



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

[REDACTED]  
Brian M.,<sup>1</sup>  
Complainant,

v.

Ryan D. McCarthy,  
Secretary,  
Department of the Army,  
Agency.

Appeal No. 2019005321

Hearing No. 420-2019-00219X

Agency No. ARREDSTON17SEP03314

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated June 13, 2019, 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Electronics Engineer at the Agency's Army Material Research & Development Engineering Command facility in Redstone Arsenal, Alabama.

On November 27, 2017, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of race (African-American), color (Black), and age when: (1) on August 25, 2017, he was management-directed reassigned from the Missile Division, Technical Management Engineering Directorate with the Joint Attach Munitions Project Office to the Aviation Division, Technical Management, Engineering Directorate AMRDEC via memorandum signed by the Supervisory General Engineer, Chief, Missile

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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.

Division, Engineering Directorate, ARMDEC; and (2) in September 2017, he received notice of local suspension of his security access via memorandum, SUBJECT: Suspension of Access to Classified Information, dated September 6, 2017, signed by the USAG Redstone Arsenal Security Manager, Directorate of Operations, Installation Management Command.

The Agency investigated the complaint, and Complainant requested a hearing. Thereafter the EEOC Administrative Judge (AJ) issued notice to the parties of an intent to dismiss the complaint without a hearing because Complainant had filed a grievance under the collective bargaining agreement on the same matter. The parties were provided with an opportunity to respond. Thereafter the AJ issued a decision dismissing the complaint.

The Agency adopted the AJ's dismissal, and the instant appeal followed. In his appeal, Complainant basically argues that in his EEO complaint he raised claims of discrimination and, in his grievance, he alleged that the Agency did not follow proper procedures and violated the collective bargaining agreement.

#### ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.301(a) states that when a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or whether the grievance has raised an issue of discrimination.

Here, Complainant filed his formal grievance on August 28, 2017, concerning his reassignment on August 25, 2017, after he plugged his personal telephone into a classified government computer. It is also undisputed that the September 2, 2017 suspension of his security clearance was directly related to the August 25 incident and was part of the grievance. Complainant did not file his formal EEO complaint on the same matters until November 27, 2019. Therefore, the record evidence establishes that Complainant elected to process his concerns through the grievance process and is not also entitled to file an EEO complaint on the same issues. As already noted, Complainant's election to have his claim processed through the grievance process rather than the EEO complaint process is dispositive even though Complainant failed to raise his discrimination claims as part of the grievance.

In reaching this conclusion, we note that there is no copy of the collective bargaining agreement that shows that claims of discrimination may be raised in the grievance process, and the AJ erred in not ensuring such information was in the record before dismissing the complaint. Nonetheless, under the circumstances of this case, we find the error was harmless.

We conclude the record contains other evidence showing claims of discrimination can be raised in the grievance process at issue. Specifically, the record contains another grievance filed by Complainant in 2016 where his allegations of discrimination were addressed. We find this shows that claims of discrimination may be raised in the grievance process.

Accordingly, the Agency's final order adopting the AJ's dismissal of the complaint is AFFIRMED.

**STATEMENT OF RIGHTS - ON APPEAL**  
**RECONSIDERATION (M0617)**

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

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 his or her 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:

A handwritten signature in blue ink, reading "Carlton M. Hadden", is written over a horizontal line.

Carlton M. Hadden, Director  
Office of Federal Operations

March 13, 2020

Date