



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

[REDACTED]  
Elliot M,<sup>1</sup>  
Complainant,

v.

David Lebryk,  
Acting Secretary,  
Department of the Treasury  
(Internal Revenue Service),  
Agency.

Appeal No. 2024004987

Agency No. IRS-24-0665

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 12, 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. We affirm the Agency's final decision for the reasons discussed below.

ISSUES PRESENTED

Whether the Agency properly dismissed Complainant's complaint for failure to state a claim and for raising a claim previously raised in a prior complaint.

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<sup>1</sup> 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 relevant time, Complainant was the former Supervisory Revenue Agent for Planning & Special Projects section (PSP) at the Agency's Large Business and International division.

On July 5, 2024, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination based on race (Caucasian), sex (male), color (White), age (72), and in reprisal for prior protected EEO activity when:

1. On January 19, 2024, Complainant became aware that in March 2022, a manager who was assigned to handle his job duties while he was out of the office on extended medical leave, drafted a document that created a false narrative of Complainant's performance in his role as PSP supervisor that was disseminated to members of management. Complainant further stated that:
  - a. The document may have been used as part of an effort to prevent the Complainant from returning to his position upon his return from extended medical leave.
  - b. The document may have been used to force the Complainant to accept a mandatory detail offered in lieu of returning to his original position upon his return from extended medical leave.
  - c. The document may have had a negative impact upon Complainant's annual performance review, if had not retired.
  - d. The document may have "poisoned the water" regarding any opportunities that may have been available to Complainant to apply for another position within his prior organization.
2. Complainant was subjected to a constructive discharge in or about May 2022, when he retired in lieu of accepting a mandatory detail, and lost the opportunity to complete several critical projects.

In the instant final decision, the Agency dismissed Claim 1) for failure to state a claim. The Agency reasoned Claim 1) was speculative and did not allege a present employment harm. The Agency dismissed Claim 2) for stating a claim that had been decided by the Agency or Commission. In the alternative, the Agency dismissed both claims for untimely EEO Counselor contact.

### CONTENTIONS ON APPEAL

On appeal, Complainant restates his position that, employee who was designated as the acting PSP supervisor, because of his medically-excused absence, prepared a memo calling for improvements in PSP. Complainant argues this PSP improvement memo directly harmed his opportunity to return as the PSP supervisor once he was medically able to return to work. Complainant argues that because senior managers reviewed the PSP improvement memo, they ultimately determined to replace him with the acting PSP supervisor, while Complainant was required to complete a post-medical leave detail which Complainant considered a demotion. Rather than accepting the detail, Complainant felt compelled to retire.

Regarding timeliness of EEO contact, Complainant claims he was not aware of the applicable time limits and of the proper points of contact for initiating his EEO complaint. Complainant attributed his difficulties meeting deadlines to the fact that he was acting pro se for this matter, whereas he had previously been represented by counsel.

The Agency filed an appellate brief opposing Complainant's appeal and a motion to strike Complainant's appellate brief as untimely despite extensions.

### 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

EEOC Regulation 29 C.F.R. § 1614.107(a)(1), states that prior to a request for a hearing in a case, the Agency shall dismiss an entire complaint that falls to state a claim under 29 C.F.R. § 1614.103 or 29 C.F.R. § 1614.106(a). The regulations provide that an agency may not accept a complaint from a complainant who is not aggrieved. 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 under EEOC regulations. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994).

In Claim 1, Complainant has only alleged speculative and possible harm that he suspects "may have" been caused by the PSP improvement memo instead of a viable employment discrimination claim. Stroud v. Dep't of the Treasury, EEOC Appeal No. 01952101 (Oct. 26, 1995); Spencer v. Dep't of the Navy, EEOC Appeal No. 01942408 (May 27, 1994). Because of this lack of an actual, present employment harm, Complainant is not aggrieved under EEO regulations. The Agency properly determined that Claim 1 failed to state a claim. Parks v. Dep't of Def., EEOC Request No. 05950314 (Sept. 11, 1995).

EEOC Regulation 29 C.F.R. § 1614.107(a)(1) also provides for the dismissal of a complaint that states the same claim that is pending before or has been decided by the Commission or the Agency. To be dismissed as the "same claim," the present formal complaint and prior complaints must have involved identical matters. In order from a formal complaint to be dismissed as identical, the elements of the complaint must be identical to the elements of the prior complaint in time, place, incident, and parties. Jackson v. U.S. Postal Serv., EEOC Appeal No. 01955890 (Apr. 5, 1996).

Claim 2 concerns Complainant's claim that he was constructively discharged from the PSP supervisor position when Agency management offered him a lesser detail upon his return from extended medical leave. The record revealed that Complainant has already raised the matter of his constructive discharge in Agency Case No. IRS-23-0025-M. The file contained the Agency's October 20, 2022 acceptance of claims letter for Agency Case No. IRS-23-0025-M. Similarly, Complainant had challenged the propriety of the Agency's detailing him upon return from his medical leave in Agency Case No. IRS-22-0613-F1. The file contained the Agency's October 20, 2022 acceptance of claims letter for Agency Case No. IRS-22-0613-F1. Therefore, we also concur with the Agency's dismissal decision regarding Claim 2.

Because we find the Agency's decision was proper, we decline to review its dismissal's untimeliness of EEO contact grounds under 29 C.F.R. § 1614.107(a)(2).

### CONCLUSION

Accordingly, 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.** 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 11, 2025

Date