



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

[REDACTED]
Kristofer D,¹
Complainant,

v.

David A. Jones,
Acting Chairman,
Federal Retirement Thrift Investment Board,
Agency.

Appeal No. 2021004213

Agency No. FRTIB-2020-05

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 17, 2021, dismissing a formal complaint alleging 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

During the period at issue, Complainant worked as a previously worked as an Accountant, GS-12, at the Agency's office in Washington, D.C.

On October 26, 2020, Complainant filed a formal complaint claiming that the Agency unlawfully retaliated against him for prior protected EEO activity when:²

1. On July 20, 2020, Complainant received an email detailing continued work conditions that was unclear.

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 Complainant's formal complaint included additional claims that the Agency had dismissed prior to its June 17, 2021 decision on other procedural grounds. Complainant has not disputed the dismissal of these claims on appeal. As such, we will not address them further in this decision.

2. On October 2, 2020, 1.5 hours were removed from Complainant's current 2020 PMR pertaining to the completion of times under the performance period providing no explanation and again threatening punishment of reassignment, demotion, and or removal from his current position upon failure to perform. On the same day, he was pressured to agree to a more stringent PMR as opposed to the current allotted time, which he refuses to sign.
3. On October 5, 2020, after refusing to sign an unprecedented work requirement, he attended a meeting and without prior warning he was faced with the decision to impose a demotion and was not given an opportunity to speak in order to defend his position.
4. Throughout August and September 2020, his responsibilities increased without incident as can be confirmed by analytics.

On June 17, 2021, the Agency issued a final decision. The Agency dismissed Complainant's formal complaint for failure to cooperate, pursuant to 29 C.F.R. § 1614.107(a)(7). Specifically, the Agency determined that an EEO investigator contacted Complainant on December 29, 2020, but that Complainant did not respond. The Agency further determined that Complainant did not respond to the interrogatory requests sent via email on December 30, 2020, and delivered by certified mail on January 15, 2021. The Agency noted that the EEO investigator called Complainant three times and left voice messages on January 25, 2021, but that Complainant did not respond.

The instant appeal followed.

ANALYSIS AND FINDINGS

The Commission has held that an Agency should not dismiss a complaint when it has sufficient information upon which to base adjudication. See Ross v. United States Postal Service, EEOC Request No. 05900693 (Aug. 17, 1990); Brinson v. United States Postal Service, EEOC Request No. 05900193 (Apr. 12, 1990). It is only in cases where the Complainant has engaged in delay or contumacious conduct and the record is insufficient to permit adjudication that the Commission has allowed a complaint to be dismissed for failure to cooperate. See Card v. United States Postal Service, EEOC Request No. 05970095 (Apr. 23, 1998); Krotten v. United States Postal Service, EEOC Request No. 05940451 (Dec. 22, 1994).

Here, the record indicates that Complainant retained counsel on April 29, 2021, approximately two months after the investigation closed on February 16, 2021, and requested a reopening of the investigation. Complainant's attorney explained that "due to personal issues beyond his control, [Complainant] did not participate in the investigation." However, on May 5, 2021, the Agency denied Complainant's request to reopen the investigation.

On appeal, Complainant's attorney asserts that: (1) Complainant did not have legal representation during the investigative process; (2) Complainant did not have a clear understanding of the EEO investigative process; and (3) Complainant had mitigating personal issues that prevented him from responding to the EEO investigator. Complainant's attorney notes Complainant informed the EEO Investigator that he thought the investigator was biased and was aligned with Agency officials. Additionally, Complainant informed the EEO Investigator twice that he was experiencing stress from his pending eviction from his home. Complainant's attorney further notes that on January 28, 2021, Complainant emailed the EEO Investigator and stated, "I live in a motel and I don't have internet access. This is over until I establish stability." Consequently, Complainant's personal problems, as well as general confusion about the EEO Investigator's role, prevented him from timely completing all steps in the EEO investigative process. Under these circumstances, we determine the evidence does not support a finding that Complainant engaged in contumacious conduct that would merit dismissal on the grounds determined by the Agency. Complainant, however, is advised to cooperate in the continued processing of the instant complaint or face possible future dismissal for failure to do so.

The Agency's final decision dismissing the instant formal complaint is REVERSED and the formal complaint is REMANDED to the Agency for further processing in accordance with the ORDER below.

ORDER

Within thirty (30) calendar days from the date this decision was issued, the Agency is ORDERED to resume processing of the underlying complaint, pursuant to 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded complaint **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.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

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 (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

October 26, 2021

Date