



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

████████████████████
Diego A.,¹
Complainant,

v.

Terence Emmert,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2024004957

Agency No. MC-24-67056-01129

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated August 7, 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 reasons presented below, we AFFIRM the Agency's final decision dismissing Complainant's complaint.

ISSUES PRESENTED

Whether the Agency's final decision properly dismissed Complainant's formal complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Operations Research Analyst, GS-1515-13, for the Marine Corps Combat

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.

Development Command. He was terminated from this position on September 9, 2022.² Later, Complainant made a Freedom of Information Act (FOIA) request for his security information file from the Defense Counterintelligence and Security Agency (DCSA). Complainant received those documents in March 2024 and learned that the Agency had issued a Loss of Jurisdiction letter on or about October 2022.³

On March 18, 2024, Complainant contacted an EEO counselor and alleged that Lieutenant Colonel discriminated and retaliated against him in reprisal for a prior EEO complaint against Lieutenant Colonel, subjecting Complainant to a loss of referral and hiring from an outside institution when in or around March 2024, Complainant learned through his response to his FOIA request that the Agency had issued a Loss of Jurisdiction letter on or about October 2022.

On July 9, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of reprisal for prior protected EEO activity (Agency No. 21-00027-00359) when beginning on April 1, 2021, Lieutenant Colonel became Complainant's supervisor and created a hostile work environment, Lieutenant Colonel and others conspired to have Complainant removed from government service, Lieutenant Colonel spearheaded Complainant's termination on September 9, 2022, and placed Complainant in a Loss of Jurisdiction status.

² Complainant appealed his termination to the Merit Systems Protection Board (MSPB). However, according to Complainant, on October 26, 2022, the MSPB dismissed his appeal for lack of jurisdiction because Complainant was a probationary employee. Complainant reports that he appealed the MSPB dismissal to the United States Court of Appeals for the Federal Circuit.

³ According to the DCSA website, "[Loss of Jurisdiction] LOJ is placed in [Defense Information System for Security] DISS on an individual's eligibility once they have been out-processed from DISS and no longer have an affiliation with the DOD as a military member, employee, or cleared contractor employee, prior to the DCSA Adjudication and Vetting Services being able to make a favorable eligibility determination. In order to request adjudication, the Security Manager or Facility Security Officer (FSO) must submit a Customer Service Request (CSR) in the Defense Information Security System (DISS) for a new action to request adjudication once they have created a new owning relationship for that individual in their account."

Complainant stated that reprisal for the EEO complaint he filed in December of 2020 was the most logical reason for his termination.

The Agency framed the complaint as alleging discrimination by Complainant's first level supervisor, Lieutenant Colonel, based on reprisal (21-00027-00359), when in March of 2024, Complainant learned through a FOIA request the Agency issued a Loss of Jurisdiction letter on or about October 2022.

The Agency then dismissed the complaint as framed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state claim, finding that Complainant had lodged a collateral attack on the loss of jurisdiction security clearance eligibility determination. The Agency stated that the proper forum to raise such challenges would be with Defense Information System for Security (DISS). Complainant filed the instant appeal.

CONTENTIONS ON APPEAL

On appeal, Complainant asserts that he has stated a claim because he clearly laid out a claim for retaliation based on his prior EEO activity which is within the Commission's jurisdiction. Complainant states that the Agency placed derogatory information into his security information file well after he was terminated. Complainant also takes issue with his termination. However, Complainant did not challenge the framing of the complaint.

The Agency did not file a brief or statement in connection with this 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

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 disability. 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 (Apr. 21, 1994). 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.

The Commission does not have jurisdiction to review an agency's determination on the substance of a security clearance decision. Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as Amended, EEOC Notice No. N-915-041 (May 1, 1989) (Guidance); Dep't of the Navy v. Egan, 484 U.S. 518, 529 (1988). Section 703(g) is an affirmative defense to a charge of discrimination.

However, the legislative history of § 703(g) makes it clear that the Commission is not precluded from determining whether the grant, denial or revocation of a security clearance is conducted in a nondiscriminatory manner. Guidance. Once statements gathered during the background clearance investigation are included in the security clearance investigative report, they are "squarely within the rubric of a security clearance determination and, accordingly beyond the Commission's jurisdiction." Schroeder v. Dep't of Defense, EEOC Request No. 05930248 (April 14, 1994). The Commission has applied Schroeder even to cases involving false or negative comments. In Complainant v. Dep't of Energy, EEOC Appeal No. 0120141119 (July 9, 2014), the Commission determined a claim accusing management and coworkers of making false statements during the course of OPM's security clearance investigation fails to state a claim. In Complainant v. Dep't of Veterans Affairs, EEOC Appeal No. 0120131718 (Jan. 22, 2015), the Commission found that a complainant had not stated a valid retaliation claim by accusing his supervisor of making negative comments about him to an OPM investigator that resulted in an unfavorable security clearance determination.

Here a fair reading of the complaint is that Complainant is alleging the Agency retaliated against him for prior EEO activity when it placed "derogatory information", a loss of jurisdiction letter, into his security file after his termination. We find this falls within the rubric of a security clearance determination and is beyond the Commission's jurisdiction.⁴

Accordingly, the Agency's dismissal of the complaint for failure to state a claim was proper.

CONCLUSION

For the foregoing reasons, the Agency's final decision dismissing Complainant's complaint is AFFIRMED.

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.**

⁴ To the extent Complainant raises discrimination claims related to his termination, these claims were not counseled, nor were they timely raised with an EEO counselor. Further, it appears Complainant has elected to pursue the MSPB appeals process instead of the EEO process for claims related to his termination. Therefore, these claims are not before us, and we decline to address them here.

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)

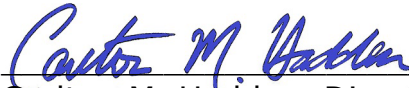
You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department 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 20, 2025

Date