



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

[REDACTED]  
Jacinto Q.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2019005560

Agency No. 2019-0046

**DECISION**

On August 7, 2019, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 8, 2019, 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. For the following reasons, the Commission AFFIRMS the Agency's final decision.

**ISSUE PRESENTED**

The issue presented is whether the Agency properly dismissed Complainant's 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

At the time of events giving rise to this complaint, Complainant was an applicant for federal employment. He applied for a position with the Agency's Office of Federal Operations.

On July 2, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of reprisal for prior protected EEO activity arising under Title VII when:

1. He was not selected for an advertised vacancy as a GS-13 EEOC Supervisory EEO Specialist under Vacancy Announcement No. OFO-19-1046117-026-TMD; and
2. EEOC employees, including the (former) Office of Equal Opportunity (OEO) Director, engaged in a collective campaign to taunt, intimidate, and bully him to prevent him from being able to make an informed decision regarding whether to file a formal EEO complaint.

On July 8, 2019, the Agency dismissed Complainant's complaint in its entirety. In dismissing claim 1 pursuant to 29 C.F.R. § 1614.107(a)(1), the Agency initially noted that the vacancy announcement at issue was open only for internal candidates, *i.e.*, individuals currently employed by the Commission. The Agency then emphasized that Complainant did not apply for the position and, even if he did, because Complainant fell outside of the area of consideration, it would be a violation of 5 U.S.C. § 2302, "giving unfair advantage to an applicant to obtain Federal Employment," to even consider his application. Finally, the Agency found that Complainant was not entitled to information regarding the vacancy announcement because he did not have status, *i.e.*, was not an internal candidate. The Agency's final decision advised Complainant that he could file a Freedom of Information Act request to obtain Agency records. As for claim 2, the Agency dismissed this claim pursuant to 29 C.F.R. § 1614.107(a)(8) because the claim concerned Complainant's dissatisfaction with the processing of an existing complaint. The Agency also found no evidence that Complainant was subjected to intimidation or bullying by Office of the Chief Human Capital Officer (OCHCO) or OEO employees. Complainant then filed the instant appeal.

## CONTENTIONS ON APPEAL

Complainant's contentions on appeal are addressed in our analysis of the appeal, *infra*. The Agency reiterates the position taken in its final decision, and requests that we affirm that decision.

## ANALYSIS AND FINDINGS

### Preliminary Matters

We initially address Complainant's request for outside processing of his complaint. While we acknowledge his concerns about the potential for a conflict of interest and/or bias, we note that the Commission, as a matter of longstanding policy, does not recuse itself in the adjudication of appeals even when the Commission is the respondent agency. This policy applies to all

complainants, including current and former Commission employees, as well as applicants for employment. Given our longstanding policy, we deny Complainant's request for outside processing because such action would afford Complainant a privilege not available to any other complainants.

### Claim 1

The Agency dismissed claim 1 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an 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 disability. 29 C.F.R. §§ 1614.103, 1614.106(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. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). 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 him or her to relief. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997). In determining whether a complaint states a claim, the proper inquiry is whether the alleged conduct would constitute an unlawful employment practice under EEO statutes. Id.

When a complainant alleges reprisal for prior protected EEO activity, he or she need not show that the agency's conduct affected a term, condition, or privilege of employment or constituted an "ultimate employment action" such as hiring, firing, demotion, denial of promotion or leave, or adverse pay decisions. Rather, any allegation of adverse treatment that is based upon retaliatory motive and is reasonably likely to deter complainant or others from engaging in protected activity will suffice to state a claim. See Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (Nov. 4, 1999); EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016).

On appeal, Complainant asserts that a system issue/error prevented him from submitting his application prior to the deadline and that the Agency should have accepted his application. See Appeal Brief and Supporting Documentation, pgs. 3 and 39. He contends that the Agency refused to accept his application because of his prior protected EEO activity.

As a general matter, a complainant who fails to apply for a position cannot then claim discriminatory non-selection unless he or she alleges that the agency discouraged him or her from applying, utilized an informal/secretive selection process, or took other affirmative steps to harm his or her candidacy. See, e.g., Fuester v. Office of Personnel Mgt., EEOC Request No. 05910751 (Jan. 21, 1992) (holding that the failure to actually file an application or otherwise to apply for a particular position or program will not generally bar an applicant from showing that he or she was aggrieved if other evidence exists which demonstrates that the applicant was discouraged or deterred from applying); Paul v. Dep't of Defense, EEOC Appeal No. 01923043 (Nov. 3, 1992) (holding that a complainant, who did not apply for the position at issue was not aggrieved when

the agency failed to select her), req. for recon. den., EEOC Request No. 05930293 (July 30, 1993); Braswell v. Dep't of Agriculture, EEOC Appeal No. 01A14564 (Jan. 3, 2002) (rejecting complainant's contention that he was unable to apply for the position in question because it was not advertised on a specific website); cf., Delgrego v. U.S. Postal Serv., EEOC Appeal No. 01A45369 (Nov. 18, 2004) (holding that a complainant who fails to apply for a position may nevertheless state a claim if he or she alleges that "the agency discouraged him [or her] from applying or that the application process was secretive").

In the instant case, the record shows that the closing date for Vacancy Announcement No. OFO-19-1046117-026-TMD was April 4, 2019 at 11:59 p.m. See Appeal Brief and Supporting Documentation, pg. 32. Complainant did not submit an application by the deadline. On April 5, 2019, Complainant sent the Agency's point of contact for the vacancy announcement an email inquiring whether he, "as a veteran with a disability rated at 30 percent or more and/or an individual with a Schedule A disability," would be "eligible to submit [his] application materials after the vacancy [had] closed." Id. at 39. In support of his request to file a late application, Complainant explained that he viewed the vacancy announcement on "federalgovernmentjobs.us" and attempted to submit his application, but "apparently there was a system issue/error that prevented [him] from submitting [his] application before the deadline." Id. In this regard, Complainant stated that "each time he clicked on the apply online indicator within the vacancy announcement that [he] was only able to view from a website at federalgovernmentjobs.us, [he] was directed to the USAJOBS website, but there was no listing for the vacancy." Id. Within two hours of Complainant's email, the Agency's point of contact responded to Complainant's inquiry and provided Complainant a publicly accessible direct link to the vacancy announcement on USAJOBS. Id. at 38. In May 2019, Complainant learned that the vacancy announcement had been filled. He then filed an EEO complaint alleging that the Agency retaliated against him by refusing his application.

After careful consideration of the record, including Complainant's contentions on appeal, we find that it appears beyond doubt that Complainant cannot prove a set of facts in support of the claim which would entitle him to relief. We initially note that Complainant did not apply for the position at issue. While we recognize that Complainant may not be entirely at fault for the failure of "federalgovernmentjobs.us" to properly link to the vacancy announcement on USAJOBS, we find no evidence that the Agency subjected Complainant to reprisal, as the record clearly shows that the Agency posted the vacancy announcement on USAJOBS, but Complainant failed to apply prior to the deadline and did not request assistance from the Agency until after the deadline. See Franklin, supra. We also find no evidence that the Agency discouraged Complainant from applying for the position, utilized an informal/secretive selection process, or took other affirmative steps to harm his candidacy.<sup>3</sup> Consequently, we conclude that the Agency properly dismissed claim 1 pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

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<sup>3</sup> We note that the USAJOBS website allows applicants to search for internal vacancies by selecting the filter "Internal to an agency." This filter is located under "Top filters" and "Hiring path." It appears that Complainant did not select this filter when he attempted to search for the vacancy announcement on USAJOBS.

## Claim 2

Complainant also expresses dissatisfaction with the Agency's processing of his complaint. In this regard, he alleges that Agency officials engaged in a collective campaign to taunt, intimidate, and bully him to prevent him from being able to make an informed decision regarding whether to file a formal EEO complaint. Under 29 C.F.R. § 1614.107(a)(8), allegations of dissatisfaction with an agency's processing of a previously filed or pending complaint cannot be the subject of an EEO complaint. See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, (EEO MD-110), Ch. 5, IV.A.12 and IV.D (Aug. 5, 2015); Morris v. Dep't of Def., EEOC Request No. 0520130316 (Aug. 27, 2013).

When a complainant raises allegations of dissatisfaction regarding the processing of his or her pending complaint, the agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the agency's reason(s) for not taking any action. EEO MD-110, supra. Having reviewed the record in this case, we find no evidence that the OEO Director or any other Agency official engaged in wrongdoing or sought to intimidate or bully Complainant. Therefore, we agree with the Agency's decision to dismiss claim 2 pursuant to 29 C.F.R. § 1614.107(a)(8).

## 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 13, 2019

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Date