



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]

Wes S.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Highway Administration),²
Agency.

Appeal Nos. 2024004937
2024004938

Agency Nos. 2024-00249-FAA-02
2024-00273-FAA-02

DECISION

Complainant filed two appeals with the Equal Employment Opportunity Commission (EEOC or Commission),³ from the Agency's decisions dismissing his complaints of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq., and Title II of the Genetic

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.

² The complaints were initially filed against the Federal Aviation Administration, but the Agency informed the Commission that the proper responding agency is the Federal Highway Administration.

³ The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. See 29 C.F.R. § 1614.606. The Commission exercises its discretion to consolidate the captioned cases.

Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. For the following reasons, the Commission AFFIRMS the Agency's dismissals.

ISSUE PRESENTED

The issue presented is whether the Agency properly dismissed Complainant's claims.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was a former Agency employee.

Agency Case No. 2024-00273-FAA-02

On June 6, 2024, Complainant filed a formal complaint alleging discrimination and harassment based on disability (mental and physical) and age (YOB: 1975), and in reprisal for prior protected EEO activity, when:

1. on May 6, 2024, management denied granting him Continuation of Pay (COP).

On July 30, 2024, the Agency dismissed the claim as a collateral attack. The Agency noted that a determination to award or deny COP is made by the Department of Labor's Office of Workers' Compensation Program (OWCP), and any concerns should be raised within the OWCP process.

Agency Case No. 2024-00249-FAA-02

On June 18, 2024, Complainant filed another formal complaint alleging discrimination and harassment based on disability and age, and in reprisal for prior protected EEO activity. On August 30, 2024, the Agency issued a Corrected Notification of Dismissal for the following claims:

2. on or about March 20, 2024, management sent a letter to Complainant stating that the Agency was not required to provide accommodations for access to government benefits and services;
3. on or about March 24, 2024, a Privacy Act Officer refused to provide medical information retained by the Agency;
4. on or about May 6, 2024, the Department of Labor notified Complainant that the Agency was instructed to provide him with COP;

5. on or about June 11, 2024, management made unequal requests for documents from Complainant; and
6. on or about June 17, 2024, Complainant was not provided the Counselor's Report in a timely manner.

The Agency noted that in claim 2, Complainant alleged that this action was in violation of a settlement agreement, and the Agency previously provided instructions for addressing any alleged breaches of a settlement agreement. As such, the Agency would not render a decision on the alleged breach.

The Agency dismissed claims 3 and 4 as collateral attacks. The Agency reiterated that any claims related to COP needed to be addressed with the OWCP. In addition, the Agency's Privacy Act Office is an autonomous office with an established redress process. The Agency then found that Complainant failed to state a claim with his allegation that management requested documents pertaining to his informal complaint in an unequal manner (claim 5) because he did not specify a harm that was severe or pervasive to categorize him as aggrieved.

The Agency dismissed claim 6 based on dissatisfaction with the EEO process. When Complainant complained on June 17, 2024, that he did not receive a copy of the EEO Counselor's Report, the Agency replied that a Counselor's Report was not required until Complainant filed a formal complaint.⁴ This spin-off complaint was referred to an EEO Specialist for appropriate action.

The instant appeal followed.

CONTENTIONS ON APPEAL

Through his attorney, Complainant argues that the Agency erred in dismissing his claims for failure to show a harm that is severe or pervasive to categorize him as an aggrieved person because that is not the standard. Rather, Complainant asserts that the "only questions" to consider are whether a complainant claims that he is aggrieved and whether he alleges that he was subjected to discrimination on a basis covered by EEO statutes.

⁴ The Commission's regulations provide that an EEO Counselor shall submit a written report within 15 days after being advised that a complaint has been filed. 29 C.F.R. § 1614.105(c).

Regarding the other reasons for dismissal, such as a collateral attack and dissatisfaction with the EEO process, Complainant claims that he was forced to file his complaint in a system that was inaccessible to his attorney, and the Agency failed to provide him with due process to file his claim.

The Agency opposes the appeal. It asserts that Complainant's claims were properly dismissed as collateral attacks; dissatisfaction with procedural matters; and for lack of severity or pervasiveness to constitute adverse employment action. The Agency maintains that a remand is not warranted.

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

Collateral Attack (Claims 1, 3, and 4)

The Agency dismissed claims 1, 3, and 4 as collateral attacks. 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; an internal agency investigation; or state or federal litigation. See Fisher v. Dep't of Defense, EEOC Request No. 05931059 (July 15, 1994). In his appeal brief, Complainant only generally asserts that these were not collateral attacks, without any specific arguments to support his contention.

While it appears that Complainant complains of actions by Agency officials related to his COP, the Commission has found that such actions are governed by duties under OWCP regulations, and the proper forum to raise his concerns is with the OWCP. See Katina R. v U.S. Postal Serv., EEOC Appeal No. 2022004303 (Oct. 31, 2022); Charles M. v. U.S. Postal Serv., EEOC Appeal No. 2022000218 (Jan. 18, 2022).

In addition, matters concerning the Privacy Act are not within the regulations enforced by the Commission, and complaints about a Privacy Officer's conduct are collateral attacks and fall outside of the Commission's jurisdiction. See Nicki B. v. Dep't of Veterans Affairs, EEOC Appeal No. 2020002389 (Sept. 9, 2020); Grove v. U.S. Postal Serv., EEOC Appeal No. 0120110456 (Jan. 5, 2012); Price v. U.S. Postal Serv., EEOC Appeal No. 0120111033 (Dec. 8, 2011).

The Commission has held that an employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Dep't of Defense, EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June 25, 1993). Accordingly, we find that claims 1, 3, and 4 were properly dismissed as collateral attacks related to the processing of Complainant's COP worker's compensation benefits and his allegations against a Privacy Act Officer.

Failure to State a Claim (Claim 2)

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 or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission 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. Department of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). When the complainant does not allege that he is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

In the letter at issue, the Human Resources Director informed Complainant that the Agency no longer had an obligation with respect to a reasonable accommodation because Complainant separated from the Agency as of September 10, 2022.⁵ Administrative File at 192.

⁵ The Agency did not address claim 2 in the dismissal letter stating that Complainant was provided with instructions to raise allegations of a settlement breach. However, Complainant alleged a violation of the settlement agreement regarding the letter's mode of transmittal because the settlement stipulated that correspondences must be emailed or sent via overnight mail. Administrative File at 43. The allegation related to the

On appeal, Complainant argues that a claim should not be dismissed if a complainant claims that he is aggrieved and alleges that he was subjected to discrimination on a basis covered by EEO statutes. However, the allegation(s) must be related to a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy.

Here, the Human Resources Director informed Complainant that the Agency was not obligated to provide a reasonable accommodation to Complainant because he was no longer an employee. A "reasonable accommodation" is a modification or adjustment: (1) to the application process that enables a qualified applicant with a disability to apply for a job; (2) to the work environment or manner or circumstances under which a position is performed that enables an individual with a disability to perform the position's essential functions; or (3) that enables an employee with a disability to enjoy equal benefits and privileges of employment. 29 C.F.R. § 1630.2(o). Complainant did not describe the "benefits and services" for which he was allegedly denied accommodations. However, there is no indication that he was trying to re-apply for a position with the Agency, and since he was not an employee, an accommodation to enable him to perform essential functions or to enjoy benefits and privileges of employment was not applicable. Accordingly, Complainant has not alleged a harm for which there is a remedy and claim 2 can be dismissed for failure to state a claim.

Further, any alleged harassment could not alter the conditions of Complainant's employment since he was not employed by the Agency. See Nagler v. Dep't of Education, EEOC Appeal No. 01901975 (Jun. 26, 1990) (finding that the complainant was no longer employed by the agency and her claims of harassment failed to state a claim), request for recon. denied, EEOC Request 05900987 (Nov. 1, 1990) (the Commission affirmed the prior decision and highlighted that the goal of relief provided pursuant to Title VII was to make the person whole from the discrimination suffered, and in alleged harassment, a complainant would be entitled to a harassment-free work environment, and since the complainant was no longer an agency employee, such relief was unavailable). See also Battle v. Dep't of Transportation, EEOC Appeal No. 0120083353 (Mar. 2, 2012) (dismissal of the claim of harassment for failure to state a claim, in part, because the complainant was not employed by the agency at the time of the incidents).

mailing of the letter is separate from the allegation regarding the content of the letter. As such, we will address claim 2 in the instant decision and remind the Agency of its obligation to address Complainant's allegation of a settlement agreement breach in accordance with 29 C.F.R. § 1614.504.

Dissatisfaction with EEO Process (Claims 5 and 6)

EEOC Regulation 29 C.F.R. § 1614.107(a)(8) provides that an agency shall dismiss a complaint that alleges dissatisfaction with the processing of a previously filed complaint. Such a complaint is a "spin off" complaint, which should be referred to the agency official responsible for complaint processing and/or processed as part of the original complaint. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015); see also Fields v. Dep't of Health and Human Servs., EEOC Request No. 05910159 (Feb. 11, 1991).

Here, Complainant's claim that he was not provided a copy of the Counselor's Report prior to his filing of his formal complaint was related to complaint processing. The Agency explained that it referred the matter to an EEO Specialist for appropriate action, which Complainant does not challenge. As such, we find that the Agency appropriately dismissed claim 6.

While the Agency dismissed claim 5 for failure to state a claim, a fair reading shows that this event was related to the processing of Complainant's EEO complaint. The EEO Counselor requested that Complainant provide a copy of the letter referenced in claim 2 during informal counseling, and Complainant protested being asked to "provide them papers,"⁶ and he immediately requested that the EEO Counselor add a claim of "unequal demands of disclosure." Administrative File at 181-3. We find that claim 5 can be dismissed as an allegation of dissatisfaction with the EEO process.

Complainant also laments that he had to file his complaint in an Agency system that his attorney could not access. However, this is another matter related to his dissatisfaction with the processing of his EEO complaint, and he is advised to contact appropriate Agency officials.

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 dismissals of Complainant's claims.

⁶ The Human Resources Director provided a copy of the letter. Administrative File at 190-2.

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

December 9, 2024
Date