



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

[REDACTED]
Alton F.,¹
Complainant,

v.

Pete Buttigieg,
Secretary,
Department of Transportation
(Federal Aviation Administration),
Agency.

Request No. 2021002148

Appeal No. 2020004908

Agency No. 2020-28759-FAA-03

DECISION ON REQUEST FOR RECONSIDERATION

The Agency timely requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Alton F. v. Dep't of Transp., EEOC Appeal No. 2020004908 (Nov. 30, 2020). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

Complainant, a Telecommunications District Services Representative at the Agency's Seattle Headquarters in Des Moines, Washington, filed an EEO complaint alleging that the Agency subjected him to discrimination and a hostile work environment based on disability when:

1. Beginning in July 2019 and continuing through November 2019, while on detail to the National Airspace System Security and Enterprise Operations (NASEO), Complainant was subjected to "verbally abusive and disrespectful behavior" from his temporary manager (TM);

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. On September 19, 2019, TM ridiculed Complainant's medical condition when TM noticed Complainant's mouse pointer wiggling due to Complainant's physical disability and TM laughingly asked, "Do I make you nervous?"; and
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 claims (1) and (2) pursuant to 29 C.F.R. §1614.107(a)(2) for untimely EEO Counselor contact. In addition, the Agency dismissed claim (3) for failure to state a claim pursuant to 29 C.F.R. §1614.107(a)(1) finding that the claim constituted an impermissible collateral attack on the AB process.

In the appellate decision, the Commission reversed the Agency's dismissal. Regarding claims (1) and (2), the Commission determined that the Agency failed to show that Complainant had actual or constructive knowledge of the time limits for contacting an EEO Counselor. Complainant's statement in support of his appeal suggested 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. Further, the Commission noted that a fair reading of the record revealed that Complainant's claims were broader than the three incidents identified in the final decision and that matters that were excluded by the Agency fell within the 45-day EEO Counselor contact period. Finally, with respect to claim (3), the Commission noted that the claim was part of a broader harassment claim and therefore should be considered as evidence in support. Accordingly, the Commission remanded the complaint for further processing.

In its request for reconsideration, the Agency contends that the appellate decision was clearly erroneous. The Agency argues that the first two claims were properly dismissed as untimely raised with an EEO Counselor and that Complainant was aware of the contact deadlines as evidenced by his training records. In support, the Agency submitted a declaration from Complainant's front-line manager and a copy of Complainant's training history. Further, the Agency reiterates its contention that complaints about the Agency's AB process constitute an impermissible collateral attack and fail to state a claim. Accordingly, the Agency requests that the Commission grant its request for reconsideration.

The Commission notes that new evidence generally will not be accepted in a request for reconsideration. See Houser v. Dep't of Homeland Sec., EEOC Request No. 0520110548 (Oct. 7, 2011) (citing Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110) (Aug. 5, 2015)). The Commission may accept new evidence, however, if the parties affirmatively demonstrate it was not previously available despite the exercise of due diligence. Id.; Est. of Petersen v. Dep't of Transp., EEOC Appeal No. 07A50016 (Sep. 21, 2005). The Commission reminds the Agency that a request for reconsideration is not a second appeal to the Commission. EEO MD-110, at 9-18; see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007).

Here, the Agency failed to demonstrate that evidence of Complainant's actual or constructive knowledge of the 45-day limitation period was not previously available despite the exercise of due diligence. The Agency had an opportunity to provide these documents to the Commission on appeal but did not do so. As such, the Commission declines to consider the documents submitted by the Agency for the first time in its request for reconsideration.

Finally, the Agency argues that Complainant's claim regarding the Agency's AB constituted a collateral attack on that process and was properly dismissed. As the previous decision noted, Complainant's overall complaint can be fairly read as alleging a broader hostile work environment claim and Complainant's claim regarding the AB, while not permissible as a discrete act, can be considered as background evidence in support.

A reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here. The Commission finds that the Agency has not presented any argument or evidence tending to establish the existence of either reconsideration criterion.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to DENY the request. The decision in EEOC Appeal No. 2020004908 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. 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.

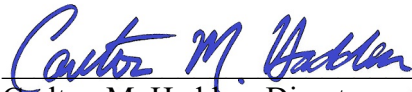
COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

June 14, 2021

Date