



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

[REDACTED]
Alejandro T.,¹
Complainant,

v.

Todd M. Harper,
Chairman,
National Credit Union Administration,
Agency.

Appeal No. 2024003915

Agency No. NCUA 24-02

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 23, 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 REVERSE the Agency's final decision dismissing Complainant's complaint, and REMAND the complaint to the Agency for further processing.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint pursuant to 29 C.F.R. § 1614.107(a)(4).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Information Technology (IT) Specialist, GS-14, at an Agency facility in

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.

Alexandria, Virginia. On March 28, 2024, Complainant filed a formal equal employment opportunity (EEO) complaint alleging that the Agency subjected him to discrimination on the basis of race (Caucasian) when:

1. in late April 2023, management falsely accused Complainant of race discrimination;
2. approximately June 1, 2023, the Agency's IT contractors began efforts to undermine Complainant's skills and make it look like he was not good at his job;
3. approximately October 9, 2023, the Agency essentially demoted Complainant and put someone into his former position; and,
4. on November 15, 2023, while in his probationary period, the Agency terminated Complainant's employment, effective November 16, 2023.²

The Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(4), for electing to pursue the non-EEO forum.³ The instant appeal from Complainant followed.

² The record contains a letter, dated November 15, 2023, terminating Complainant's employment, citing "incidents involving [Complainant's] communications and conduct." Further, the letter stated:

You have the right to appeal this action to the Merit Systems Protections Board (MSPB) or through the Equal Employment Opportunity (EEO) process, but not both. . . . While you have a choice, you are bound by the choice you make. If you first file a direct appeal with the MSPB before you file a formal EEO complaint with the [Agency], you will not be able to file a formal EEO complaint as part of the [Agency's] EEO process unless the MSPB dismisses your appeal for lack of jurisdiction. . . . If you first file a formal EEO complaint with the [Agency], you will not be able to appeal to the MSPB right away. Instead, you will have to wait 120 days from the filing of your formal EEO complaint or until the [Agency] issues a final decision on your complaint, whichever occurs first, before appealing to the MSPB.

³ On April 3, 2024, Complainant filed a mixed case appeal with the MSPB. The MSPB docketed the appeal as No. DC-1221-24-0456-W-1, and it is pending before the Board's Washington Regional Office. An initial decision has not yet been issued.

CONTENTIONS ON APPEAL

On appeal, Complainant stated that he informed management that IT Contractors were collectively performing poorly, several IT Contractors falsely alleged that Complainant called them “fucking noobs,” several IT Contractors tried to make it seem that Complainant lacked IT skill and knowledge, management instructed Complainant not to engage with the IT contractors and moved him out of his position, and then management removed him from employment. Complainant acknowledged that he filed a claim with the Office of Inspector General (OIG) on November 13, 2023; the Office of Special Counsel (OSC) on November 20, 2023; the Agency’s EEO Office on March 28, 2024; and the MSPB on April 3, 2024. Complainant stated that his claims are based on the same factual background, but the claims with OIG, OSC, and MSPB are not based on allegations of discrimination. He stated that those claims are based on whistleblower retaliation.

Complainant stated that he filed his formal mixed case complaint with EEO before he filed a mixed case appeal with MSPB, so his election is the EEO process. Further, Complainant stated that the Agency should be sanctioned because its Office of General Counsel improperly informed the Agency that Complainant filed an MSPB appeal.

The Agency opposed Complainant’s appeal, stating that Complainant elected to pursue the non-EEO forum, so it properly dismissed his complaint. The Agency stated that Complainant filed complaints based on the same or similar facts and allegations with the OIG and OSC and a related Independent Right of Action complaint to the MSPB (April 3, 2024.) The Agency stated the same facts Complainant relies on to support his whistleblower claims to the OIG, OSC and MSPB are also asserted to support his EEO complaint.

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 dismiss an entire complaint where the complainant has raised the matter in an appeal to the Merit Systems Protection Board and 29 C.F.R. § 1614.302 indicates that the complainant has elected to pursue the non-EEO process. 29 C.F.R. § 1614.107(a)(4).

"A mixed case complaint is a complaint of employment discrimination filed with a federal agency...related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB)." 29 C.F.R. § 1614.302(a)(1). "A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on [a basis within EEOC jurisdiction]." 29 C.F.R. § 1614.302(a)(2). "An aggrieved person may initially file a mixed case complaint with an agency...or an appeal on the same matter with the MSPB...but not both." 29 C.F.R. § 1614.302(b). "[W]hichever is filed first shall be considered an election to proceed in that forum." Id.

Here, Complainant filed the instant formal EEO complaint (alleging hostile work environment harassment and related disparate treatment resulting in his removal) on March 28, 2024, and an MSPB appeal based on his removal on April 3, 2024. We find that Complainant elected to proceed in the EEO forum by filing a mixed case complaint first.

Pursuant to 29 C.F.R. § 1614.302(d), when a complainant elects to proceed in the EEO forum (with a mixed case complaint) rather than with the MSPB (with a mixed case appeal), the procedures set forth in 29 C.F.R. Part 1614, Subpart A governs processing of the mixed case complaint except as stated below.

- (1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:
 - (i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR

1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

- (2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and
- (3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

Based on the above, we find that this complaint must be remanded to the Agency for mixed case complaint processing, consistent with 29 C.F.R. § 1614.302. When the Agency issues a final decision on the merits of complainant's claims, it must provide appeal rights to the MSPB (not the EEOC).

Separately, based on the record before us, we do not find concern with Complainant filing for whistleblower retaliation with OSC and OIG and filing a mixed case discrimination complaint with the Agency. There does not appear to be a need for election here. Further, we do not find that the Agency's actions alleged herein warrant sanctioning.

CONCLUSION

We REVERSE the Agency's final decision dismissing Complainant's complaint, and REMAND the complaint to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.302. 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 a final decision on the merits with appropriate appeal rights to the MSPB **within ninety (90) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time.

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) a copy of the Agency's final decision ("FAD").

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

November 20, 2024
Date