



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

[REDACTED]  
Norberto G,<sup>1</sup>  
Complainant,

v.

Thomas J. Vilsack,  
Secretary,  
Department of Agriculture,  
Agency.

Appeal No. 2024003799

Agency No. FPAC-2024-00175

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision (FAD) dated May 3, 2024, 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 reasons below, we AFFIRM the FAD.

**ISSUES PRESENTED**

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

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Contract Specialist/Section Chief, GS-1142/14, at the Agency's Farm Production and Conservation Business Center facility in Raymore,

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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.

Missouri. On March 27<sup>2</sup>, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of reprisal for prior protected EEO activity under an EEO statute that was unspecified in the record when:

1. on January 8, 2024, management contacted Complainant and advised him that his behavior in handling a harassment claim of one of his employee's was inappropriate, his activities in attempting to resolve the matter within Acquisitions Division leadership fell outside of the responsibilities of management in handling harassment claims, his understanding of the Anti-Harassment Program Regulation was inaccurate in that attempting to engage all responsible parties and groups proactively to resolve the employee's concern is not covered within that regulation, and further advised Complainant to write a letter/memo addressing his involvement in the matter, thus allegedly putting Complainant at risk;
2. on or about December 1, 2023, management engaged in retaliation/reprisal against Complainant verbally and in writing through multiple emails, and suggested that Complainant was failing as a supervisor by not working, and instead was making phone calls and sending emails regarding the harassment concerns after Complainant informed management about the harassment concerns of an Acquisitions Division Operations Branch Central Section employee;
3. on or about December 4, 2023, in the absence of any action by management, Complainant raised the harassment concerns of the ADO Branch employee to an upper management official who responded that he had received guidance from FPAC Human Resources/Labor Relations that he was not to engage or respond to Complainant's emails concerning harassment and retaliation of the ADO Branch employee by FPAC's Human Resources personnel;
4. on or about December 4, 2023, in the absence of any action by management, Complainant reported the concerns of harassment and now retaliation towards him to senior management who elected to not engage in resolving the concerns but referred Complainant to contact Civil Rights.

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<sup>2</sup> Complainant amended his complaint on April 23, 2024, to include additional incidents of harassment, included above.

The Agency dismissed the claims for failure to state a claim, finding that the actions complained of were insufficiently severe/and or pervasive to state a claim of harassment and that the alleged actions were not reasonably likely to deter Complainant or others from engaging in protected EEO activity. The Agency further found that to the extent Complainant was alleging that he was harassed when management failed to respond to his "referrals and inquiries" about the complaint of another employee, such an allegation constituted a collateral attack on the EEO process and should be dismissed.

### CONTENTIONS ON APPEAL

Complainant makes no new contentions on appeal but repeats arguments previously made before the Agency. The Agency requests that we affirm its FAD.

### 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

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. Department of the Air Force, EEOC Request No. 05931049 (April 21, 1994). When the complainant does not allege he or she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. Thus, not all claims of harassment are actionable. Where a complaint does not challenge an agency action or inaction regarding a specific term, condition, or privilege of employment, such as the complaint at issue here, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment. With regard to claims alleging reprisal, as is the case here, the Commission interprets the statutory retaliation clauses "to prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual, Section 8 (Retaliation) at 8-13, 8-14 (May 20, 1998).

Following a review of the record we find that the actions complained of constitute disagreements with upper management about how to interpret the Agency's EEO policy, and some chastisement by management about Complainant giving insufficient attention to his work duties. While Complainant insists that such actions were severe, we find such actions are not the type of actions that are reasonably likely to deter Complainant or others from engaging in protected activity. Because we find that the Agency properly dismissed the complaint for failure to state a claim, we need not address the issue of whether or not the claim constitutes a collateral attack.

### CONCLUSION

The FAD 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

November 25, 2024

Date