



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

[REDACTED]  
Adalberto S.,<sup>1</sup>  
Complainant,

v.

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

Appeal No. 2020005223

Agency No. 200J-0556-2020104791

**DECISION**

Complainant timely appealed with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the July 16, 2020 Final Agency Decision (“FAD”) 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.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as an Addiction Therapist, GS-9, at the Captain James A. Lovell Federal Health Care Center in North Chicago, Illinois.

On July 7, 2020, Complainant filed a formal EEO complaint alleging that he was subjected to discrimination by the Agency on the basis of race (Black) when, on June 23, 2020, the Section Chief (SC) notified Complainant that an investigation had been initiated regarding a complaint made by two of his clients (C1 and C2, both white) and raised with the Program Manager (PM).

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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.

The SC directed Complainant not to communicate with any of his clients and coworkers in Patient Care, and, effective June 24, 2020, placed him on a Temporary Reassignment in another building, requiring Complainant to change his schedule, and limiting him to administrative duties.<sup>2</sup>

As further detail to his complaint, Complainant alleged that on or about June 19, 2020, he asked PM if he could take his clients to an event with speakers who would talk about their experiences in long-term recovery. He individually asked each client if they would feel comfortable going to the event, and checked in with them during the event. Afterward, C1 and C2 complained to PM that Complainant took them to a “Black Lives Matter event,” which they found offensive.

On June 23, 2020, Complainant alleges that PM and C1 confronted him in his office about the event. He tried to explain that the event was not a Black Lives Matter event, noting that two of the speakers were white, and offering flyers and a recording from the event. PM allegedly told Complainant to “shut up” and refused to allow him to explain or apologize to C1. When Complainant stated that he was sorry C1 felt the way he did about the event, PM allegedly launched into verbal abuse, including repeatedly telling Complainant “fuck you.” By Complainant’s account, C1 also yelled at him and told him “fuck you,” while PM stood by. Complainant described the incident as so “intense” that it impacted his PTSD symptoms.

Later that day, Complainant said he attempted to report the incident to SC. Rather than meet with Complainant, Complainant alleged SC issued him a letter notifying him that C1 and C2’s complaint against him was under investigation, and he would be temporarily reassigned for the duration of the investigation, or until she or “a higher authority” determined he could be reinstated.

The Agency dismissed Complainant's complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, finding the allegation concerning the investigation constituted an impermissible collateral attack on another administrative process, and the actions described in the encounters with management and the client as not sufficiently severe to state a claim of discriminatory harassment.

The instant appeal followed.

### ANALYSIS AND FINDINGS

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).

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<sup>2</sup> An examination of the FAD shows that the Agency fragmented Complainant’s claim into separate parts, which it considered individually in its dismissal decision. The overarching claim articulated in this Decision diverges somewhat from the FAD to reflect the contents of the EEO counseling report, as well as clarifications Complainant provided on appeal, and in a July 21, 2020 email to the Agency disputing its framing of his complaint.

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. See Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If complainant cannot establish that s/he is aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

Here, we conclude that the Agency erred in dismissing the complaint for failure to state a claim. The Commission has held in some cases that merely conducting an investigation into purported improper conduct does not cause any injury without more, such as, resulting disciplinary action. Shelly v. Dep't of the Treas., EEOC Appeal No. 01996655 (Oct. 27, 2000). However, in the instant case, the June 23, 2020 letter to Complainant not only informed Complainant that he was subject to an investigation, it also stated that effective June 24, 2020, Complainant would be temporarily reassigned. Complainant has alleged that the initiation of the investigation was accompanied by a concrete action, the temporary reassignment. As the temporary reassignment allegedly caused Complainant a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy, we find that Complainant states a viable claim of discrimination. Moreover, we also note that, as alleged by Complainant, the complaints by the clients and the encounters with management over those complaints, contained a potentially explicit racial element that needs to be further investigated.

The Agency also argues that the complaint constitutes an impermissible collateral attack on its internal investigative process. It is well established that an employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. See Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998); Kleinman v. United States Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994); Lingad v. United States Postal Serv., EEOC Request No. 05930106 (June 25, 1993). Here, however, the investigation referenced appears to be an Agency management-directed inquiry and not an adjudication by a neutral outside body such as the Office of Workers' Compensation Programs. As such, we do not find that Complainant's allegations constitute an impermissible collateral attack.

As a final matter, Complainant has suggested on appeal, without detail, that the alleged discrimination in the instant complaint is an ongoing matter. However, the record indicates that throughout the processing of his complaint, he did not specifically identify any other incidents of discrimination. If Complainant wishes to pursue additional claims of discrimination or harassment, he must contact an EEO Counselor pursuant to 29 C.F.R. § 1614.105. See Hall v. United States Postal Serv., EEOC Appeal No. 0120031342 (Apr. 24, 2003).

### CONCLUSION

Accordingly, we REVERSE the Agency's Final Decision dismissing Complainant's complaint, and REMAND the matter for processing in accordance with 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)

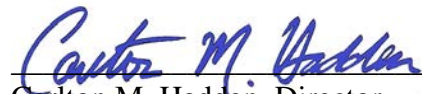
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this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

  
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Carlton M. Hadden, Director  
Office of Federal Operations

December 10, 2020

Date