



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

[REDACTED]
Thaddeus G.,¹
Complainant,

v.

Charlotte A. Burrows,²
Chair,
Equal Employment Opportunity Commission,
Agency.

Appeal Nos. 2021001041
2021002311

Agency Nos. 2020-0060
2021-0003

DECISION

Complainant filed timely appeals with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decisions dated November 9, 2020, and February 8, 2021,³ dismissing his complaints 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 Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission **AFFIRMS** the Agency's dismissals.

ISSUE

The issue is whether the Agency properly dismissed Complainant's claims for failure to state a claim, pursuant to 29 C.F.R. § 1614.107(a)(1).

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 As a procedural matter, the Commission notes that the Equal Employment Opportunity Commission is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the terms "Commission" or "EEOC" are used when referring to the adjudicatory authority and the term "Agency" is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints. The Chair has abstained from participation in this decision.

³ The Commission may, in its discretion, consolidate two or more complaints of discrimination filed by the same complainant. See 29 C.F.R. § 1614.606. Accordingly, the Commission exercises its discretion to consolidate the captioned cases.

BACKGROUND

At the time of events giving rise to this complaint, Complainant was not employed, nor an applicant, with the Agency. On August 13, 2020, Complainant filed a formal complaint (Agency Case Number 2020-0060) alleging that the Agency subjected him to discrimination on the bases of race (Hispanic),⁴ and disability (unspecified), and in reprisal for prior protected equal employment opportunity (EEO) activity, such as when, in April 2020, Complainant was not selected for an EEO Analyst or Alternate Dispute Resolution Mediator position located in the El Paso Field Office; and Complainant was denied a reasonable accommodation when he was not reassigned to a vacant position within the Agency.⁵

The Agency dismissed the complaint for failure to state a claim. The Agency found that Complainant did not apply for a vacant position or allege that he was discouraged from applying for a position, nor submit a request for a reasonable accommodation during the application process. The Agency dismissed Complainant's complaint in its entirety for failure to state a claim.

On November 29, 2020, Complainant filed another formal complaint (Agency Case Number 2021-0003) alleging that the Agency subjected him to discrimination and harassment on the bases of national origin (Hispanic), sex (male/sexual orientation of heterosexual), color (brown), and disability (unspecified), and in reprisal for prior protected EEO activity, including when:

1. he was not selected for the following positions: Administrative Officer (CARZ-10924386-20-TB), Administrative Officer (RP-20-LS-10924523-886), Transition Services Specialist (WTEQ207377370986), and Operations Officer (OFO-SMP(ICTAP)-10919645-BRH);
2. he was not selected for the Executive Staff Assistant position located in the Office of the Chair (IMP-10933895-21-JB);
3. Complainant was subjected to disability discrimination when he was denied a reasonable accommodation when he was not reassigned to a vacant position with the Agency; and
4. Complainant was not selected for the Equal Opportunity Investigator position located in the Dallas District Office (DE-10950777-21-MR), or the Program

⁴ The Commission notes that the term "Hispanic" typically denotes national origin rather than race. However, the Commission acknowledges Complainant's self-identification of his race as Hispanic.

⁵ Complainant also raised allegations that are beyond the scope of the EEOC's jurisdiction as provided in 29 C.F.R. §1614. Accordingly, they will not be addressed in the instant decision.

Analysis Officer position located in the Office of Field Programs (ST-109577321-MR).

The Agency dismissed the non-selection claims because five of the eight positions⁶ identified were not with the Commission and Complainant did not apply for the remaining three identified Commission positions. The Agency dismissed the harassment claim because Complainant was not an aggrieved employee or applicant for employment. The Agency also dismissed the reasonable accommodation claim, and other allegations, that were identical to those raised by Complainant in Agency Case Number 2020-0060.

Complainant appealed both dismissals and provided multiple statements and additional documents in support of his appeals. The Agency opposed Complainant's appeals. On December 20, 2020, Complainant requested a 30-day extension to file a brief in support of EEOC Appeal Number 2021001041, due to a recent surgery. For EEOC Appeal Number 2021002311, Complainant uploaded an additional statement in response to the Agency's opposition on May 2, 2021.

CONTENTIONS ON APPEAL

Complainant's Contentions

For EEOC Appeal Number 2021001041, Complainant requested sanctions against the Agency for "tainting the file." While the Agency stated that Complainant failed to state a claim, Complainant argues that the Agency "sanitized" the file. Complainant also alleges a violation of the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d).

Complainant asserts that he was not reassigned to over 40,000 vacant positions within the federal government as a reasonable accommodation. Complainant states that he mailed his application and request for an accommodation to Agency officials, whom he contends admitted to having Complainant's application and request. Complainant alleges that an Agency official also sent him written threats for requesting a reasonable accommodation and ordered him to take a demotion or be terminated.⁷

Regarding claim 1, Complainant argues that he has "guaranteed placement," and that an Agency official never sent the guaranteed placement packet to Complainant and failed to notify agencies that Complainant was guaranteed the positions. Complainant avers that he was referred for the positions of Administrative Officer (Job announcement number ST-11024977-21-JB) and Government Information Specialist (Job announcement number ST-11061199-21-

⁶ Although not set out with the claims enumerated in the text above, there was an eighth claim noted in the Agency's letter of dismissal: non-selection for the position of Public Health Advisor, Announcement Number HHSCDC-D3-20-108301, a non-Agency position.

⁷ Complainant stated that he was demoted from his position as a Deportation Officer. However, Complainant did not specify his employer.

SM) and was guaranteed placement as a reasonable accommodation. For the Agency's vacancies (claims 2 and 4), Complainant asserts that he sent his packets through certified mail, which indicated his interest in the positions.

Agency's Contentions

The Agency contends that Complainant's Response to Notice of Dismissal is a litany of conclusory, factually unsupported allegations. For example, Complainant stated that he mailed his application and request for an accommodation in the form of a reassignment, and that certain responsible management officials "have admitted" to receiving Complainant's application and request for a reassignment as a reasonable accommodation. However, the Agency notes that the record contains no such admissions and no evidence of Complainant's application or request for accommodation.

The Agency asserts that Complainant did not submit any evidence even suggesting that he applied for positions with the Agency, and that he did not allege that he was discouraged from applying or that the selection process was secretive. The Agency states that Complainant is not an aggrieved employee because he was not an Agency employee, nor was he an applicant for employment.

Regarding claim 1, the Agency argues that these vacancies were not with the Commission, and thus, the claim was properly dismissed. The Agency also argues that, because Complainant was not an aggrieved employee or applicant, his harassment claim was properly dismissed. In addition, the Agency asserts that claims 3 and 4 should be dismissed because they are identical to claims included in EEO Complaint Number 2020-0060. The Agency requests that the Commission affirm the Notices of Dismissal.

ANALYSIS AND FINDINGS

Complainant's briefs and evidence

As an initial matter, the Commission addresses Complainant's submissions in support of his appeal. The Commission's regulations provide that "[a]ny statement or brief on behalf of a complainant in support of the appeal must be submitted to the Office of Federal Operations within 30 days of filing the notice of appeal." 29 C.F.R. § 1614.403(d). Here, Complainant requested an extension of an additional 30 days to file his brief for EEOC Appeal Number 2021001041. The Commission notes that Complainant did not receive a response to this request. Therefore, the Commission will exercise its discretion to add an additional 30 days to Complainant's deadline. As such, the Commission will consider the documents received prior to January 27, 2021.

For EEOC Appeal Number 2021002311, the Commission finds that Complainant's response to the Agency's opposition is untimely because it was filed on May 2, 2021, which was more

than 30 days after he filed his appeal on March 5, 2021. Accordingly, the Commission will not consider this brief on appeal.

New Claims on Appeal

Complainant raises new allegations for the first time on appeal, such as an EPA claim. The Commission has held that it is not appropriate for a complainant to raise new claims for the first time on appeal. See Hubbard v. Dep't of Homeland Sec., EEOC Appeal No. 01A40449 (Apr. 22, 2004). As such, the Commission will not consider Complainant's newly raised allegations in the instant decision.

Sanctions

Sanctions serve a dual purpose. On the one hand, they aim to deter the underlying conduct of the non-complying party and prevent similar misconduct in the future. Barbour v. U.S. Postal Serv., EEOC Appeal No. 07A30133 (June 16, 2005). On the other hand, they are corrective and provide equitable remedies to the opposing party. Given these dual purposes, sanctions must be tailored to each situation by applying the least severe sanction necessary to respond to a party's failure to show good cause for its actions and to equitably remedy the opposing party. Royal v. Dep't of Veterans Affairs, EEOC Request No. 0520080052 (Sept. 25, 2009). Here, Complainant requested sanctions against the Agency for "tainting the file." For example, Complainant contends that the Agency "sanitized" 40,000 positions he sought as a reasonable accommodation, allegedly by removing these requests from his submission. However, Complainant has failed to show that he, in fact, submitted any such requests or documents to the Agency. Therefore, the Commission finds that Complainant has not alleged facts sufficient to infer, much less proven with evidence, that the Agency tainted or sanitized the file. As a result, the Commission declines to issue sanctions.

Failure to state a claim

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 29 C.F.R. §§ 1614.103, 1614.106(a). The Commission has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). When the complainant does not allege that he is aggrieved within the meaning of the regulations, the agency shall dismiss the complaint for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1). As Complainant failed to allege facts sufficient to support an inference, or otherwise demonstrate, that he was aggrieved, the Commission finds that the Agency properly dismissed claim 1 because Complainant was not aggrieved by the Agency with respect to any employment decisions made by other federal agencies.

Further, the Commission has found that a complaint fails to state a claim when there is no employer/employee relationship. See Alline B. v. Dep't of Labor, EEOC Appeal No. 2020003156 (Oct. 8, 2020) (Commission found failure to state a claim where there was no employment relationship between the complainant and the alleged discriminator, an EEOC Administrative Judge hearing her complaint); Giesecking v. Dep't of the Army, EEOC Appeal No. 0120083821 (Jan. 30, 2009), citing Loneragan v. Dep't of Veterans Affairs, EEOC Request No. 05970406 (July 10, 2000) (claim can be brought against agency if complainant can show that he is connected to agency with "aspects of the relationship that are indicative of an employer/employee relationship"). Here, Complainant was not an Agency employee, and therefore is not an aggrieved employee for purposes of filing an EEO complaint.

The Commission also finds that Complainant did not provide any evidence to show that he was an applicant for employment with the Agency. Generally, a claim of discriminatory non-selection fails to state a claim when the complainant failed to apply for the position. See Owen v. Soc. Sec. Admin., EEOC Request No. 05950865 (Dec. 11, 1997). Where a complainant did not apply for a position, he is only aggrieved for such claims where he proves that the agency discouraged him from applying or that the application process was secretive. See Ozinga v. Dep't of Veterans Affairs, EEOC Request No. 05910416 (May 13, 1991). A review of the record shows that, although the EEO Counselor requested additional information from Complainant, such as the vacancy numbers and dates of his applications, Complainant did not provide this information in his responses. The Commission notes that Complainant did not allege that the Agency discouraged him from applying or that the application process was secretive.

In addition, there is no evidence that Complainant requested a reasonable accommodation as an applicant to the Agency. The record shows that the EEO Counselor asked Complainant for details regarding his reasonable accommodation claim, such as the specific accommodation requested and the dates of his request. On appeal, Complainant asserted that he was not provided, as a reasonable accommodation, reassignment to one of over 40,000 vacant positions across the federal government, but there is no evidence that Complainant provided the details on any of the 40,000 positions. Complainant also did not provide proof that any Agency official received his request for a reasonable accommodation or that he was threatened for requesting a reasonable accommodation.

Regarding Complainant's harassment claim, the Commission has held that where, as here, a complaint does not challenge an agency action or inaction regarding a specific term, condition, or privilege of employment, the claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See, e.g., Cullors v. Dep't of Defense, EEOC Appeal No. 01A41560 (June 27, 2006), citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993). In this case, the Commission finds that Complainant was not an Agency employee, former employee, or applicant for employment. Therefore, any allegedly harassing conduct could not alter the conditions of Complainant's employment. Further, there is no evidence that he applied for a vacant position

or requested a reasonable accommodation with the Agency. As such, dismissal of his complaints for failure to state a claim was proper.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, the Commission finds that the Agency properly dismissed Complainant's complaints for failure to state a claim. Accordingly, the Agency's final decision is AFFIRMED.

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 (S0610)

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. 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:

/s/ Shelley E. Kahn

Shelley E. Kahn
Acting Executive Officer
Executive Secretariat

March 24, 2022
Date