



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Russel D.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2024004334

Agency No. 4J-553-0002-24

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 12, 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. and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, we REVERSE the Agency's decision dismissing the complaint.

ISSUE PRESENTED

The issue presented is whether the Agency properly dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(7) for failure to cooperate.

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 Sales and Services Distribution Associate at the Agency's Garrison Post Office facility in Garrison, North Dakota.

On February 21, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of sex (sexual orientation (gay)),² disability (HIV positive and cancer),³ and reprisal for prior protected EEO activity when:

1. On September 28, 2023, he was issued a Notice of Separation during his probationary period;
2. On or about November 15, 2023, his job offer at the Des Lacs Post Office was rescinded.

On March 19, 2024, the Agency accepted the complaint for investigation. On April 4, 2024, the EEO Investigator emailed Complainant a request for an affidavit. CF at 115. Attached to the EEO Investigator's email was a letter that the completed affidavit must be postmarked no later than 15 days from receipt of the letter, which served as Complainant's 15-day notice that, if he did not respond, his complaint could be dismissed for failure to cooperate pursuant to 29 C.F.R. § 1614.107(a)(7). CF at 113-14.

On April 4, 2024, Complainant responded to the EEO Investigator by email:

I'm not reading anything. I am requesting to have either someone who belongs to the same demographic as I do or someone who I share race [sic] with. I refuse to be targeted or retaliated against

² In Bostock v. Clayton Cty., the Supreme Court held that discrimination based on sexual orientation or transgender status is prohibited under Title VII. 590 U.S. ___, 140 S. Ct. 1731 (2020); see also Baldwin v. Dep't of Transp., EEOC Appeal No. 0120133080 (July 15, 2015) (an allegation of discrimination based on sexual orientation states a claim of sex discrimination under Title VII because sexual orientation is inherently a sex-based consideration).

³ The Agency stated that Complainant's sexual orientation and disability were unspecified. However, during the pre-complaint process, Complainant stated that he was gay and identified his disability as his HIV status and cancer. Complaint File (CF) at 37, 40-44. Moreover, the Postmaster stated in his affidavit that he was aware of Complainant's sexual orientation and his disability. CF at 120-21.

because the trans movement and ideology has caused some people to feel distant franchised [sic] and move down the totem pole, I fought for gay rights, not the make-believe biology from the land of Narnia, but I will say it again I wish to have a Caucasian or Hispanic or gay person to represent

I already asked [the EEO Counselor] to be assigned elsewhere, but once again I was discriminated against and him in conjunction with another party maliciously retaliated in my direction

Thank you for your time like I said I request another individual, so we probably have nothing else to talk to or about until that happens. Hope you're having a wonderful day.

CF at 117. According to the record, Complainant did not provide a completed affidavit to the EEO Investigator.

On June 12, 2024, the Agency dismissed the complaint pursuant to 29 C.F.R. § 1614.107(a)(7) for failure to cooperate. The Agency determined that the EEO Investigator contacted Complainant to request an affidavit and informed him that, if he did not respond to the Agency's request within 15 days of receipt, his complaint could be dismissed for failure to cooperate. The Agency stated that there was nothing in the record reflecting that Complainant was incapacitated or otherwise unable to provide an affidavit. According to the Agency, without further information from Complainant concerning the specifics of his allegations, the Agency was unable to adequately investigate and respond to his complaint. The Agency therefore found that it was appropriate to dismiss Complainant's complaint for failure to provide relevant information in accordance with 29 C.F.R. § 1614.107(a)(7).

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that he is experiencing racism because he is white and requests to be put in contact with someone who "isn't racist and actually believes in equal opportunity."⁴ Complainant also makes arguments concerning the merits of his claims.

⁴ While Complainant is entitled to a fair and impartial investigation of his discrimination claims, he is not entitled to his choice of personnel.

The Agency did not submit a statement or brief in response 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 a preliminary matter, Complainant alleged dissatisfaction with the processing of his EEO complaint by the EEO Counselor. A complainant may raise dissatisfaction with the processing of an EEO complaint and has the burden of showing improper processing. When a complainant raises allegations of dissatisfaction regarding the processing of his or her pending complaint, the Agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the Agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 5, § IV.D (Aug. 5, 2015). If no action was taken, the file must contain an explanation of the Agency's reason(s) for not taking any action. Id. If the Commission finds that the Agency has improperly processed the original complaint, and that such processing had a material effect on the processing of the complaint, it may impose sanctions on the Agency. Id. The Commission has reviewed the entire record and finds that the Agency properly addressed Complainant's allegations in accordance with EEO MD-110. See CF at 57-58. Moreover, there is no indication of improper processing of Complainant's complaint by the Agency.

The Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a)(7) for failure to cooperate. The regulation set forth at 29 C.F.R. § 1614.107(a)(7) provides for the dismissal of a complaint where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has

failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. The regulation further provides that, instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available.

The Commission has held that as a general rule, an agency should not dismiss a complaint when it has sufficient information on which to base an adjudication. See Ross v. U.S. Postal Serv., EEOC Request No. 05900693 (August 17, 1990); Brinson v. U.S. Postal Serv., EEOC Request No. 05900193 (Apr. 12, 1990). It is only in cases where the complainant has engaged in delay or contumacious conduct and the record is insufficient to permit adjudication that the Commission has allowed a complaint to be dismissed for failure to cooperate. See Card v. U.S. Postal Serv., EEOC Request No. 05970095 (Apr. 23, 1998); Kroeten v. U.S. Postal Serv., EEOC Request No. 05940451 (Dec. 22, 1994).

The record indicates that, on April 4, 2024, Complainant received a letter from the EEO Investigator requesting that he furnish an affidavit and indicating that failure to do so within 15 days would result in dismissal of his complaint. According to the Agency, Complainant failed to provide an affidavit within the requisite time frame, so his complaint therefore should be dismissed for failure to cooperate. We note, however, that the Agency has failed to show why Complainant's affidavit was necessary for the further processing of his complaint. The Agency has not claimed that the complaint was vague and found there was sufficient information in the record to be able to define the complaint and accept it for investigation. The Agency was able to complete an investigative record that, even without Complainant's affidavit, appears sufficient to adjudicate the merits of his discrimination claims.⁵ Therefore, under the circumstances, we find that the Agency's dismissal of Complainant's complaint for failure to cooperate was improper.

Because the Agency has already completed its investigation with the exception of Complainant's affidavit (and any potential follow up after he provided an affidavit), we shall remand the matter for the issuance of a final decision on the merits of the complaint.

⁵ Because the record is sufficiently developed to adjudicate the merits of Complainant's claims, we do not reach the question of whether Complainant engaged in contumacious conduct.

CONCLUSION

Accordingly, the Agency's dismissal for failure to cooperate is REVERSED, and we REMAND the matter to the Agency for further processing in accordance with this decision and the ORDER below.

ORDER

Within sixty (60) days of the date this decision is issued, the Agency shall issue a final decision on the merits of the captioned complaint in accordance with 29 C.F.R. § 1614.110. As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send a copy of the Agency's final decision to the Compliance Officer.

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 14, 2024

Date