



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

[REDACTED]
Avery S.,¹
Complainant,

v.

Denis R. McDonough,
Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2023004495

Agency No. 200J-583-2023- 15061

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 17, 2023, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Licensed Mental Health Counselor, GS-9, at the Agency's Richard L. Roudebush Veterans' Administration Medical Center facility in Indianapolis, Indiana.

On May 21, 2023, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of disability (ADHD and Autism Spectrum Disorder) when, on January 11, 2023, Reasonable Accommodation Coordinator completed Form 3112d as part of Complainant's disability retirement but included information that contradicted the documentation she had been provided and indicated Complainant had fully met performance standards and had no medical restrictions. She also failed to document the Agency's failure to engage in the interactive reasonable accommodation process and attempt reassignment.

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.

The Agency dismissed this claim pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim as it is a collateral attack on the disability retirement process. Complainant filed the instant appeal.

On appeal, Complainant seeks to have the dismissal of his claim reversed and remanded for investigation.² He contends that Reasonable Accommodation Coordinator “acted in a discriminatory manner with a purpose to obstruct, delay, and undermine [his] application for disability retirement.” Complainant states that, as a result of her actions, he has experienced anxiety, depression, and insomnia, and his disability retirement application has been delayed by over seven months. Complainant argues this represents a present harm for which there is a remedy based on disability. Complainant further argues this is not a collateral attack because his application had not been submitted at the time of the discriminatory conduct and therefore there had been no other process, adjudication, or decision related to his claim. He states he is not challenging the disability retirement process, but Reasonable Accommodation Coordinator’s discriminatory refusal to perform her duties. He notes that the Commission has held that simply because a complainant references another process in the complainant or pre-complaint process, does not automatically convert the claim to a collateral attack.

The Agency contends on appeal that the dismissal should be upheld because Complainant’s claim challenging the Agency actions or inactions in the processing of his disability retirement application and the Commission has held that an employee cannot use the EEO complaint process to collaterally attack the disability retirement process. The Agency argues that the Commission has no jurisdiction over Complainant’s claims regarding the way the Agency processed his disability retirement paperwork.

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. Dep’t of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). 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 fails to state a claim.

An employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. See Wills v. Dep’t of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993).

² In his appeal brief, Complainant provides a detailed timeline of his time at the Agency, but he stated that “events in the timeline prior to January 11, 2023 are not part of this or any other claim.”

Such administrative proceedings include those related to processing disability retirement benefits through the Office of Personnel Management (OPM). See Dixon v. U.S. Postal Serv., EEOC Appeal No. 0120080278 (Feb. 4, 2010), citing Walker v. U.S. Postal Serv., EEOC Appeal No. 01A20425 (Apr. 3, 2002), see also, Foulke v. U.S. Postal Serv., EEOC Appeal No. 0120083962 (Mar. 15, 2010) (the proper forum for the complainant to raise his dissatisfaction with the processing of his disability retirement with OPM is within the OPM disability retirement process).

Although Complainant argues this does not concern the proceedings of another forum because the discriminatory actions happened before his paperwork was submitted to OPM, we are not persuaded. Complainant's complaint alleges that he was discriminated against when Reasonable Accommodation Coordinator included false information on his disability retirement paperwork and failed to complete it fully. Thus, he is alleging discrimination in the Agency's actions (and inactions) in the processing of his disability retirement application.

As noted by the Agency in its dismissal and on appeal, the Commission has long held that an employee cannot use the EEO complaint process to collaterally attack the disability retirement process. See Charles O. v. Dep't. of Veterans Affairs, EEOC Appeal No. 2022004016 (Feb. 8, 2023) (dismissal upheld on appeal as collateral attack on the disability retirement process where Complainant alleged, among other things, that his supervisor provided false information on Complainant's Form 3112d, the information was not corrected, and the District Reasonable Accommodation Coordinator delayed processing of Complainant's retirement packet by failed to correct the information); Tyrone D. v. Smithsonian Inst., EEOC Appeal No. 2020003601 (Aug. 17, 2020) (dismissal upheld on appeal as collateral attack on the disability retirement process where Complainant alleged, among other things, that he had difficulty getting a response from Human Resources, he received no response to his request for a copy of his completed disability retirement application, and when he received the completed copy, it contained a forged signature and was dated after the application had purportedly been submitted to OPM). Allegations that an agency supplied OPM with false information on disability retirement paperwork constitute a collateral attack because the content of the retirement package is part of the OPM disability retirement adjudicatory process. Diane D. v. Dep't of the Army, EEOC Appeal Nos. 2021000665, 2021001277 (Feb. 2, 2021).

Therefore, we find the Agency properly dismissed the complaint for failure to state a claim as a collateral attack on the proceedings of another forum.

CONCLUSION

The Agency's final decision dismissing the formal complaint is AFFIRMED for the reasons discussed above.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration**. A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

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 their 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:



Carlton M. Hadden, Director
Office of Federal Operations

January 23, 2024

Date