



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

[REDACTED]
Emmitt E.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2024000612

Agency No. 1A-538-0035-23

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated September 12, 2023, dismissing a formal EEO complaint alleging 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., 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 Tractor Trailer Operator, Grade Level 08/P, at the Agency's Processing & Distribution Center in Philadelphia, Pennsylvania.

On July 13, 2023, Complainant initiated informal EEO counseling, but the parties were unable to resolve the matter.

On August 18, 2023, Complainant filed a formal EEO complaint alleging that the Agency subjected him to discrimination based on age and in reprisal for prior EEO-protected activity when:

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.

1. On various dates since December 19, 2021, management has not responded to Complainant's PS Form 1767 (Report of Hazard, Unsafe Condition or Practice) submissions; and
2. On May 20, 2023, management lured Complainant into a verbal altercation.

On November 3, 2023, the Agency issued its final decision dismissing Complainant's formal EEO complaint. The Agency dismissed the formal complaint for failure to state a claim, in accordance with 29 C.F.R. 1614.107(a)(1). The Agency also dismissed the formal complaint on the grounds that it was not timely filed.

The instant appeal followed.

ANALYSIS AND FINDINGS

The regulation at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that the Agency shall dismiss a complaint that fails to state a claim. The Agency shall accept a complaint from an aggrieved employee who believes that he has been discriminated against by the Agency because of a prohibited consideration or because of retaliation. 29 C.F.R. §§ 1614.103, 1614.106(a). This Commission's federal sector case precedent consistently defines an "aggrieved" 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 under EEOC regulations. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

Claim 1

Regarding Claim 1, wherein Complainant alleged that Agency management has consistently ignored the many safety problems that he has properly reported, the Agency's dismissal for failure to state a claim was proper. Claims relating to workplace safety or an agency's failure to comply with workplace safety standards are under the jurisdiction of the Department of Labor's Occupational Health and Safety Administration ("OSHA") and, in most instances, cannot be processed via the EEO complaint process. Demarcus I. v. U.S. Postal Serv., EEOC Appeal No. 0120161563 (Aug. 12, 2016); Mayberry v. U.S. Postal Serv., EEOC Appeal No. 0120091089 (April 24, 2009) request to reconsider denied EEOC Request No. 0520110411 (June 28, 2011).

Claim 2

Because Complainant alleged has reprisal, we examined Claim 2 broadly in terms of the prohibition against words or acts that may reasonably deter employees from EEO activity. Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). We have presumed true and considered the alleged incident in the light most favorable to Complainant. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

As to Claim 2, however, we concur with the Agency and find that Complainant has failed to state a claim after reviewing his formal complaint and the related EEO counseling report. As an initial matter, it appears Complainant is alleging retaliation for reporting safety concerns which, as already found in Claim 1, is not activity protected by the EEO complaint process. Moreover, in this claim, Complainant described how after he had advised an acting supervisor on proper safety procedures, the acting supervisor cursed at Complainant. Such a single isolated incident was not severe or pervasive harassment nor was it a valid claim of specific harm to his employment status. Moreover, the alleged Agency action was not of a type reasonably likely to deter Complainant or others from engaging in EEO-protected activity. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999) (citing EEOC Compliance Manual, No. 915.003 (May 20, 1998)).

Because we find proper dismissal for failure to state a claim, we decline to address the Agency's other grounds for dismissing the complaint.

New Claim Raised on Appeal

On appeal, Complainant alleges, for the first time, that when he has reported safety concerns to management, management has retaliated by reducing his work hours despite his seniority. Complainant stated that management had improperly provided overtime opportunities to junior-grade tractor trailer operators with less seniority in an effort to reduce Complainant's overall pay. Complainant further states that management has continued to lie about addressing the safety concerns that he raised and documented on PS Form 1767s.

Complainant's appellate arguments appear to raise an additional claim relating to overtime, but EEOC has held that it is inappropriate for complainants to raise new claims for the first time on appeal. Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004). Complainant should seek EEO counseling on this claim if he wishes to pursue it.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

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 29, 2024
Date