



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

[REDACTED]  
Lloyd H.,<sup>1</sup>  
Complainant,

v.

Kilolo Kijakazi,  
Acting Commissioner,  
Social Security Administration,  
Agency.

Appeal No. 2022003449

Agency No. PHI-22-0241-SSA

**DECISION**

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated May 9, 2022, dismissing his 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 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 Claims Specialist, GS-11, at the Agency's District Office 196 facility in Rossville, Maryland.

On April 14, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination and harassment on the basis of his sex (male) alleging:

1. On February 15, 2022, management assigned Complainant disproportionate work assignments.

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<sup>1</sup> 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. Since February 15, 2022,<sup>2</sup> management subjected Complainant to non-sexual harassment, in terms of disproportionate work assignments, verbal humiliation, and intense scrutiny.

The Agency dismissed both claims for untimely EEO Counselor contact, pursuant to 29 C.F.R. § 1614.107(a)(2).<sup>3</sup> It reasoned that Complainant had contacted an EEO Counselor on April 14, 2022, which was beyond the 45-day regulatory limitation. In addition, the Agency dismissed both claims for raising issues before the Commission that were previously raised in a grievance procedure that accepts allegations of discrimination, pursuant to 29 C.F.R. § 1614.107(a)(4).

The instant appeal followed. Neither Complainant nor the Agency submits arguments or contentions on appeal.

### ANALYSIS AND FINDINGS

#### *EEO Counselor Contact*

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination should be brought to the attention of the Equal Employment Opportunity Counselor within forty-five (45) days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within forty-five (45) days of the effective date of the action. EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states that the agency shall dismiss a complaint or a portion of a complaint that fails to comply with the applicable time limits contained in §§ 1614.105, .106, and .204(c), unless the agency extends the time limits in accordance with § 1614.604(c).

The Commission has adopted a “reasonable suspicion” standard (as opposed to a “supportive facts” standard) to determine when the forty-five (45) day limitation period is triggered. See Howard v. Dep’t of the Navy, EEOC Request No. 05970852 (Feb. 11, 1999). Thus, the time limitation is not triggered until a complainant reasonably suspects discrimination, but before all the facts that support a charge of discrimination have become apparent.

The EEO Counselor’s Report indicates that Complainant initiated EEO Counselor contact on March 11, 2022, about events that occurred on February 15, 2022, and ongoing. The date of Complainant’s initial contact is well within the 45-day time limit.

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<sup>2</sup> In his formal complaint, Complainant gives the dates of occurrence of discrimination as February 15 and February 23, 2022.

<sup>3</sup> We note that there are two versions of the final agency decision (FAD) in the file, both with a release date of May 9, 2022. Untimely EEO Counselor contact was a basis of dismissal in one of the two FADs.

Thus, we find that Complainant's EEO Counselor contact was timely, according to the Agency's own records. Dismissal on these grounds was improper.

### *Grievance Procedure*

EEOC Regulation 29 C.F.R. § 1614.107(a)(4) provides, in pertinent part, that an agency shall dismiss a complaint where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination and § 1614.301 indicates that the complainant first elected to pursue the non-EEO process.

EEOC Regulation 29 C.F.R. § 1614.301(a) states that when a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or grievance on a matter of alleged employment discrimination must elect to raise the matter under either Part 1614 or the negotiated grievance procedure, but not both. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances that allege discrimination may not thereafter file a complaint on the same matter under Part 1614, regardless of whether the agency has informed the individual of the need to elect or whether the grievance has raised an issue of discrimination.

Here, the record shows that Complainant initiated the grievance process on May 19, 2021, and was decided approximately three months later, on August 18, 2021. The grievance raised issues that were similar to those in claims 1 and 2 of the instant EEO complaint. Complainant acknowledges that the matters are similar. However, the issues in the instant case concern events starting in mid-February 2022, several months later, and, therefore, are not the same as those addressed in the grievance.

Additionally, while the record shows Complainant has engaged in the negotiated grievance process, the record does not contain a copy of the collective bargaining agreement (CBA) sufficient to show that the CBA permits allegations of discrimination to be raised in a negotiated grievance procedure. Thus, we are unable to determine if the negotiated grievance procedure at issue permits the acceptance of grievances that allege discrimination. See Stella K. v. Dep't of the Army, EEOC Appeal No. 2020004013 (May 19, 2021) (reversing an agency's final decision where the agency had not provided adequate evidence that the complainant was covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure); but see Jarrod W. v. Dep't of the Navy, EEOC Appeal No. 2020005075 (Jan. 28, 2021) (affirming a final agency decision where a copy of the relevant CBA that permitted allegations of discrimination to be raised in the negotiated grievance procedure was included in the record); Lois G. v. Soc. Sec. Admin., EEOC Appeal No. 0120150341 (Apr. 20, 2017) (affirming an Administrative Judge's dismissal where a copy of the CBA showing that allegations of discrimination could be raised in the grievance procedure was included in the record). The Commission has repeatedly stated that "the agency has the burden of providing evidence and/or proof to support its final decisions."

Ericson v. Dep't of the Army, EEOC Request No. 05920623 (Jan. 14, 1993). The Agency failed to meet its burden in the instant complaint. Thus, we find dismissal on these grounds was also improper.

### CONCLUSION

The Agency's final decision dismissing the formal complaint is REVERSED. The formal 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 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, 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:



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Carlton M. Hadden, Director  
Office of Federal Operations

October 19, 2022

Date