



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

[REDACTED]
Micheal G,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Health Agency),
Agency.

Appeal No. 2024004293

Agency No. DHA-202402-0184

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 13, 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 following reasons, we REVERSE the Agency's final decision dismissing Complainant's complaint and we remand this matter to the Agency for further processing.

ISSUES PRESENTED

Whether the Agency's final decision 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

During the period at issue, Complainant worked as a Pharmacist at the Agency's Landstuhl Regional Medical Center in Germany. On March 17, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (Caucasian), national origin (association through marriage to a German woman),² sex (male), color (White), and reprisal for prior protected EEO activity.

In its June 13, 2024, final decision, the Agency determined that Complainant's complaint was comprised of the following claims:

- A. Was Complainant discriminated against on the bases of race (Caucasian), color (white), sex (male), and reprisal (non-previous EEO activity) when on January 23, 2024, he was informed that he was not selected for promotion to Inpatient Pharmacy Supervisor.
- B. Was Complainant discriminated against on the bases of race (Caucasian), color (white), sex (male), and reprisal (non-previous EEO activity) when on or about December 5, 2023, through January 23, 2024, Complainant's named supervisor retaliated against him during the selection process of the Inpatient Pharmacy Supervisor's position.

The Agency's final decision dismissed Complainant's complaint for failure to state a claim. The Agency reasoned that that the comparator in this matter is of the same race, color, and sex as Complainant. The Agency therefore determined that Complainant did not establish a prima facie case of race, color, and/or sex discrimination. Regarding the basis of reprisal, the Agency found that Complainant had no prior protected EEO activity.

The instant appeal followed.

² The Agency's final decision did not list national origin as a basis of discrimination. However, as we will discuss below, we find Complainant is also alleging national origin as a basis of discrimination.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that we reverse the Agency's final decision dismissing his complaint and asserts that the Agency did not include the full documentation supporting his EEO complaint.

The Agency did not submit a statement or brief in opposition to Complainant's appeal.

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 improperly framed Complainant's claims. Upon review of the record before us, including attachments to Complainant's formal complaint, we find that Complainant is alleging that he was subjected to an unlawful hostile work environment based on race, color, sex, national origin and reprisal.

Complainant, in an attachment to his formal complaint which he resubmits on appeal, alleges that he was subjected to a hostile work environment through various incidents, including but not limited to the following: co-workers falsely alleging that he made racist and homophobic statements, a co-worker telling him he had white, male privilege, a co-worker making derogatory comments about German people, and Complainant not being selected for the position of Inpatient Pharmacy Supervisor. Complaint File at 11-23.³

³ Our citations to the complaint file reference the page number of the pdf document before us on appeal.

We further find that Complainant is alleging discrimination on the basis of national origin, a basis not set forth in the Agency's final decision. We acknowledge that Complainant did not select the "national origin" box as a basis on his formal complaint form. Complaint File at 5. However, in an attachment to his formal complaint, Complainant asserted "[a named co-worker discriminates] against me because I am married to a person of a German national origin. She has multiple times expressed her disgust for German people open in the [workplace]." Complaint File at 21. Discrimination on the basis of national origin includes discriminating against an individual because of his association with someone of a particular national origin. See EEOC Enforcement Guidance on National Origin Discrimination, No. 915.005 (Nov. 18, 2016) at II.B. Thus, we find that Complainant is alleging discrimination on the basis of national origin due to his association, through marriage, to a German individual.

We find that the Agency improperly dismissed the formal 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. Dep't of Energy, EEOC Appeal No. 01901496 (April 16, 1990).

In the instant matter, Complainant is alleging that he was subjected to a hostile work environment (as set forth above), including not being selected for a promotion, based on various EEO protected classes; thus, he has set forth an actionable claim. To the extent that the Agency asserts that Complainant did not establish a prima facie case of discrimination on the bases of race, color, and/or sex, this assertion goes to the merits of complainant's complaint, and is irrelevant to the procedural issue of whether he has stated a justiciable claim.⁴ See Osborne v. Dep't of the Treasury, EEOC Request No. 05960111 (July 19, 1996); Lee v. U.S. Postal Serv., EEOC Request No. 05930220 (Aug. 12, 1993); Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642 (Aug. 15, 1991).

Regarding the basis of reprisal, we find that the Agency improperly dismissed this basis for failure to state a claim.

⁴ While the EEO Counselor performed an initial informal inquiry, the Agency did not conduct a formal investigation in this matter.

While the Agency, in its final decision, sets forth that Complainant did not have prior protected EEO activity, we find that this matter warrants an investigation. Complainant, in an attachment to his formal complaint, sets forth that co-workers falsely accused him of making racist and homophobic remarks. Complainant further asserts that he raised these matters to his supervisor. Complaint File at 11. Claims of reprisal must be based on a complainant's prior participation in the EEO process or opposition to discrimination. See 29 C.F.R. § 1614.101(b). Based on these circumstances, we find that the Agency improperly dismissed the basis of reprisal without the benefit of an investigation.

CONCLUSION

We REVERSE the Agency's final decision dismissing Complainant's complaint 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 (defined herein as a hostile work environment claim) 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

December 18, 2024

Date