability to secure employment with the CBP. The record included an email from Complainant to a CBP official (CBP Official) dated April 6, 2018, discussing the rescission of the job offer and the background investigation.

During this period of time, Complainant tried to obtain information that would support her claim of discrimination alleged in Agency No. 2016-0014. To this end, Complainant submitted several requests for documents and information under the Freedom of Information Act (FOIA). She believes that the Agency has continued to subject her to unlawful retaliation in mishandling and denying her FOIA requests.

Based on these incidents, Complainant contacted the EEO Counselor via email dated November 16, 2018, alleging unlawful retaliation. During the informal processing of the instant matter, Complainant emailed the EEO Office on February 2, 2019, raising concerns with the processing of Agency No. 2016-0014. She attempted to amend the instant matter to include her concerns regarding the EEO Office’s alleged misleading and false information provided in the processing of her prior EEO complaint.

When the instant matter could not be resolved informally, Complainant was issued a notice of right to file a formal complaint. On March 2, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against her on the basis of reprisal for prior protected EEO activity arising under Title VII and the Rehabilitation Act when:

1. The Agency included the private and sensitive reasons for her resignation on her SF-50. Complainant believed this was an intentional action to detract from her character and influence other federal agencies from hiring her in the future.
2. Complainant learned that the Agency provided false information to the CBP background investigator that negatively affected her ability to secure employment with the CBP.
3. On unspecified dates up to October 2018, the Agency mishandled Complainant's FOIA requests.
4. In October 2018, the Agency denied Complainant's most recent FOIA request.

On May 6, 2019, the Agency issued its final decision dismissing Complainant's EEO complaint (Agency No. 2019-0012). The Agency dismissed claim 1 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency held that Complainant failed to assert a cognizable claim and that the SF-50 was drafted pursuant to guidance issued by the Office of Personnel Management (OPM).

The Agency also dismissed claims 1 and 2 pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO Counselor contact. The Agency found that Complainant became aware of claim 1 on January 5, 2016, the date the SF-50 was issued. As to claim 2, the Agency determined that Complainant became aware that an Agency official provided information for the CBP background investigation as evidenced in the April 6, 2018 email. The record showed that Complainant contacted the EEO Counselor by email on November 16, 2018. The Agency noted that Complainant's contact occurred well outside of the 45-day time limit.

The Agency then dismissed claims 3 and 4 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency determined that Complainant was using the EEO complaint process to collaterally attack the Agency's FOIA process. The Agency stated that Complainant was inappropriately using the EEO complaint process to challenge events outside of the Commission's jurisdiction.

Lastly, the Agency noted that Complainant had attempted to amend the instant complaint by alleging claims of dissatisfaction with the processing of her prior EEO complaint. The Agency dismissed these claims pursuant to 29 C.F.R. § 1614.107(a)(8) as a spin-off complaint. The Agency nonetheless addressed the claims of dissatisfaction pursuant to EEO MD-110, Chap. IV § D, but found that the claims lacked merit.

### CONTENTIONS ON APPEAL

On appeal, Complainant maintained her claims that the Agency's EEO Office subjected her to unlawful retaliation regarding the processing of her prior EEO complaint. She levied accusations against the EEO Director and the contractor EEO Counselor. She also argued that the Agency improperly investigated her prior EEO complaint.

Complainant then argued that she did not receive the CBP investigation until March 2019. As such, she claimed that she did not become aware of the discrimination alleged in claim 2 until March 2019. She asserted that claim 2 therefore was raised in a timely manner. In addition, she stated that her prior management official with the Agency provided incorrect dates to the CBP pursuant to their background investigation. Complainant asserted that the management official's false information was the basis for the withdrawal of the CBP's offer of employment. Based on the Agency's alleged improper processing and false statements, Complainant asked that the Commission reverse the dismissal of her EEO complaint.

The Agency responded by arguing that its dismissal of the complaint was appropriate. The Agency asked that the Commission therefore affirm its final decision.

### ANALYSIS AND FINDINGS

#### *Dismissal of Claims 1 and 2*

EEOC's regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a "reasonable suspicion" standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. *See, e.g., Complainant v. U.S. Postal Serv.*, EEOC Appeal No. 0120093169 (June 27, 2014) (citing *Howard v. Dep't of the Navy*, EEOC Request No. 05970852 (Feb. 11, 1999), citing *Ball v. U.S. Postal Serv.*, EEOC Appeal No. 01871261 (July 6, 1988), *req. for recon. den.*, EEOC Request No. 05980247 (July 15, 1988)). Thus, the time-limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

As for claim 1, the record includes several forms of correspondence from Complainant requesting the Agency to change her SF-50 issued on January 5, 2016. The record shows that Complainant contacted the Agency on July 11, 2017, seeking changes to her SF-50. As such, we find that Complainant was aware of the situation as early as July 2017. However, she did not contact the EEO Counselor until November 16, 2018, well beyond the 45 calendar-day

time-limit. Complainant has provided no reason to toll the time-limit. As such, we affirm the dismissal of claim 1.<sup>3</sup>

In claim 2, Complainant argued on appeal that she was not aware of the false information provided by an Agency official (Agency Official) to the CBP until she received a copy of the background investigation in March 2019. The record shows otherwise.

Complainant provided several documents in support of her appeal. Included within the documents was a copy of an email she sent to the CBP Official dated April 6, 2018. In this email, Complainant provided the CBP Official with documents pertaining to her start date with the Agency.

After a review of the documents as a whole, we find that Complainant clearly believed that the CBP withdrew its offer of employment following its background investigation. More specifically, as of at least April 6, 2018, Complainant was aware that the Agency Official provided what she believed to be false information regarding her start date. We find that Complainant should have reasonably suspected discrimination by April 2018, and therefore, we find that the time-limitation was triggered in April 2018. Complainant subsequently received documents supporting her belief that the Agency Official provided misinformation to the CBP. Despite reasonably suspecting discrimination in April 2018, Complainant waited until she received additional information from the CBP to contact the EEO Counselor in March 2019. As Complainant did not contact the EEO Counselor within the 45-day time-limit, we find that the Agency properly dismissed claim 2 pursuant to 29 C.F.R. § 1614.107(a)(2).

#### *Dismissal of Claims 3 and 4*

The EEOC regulation set forth at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. EEOC regulations further provide that 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, disabling condition, genetic information, or reprisal. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission's federal sector case

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<sup>3</sup> We note that the Agency also dismissed claim 1 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. We have affirmed the dismissal of claim 1 on other grounds. However, we would be remiss if we did not address the Agency's application of 29 C.F.R.

§ 1614.107(a)(1). We remind the Agency that, in claim 1, Complainant alleged unlawful retaliation when the Agency provided Complainant with a negative reference contained within the SF-50. We find that Complainant has presented a cognizable claim of unlawful retaliation. Furthermore, we note that the Agency's articulated reason for the action in dispute, i.e., that the SF-50 was issued in compliance with OPM regulations, goes to the merits of Complainant's complaint, and is irrelevant to the procedural issue of whether she has stated a justiciable claim under Title VII. See Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991).

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. Dep’t of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

In claims 3 and 4, Complainant alleged discrimination based on her dissatisfaction with the Agency’s responses to, and denial of, her FOIA requests. We note that such claims fall outside of the Commission’s jurisdiction. The Commission does not have enforcement authority over the processing of FOIA requests. See Gaines v. Dep’t of the Navy, EEOC Request No. 05970321 (June 12, 1997) (Commission has no jurisdiction over the processing of FOIA requests and appeals about the processing of his FOIA requests should be brought under the appropriate FOIA regulations). As such, Complainant should bring any appeals about the processing of her FOIA requests under the appropriate FOIA regulations. We therefore affirm the dismissal of claims 3 and 4 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

*Claims of Dissatisfaction in the processing of Agency No. 2016-0014*

EEOC Regulation 29 C.F.R. § 1614.107(a)(8) provides for an Agency to dismiss an EEO complaint that alleges the dissatisfaction with the processing of a previously filed complaint. This is commonly referred to as a “spin-off” complaint.

Complainant claimed that the EEO Office mishandled her prior EEO complaint. She tried to amend the instant complaint to include her claims of dissatisfaction in the processing of her prior EEO complaint. In addition, on appeal, Complainant levied additional claims against Agency EEO staff. Here, the claims at issue are classic examples of spin-off complaints as all its allegations, considered in their totality, raise allegations of Agency misconduct in the processing of Complainant’s previously filed complaint. As such, we find that these claims are properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(8).

In cases where Complainant’s concerns have not been resolved informally with the Agency, Complainant may present those concerns to the Commission at either of the following stages of processing:

1. Where the complainant has requested a hearing, to the Commission’s Administrative Judge when the complaint is under the jurisdiction of the Administrative Judge; or
2. Where the complainant has not requested a hearing, to the Commission’s Office of Federal Operations (OFO) on appeal.

EEO MD-110 at 5-29. We note that Complainant’s prior EEO complaint, Agency No. 2016-0014, was addressed in EEOC Appeal No. 0120180745. The Commission vacated the Agency’s final decision and remanded the matter for further processing. The Agency has been ordered to provide Complainant with the right to a hearing before an Equal Employment

Opportunity Commission Administrative Judge (AJ) or an immediate final decision. Therefore, we note that the appropriate place for Complainant to raise her claims of improper processing of her original complaint and the motives therein is before the AJ if she opts for a hearing or before the Commission on appeal following the Agency's final decision in that complaint.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

### 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:

/s/Bernadette B. Wilson

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Bernadette B. Wilson  
Executive Officer  
Executive Secretariat

December 27, 2019

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Date