



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

[REDACTED]
Charles B.,¹
Complainant,

v.

Honorable John E. Whitley,
Acting Secretary,
Department of the Army,
Agency.

Appeal No. 2021000885

Agency No. ARPOM20MAY01640

DECISION

On October 7, 2020, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated September 14, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was employed by the Agency as an Associate Professor, AD-1701-05, at the Defense Language Institute Foreign Language Center, Persian Farsi School in the Presidio of Monterey, California.

On July 7, 2020, Complainant filed an equal employment opportunity (EEO) complaint alleging that the Agency subjected him to discrimination and a hostile work environment based on reprisal for prior protected EEO activity when:

1. On February 26, 2020, he was scolded by first line supervisor (S1) and told he had not been professional because he did not follow her instruction not to allow Coworker 1 to enter his office and indicated she was going to change his office because of this. Complainant wrote that he was an EEO witness in Coworker 1's EEO complaint against

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.

S1, and shared his office with teammate Coworker 2, another EEO witness in the above EEO case, and teammate Coworker 3, an acquaintance of Coworker 1.

2. On February 27, 2020, he received an email from S1 notifying him that he and his two coworkers were no longer going to work together on the same team and ordering them to go to different offices.²
3. S1 used racial slurs in the workplace on numerous occasions, giving Jews, Arabs, and Afghans hateful labels in front of him and five identified colleagues. On February 28, 2020, he reported this to the Assistant Dean, and nothing was done.³
4. On April 20, 2020, S1 sent him an email that he was going to receive a rating of 3 “Fully Satisfactory” on his performance element of “Teamwork and Professionalism” for his performance appraisal, lower than warranted.

The Agency dismissed issue 4 under 29 C.F.R. § 1614.107(a)(4) because Complainant elected to pursue the matter in the negotiated grievance procedure. It dismissed issues 1 – 3 because Complainant initiated EEO counseling on them on May 12, 2020, beyond the 45-day time limit. The instant appeal followed.

ANALYSIS AND FINDINGS

Election of Grievance Procedure

EEOC Regulation 29 C.F.R. §1614.301 requires that where a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement (CBA) that permits allegations of discrimination to be raised in the negotiated grievance procedure, an election must be made to proceed under either the negotiated grievance procedure or the EEO complaint procedure (part 1614). The regulation states that the election is indicated by the filing of a written complaint or timely grievance, whichever is done first. It also states that an aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under part 1614 irrespective of whether the agency has informed the individual of the need to elect or whether the grievance has raised an issue of discrimination.

² The Agency defined this issue as S1 on February 27, 2020, emailing Complainant that his office location was changed. We have redefined this issue to better capture Complainant’s claim.

³ The Agency defined issue 3 as the slurs occurring on February 28, 2020. We have redefined the issue to better capture Complainant’s claim.

As a civilian employee of the Army, Complainant is employed by an agency subject to 5 U.S.C. 7121(d). Also, the record shows he was covered by a CBA that permitted allegations of discrimination to be raised in the negotiated grievance procedure. Complainant on appeal argues that he was not a member of the union. Nevertheless, he was still covered by the CBA.

On May 28, 2020, Complainant filed a grievance in the negotiated grievance procedure concerning his annual appraisal rating for the period of April 1, 2019 through March 31, 2020, on the performance element of "Teamwork and Professionalism", the same subject as 4. On appeal, Complainant argues that he did not raise reprisal or a hostile work environment in his grievance. In reply to Complainant's appeal, the Agency disputes this. Regardless, the above regulatory language indicates Complainant elected the grievance process by filing the grievance before his EEO complaint. The Agency's dismissal of issue 4 is affirmed.

Timeliness

An aggrieved person must seek EEO counseling within 45 days of the date of the alleged discriminatory action, or in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1) & .107(a)(2).

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one unlawful employment practice. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 117 (2002). Unlike a claim which is based on discrete acts of discrimination, a hostile work environment claim is based upon the cumulative effect of individual acts that may not themselves be actionable. Id. at 115. A hostile work environment claim will not be time barred if all acts constituting the claim are part of the same unlawful practice even if some component acts of hostile work environment fall outside the statutory time period so long as an act contributing to the claim falls within the filing period. Id. at 117. Discrete incidents which are part of the hostile work environment that occurred more than 45 calendar days prior to Complainant contacting an EEO counselor may only be challenged as part of the hostile work environment claim and are not independently actionable (meaning, for example, no instatement or back pay for an untimely demotion claim itself). EEOC Compliance Manual, Threshold Issues Sec. 2-IV-C, OLC Control No. EEOC-CVG-2000-2 (REV. July 21, 2005).

On appeal, Complainant contends that S1's February 2020 threat to change his office was implemented on April 13, 2020, within the 45-day time limit. For the record, Agency management provided an organizational chart and spreadsheet reflecting individuals and units subordinate to S1. A notation on the organizational chart indicates that at his request, on April 13, 2020, Complainant was reassigned from S1's Department D to Department A, under a different Chair/supervisor. The spreadsheet indicates that in accordance with their requests, on April 13, 2020, Coworkers 2 and 3 were transferred from S1's Department D to other department(s).

While Complainant's EEO complaint is unartfully drawn, we find his claim that in February 2020, S1 told him she was going to change his office and indicated this was because he did not comply with her instruction not to let Coworker 1 enter and notified him by email that he and his two coworkers were no longer going to work together on the same team and ordering them to go to different offices (issues 1 and 2) encompasses changing Complainant's office via transferring him to another Department. We find that under Morgan, issues 1 and 2 are part of the same alleged unlawful work environment – retaliation for him being an EEO witness for Coworker 1's EEO complaint. In addition, we find issue 3 is sufficiently connected because, if true, it would show a similar animus on the part of S1 for a work environment that is a model of equal employment opportunity. Because Complainant initiated EEO counseling on May 12, 2020, within 45 days after his transfer (a personnel action) was effectuated on April 13, 2020, we find that issues 1, 2 and 3, which are part of the same hostile work environment claim, were timely raised.

The FAD is MODIFIED.

ORDER

The Agency is ordered to process, in accordance with 29 C.F.R. § 1614.108 et seq., issues 1, 2 and 3, as defined herein, as well as Complainant's connected claim that on April 13, 2020, his office was changed via his transfer to another Department. 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 (M0920)

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 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, a 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 (T0610)


This decision affirms the Agency's final decision/action in part, but it also requires the Agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed and that portion of the complaint which has been remanded for continued administrative processing. 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 your appeal with the Commission, until such time as the Agency issues its final decision on your complaint. 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. If you file a request to reconsider and also file a civil action, **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

March 31, 2021

Date