



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

[REDACTED]
Sam H,¹
Complainant,

v.

Gary Ashworth,
Acting Secretary,
Department of the Air Force,
Agency.

Appeal No. 2024004628

Agency No. 9W4W2400461

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 15, 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 reason below, the Commission AFFIRMS the Agency's decision.

ISSUES PRESENTED

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

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as the Chief of Security Facilities and Administration, GS-15, at the Pentagon in Washington, DC.

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.

On June 17, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African-American) and color (Black) when:

1. On March 21, 2024, Complainant's second level supervisor ("Supervisor 2") suspended Complainant's access to classified information.

The Agency dismissed the matter for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). Specifically, the Agency determined that the Commission lacked jurisdiction to review Complainant's complaint because the Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance decision, citing Department of the Navy v. Egan, 484 U.S. 518 (1998).

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that Egan does not apply to the underlying facts of his complaint because he does not challenge a security clearance determination.

The Agency contends that the complaint was properly dismissed for lack of jurisdiction because Egan does not distinguish between security determinations by an agency, regardless of whether that determination is for suspension of access to classified information or revocation of a security clearance. The Agency reasoned that command-level officials, such as Supervisor 2, make substantive determinations based on "precisely the same substantive evidence and apply the same national security criteria in rendering their decisions. That is, the commander takes more immediate action on an interim basis and based on present information regarding an individual's trustworthiness to access protected information related to national security." The Agency then notes that Supervisor 2 submitted a request to the DCSA AVS to review Complainant's security clearance, and the matter is currently pending review.

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, disabling condition, genetic information, or reprisal. 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 (April 21, 1994).

In accordance with the national security exception contained in Section 703(g) of Title VII, 5 U.S.C. Chapter 75, and Egan, supra, and its progeny, the EEOC has long held that it does not have jurisdiction, and therefore will not, review an agency's determination concerning the substance of a security decision. However, the EEOC does have jurisdiction to review whether an agency has suspended a complainant's security clearance in a discriminatory manner. See Schroeder v. Dep't of Def., EEOC Request No. 05930248 (Apr. 14, 1994); Lyons v. Dep't of the Navy, EEOC Request No. 05890839 (Mar. 22, 1990).

Here, the alleged discriminatory event is the suspension of Complainant's access to classified information as a result of a security inquiry.

The Civilian Initial Complaint Form, completed by Complainant, indicates that the incident or event at issue was that a Lieutenant General ("Lt. General") informed him that "he was suspending [Complainant's] access to classified information effective immediately and until further notice." Complainant states, "It is my firm belief that [Lt. General's] decision to suspend my access to classified information was an act of racially motivated discrimination..."

While Complainant alleges being treated differently and held to a different standard than his "Caucasian/non-black counterparts," he consistently does so within the context of challenging the decision to suspend his access to classified information. The record includes a "Narrative of the Incident" statement that provides that "[Complainant] received a suspension of [his] access to classified information and was stripped of all [his] duties, while [his] Caucasian/non-black counterparts who bore the same, if not more responsibility, for the identified security issues, did not receive any type of discipline or access suspension despite evidence proving their involvement and liability." We note that Complainant does not allege that the other employees involved in the underlying incident, i.e. his Caucasian/non-black counterparts, were not subjected the security inquiry regarding the incident. Rather, Complainant's allegations concern the manner of the security inquiry and the decision to suspend his access to classified information. In his narrative, he argues that he was not given an opportunity to defend himself and the Agency suspended his access without meeting the burden of proof, without due process, and without just cause. Any inquiry into the appropriateness of the Agency's decision to suspend Complainant's access to classified information goes squarely to the merits of the of the security determination and is precluded by Egan. Thus, the dismissal of the complaint was proper.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's final decision.

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

February 3, 2025
Date