



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

[REDACTED]

Jeffery J.¹
Complainant,

v.

James E. McPherson,
Acting Secretary,
Department of the Navy,
Agency.

Appeal No. 2020004860

Agency No. 20-67400-01990

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated July 27, 2020, dismissing a formal 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

During the period at issue, Complainant was a retiree, having previously employed by the Department of Defense.

On June 21, 2020, Complainant filed the instant formal complaint. Complainant claimed that the Agency subjected him to discrimination on the bases of race, national origin, religion, age, and in reprisal for prior EEO activity when, on June 10, 2020, the Director Environmental Affairs Branch, Marine Corps Installations Pacific, Marine Corps Base Camp Butler, did not select him to the position of Environmental Engineer with Marine Corps Base Camp Butler as detailed in Announcement ST-10740392-20-DNM.

On June 21, 2020, the Agency issued a final decision dismissing the formal complaint for abuse of process, pursuant to 29 C.F.R. § 1614.107(a)(9).

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.

Specifically, the Agency noted that this is Complainant's ninth complaint that has been filed against Marine Corps Installations Pacific at Marine Corps base Camp Butler in the past ten years.

In addition, the Agency argued that over the past ten years, Complainant had filed numerous similar non-selection complaints against other federal agencies.

The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC regulations state that an agency shall dismiss a complaint where there is a clear pattern of misuse of the EEO process for ends other than that which it was designed to accomplish. See Fisher v. Department of Defense, EEOC Appeal No. 01962325 (Dec. 11, 1998) (citing Burden v. U.S. Postal Service), EEOC Request No. 05850299 (Nov. 18, 1985)).

Specifically, 29 C.F.R. § 1614.107(a)(9) states:

A clear pattern of misuse of the EEO process requires:

- (i) Evidence of multiple complaint filings, and
- (ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved, or
- (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.

As a policy, the Commission aims at preserving a complainant's EEO rights whenever possible, and we rarely permit dismissal of a complaint for abuse of process. See Kessinger v. U.S. Postal Service, EEOC Appeal No. 01976399 (June 8, 1999); Equal Employment Opportunity Commission, Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Ch. 5, § IV.A.4 (revised August 2015). Given this policy and our concern about protecting complainants and their rights under the EEO statutes, the agency bears a very high standard of proof ultimately to show that complainant's actions reveal "an ulterior purpose to abuse or misuse the EEO process." EEO-MD-110 at Ch. 5, § IV.A.4.

Filing numerous complaints alone is not a sufficient basis for dismissal. The Agency must show evidence that somehow in filing numerous complaints a complainant specifically intended to misuse the EEO process. Compare Wiatr v. Department of Defense, EEOC Appeal No. 01A30752 (Feb. 25, 2004) (finding no abuse of process in the case of a complainant who filed over 40 complaints, but where the record did not show that he did so for any other reason than to put an end to alleged discrimination); with Abell v. Department of Interior, EEOC Appeal No. 01A33023 (May 13, 2004) (finding abuse of process where complainant filed 40 complaints of non-selection with no intention to take the job). Therefore, the focus of the analysis is on the totality of the individual's claims, circumstances, and intentions.

Upon review of the record, we find that the Agency has not provided support for its abuse of process dismissal. We readily acknowledge that Complainant has filed multiple complaints regarding non-selection. However, this action alone does not rise to the level of abuse of process. Nine complaints filed, along with multiple bases, are not dispositive of an abuse of process. A complainant often will not know precisely what the basis of possibly discriminatory conduct is and may take a best guess and list multiple bases. The Agency noted that in one of his complaints that was filed in May 2020, Complainant pleaded for a temporary job so he could have eye surgery at the Agency's facility. As previously stated, the number of complaints filed by Complainant is not sufficient to demonstrate an abuse of process.

Finally, and perhaps most significantly, there is no evidence to support a finding that the instant complaint is an attempt to circumvent or overburden the process for the reasons proffered by the Agency. Indeed, the Agency offers various grounds in support of this proposition: that Complainant's complaint filings have been identical or "similar;" that numerous complaints filed have never resulted in a discrimination finding; that Complainant is using the complaint process as a "weapon" to secure an Agency position; and that Complainant has disparaged an Agency official, which is reflective of merely a "personal grudge." We determine, however, that none of these assertions undercut Complainant's complaint regarding the subject claim.

Therefore, the Agency's final decision dismissing the formal complaint is REVERSED for the reasons discussed above. The formal complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claim 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 (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 (R0610)

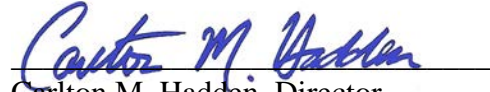
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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 2, 2020

Date