



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

[REDACTED]  
Celine B.,<sup>1</sup>  
Complainant,

v.

Lonnie G. Bunch III,  
Secretary,  
Smithsonian Institution,  
Agency.

Appeal No. 2020003113

Agency No. 20-05-120619

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 25, 2020, dismissing 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 worked as a Supervisory Attorney Advisor in the Agency's Office of Contracting and Personal Property Management (OCPPM) in Washington, District of Columbia.

On December 6, 2019, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of race (African-American) when management "deprived [Complainant] of an opportunity to compete for a federal position for which [she] was more than qualified." Complainant alleged that there was "consistent denial of an opportunity to compete for a promotion." Specifically, Complainant stated, on September 9, 2019, she learned that the Agency pre-selected a non-attorney colleague (C1) to fill the OCPPM Deputy Director (Supervisory Attorney Advisor) position. Complainant stated that the Agency withdrew the vacancy announcement and then placed C1 in the position as acting and then permanent.

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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.

As background, Complainant alleged, in hiring C1, the Agency converted the Deputy Director position from a “trust” funded position to a “federal” funded position, which changed the associated classification, benefits, and seniority, and then changed the qualifications criteria to not require an attorney incumbent or extensive experience in contracting. Further, Complainant stated that management did not announce the position at monthly OCPPM staff meetings as is usually the practice. Complainant alleged that management acted improperly to exclude her and several other African-American colleagues from applying for the vacancy. Complainant also stated, in 2017, the Agency failed to give her the opportunity to apply for an Associate Director vacancy.

In a February 25, 2020 final decision, the Agency dismissed the incidents Complainant alleged as background pursuant to 29 C.F.R. § 1614.107(a)(2) for untimely EEO contact, and dismissed the September 2019 non-selection pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency stated that Complainant was not aggrieved because she did not apply for the Deputy Director position.

The instant appeal from Complainant followed, in which she stated that the background evidence does not allege separate claims. Further, Complainant reiterated that the Agency acted improperly in how it selected C1 for the OCPPM Deputy Director vacancy.

### ANALYSIS AND FINDINGS

#### *Dismissal for Failure to State a Claim*

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). When the complainant does not allege he or she is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1).

As an initial matter, we find that the Agency mischaracterized the information Complainant provided as background for her September non-selection as separate claims. The claim before us is Complainant's non-selection for the OCPPM Deputy Director vacancy. Complainant is alleging that the Agency manipulated the classification and qualification criteria for the Deputy Director vacancy to exclude Complainant from applying, and to facilitate choosing the selected candidate, who is outside of her protected class. Complainant also alleged that the Agency failed to convey information about the Deputy Director vacancy as it usually does at staff meetings to prevent knowledge of the vacant position.

Generally, a complainant who claims discriminatory non-selection is not sufficiently aggrieved to state a valid claim when she has not applied for the position in question. See Owen v. Social Security Administration, EEOC Request No. 05950865 (December 11, 1997). However, the Commission has found that, under certain circumstances, a complainant might be aggrieved by non-selection for a position for which she did not apply, where she alleges that the Agency discouraged her from applying or the application process was secretive. See Ozinga v. Dep't of Veterans Affairs, EEOC Request No. 05910416 (May 13, 1991). We find this to be the case here. Complainant's allegations that the Agency affirmatively acted discriminated against her by discouraging her from applying and/or having a secretive selection process are allegations of an injury or harm to a term, condition, or privilege of employment for which there is a remedy. See Diaz, supra. Therefore, we find that the Agency's dismissal of the complaint pursuant to 29 C.F.R. §1614.107(a)(1), for failure to state a claim, was not appropriate.

### CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND the complaint to the Agency for further processing consistent with this decision and the Order below.

### ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims **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 (M0620)

The Commission may, in its discretion, reconsider this appellate decision if the 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 his or her request for reconsideration, and any statement or brief in support of his or her request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his or her 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, 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 his or her 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(c).

#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)


This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 filed your appeal with the Commission. 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. **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

October 5, 2020

Date