



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

[REDACTED]
Alonso T,¹
Complainant,

v.

Todd Hunter,
Acting Secretary,
Department of Veterans Affairs,
Agency.

Appeal No. 2024004702

Agency No. 2004-581-2024-158625

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 19, 2024, dismissing a formal 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the reasons set forth herein, we MODIFY the Agency's final decision dismissing Complainant's complaint.

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 Health Technician at the Agency's facility in Huntington, West Virginia.

On May 2, 2024, Complainant initiated EEO contact. Informal efforts to resolve his concerns were unsuccessful. Complaint File at 19. On June 5, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on race (African-American), age, veteran's status, and in reprisal for prior protected activity when:

- 1) Complainant was subjected to a hostile work environment when:
 - a. Since 2019, he has not received a bonus;
 - b. He did not have union representation when he was written up;
 - c. He is "always" being asked when he is going to retire;
 - d. He was called a racial slur twice by a white patient and management failed to take appropriate action;
 - e. On April 4, 2024, Complainant was issued a proposed admonishment.² Complaint File 22-25.

In the instant final decision, the Agency dismissed Complainant's complaint for failure to state a claim. Complaint File at 93-97. Regarding incident (a), the Agency reasoned that Complainant raised this matter in a prior EEO case, Agency No. 2004-581-156339, in which he did not file a formal complaint and the Agency administratively closed the matter on February 21, 2024. Thus, the Agency deemed incident (a) as abandoned by Complainant. The Agency further set forth that Complainant did not raise incident (a) during EEO Counseling. Complaint File at 93.

The Agency dismissed the basis of veteran's status reasoning that this was not a protected basis under the jurisdiction of the Commission. Complaint File at 94.

² The claims are re-numbered herein for ease of reference.

The Agency dismissed incident (b) reasoning that it is a union matter over which the Commission does not have jurisdiction. Complaint File at 94. Regarding incident (c), that management “always” asked him when he was going to retire, the Agency reasoned that Complainant is not aggrieved because the record does not reflect that he actually resigned or retired. Complaint File at 94. Regarding incident (d), that Complainant was twice called a racial slur and management failed to take proper action, the Agency reasoned that Complainant did not raise these matters during EEO Counseling.

Regarding incident (e), that he was issued a proposed admonishment,³ the Agency reasoned that this matter was not sufficiently severe or pervasive to set forth an actionable claim of harassment. In addition, regarding the basis of reprisal, the Agency reasoned that incident (e) was not reasonably likely to deter Complainant or others in engaging in protected EEO activity. Complaint File at 96.

The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant requests that we reverse the Agency’s final decision. For the first time on appeal, Complainant asserts that he is raising disability as a basis to his formal complaint and alleging that the Agency does not adhere to his approved reasonable accommodation which he asserts is ongoing and is part of his harassment claim. Complainant reasserts that he is repeatedly asked when he is going to retire and that the Agency’s actions regarding this matter occurred within the 45 days preceding his EEO contact.

In response, the Agency requests that we affirm its final decision dismissing Complainant’s complaint for failure to state a claim. The Agency asserts that Complainant’s claims lack specificity. In addition, the Agency reiterates that various incidents comprising Complainant’s harassment claim were not raised during informal EEO Counseling. Regarding incident (d), management not taking proper action when a patient used a racial slur towards him, the Agency, for the first time on appeal, asserts that this matter was untimely raised with an EEO Counselor because it occurred in July 2022.

³ The record reflects that the proposed admonishment was rescinded via email on May 2, 2024. Complaint File at 89. Complainant asserts that the proposed admonishment was rescinded after he initiated EEO contact on May 2, 2024.

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 Agency properly dismissed the basis of veteran's status. The Commission has held that to the extent that a claim is based on veteran's status, it does not come within the purview of the 29 C.F.R. Part 1614 EEO complaint process. Devereux v. U.S. Postal Serv., EEOC Request No. 05960869 (April 24, 1997).

The Agency also properly dismissed incident (b) because Complainant's claim that he was not provided with union representation at specified times is a collateral attack on the negotiated grievance process. The proper forum for Complainant to raise challenges to being denied union representation is through the grievance process. See Jamison F. v. U.S. Postal Serv., EEOC Appeal No. 0120161522 (June 14, 2016) (grievance process is proper forum for Complainant to raise concern about being denied union representation, not the EEO process).

We determine, however, that the Agency improperly dismissed incident (a), that he has been denied a bonus since 2019. The Agency reasoned that Complainant abandoned this matter by raising it in a prior EEO case, Agency No. 2004-581-156339. However, the record, before us on appeal, does not contain any documentation regarding the specified prior EEO case. It is the burden of the Agency to have evidence or proof in support of its final decision. See Marshall v. Dep't of the Navy, EEOC Request No. 05910685 (Sept. 6, 1991). The Agency has not met its burden regarding incident (a).

Regarding the Agency's assertion that Complainant did not raise this matter (incident (a)) during EEO Counseling, we disagree. The EEO Counselor's Report provides, in pertinent part, that Complainant "believed the [proposed admonishment] was done to prevent him from receiving an annual bonus."

Complaint File at 20. Moreover, according to the Counselor's Report, Complainant was counseled on a "harassment/hostile work environment" claim. Complainant during EEO Counseling asserted that he believed he was being treated differently from other employees based on his protected EEO classes. Complaint File at 20. We find incident (a) that Complainant was denied bonuses is like or related to his hostile work environment claim raised during EEO Counseling.

We find that the Agency, in its final decision, fragmented Complainant's complaint rather than viewing the alleged incidents (incidents (a), (c)-(e)) of harassment collectively. In Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993), the Supreme Court reaffirmed the holding of Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986), that harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of a complainant's employment. The Court explained that an "objectively hostile or abusive work environment [is created when] a reasonable person would find [it] hostile or abusive:" and the complainant subjectively perceives it as such. Harris, supra at 21-22. Thus, not all claims of harassment are actionable. Where a complaint does not challenge an agency action or inaction regarding a specific term, condition or privilege of employment, a claim of harassment is actionable only if, allegedly, the harassment to which the complainant has been subjected was sufficiently severe or pervasive to alter the conditions of the complainant's employment.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief. The trier of fact must consider all of the alleged harassing incidents and remarks, and considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997).

Complainant is alleging that he was subjected to harassment comprised of incidents (a), (c)-(e): when management "always" asked him when he was going to retire, denied him bonuses, did not take proper action when a racial slur was used towards him, and issued him a proposed admonishment. When viewing these incidents collectively, we find that Complainant has set forth an actionable claim of harassment. Regarding the Agency's assertion that Complainant did not raise some of these alleged incidents during EEO Counseling, we find these matters are like or related to the hostile work environment claim he raised during EEO Counseling.

To the extent that the Agency, for the first time on appeal, asserts that some of the incidents comprising Complainant's harassment claim are untimely raised, we disagree. The Commission has held that "[b]ecause the incidents that make up a hostile work environment claim 'collectively constitute one unlawful employment practice,' the entire claim is actionable as long as at least one incident that is part of the claim occurred within the filing period. This includes incidents that occurred outside of the filing period that [Complainant] knew or should have known were actionable at the time of the occurrence." EEOC Compliance Manual, Section 2, Threshold Issues at 2-75 (rev. July 21, 2005) (citing National Railroad Passenger Corp v. Morgan, 536 U.S. 101, 117 (2002)).

In the instant matter, various incidents purportedly occurred within 45 days preceding Complainant's May 2, 2024 EEO contact. For example, the proposed admonishment was issued on April 4, 2024 and reissued to Complainant on April 22, 2024. Complaint File at 91, 107. In addition, Complainant asserts that the repeated comments from management regarding his retirement occurred within the 45 days preceding his EEO contact. Based on the foregoing, we find Complainant's harassment claim, comprised of incidents (a), (c)-(e), is timely.

Regarding Complainant's assertion, on appeal, that he is also alleging, as part of his hostile work environment claim, disability as a basis of his complaint and that the Agency has not adhered to an approved accommodation for his disability (on an ongoing basis), Complainant may request, in writing, that the Agency's EEO Director amend these matters to the instant complaint. See EEO Management Directive for 29 C.F.R. Part 1614 (rev. Aug. 5, 2015) at Ch. 5, § III(B).

CONCLUSION

We AFFIRM the Agency's final decision dismissing the basis of veteran's status and incident (b). However, we REVERSE the Agency's dismissal of the remainder of Complainant's complaint, defined herein as a hostile work environment claim (comprised of incidents (a), (c)-(e)), and 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, incidents (a), (c)-(e)) 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)

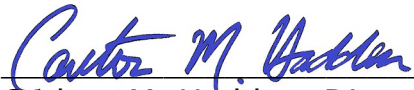
This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from 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 4, 2025
Date