



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

[REDACTED]
Alton F,¹
Complainant,

v.

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

Appeal No. 2020004908

Agency No. 2020-28759-FAA-03

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated August 25, 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.

BACKGROUND

Complainant worked as a Telecommunications District Services Representative at the Agency's Seattle Headquarters in Des Moines, Washington. From July 2019 through November 2019, Complainant was detailed to the National Airspace System Security and Enterprise Operations (NASEO) at the Agency's facility located in Melbourne, Florida.

On February 19, 2020, Complainant initiated EEO Counselor contact. Informal efforts at resolution were not successful.

On March 18, 2020, Complainant filed the instant formal complaint alleging that the Agency subjected him to discrimination based on disability.

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.

The Agency framed Complainant's claims as follows:

1. Beginning in July 2019 and continuing through November 2019, while on detail to the NASEO, Complainant was subjected to "verbally abusive and disrespectful behavior" from his temporary manager (hereinafter "TM").
2. On September 19, 2019, TM ridiculed Complainant's medical conditional when TM noticed Complainant's mouse pointer wiggling due to Complainant's physical disability and TM laughingly asked, "Do I make you nervous?"
3. On February 12, 2020, Complainant was informed by the Accountability Board (AB) that his claim alleging harassment while on detail to NASEO had not been accepted and was sent back to the line of business to address. Complainant also learned the AB had not adhered to its published processing procedures.

The Agency dismissed Claim 1 and Claim 2 for failure to comply with the applicable time limits under 29 C.F.R. §1614.107(a)(2). The Agency reasoned that the matters alleged in those claims occurred no later than November 2019, but that Complainant did not initiated contact with an EEO counselor until February 19, 2020. According to the Agency, Complainant had exceeded the 45-day limit for timely EEO Counselor contact pursuant to 29 C.F.R. § 1614.105(a)(1).

The Agency dismissed Claim 3, for failure to state a claim under 29 C.F.R. §1614.107(a)(1). The Agency determined that Claim 3 was an impermissible collateral attack on the AB process.²

The instant appeal followed. On appeal, Complainant contended his delay in contacting an EEO Counselor was a "direct result" of the Agency management in addition to the AB ignoring his inquiries about the discrimination allegation in the report that he had filed on September 18, 2019.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(2) required Complainant to initiate contact with the EEO counselor within 45 days of the matter he alleged to be discriminatory. However, all EEO time limits are subject to waiver, estoppel or equitable tolling under 29 C.F.R. § 1614.604(c).

² We note that it appears the Agency inadvertently identified numerically the claims and their respective dismissal grounds. To wit, a fair reading of the record reflects that the Agency actually dismissed Claims 1 and 2 for untimely EEO contact, and Claim 3 for failure to state a claim, as identified above.

EEOC regulations provide that the Agency or Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the Agency or Commission.

This Commission had long held that the Agency bears the burden to prove its final dismissal decisions. Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993). The Agency must present sufficient evidence to support a determination of untimeliness. Guy v. Dep't of Energy, EEOC Request No. 05930703 (Jan. 4, 1994). In the present matter, the Agency apparently assumed that Complainant somehow had constructive knowledge of the limit for timely EEO Counselor contact. However, the Agency failed to explain why Complainant knew or why Complainant reasonably should have known about the applicable 45-day time limit. Indeed, Complainant's statement in support of his appeal suggests that Complainant was either unaware of the 45-day limitation or held a mistaken belief that he could not initiate the EEO process until after he had received a decision from the Agency's AB. In sum, this record is unclear as to whether Complainant had notice about the applicable time limit in 29 C.F.R. § 1614.105(a)(2).

As significantly, however, a fair reading of the record reveals that Complainant's claims were broader than simply the three matters which the Agency identified in the instant final decision. Specifically, in the narrative accompanying his formal complaint and in the EEO Counselor's report Complainant had raised matters that the Agency excluded from its descriptions of his claims. Complainant stated that not only was he harassed throughout the 2019 detail at NASEO, but also that Agency management has *continued* to ignore or delay responding to his claims of discriminatory treatment. On January 15, 2020, the Agency conducted a management inquiry into Complainant's alleged mistreatment while temporarily assigned to NASEO. However, Complainant stated that he was told to hand-write additions or corrections to the summary of that management inquiry in disregard of his hand-related disability. Complainant further stated that in February 2020, the Agency referred him to a Labor Relations Manager who was disrespectful and dismissive of his disability discrimination allegations. Finally, Complainant's statements accused the Agency of not paying him per diem. According to Complainant, the Agency had advertised that temporary duty (TDY) expenses were authorized for the NASEO detail. These matters fell within the forty-five day period preceding the initial EEO contact.

Therefore, based on the foregoing analysis, the Agency's dismissal for untimely EEO Counselor contact was improper.

Moreover, to the extent that Complainant's third claim concerning the AB's delay is construed as a collateral attack, such a matter can nevertheless be construed as part of a broader harassment claim, and should be considered as evidence in support of that broader claim. See Taylor-Allums v. Department of Health and Human Services, EEOC Appeal No. 0120131068 (June 14, 2013).

CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED. The complaint is REMANDED and herein designated an ongoing hostile work environment claim for further Agency 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 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 request for reconsideration, and any statement or brief in support of his request, via the EEOC Public Portal, which can be found at <https://publicportal.eeoc.gov/Portal/Login.aspx>.

Alternatively, complainant can submit his 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 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).**

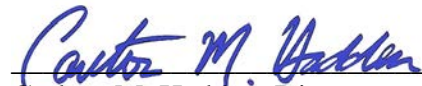
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

November 30, 2020
Date