



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Bret E.,¹
Complainant,

v.

Mark Averill,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2024004682

Agency No. ARAC24JUN002697

DECISION

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

ISSUES PRESENTED

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

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 Management and Program Analysis Officer, GS-13, at the Agency's Arlington National Cemetery (Cemetery) in Arlington, Virginia.² On July 2, 2024, Complainant filed a formal equal employment opportunity (EEO) complaint alleging that the Agency subjected him to discrimination on the bases of race (African-American), disability (mental and physical unspecified), and reprisal for prior protected EEO activity (prior EEO complaints) when:

1. on April 22, 2024, the Cemetery Executive Director (ED) barred Complainant from Cemetery premises to prevent him from filing his formal complaint,
2. on April 28, 2024, the Agency intentionally provided inaccurate information to the Department of Labor (DOL) for Complainant's Office of Workers' Compensation Programs (OWCP) claim,
3. on May 1, 2024, management failed to complete Complainant's annual performance evaluation for fiscal year 2024, and
4. on May 1, 2024, management initiated a Financial Liability or Property Loss Investigation (FLIPL) regarding equipment that was allegedly assigned to Complainant.

In a final decision (FAD) dated July 23, 2024, the Agency dismissed Complainant's complaint pursuant to 29 C.F.R. §§ 1614.107(a)(1) & 1614.107(a)(9)(iii). Specifically, the FAD stated that it dismissed claim (1) because it circumvents the Agency's in-house administrative processes, hence they are collateral attacks. The FAD dismissed claims (2) and (4), stating that they fail to state a claim of discrimination for which relief can be granted by EEOC. The FAD stated that DOL oversees the OWCP process, and the Army Regulatory process handles property loss investigations. For claim (3), the FAD found that it states the same claim that the Agency has already decided. The FAD stated that the Agency previously decided and dismissed the actions alleged in claim (3) under Agency Docket # ARAC24APR000049.³ The instant appeal from Complainant followed.⁴

² Complainant is no longer an Agency employee.

³ The record contains an Amendment Dismissal dated June 27, 2024 regarding Agency Docket # ARAC24APR000049, which included a claim that the Agency retaliated against Complainant when, on May 1, 2024, management did not complete or issue Complainant an annual performance

CONTENTIONS ON APPEAL

On appeal, Complainant stated, for claims (1), (2), and (4), he stated justiciable claims. Regarding claim (3), Complainant stated the Agency erred in its same claim dismissal because “a performance evaluation is an entitlement that federal employees have, independent from any negotiated agreements.” Complainant also stated, for claim (3) that he initiated EEO contact on the matter but never filed a formal complaint, so it is not the same claim.

In opposition to Complainant’s appeal, the Agency stated that Complainant’s claims fail to state a claim and/or were subsumed by his global settlement with the Agency in connection with his Merit Systems Protection Board (MSPB) appeal.⁵

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.

appraisal for Fiscal Year 2024. The Dismissal stated the claim concerned the performance of terms within a negotiated settlement agreement executed under the Merit Systems Protection Board and enforcement should be requested there.

⁴ On appeal, Complainant requested an extension to submit his supporting brief, which the Commission granted.

⁵ On February 29, 2024, Complainant and the Agency entered into a negotiated settlement agreement in “full and complete satisfaction of all of [Complainant’s] claims . . . predating the effective date of this Agreement with the one exception of his pending Worker’s Compensation claim.”

ANALYSIS

Failure to State a Claim

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).

For claims (1), (2), and (4), respectively, Complainant alleged that management barred him from cemetery premises, provided inaccurate information to DOL for his OWCP claim, and conducted an FLIPL property loss investigation against him. Complainant stated that these are justiciable claims.

The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding, including the results of an internal investigation. See Wills v. Dep't of Defense, EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Service, EEOC Request No. 05940585 (September 22, 1994); Lingad v. U.S. Postal Service, EEOC Request No. 05930106 (June 25, 1993). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's proceeding, such as the grievance process, the workers' compensation process, or, as in this instance, an internal agency investigation. See Fisher v. Dep't of Defense, EEOC Request No. 05931059 (July 15, 1994).

For claim (2), the proper forum for Complainant to have raised his challenges to actions which involve his OWCP claim is with DOL. It is inappropriate to attempt to use an EEO complaint to collaterally attack processing concerns and decisions made during the OWCP adjudicatory process, including the Agency's decision to controvert his claim. Regarding claim (4), we find the proper forum for Complainant to have raised his challenges to actions which occurred because of the internal investigation was during the internal investigation itself.

It is inappropriate to now attempt to use the EEO process to collaterally attack actions which occurred or did not occur to his satisfaction due to the internal investigation process.

After careful consideration of the circumstances herein, we find that claims (2) and (4) were properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1).

Conversely, we find that claim (1) was improperly dismissed. Complainant alleged that the Agency banned him from Cemetery premises based on reprisal. Where, as here, a complainant has asserted that he was subjected to unlawful retaliation for his prior protected activity, the Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U. S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process); see also Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999) (citing EEOC Compliance Manual, No. 915.003 (May 20, 1998)). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Id.

Upon review of the record, we find, in claim (1), Complainant has alleged an adverse action that is reasonably likely to deter Complainant or others from engaging in protected activity – barring from Cemetery premises.

States the Same Claim

We dismiss Complainant's allegation (3) pursuant to 29 C.F.R. § 1614.107(a)(1) for stating the same claim previously raised in his prior complaint. Complainant's prior complaint (Agency No. ARAC24APR000049) alleged retaliation when, on May 1, 2024, management did not complete or issue Complainant an annual performance appraisal for Fiscal Year 2024. Complainant's current allegation, claim (3), alleges, on May 1, 2024, management failed to complete Complainant's annual performance evaluation for fiscal year 2024. We find that Complainant's claim (3) arises from the same adverse employment action alleged in his prior complaint of discrimination and the allegations address the same matters.

As such, the instant allegation is appropriately dismissed for stating the same claim that has previously been addressed by the Agency.

On appeal, Complainant stated that he initiated EEO contact on the actions in claim (3) previously, but did not file a formal complaint on the matter. If such is the case, the Agency would have informed Complainant of the right to file a formal complaint pursuant to 29 Part 1614. If he did not do so, the matter would have ended at the pre-complaint stage without the ability to raise the same matter again.

CONCLUSION

We AFFIRM the final agency decision dismissing claims (2), (3), and (4), and REVERSE it as to claim (1). We REMAND claim (1) to the Agency for further processing consistent with this decision and the Order below.

ORDER (E0224)

The Agency is ordered to process the remanded claims 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 (T0124)

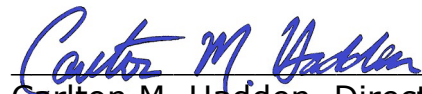
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint.

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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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 11, 2025
Date