



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**Office of Federal Operations**

**P.O. Box 77960**

**Washington, DC 20013**

[REDACTED]  
Jonathan V.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2025000025

Agency No. ARBLISS24AUG003497

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated September 4, 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 the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. Upon review, the Commission finds that Complainant's complaint was properly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1).

**ISSUES PRESENTED**

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

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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

At the time of events giving rise to this complaint, Complainant worked as a Missile Equipment Specialist at the Agency's Directorate of Plains, Training, Mobility, and Security (DPTMS) in Fort Bliss, Texas. On August 28, 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) and age (Date of Birth: July 27, 1963) when:

1. on June 28, 2024, a Supervisory Equipment Specialist ("Supervisor"), his immediate supervisor, stated "let's face it we are an aging workforce, and some of you are old as dirt including myself;" and
2. on February 28, 2024, Supervisor validated a memorandum from a DPTMS Secretary ("Secretary") stating, "what I'm realizing is that these personnel have the mindset of Air Defense from the 80's, 90's, 2000's and the Blacks have made themselves be in a glass ceiling." <sup>2</sup>

Specifically, Complainant alleged that Supervisor forwarded the memorandum, which validates it and shows Complainant was denied an opportunity for promotion to a GS-1670-11 position.<sup>3</sup> Complainant stated that Supervisor preselected selectees base on race and age for promotions.

On September 4, 2024, the Agency issued a final decision (FAD) dismissing Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a), for failure to state a claim as to claim (1) and same claim already addressed as to claim (2)<sup>4</sup>. The instant appeal from Complainant followed.

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<sup>2</sup> The record reveals that Complainant initiated EEO contact on July 17, 2024 regarding the incident alleged in claim (1).

<sup>3</sup> The record shows, on January 30, 2024, Complainant filed a grievance regarding the way a promotion board was conducted on January 29, 2024. Complainant stated that Supervisor ignored his concerns and Supervisor's response "was offensive and defamed my character along with every other black person who happens to be a certain age or race."

<sup>4</sup> In a decision dated July 1, 2024 addressing Agency No. ARBLISS24MAY001941, the Agency dismissed the actions alleged in Claim (2) herein, citing untimely EEO contact. The Agency stated that Complainant initiated EEO contact for the February 28, 2024 incident on May 17, 2024. The Agency stated that Complainant filed the formal complaint for Agency No. ARBLISS24MAY001941 on June 21, 2024.

### CONTENTIONS ON APPEAL

On appeal, Complainant expressed concerns about processing of the instant complaint. Also, he reiterated his contentions of bias in the hiring and promotion process at the Agency.

In opposition to Complainant's appeal, the Agency stated that Complainant was not rendered aggrieved by the incident alleged in claim (1). The Agency stated that Complainant provided no evidence that he suffered direct and personal harm due to Supervisor's comment or that the action rose to the level of severe or pervasive. Regarding claim (2), the Agency reiterated that it is an allegation it addressed previously in the July 1, 2024 decision for Agency No. ARBLISS24MAY001941, so should be dismissed as same claim.

### 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 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).

The Commission has held that where a complaint does not challenge an agency action or inaction regarding a specific term, condition, or privilege of employment, a claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

In the instant case, the Commission finds that the Agency properly dismissed claim (1) for failure to state a claim. As an initial matter, the alleged incidents did not involve adverse action against Complainant. See Backo v. United States Postal Service, EEOC Request No. 05960227 (June 10, 1996) (finding that the Commission has repeatedly found that remarks unaccompanied by "concrete action" fail to state a harassment claim under Title VII). Furthermore, the Commission finds that Complainant's allegations, even if true, do not rise to the level of being sufficiently severe or pervasive to assert a claim of hostile work environment discrimination. See, e.g., Banks v. Dep't of Health and Human Services, EEOC Request No. 05940481 (February 16, 1995) (finding that a supervisor allegedly throwing a file onto a complainant's desk and loudly berating her in front of other employees did not state a harassment claim); Omer P. v. Dep't of the Army, EEO Appeal No. 2019002814 (July 25, 2019) (finding allegations that a supervisor undermined Complainant's authority insufficient to state a claim when the supervisor held secret meetings without complainant, promised to reinstate the complainant's subordinate without the complainant's permission, and used derogatory language when describing complainant's supervisory role).

Further, as to claim (2), the claim identified in the final decision for Agency No. ARBLISS24MAY001941 appears to be the same claim as the action alleged in claim (2) here. As such, the instant allegation would be appropriately dismissed for stating the same claim that has previously been addressed by the Agency. Even if the matter is not the same as that identified in Agency No. ARBLISS24MAY001941, based on the above, claim (2) fails to state a claim on its own or together with claim (1).

#### 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 27, 2025

Date