



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

[REDACTED]
Maximo L.,¹
Complainant,

v.

Deb A. Haaland,
Secretary,
Department of the Interior
(Bureau of Reclamation),
Agency.

Appeal No. 2021001813

Hearing No. 550-2019-00482X

Agency No. DOI-BOR-18-0606

DECISION

Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's December 22, 2020 final order concerning an equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 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 for the Agency as a Craftsman in Yakima, Washington.

On December 17, 2018, Complainant filed an EEO complaint alleging that the Agency discriminated against him based on disability (wrist injury) and age. By letter dated February 25, 2019, the Agency accepted the formal complaint for investigation and determined that it was comprised of the following three claims:

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.

1. On July 25, 2018, Complainant [was] forced to violate [his] medical restrictions when [he was] assigned to clean “the racks” alone.
2. On August 1, 2018, [he was] reprimanded for working outside of [his] medical restrictions.
3. From the beginning of [his] tenure with the Agency and continuing, [he has] been denied training opportunities, tools and equipment, overtime, and work assignments which were given instead to younger individuals.

After an investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge (AJ). Complainant timely requested a hearing. On June 8, 2020, the AJ issued a Notice of Intent to Issue a Decision Without a Hearing (Notice). The AJ stated that the Rehabilitation Act was not meant to cover temporary conditions and indicated it appeared this applied to Complainant's injured wrist. The AJ further indicated, regarding Complainant's claim of age discrimination, that there appeared to be no evidence that younger employees similarly situated to him were treated differently than him. The AJ provided the parties an opportunity to respond.

In response to the AJ's Notice, Complainant, now represented by an attorney, asserted that summary judgment was not proper in this matter. Complainant, through his attorney, asserted that he had also been subjected to unlawful retaliation when he was terminated from his position after he requested a hearing for the instant complaint. Specifically, Complainant's attorney stated that, “[Complainant] supplemented his EEO complaint filing in this matter by submitting a statement alleging retaliatory termination along with relevant documentation of his proposed and decided termination.” Complainant also submitted a declaration that he was initially not represented by an attorney and that he submitted documentation through the Commission's online portal regarding his termination and his belief that he was being subjected to retaliation for filing the instant complaint. Complainant's attorney asserted that there was no Acknowledgment Order issued in this matter. Complainant's attorney also argued that the other claims in the instant formal complaint warranted further development and possible credibility determinations. For example, Complainant asserted that management officials provided him with assignments clearly in violation of his light duty restrictions.²

The Agency concurred with the AJ's Notice to Issue a Decision without a Hearing. The Agency asserted that Complainant's removal/retaliation claim was not part of the instant formal complaint and that Complainant had not amended the instant complaint.

On December 15, 2020, the AJ issued a decision by summary judgment without a hearing finding no discrimination.

² While management officials assert that they assigned Complainant to simply assess a worksite to determine if additional crew would be needed to clear the area, Complainant asserted he was instructed to perform the actual work, which included heavy lifting.

Regarding a removal claim, the AJ found that Complainant's response to the Notice "raised claims that were not counseled, accepted, and investigated, including claims subject to mixed case complaint processing...At no time did Complainant request leave to amend his complaint." The AJ found no discrimination regarding the other claims.

On December 22, 2020, the Agency issued a final order implementing the AJ's decision without a hearing finding no discrimination.

The instant appeal followed. Complainant, though his attorney, asserts "[o]n July 15, 2019, [Complainant] sought to amend his complaint in this matter to add his claim of retaliation as to his termination. At the time he sought to amend his complaint, [Complainant] was not represented by an attorney and as such he followed the standard procedure for a pro se complainant to amend [the] complaint. [Complainant] was advised by his EEO Counselor to contact the EEOC Office [the office of the EEOC AJ] and tell them he wished to add to his complaint. [Complainant] contacted the EEOC office handling this matter and spoke with [a named EEOC staff member, ES1] and was instructed by [ES1] to upload the documents to the online public portal. [ES1] assisted [Complainant] with uploading/filing his letter to add his claim of retaliation as to his termination via the online EEOC public portal." Complainant's Brief at 4-5. In addition, Complainant alleged that the AJ's summary judgment decision regarding his other claims was not proper.

In response, the Agency requests that we affirm its final order implementing the AJ's decision without a hearing finding no discrimination. Regarding the retaliation/removal claim, the Agency asserts that Complainant's response to the Notice "ignored the AJ's identification of the issues..." The Agency also asserts that Complainant's counsel was on notice as of June 8, 2020, the date the AJ issued the Notice, that the reprisal claim was not an accepted issue.

ANALYSIS AND FINDINGS

A critical issue in this appeal is whether or not Complainant properly sought to amend his complaint while it was pending before the EEOC AJ to add a claim of unlawful retaliation when his employment was terminated. The AJ essentially found Complainant did not seek such an amendment.

Here, the record is devoid of evidence that an Acknowledgment Order was issued in this matter or that an Initial Conference was held. The Acknowledgment Order generally provides information to complainants, among other things, on the process for requesting an amendment to a matter pending before an AJ.³ Commission records reflect that on July 15, 2019, ES1 uploaded several documents to the EEOC portal with respect to the instant matter.

³ During an Initial Conference parties may also discuss various matters with the AJ including possible amendments.

These documents include a copy of a proposed removal for Complainant dated June 25, 2019 and a document entitled “EEO Complaint Retaliation” in which Complainant stated that Agency management issued him a Notice of Removal “in retaliation for the EEO complaint I filed against [them].” The record also reflects that ES1 uploaded documents to the portal on August 27, 2019 which included the Agency’s July 23, 2019 Decision to Remove Complainant effective July 26, 2019.⁴ The August 27, 2019 uploaded documents to the portal also contained a statement from Complainant entitled “A Statement to the EEO Judge.” Therein, Complainant stated that he believes Agency management removed him because of the instant complaint. We acknowledge that in these documents, Complainant did not expressly state he was filing a motion to amend his instant complaint. We determine, however, based on these specific circumstances set forth herein, that these documents should have been construed as a motion to amend. Moreover, we find Complainant’s termination claim, in which he alleges he was subjected to unlawful retaliation for the instant complaint, is like or related to the instant matter. To the extent the AJ’s decision determined that the removal matter was not counseled on or accepted by the Agency for investigation, EEO Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110) Ch. 5(III)(B) (rev. Aug.5, 2015) provides, in pertinent part that “[a]fter the complainant has requested a hearing, s/he may file a motion with the Administrative Judge to amend the complaint to include claims that are like or related to those in the pending complaint.” There is no requirement that Complainant seek counseling on these new claims. Id.

Based on the foregoing, we remand the instant matter, in its entirety, to the Agency to submit a renewed request for a hearing. The EEOC AJ assigned to this case shall oversee discovery regarding Complainant’s termination/reprisal claim. In addition, the AJ shall address arguments that this matter should be processed as a mixed case complaint. Because of our determination that the AJ erred in not amending the complaint to include the reprisal/termination claim, we remand the complaint in its entirety in order not to fragment Complainant’s claims. Thus, we will not Complainant’s other claims at this time.

CONCLUSION

Accordingly, we VACATE the Agency’s final order implementing the AJ’s decision without a hearing finding no discrimination and we REMAND this matter to the Agency as set forth in the Order below.

⁴ The Decision to Remove informed Complainant to contact an EEO Counselor if he believed he had been discriminated against. As set forth above, Complainant asserts that while he was pro se, he contacted an EEO Counselor who informed him to contact the Commission regarding his removal/retaliation claim, given the instant pending matter.

ORDER

Within thirty (30) calendar days from the date this decision is issued, the Agency shall submit a hearing request, the complaint file, and a copy of this decision to the EEOC San Francisco District Office Hearings Unit. The Agency shall notify the Compliance Officer of the new hearing number within five days of the assignment of the new hearing number.

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)

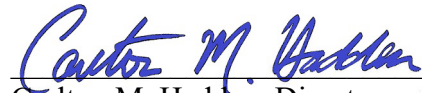
This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this 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

September 26, 2022

Date