



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

[REDACTED]
Newton P,¹
Complainant,

v.

Juan Millan,
Acting U.S. Trade Representative,
Executive Office of the President
(Office of the United States Trade Representative),
Agency.

Appeal No. 2024002618

Agency No. USTR-24-02

EEOC Hearing No. 570-2024-00521X

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated January 17, 2024, pertaining to his complaint of 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. For the reasons set forth herein, we REVERSE the Agency's final decision dismissing Complainant's complaint.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's complaint for failure to state a claim.

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.

BACKGROUND

The record reflects the following chronology of events.

During the period at issue, Complainant was an applicant for employment with the Agency. On October 30, 2023, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on race (Black), national origin (American), and age (75) when:

his application for the position of Senior Trade Representative (Beijing) (Minister Counselor for Trade Affairs), Announcement No.EOP-USTR-11999-DE-SL, was not forwarded to the selecting official and he was subsequently not selected. Complaint File at 79-80.

On November 27, 2023, the Agency issued a final decision. The Agency dismissed the formal complaint in its entirety for failure to state a claim. The Agency reasoned that “[Complainant’s] formal complaint failed to state why [Complainant believed] that [he was] discriminated against because of [his protected classes...” Complaint File at 35.²

The November 27, 2023 final decision, however, set forth unclear language as to what Complainant’s rights were following the Agency’s dismissal of the complaint. Specifically, the Agency’s November 27, 2023 final decision appeared to inform Complainant that he could request a *hearing before an EEOC Administrative Judge (AJ) or request a final agency decision on the merits of the complaint.*³ Complaint File at 36.

On January 17, 2024, after previously informing Complainant that it was dismissing Complainant’s complaint on procedural grounds, the Agency issued *another* final decision. The January 17, 2024 final decision appeared to address the merits of the complaint and found that “Complainant has failed to prove by a preponderance of the evidence that the Agency discriminated against him.” Complaint File at 5. The Agency reasoned that Complainant’s application was not forwarded to the Agency because Complainant did not submit a narrative statement that addressed each of

² Our citations to the complaint file reference the page number of the pdf document before us on appeal.

³ The November 27, 2023, final decision also appears to set forth that Complainant could file an appeal with the Commission after a subsequent final action was issued on Complainant’s complaint. Complaint File at 36.

the Mandatory Technical Qualifications (MTQs) related to this position which was required by the vacancy announcement. Complaint File at 8-9. The Agency further sets forth that the actions at issue were from the Office of Personnel Management (OPM) not forwarding his application to the Agency. Id. The Agency set forth Complainant's right to file an appeal with the Commission's Office of Federal Operations (OFO). Complaint File at 10. The Agency set forth various methods to file the appeal including the EEOC's online Public Portal. Complaint File at 10.

Complainant, on February 14, 2024, completed a Notice of Appeal Form regarding the Agency's January 17, 2024, final decision and filed it through the EEOC Public Portal. However, Complainant, who is pro se, appears to have inadvertently filed this as a hearing request in the portal rather than as an appeal.

On March 4, 2024, an EEOC AJ issued an Order of Dismissal. Therein, the AJ reasoned that Complainant improperly filed a hearing request rather than an appeal from the Agency's January 17, 2024, final decision.

On March 14, 2024, following the AJ's dismissal, Complainant filed an appeal through the EEOC Public Portal regarding the AJ's Dismissal Order.

CONTENTIONS ON APPEAL

Complainant requests that we reverse the AJ's Order of Dismissal. Complainant's Brief at 5. Complainant states that he timely filed an appeal on February 14, 2024. Id.

In response, the Agency asserts that the AJ properly dismissed the instant matter. Agency's Response Brief at 1-2. The Agency sets forth that Complainant erred in requesting a hearing before an AJ rather than filing an appeal with OFO. Id. In addition, the Agency asserts that to the extent Complainant is now attempting to appeal the Agency's January 17, 2024, final decision, his appeal is untimely. Id. at 2.

In reply, Complainant asserts that the AJ should have considered his timely electronic filing through the EEOC Public Portal rather than dismissing the instant matter. Complainant's Reply Brief at 7-8. Complainant further asserts that the Agency erred by not investigating his formal complaint. Complaint File at 3.

STANDARD OF REVIEW

The Agency's decision to dismiss a complaint is subject to de novo review by the Commission, which requires the Commission to examine the record without regard to the factual and legal determinations of the previous decision maker and issue its decision based on the Commission's own assessment of the record and its interpretation of the law. 29 C.F.R. § 1614.405(a). The Commission should construe the complaint in the light most favorable to the complainant and take the complaint's allegations as true. See Cobb v. Department of the Treasury, EEOC Request No. 05970077 (March 13, 1997). Thus, all reasonable inferences that may be drawn from the complaint's allegations must be made in favor of the complainant.

ANALYSIS

As an initial matter, we find that the Agency erred by not clearly setting forth Complainant's appeal rights to OFO in its initial November 27, 2023, final decision dismissing Complainant's complaint in its entirety.⁴ Rather, the language set forth in the Agency's November 27, 2023, final decision appears to provide Complainant a right to request a hearing before an EEOC AJ or an immediate final decision. Complaint File at 36. The Agency appears to acknowledge that the Agency's November 27, 2023 final decision informed Complainant that he had a right to request a hearing or an immediate final decision. For example, the Agency's January 17, 2024, decision set forth:

On November 27, 2023, the EEO Office notified Complainant of its determination to dismiss the formal complaint of discrimination against [the Agency]. The transmittal letter notified Complainant of his right to request a hearing before an [AJ] or a final agency decision within 30 days of receipt of the determination...Complainant did not request either a hearing or a final agency decision. Accordingly, [the Agency] is issuing this final decision. Complaint File at 6.

⁴ 29 C.F.R. § 1614.401(a) provides that complainants may appeal dismissal of complaints by an agency to the Commission. See also EEOC Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (rev. Aug. 5, 2015) at Ch.5 (II)(B)(2).

In addition, the Agency's response brief also sets forth that Complainant was advised in its November 27, 2023 decision that Complainant had thirty days to either request a hearing before an EEOC AJ or request a final decision.⁵ Agency Brief at 1.

The Agency, however, should have clearly set forth Complainant's right to appeal to OFO in its November 27, 2023 final decision which dismissed Complainant's complaint and informed him that it would not investigate his complaint. After issuing its November 27, 2023 decision dismissing Complainant's complaint, the Agency should *not* have issued a subsequent final decision.

Based on these specific circumstances, including the Agency's errors in processing Complainant's complaint, as discussed above, we find that Complainant's appeal is now properly before us. Moreover, we will now determine whether the Agency properly dismissed Complainant's complaint in its initial November 27, 2023 final decision.

The Agency improperly dismissed Complainant's complaint for failure to state a claim. The only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether complainant is an aggrieved employee; and (2) whether complainant raises employment discrimination on a basis covered by EEO statutes. If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its judgment of the merits. See Odoski v. Deep'd of Energy, EEOC Appeal No. 01901496 (April 16, 1990).

As set forth above, a review of Complainant's formal complaint and pre-complaint documents reflect that the crux of Complainant's claim is that his application for the specified position was not forwarded to the selecting official and thus he was not selected for the position at issue. Complainant has set forth that these actions were based on his protected EEO classes (race, sex, and/or age) and thus he has set forth an actionable claim. To the extent the Agency sets forth in its January 2024 final decision that Complainant failed to submit with his application a narrative regarding his

⁵ 29 C.F.R. § 1614.108(f) provides, in pertinent part, that upon completion of an investigation, the agency shall provide complainant with a copy of the investigative file, and shall notify complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and decision from an AJ or may request an immediate final decision. See also EEO MD-110 (rev. Aug. 5, 2015) at Ch.7 (I).

MTQs, we find that this assertion goes to the merits of the complaint rather than the procedural issue of whether Complainant has set forth an actionable claim. This assertion may be raised during an investigation on the merits of Complainant's complaint.

CONCLUSION

Accordingly, for the reasons set forth herein, we REVERSE the Agency's November 27, 2023, final decision and we REMAND this matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0224)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, or a copy of the final agency decision ("FAD") if Complainant does not request a hearing.

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 (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 (R0124)

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 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. **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, 2025

Date