



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

[REDACTED]
Nicki B,¹
Complainant,

v.

Robert Wilkie,
Secretary,
Department of Veterans Affairs
(Veterans Health Administration),
Agency.

Appeal No. 2020001389

Agency No. 200I06142019105812

DECISION

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's November 13, 2019, dismissal of her 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was a former employee and job applicant at the Memphis VA Medical Center, in Memphis, Tennessee.

On October 19, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of reprisal for prior protected EEO activity when:

1. In July 2019, the Privacy Office’s response to her information request was useless,
and,

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. On September 4, 2019 (and ongoing) she received no response after she submitted a reworded version of her request, and the Privacy Officer told her not to be harassing when she inquired about her request.

In May 2019 Complainant was notified that she had not been referred for the position of Transcription Program Assistant (Job Announcement No. CARZ104797719JSGS05), which she applied to the previous month.² According to USAjobs.gov, the position had been canceled. However, at the time, Complainant had a case pending before the Merit Systems Protection Board (“MSPB”) contesting her termination from the Agency in August 2018, and was pursuing an unrelated EEO complaint with the Agency. Suspecting that the non-referral may have been retaliatory, Complainant inquired with HR for more information, such as why the position was canceled, whether it would be reposted, and who specifically was responsible for canceling the position. After HR gave Complainant “the runaround,” she submitted requests through the Agency’s Freedom of Information Act (“FOIA”) Privacy Office in July and September 4, 2019.

The Agency dismissed Complainant’s complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

ANALYSIS AND FINDINGS

Under 29 C.F.R. § 1614.107(a)(1) an agency shall dismiss a complaint that fails to state a claim. This Commission has generally held that complaints involving other administrative proceedings, and related processes, do not state a claim within the meaning of its regulations. See Hogan v. Dep’t of the Army, EEOC Request No. 05940407 (Sept. 29, 1994); Heard v. Dep’t of Justice, EEOC Appeal No. 0120092680 (Aug. 27, 2009). Additionally, 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 (Jul. 30, 1998). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum’s proceeding. See Lingad v. United States Postal Serv., EEOC Request No. 05930106 (Jun. 23, 1994).

Here, Complainant's concerns are in regard to the Freedom of Information Act (“FOIA”). The Commission has previously determined that it does not have jurisdiction over the processing of FOIA requests since disputes regarding such requests should be addressed through the approximate Department of Justice guidelines and agency FOIA implementing regulations. See Gaines v. Dep’t of the Navy, EEOC Request No. 05970386 (Jun. 13, 1997) citations omitted. The language of the Act provides exclusive statutory frameworks for governing the disclosure and access to information contained in federal records.

² Although Complainant referenced her nonselection in her Formal Complaint, the Agency did not include the matter in its framing of her complaint, and Complainant did not dispute the Agency’s framing on appeal.

Complainant's allegation in Claim 1, that the Privacy Office's response to her FOIA request was "useless," challenges the outcome of another administrative proceeding, and constitutes an attempt to lodge collateral attack. Similarly, Complainant's allegation in Claim 2, that the Privacy Office has not responded to her FOIA request, concerns the processing (or lack thereof) of a FOIA request, which, as previously stated, is outside EEOC jurisdiction. See Angella F. v. United States Postal Serv., EEOC Appeal No. 0120160439 (Mar. 3, 2016).

We have previously found complaints identifying individuals as directly responsible for impeding FOIA requests to be outside the purview of the EEOC, because ultimately, they concern the processing of a FOIA request. See, e.g. Onie R. v. United States Postal Serv., EEOC Appeal No. 0120172583 (Oct. 3, 2017) (allegation that Management violated FOIA when it denied complainant's request to view her personnel file, and when it did not respond to her request to view her files, were an attempt to lodge a collateral attack) see also, Cortez J. v. Dep't of Homeland Sec., EEOC Appeal No. 0120160744 (Mar. 18, 2016) (affirming Agency final order on the grounds that the EEOC does not have jurisdiction over the processing of FOIA requests, where complainant alleged that the Agency's FOIA Officer and the Office of Chief Counsel deliberately withheld information and misinformed the complainant about the status of his FOIA request for information that would support his claim in an EEO complaint).

In this case, Complainant emphasizes the Privacy Officer's culpability in the alleged retaliation, describing him as "rude," "arrogant" and "mean." Frustrated by the Privacy Officer's July 2019 response, the September 4, 2019 reworded FOIA request informed the Privacy Officer, "[i]f you fail in this attempt to give me the names of the people I am requesting... I will include your name and title in the EEO complaint. Then you can be responsible for their retaliation." When she called the FOIA Privacy Office for an update one week after hand delivering the reworded request to the Privacy Officer, Complainant alleges that he said if she called again he would file a harassment complaint against her, and has since failed to respond to her request. Even though the document request identifies an Agency employee and relates to documents that could establish the alleged EEO violation of reprisal, Complainant's allegations regarding the Privacy Officer concern the FOIA process, and therefore fall outside our jurisdiction.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint for failure to state a claim 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:



Carlton M. Hadden, Director
Office of Federal Operations

September 9, 2020

Date