



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

██████████
Michell B,¹
Complainant,

v.

General Paul M. Nakasone,
Director,
National Security Agency,
Agency.

Appeal No. 2024003635

Agency No. 24-005

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated April 25, 2024, dismissing her 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. Upon review, the Commission finds that Complainant's complaint was properly dismissed for failure to state a claim.

ISSUES PRESENTED

The issue presented before the Commission is whether Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1), 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

At the time of events giving rise to this complaint, Complainant worked as a Facilities Planner at the Agency's facility in Ft. George G. Meade, MD.

On December 28, 2023, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of disability (mental) when she requested to have an Employment Assistance Services (EAS) Representative accompany her during her interviews with Security & Counterintelligence (S&CI), but her accommodation was denied.

The Agency dismissed the complaint for failure to state a claim. Specifically, the Agency determined that Complainant failed to show that she was an aggrieved employee. The Agency noted that it is S&CI's policy that an EAS is not permitted in the interview room during a security interview. The Agency also noted that when a complainant does not allege that an adverse action was taken, as is the case here, that her security clearance was revoked or denied and consequently some personnel action was taken (e.g. ... removal for failing to meet a condition of employment), the Commission has consistently and overwhelmingly affirmed Agency dismissals of such claims for failing to state a claim. The Agency also provided an analysis on the merits of Complainant's claim.

CONTENTIONS ON APPEAL

Complainant, through her attorney, primarily asserts that because she was not provided with her requested reasonable accommodation "during a traumatic personnel security investigation, I continue to live with intense fear and anxiety that my employment situation is precarious." In response, the Agency notes that Complainant's "material allegations relate to conjecture about her continued employment" but do not establish any present harm to Complainant's employment. Furthermore, the decisions underpinning S&CI's investigation are security clearance decisions and are therefore outside the Commission's purview. The Agency asks that we affirm its final decision.

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

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 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 disability. 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).

Having reviewed Complainant's formal complaint, EEO Counseling Report and appeal submissions, we acknowledge that Complainant may have felt upset by the Agency's actions in this matter. However, Complainant has not alleged harm or loss to a specific term, condition, or privilege of her employment. While Complainant claims that she was disadvantaged because an EAS was not permitted in the interview room during her security interview, Complainant alleges no adverse, *employment action* as a consequence of the Agency's investigative interview. As the Agency correctly noted, Complainant conjectures about *future harm*, which is inadequate to state a viable claim of employment discrimination. Furthermore, the Commission is precluded from reviewing the validity of the requirement of a security clearance and the substance of a security clearance determination. Thierjung v. Dep't of Def. (Def. Mapping Agency), EEOC Request No. 05880664 (Nov. 2, 1989); see also "Policy Guidance on the Use of Nat'l Sec. Exception contained in 703(g) of Title VII of the Civil Rights Act of 1964, as amended.", EEOC Notice No. N-915-041 (May 1, 1989).

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)

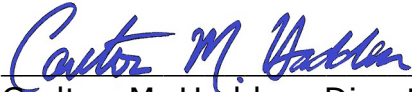
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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

December 9, 2024
Date