



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

[REDACTED]
Fritz O.,¹
Complainant,

v.

Christine Wormuth,
Secretary,
Department of the Army,
Agency.

Appeal No. 2022001216

Agency No. ARYUMA21JUL02235

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated December 14, 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., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

During the period at issue, Complainant worked as a Deputy Police Chief/Major, Grade GS-10, for the Protection Division, Directorate of Operations, at U.S. Army Garrison Yuma Proving Ground, Arizona.

On July 7, 2021, Complainant contacted an EEO Counselor but the matter could not be resolved informally.

On September 9, 2021, Complainant filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of race (Native American), sex (male), age (52), and reprisal for EEO-protected activity when:

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.

- a. On June 15, 2021, Complainant was notified that the Director of Operations had banned him from Building 2670;
- b. On June 2, 2021, the Operations Branch Chief used violent and disrespectful language towards Complainant;
- c. On June 2, 2021, the Operations Branch Chief responded to Complainant's email with corrected slides with "Bro you know who made these slides?"; and
- d. On February 27, 2021, the Operations Branch Chief, while Acting Director of Operations responded, "I don't have to handle them with kid gloves" while Complainant was discussing the Operations Branch Chief's unprofessional behavior towards one of Complainant's subordinates.

On December 14, 2021, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. 1614.107(a)(1) for failure to state a claim. Regarding Claim a, the Agency reasoned that Complainant was instructed to avoid Building 2670 because that was where the Operation Branch Chief's office was located, and Complainant had made a complaint against the Operations Branch Chief. The Agency stated that Complainant's remaining claims were based on isolated comments which did not result in Complainant suffering an employment harm.

The instant appeal followed.

ANALYSIS AND FINDINGS

The regulation at 29 C.F.R. § 1614.107(a)(1) provides, in relevant part, that the Agency shall dismiss a complaint that fails to state a claim. The Agency shall accept a complaint from an aggrieved employee who believes that he has been discriminated against by the Agency because of a prohibited consideration or because of retaliation. 29 C.F.R. §§ 1614.103, 1614.106(a). EEOC's federal sector case precedent consistently defines an "aggrieved" 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). If a complainant cannot establish that he is aggrieved, then an agency shall dismiss the complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle him or her to relief. The trier of fact must consider all incidents and remarks together in the light most favorable to a complainant, in order to determine sufficiency to state a claim. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997). Claims of reprisal are examined broadly such that employees are protected from words or acts that may reasonably deter employees from EEO activity. Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000).

Here, we find that Complainant has stated a viable harassment claim. On at least three occasions, between February 2021 and June 2021, the Operations Branch Chief purportedly had been abusive toward Complainant and those under his command. For example, Complainant accused the Operations Branch Chief of yelling about “beating Complainant’s ass” during a telephone argument. Complainant stated that he heard the Operations Branch Chief violently slamming the phone and then later observed that the phone had been broken.

Complainant further alleges the Operations Branch Chief had shouted words to the effect of “Motherfucker don’t you ever talk to me like that again, who do you think you are?” Complainant asserted that the Operations Branch Chief had earlier threatened one of his subordinate police officers by stating the officer needed to recognize him as the Operations Branch Chief if they wanted to keep “their fucking jobs.” Complainant additionally claimed that a Supervisory Anti-Terrorism Officer insulted Complainant and his unit by referring to them as “the assclowns.” Next, Complainant accuses the Operations Director of siding with the Operations Branch Chief and taking no action when notified of the harassment in retaliation against Complainant for having complained about the Operations Branch Chief.

CONCLUSION

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

ORDER (E0618)

The Agency is ordered to process the remanded claims (ongoing discriminatory harassment) 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, 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, 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 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

March 28, 2022

Date