



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

██████████
Kenyatta S.,¹
Complainant,

v.

Andrew Wheeler,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 2019003653

Hearing Nos. 440-2018-00257X and 440-2018-00344X

Agency Nos. EPA-2017-0113-R05 and EPA-2018-0011-R05

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated May 16, 2019, dismissing a formal complaint of unlawful employment discrimination alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., 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

During the period at issue, Complainant worked as a Physical Scientist, GS-1301-13, at the Agency's Land and Chemicals Division in Chicago, Illinois.

On October 21, 2017 and January 27, 2018, Complainant filed two formal EEO complaints claiming that the Agency discriminated against her and subjected her to discrimination and a hostile work environment based on race (African American), color (brown) national origin (Haitian descent), sex (female), disability, age (50), and/or in reprisal for prior protected EEO activity.

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.

In the complaints, Complainant raised matters primarily concerning incidents of alleged ongoing harassment, a non-selection, an unfair performance appraisal, the denial of awards, and a denial of an Agency transfer.

Complainant's complaints were accepted by the Agency for investigation. After the investigations, the Agency provided Complainant with copies of the reports of investigation and notices of right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On November 8, 2018, the Agency submitted a Motion to Consolidate and Dismiss for Failure to State a Claim and Abuse of Process.

On April 24, 2019, the AJ issued an order consolidating the two complaints and, over Complainant's objections, the AJ granted the Agency's Motion to Dismiss for the Abuse of Process. The AJ determined that Complainant had an "overwhelming" record of litigation and that Complainant did not act in good faith while pursuing her claims. Specifically, the AJ determined that Complainant used the EEO complaint process as a "weapon" to retaliate against her supervisor and other managers when Complainant testified, during a February 2, 2017 deposition, that she wanted to "kill [the management officials'] careers" through the EEO process because she believed that Agency officials were attempting to "kill her career."

On May 16, 2019, the Agency issued a final order adopting the AJ's dismissal of Complainant's formal complaints on the grounds of abuse of process.

The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC regulations provide for dismissal of complaints that are part of a "clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination." 29 C.F.R. § 1614.107(a)(9).

Abuse of process has long been defined by the Commission as a clear pattern of misuse of the process for ends other than that which it was designed to accomplish. See Buren v. U.S. Postal Service, EEOC Request No. 05850299 (Nov. 18, 1985); Kleinman v. U.S. Postal Service, EEOC Appeal No. 01943637 (September 22, 1994); Sessoms v. U.S. Postal Service, EEOC Appeal No. 01973440 (June 11, 1998). The Commission has stated a strong policy in favor of preserving a complainant's EEO rights whenever possible. See EEOC's Management Directive 110 (MD-110), Chap. 5 (IV)(A)(4) (August 5, 2015) (citing Love v. Pullman, 404 U.S. 522 (1972); Wrenn v. Equal Employment Opportunity Commission, EEOC Appeal No. 01932105 (Aug. 19, 1993)).

Here, the record includes a history of Complainant's cases indicating that Complainant filed a total of 20 EEO complaints from 2004 through 2018.

MD-110 cautions that “numerous complaint filings alone is not a sufficient basis for determining that there has been an abuse of the process.” Id. We do not find, as the AJ acknowledged in her decision, that the number of EEO complaints filed by Complainant over a twelve-year period to be extraordinary. Compare, Kessinger v. United States Postal Service, EEOC Appeal No. 0197639 (June 8, 1999) (over 160 complaints and 150 appeals); Hooks v. U.S. Postal Service, EEOC Appeal No. 01953852 (November 28, 1995) (132 open appeals).

We also address the AJ’s argument that Complainant provided “bare bone facts” during the investigation of her complaints to suggest that Complainant’s allegations were so lacking in supporting evidence that they could not have been raised in good faith. However, we conclude that this analysis pertains only to whether Complainant has proven her allegations of discrimination and does not address whether Complainant’s filing of her two complaints amounted to an abuse of process. In that vein, we similarly determine that the AJ’s assessment that Complainant’s affidavits were “often short, vague, and repeat[ed] phrases that she has used in other complaints” was not adequately reflective of her pursuing the EEO complaint process in bad faith. If Complainant’s affidavit responses were unartfully phrased or lacking in detail, we do not find under the circumstances presented in this case that this adequately evidenced an abuse of process. Here, Complainant, without legal representation, has raised substantive claims on a variety of matters ranging from harassment to transfer denials, which the Agency felt were sufficiently articulated to proceed with and successfully complete an investigation.

We also note that while Complainant raised, among her other claims, an issue concerning not being provided adequate official time to litigate her EEO claims, this too was insufficient to consider an abuse of process. Compare, Goatcher v. U.S. Postal Service, EEOC Request No. 05950557 (October 18, 1996) (Complainant filed 22 appeals in a one-year period alleging dissatisfaction with complaint processing, including the agency’s purported denial of access to sufficient equipment and storage for EEO claims, denial of official time for such claims, inadequate EEO counseling, agency monitoring of time spent in the EEO process, and failure to maintain her anonymity during EEO counseling).

Finally, the AJ cited to deposition testimony of Complainant where she stated she wanted to ruin the careers of the management officials she believed were ruining her career through their discriminatory actions. From this testimony, the AJ concluded that it was Complainant’s goal to “use the EEO process, as a weapon, to put supervisors and managers at risk for a poor evaluation or discipline when a complaint is filed.” Again, Complainant’s comment, while intemperate, is insufficient to overcome the Commission’s strong policy on preserving a complainant’s EEO rights. A fair reading of the complete record in these two complaints reflects that Complainant seems to genuinely believe that she is a victim of discrimination and that she will eventually remedy her situation through the EEO complaint process. It appears that Complainant’s comments, at worst, reflect the frustration of a *pro se* complainant who feels that she has been discriminatorily treated as indicated in her subject claims, and is not dissimilar to the assertions of many other EEO complainants, who have vented displeasure at perceived discrimination by management officials.

In sum, based on our review of all the circumstances presented in this case, we do not find adequate justification to overcome the Commission's strong policy against depriving Complainant of her right to proceed with her two EEO complaints and receive a decision on the merits of her claims.

CONCLUSION

The Agency's final order implementing the AJ's dismissal of the complaints is **REVERSED**. We **REMAND** this matter to the Agency for further processing in accordance with the **ORDER** below.

ORDER

Within fifteen (15) calendar days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's Chicago District Office, a renewed request for a hearing on behalf of Complainant, as well as submitting all the relevant complaint files and a copy of this decision. Thereafter, the EEOC AJ assigned shall process the claims in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 8, 2019

Date