



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

[REDACTED]
Tyrone D.,¹
Complainant,

v.

Dr. David J. Skorton,
Secretary,
Smithsonian Institution,
Agency.

Appeal No. 2020003601

Agency No. 20-04-120319

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from an Agency decision, dated March 12, 2020, dismissing a formal complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. The Commission accepts the appeal in accordance with 29 C.F.R. § 1614.405.

BACKGROUND

During the relevant time, Complainant worked as a Security Officer for the Agency's Office of Protection Services at the Smithsonian Institution, in Washington D.C.

Believing that he was subjected to discrimination based on disability (physical) and in reprisal for prior protected EEO activity, Complainant filed a formal EEO complaint on December 3, 2019.

In the instant final decision, the Agency framed the claims as follows:

1. Between June 11, 2019 and July 26, 2019, Complainant attempted to contact [Individual-L] of the Office of Human Resources Compensation and Benefits Contractor, regarding his application for disability retirement. [Individual-L] was difficult to reach via phone and email during this time;

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. Between August 2, 2019 and August 12, 2019, Complainant requested that [Individual-L] provide him with a certified/final copy of his completed disability retirement application, but he received no response;
3. On August 23, 2019, Complainant received a copy of his final disability retirement application, which contained a forged signature and supervisor statement forms dated August 22, 2019, even though the paperwork was [purportedly] submitted to OPM on August 4, 2019; and,
4. On an unknown date, [Individual-L] shared Complainant's personal medical information with unnamed individuals in the Office of Protection Services (OPS) Labor Relations without his permission.

In its March 12, 2020 final decision, the Agency dismissed the formal complaint for failure to state a claim. The Agency reasoned that claims (1) through (3) concerned the processing of Complainant's disability retirement and constituted a collateral attack on OPM's disability retirement process.

According to the Agency, Complainant's claim that Human Resources shared his confidential medical information without his permission (claim (4)) was a possible violation of the Privacy Act. The Agency stated that because the Privacy Act falls under the exclusive jurisdiction of the United States District Court, it too was a collateral attack.

Complainant filed the instant appeal.

ANALYSIS AND FINDINGS

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 or disabling condition. 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).

Claims (1) – (3)

In claims (1) through (3), Complainant challenges the Agency's actions, or inaction, in the processing of his disability retirement application. On appeal, he elaborates on these claims and reiterates his concern that the application was ever sent to OPM. An employee cannot use the EEO complaint process to lodge a collateral attack on another proceeding. See Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. U.S. Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. U.S. Postal Serv., EEOC Request No. 05930106 (June

25, 1993). The proper forum for Complainant to have raised his challenges to actions which occurred during the processing of his disability retirement was at that proceeding itself, with OPM. It is inappropriate to now attempt to use the EEO process to collaterally attack actions which occurred during OPM's processing of his disability retirement.

Claim (4)

As framed by the Agency, Complainant alleges that due to his disability and in reprisal for his prior protected EEO activity, his personal medical information was shared with OPS Labor Relations without his permission. The Agency correctly stated that violations of the Privacy Act or HIPPA (Health Information Portability Accountability Act) are beyond the Commission's jurisdiction. See Osborne v. United States Postal Service, EEOC Request No. 05950654 (February 15, 1996); Shanti N. v. United States Postal Service, EEOC Appeal No. 2019005987 (February 21, 2020)(allegation that Human Resources sent complainant's CA-2 form and medical documents to her colleagues did not only implicate HIPPA, as reasoned by the Agency, but also the confidentiality provision of the Rehabilitation Act).

However, Section 102(d) of the Americans with Disabilities Act, and by extension Section 501(g) the Rehabilitation Act, also specifically prohibits the disclosure of medical information, except in certain limited situations. See Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002, (Oct. 17, 2002) (describing the limited exceptions to the medical confidentiality requirements); Titus v. Dep't of Homeland Security, EEOC Appeal No. 0120102384 (Apr. 17, 2013). The Commission has previously stated that the disclosure of "medical information pertaining to appellant in a manner that did not conform to the conditions prescribed in [the Commission's regulations pertaining to confidentiality of medical records: 29 C.F.R. § 1630.14(c)]," is "a per se violation of the Rehabilitation Act, and no showing of harm beyond the violation would be necessary for appellant to state a claim." Valle v. United States Postal Service. EEOC Request No. 05960585(Sept. 5, 1997). Therefore, we find that claim (4) states a claim and the Agency's dismissal was improper.

CONCLUSION

The Agency's dismissal of claims (1) through (3) is **AFFIRMED**. The dismissal of claim (4) is **REVERSED**. Claim (4) is **REMANDED** to the Agency for further processing in accordance with this decision and the **ORDER** below.

ORDER (E0618)

The Agency is ordered to process the remanded claim (claim (4)) in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claim **within thirty (30) calendar days** of the date this decision was issued. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision was issued, unless the matter is otherwise resolved prior to that time. If the

Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

As provided in the statement entitled "Implementation of the Commission's Decision," the Agency must send to the Compliance Officer: 1) a copy of the Agency's letter of acknowledgment to Complainant, 2) a copy of the Agency's notice that transmits the investigative file and notice of rights, and 3) either a copy of the complainant's request for a hearing, a copy of complainant's request for a FAD, or a statement from the agency that it did not receive a response from complainant by the end of the election period.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.

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 (T0610)

This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. 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 on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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

August 17, 2020

Date