



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

[REDACTED]
Alvaro M.,¹
Complainant,

v.

Elaine L. Chao,
Secretary,
Department of Transportation
(Federal Highway Administration),
Agency.

Appeal No. 2020004764

Agency No. 2020-28856-FHWA-01

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 30, 2020, 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 a Structural Engineer, GS-13, at the Agency's Vermont Division Office in Montpelier, Vermont.

On March 27, 2020, Complainant initiated equal employment opportunity (EEO) contact alleging discrimination based on religion (practicing Evangelical Christian) and age (54), as well as unlawful retaliation for engaging in activity protected under Title VII, when:

- (1) He was subjected to disciplinary actions (verbal and written reprimands) on April 24, 2016, September 30, 2016, October 27, 2016, and November 22, 2016.

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 2016 and at least February 27, 2020, the Agency disregarded Complainant's concerns about mistreatment of him and other employees; improperly disciplined him with written reprimands, verbal reprimands and allegations of fostering discord between staff and leadership; threatened a change of duties for Complainant; gave a corrective action in the form of a "Communications Plan"; denied Complainant the opportunity to give "buy in" on his projects and work assignments; failed to intercede as to mistreatment by lower management; tried to personally intimidate Complainant; mentioned retirement for Complainant; purposely rescheduled an office meeting to a day Complainant would be out of the office; and disregarded Complainant's recommendations about employee satisfaction in response to an all-employee climate survey.²

On June 12, 2020, Complainant filed a formal EEO complaint reiterating the same.

In a final decision dated July 30, 2020, the Agency dismissed Complainant's complaint pursuant to 29 C.F.R. § 1614.107(a), for failure to state a claim and untimely EEO contact. Specifically, the Agency stated that the incidents alleged in claim (1) are discrete discriminatory events and Complainant initiated EEO contact on March 27, 2020 for events that occurred between April 24, 2016 and November 22, 2016. As to claim (2), the Agency stated that Complainant initiated EEO contact on March 27, 2020 for events dating back to 2011 and as most recently as January 2020. Further, the Agency stated that Complainant's claim of harassment is a list of "perceived slights" that do not render him aggrieved.

The instant appeal from Complainant followed. On appeal, Complainant stated that he alleged "a pattern of harassment spanning over four years and he identified incidents of harassment directly linked to his protected characteristics."

ANALYSIS AND FINDINGS

Failure to State a Claim – Claim (2)

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).

² The Agency stated that Complainant also alleged, prior to 2016, management used obscene language and discussed opposing religious beliefs in Complainant's presence.

With regard to his retaliation claim, Complainant further explained in a March 27, 2020 email to the Agency EEO Office, that the alleged workplace discrimination and harassment began following the 2011 appointment of the Agency Vermont Division Administrator (VDA). Complainant stated, “I was retaliated against by federal officials for calling out [VDA’s] harassing behavior directed against [a former employee who is female].” Complainant alleged that the retaliation has continued through to 2020. Complainant alleged that leadership retaliated against him for reporting VDA’s “abuse of authority” against him and other employees. Complainant alleged that many of the adverse actions were also based on his protected EEO bases. Complainant provided a detailed written timeline of management actions between July 2011 and March 27, 2020.

Where, as here, a complainant has asserted that he was subjected to unlawful retaliation for his prior protected activity, the Commission has stated that adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. See Burlington Northern and Santa Fe Railway Co. v. White, 548 U. S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found “materially adverse,” which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEOC charge process); see also Lindsey v. U.S. Postal Service, EEOC Request No. 05980410 (November 4, 1999) (citing EEOC Compliance Manual, No. 915.003 (May 20, 1998)). The statutory retaliation clauses prohibit any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. Id.

As already noted, Complainant has alleged, since 2016 and continuing until at least February 27, 2020, Agency management subjected him to harassment through improper discipline using verbal and written reprimands, disregard for his concerns about mistreatment, threatening a change of duties for Complainant, issuing a “Communications Plan” as a corrective action, ignoring feedback by Complainant about employee satisfaction, failing to intercede about his allegations of managerial mistreatment, use of personal intimidation, raising the matter of retirement with him, and intentionally rescheduling a meeting so that he could not attend. He provided a detailed written timeline of management actions through March 27, 2020. Complainant stated that the aforementioned actions occurred, “for calling out [VDA’s] harassing behavior directed against [a former employee because she was female].” We find that Complainant has sufficiently alleged (for the purpose of stating a claim) that he opposed practices that were allegedly unlawful under statutes enforced by EEOC and the alleged retaliatory actions are of a type reasonably likely to deter Complainant or others from engaging in protected activity. As such, we conclude the Agency erred in dismissing Claim (2) for failure to state a claim.

Untimely EEO Contact – Claim (1) and (2)

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the EEO Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. The Supreme Court has held that a complaint alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). The Court recognized that allegations of harassment and the existence of a hostile work environment involve, by their nature, a series of incidents linked by a pattern of conduct.

This is contrasted with claims involving discrete acts such as a promotion or termination which are clearly defined. In those instances, the Court held that “discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.” Id. Untimely discrete acts may, however, be used as evidence in support of a timely claim of harassment. Id.

Here, Complainant alleged, between 2016 and to at least February-March 2020, Agency management subjected him to ongoing harassment that included the alleged improper disciplinary action raised in Claim (1). Therefore, while any of these disciplinary actions that are untimely raised cannot be adjudicated as individual claims, the actions can be considered as evidence in support of Complainant’s overall ongoing harassment/hostile work environment claim. Since Complainant has alleged other timely incidents in support of this claim, the Agency’s dismissal of Complainant’s harassment claim, pursuant to 29 C.F.R. § 1614.107(a)(2) as untimely, is also improper.

CONCLUSION

Accordingly, we REVERSE the final agency decision and REMAND Complainant’s harassment claim to the Agency for further processing from the point that processing ceased.

ORDER (E0618)

The Agency is ordered to process the remanded claim (ongoing harassment/hostile work environment) 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

December 3, 2020

Date