



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Roman B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Commissary Agency),
Agency.

Appeal No. 2022002701

Agency No. DECA-00035-2022

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 22, 2022, dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Commissary Management Specialist Intern, GS-7, in Fort Hamilton, New York. Complainant could not work early mornings or nights due to medication that caused fatigue. As a result, Complainant was reassigned to a Computer Assisted Ordering Technician position at the Mitchell Field Commissary as part of the reasonable accommodation process. However, according to Complainant, he did not receive his agreed upon reasonable accommodation following the reassignment. Complainant contended that in November 2021, he was forced to transfer to the Arnold Air Force Base Commissary as a Meatcutter in Tullahoma, Tennessee, due to the Agency's ongoing failure to accommodate his required duty hours. However, he indicated that he was assigned to work one day when his shift begins early at 6 a.m. while his doctor has cleared him to begin work at 7 p.m.

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.

On December 15, 2021, Complainant contacted the EEO Counselor alleging discrimination. When the matter could not be resolved informally, on February 21, 2022, Complainant filed a formal complaint. In his formal complaint, Complainant provided a long narrative detailing the events surrounding his claim of denial of reasonable accommodation.

In its final decision, the Agency identified Complainant's formal complaint as alleging that the Agency subjected him to discrimination on the basis of disability (mental and physical) when, on October 8, 2021, Complainant was removed from the DeCA Management Internship Program and transferred to the Mitchell Field Commissary as a Computer Assisted Ordering Technician.²

The Agency dismissed the claim for untimely counselor contact, pursuant to 29 C.F.R. §1614.107(a)(2). The Agency determined that Complainant's initial EEO Counselor contact was on December 15, 2021, and therefore 68 days after Complainant's transfer. As such, the Agency found that Complainant's initial EEO contact was beyond the 45-day limitation period. The Agency added that even if the incident occurred on October 14, 2021, as stated in the formal complaint, a total of 62 calendar days passed before Complainant contacted an EEO Counselor.

The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination be brought to the attention of an EEOC Counselor withing 45-days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45-days of the effective date of the action.

As an initial matter, we find that the Agency's final decision failed to properly identify Complainant's claim of alleged discrimination. A fair reading of the record shows that Complainant alleged that the Agency failed to provide him with reasonable accommodation beginning in his position as a Commissary Management Specialist Intern, GS-7, in Fort Hamilton, New York, and continuing to his position at the Arnold Air Force Base Commissary in November 2021.

A review of the record indicates that Complainant's claim addresses an allegation of ongoing reasonable accommodation denial and should be construed as timely raised. See Complainant v. Dep't of Health and Human Serv., EEOC Appeal No. 0120130602 (Sept. 12, 2014) (agency improperly dismissed EEO complaint for untimely EEO Counselor contact when management continued to ignore complainant's requests for reasonable accommodation, which complainant asserted were still ongoing). Specifically, the formal complaint and counselor's report show that Complainant alleged that the Agency continued to fail to accommodate him following his transfer through November 2021.

² The Agency's final decision identifies the transfer date as October 8, 2021. However, the formal complaint states that the incident occurred on October 14, 2021.

The Commission has stated that because an employer has an ongoing obligation to provide a reasonable accommodation, failure to provide such accommodation constitutes a violation each time the employee needs it. See “Threshold Issues,” EEOC Compliance Manual, at 2-IV (revised July 21, 2005).

Therefore, we determine that Complainant timely contacted the EEO Counselor on December 15, 2021.

CONCLUSION

We REVERSE the Agency's final decision dismissing the formal complaint, defined herein as an on-going failure to accommodate claim, and we REMAND the matter to the Agency for further processing in accordance with the ORDER below.

ORDER (E0618)

The Agency is ordered to process the remanded claims in accordance with 29 C.F.R. § 1614.108. 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 (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 18, 2022

Date