



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

[REDACTED]  
Marcos S.,<sup>1</sup>  
Complainant,

v.

Denis R. McDonough,  
Secretary,  
Department of Veterans Affairs,  
Agency.

Appeal No. 2021004325

Hearing No. 480-2019-00921X

Agency No. 200P-0593-2019101161

**DECISION**

On July 27, 2021, 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 June 30, 2021, final order concerning his equal employment opportunity (EEO) complaint alleging 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. For the following reasons, the Commission VACATES the Agency's final decision and REMANDS the decision.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Clinical Pharmacist at the Agency's facility in North Las Vegas, Nevada.

In July 2018, Complainant started the informal EEO process. In Agency No. 200P-0593-2018105281, Complainant alleged that he was subjected to events from 2016 to October 18, 2018.<sup>2</sup> However, he did not file a formal complaint in Agency No. 200P-0593-2018105281.

---

<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.

<sup>2</sup> In Agency No. 200P-0593-2018105281, his initial contact alleged the following events: (a) ongoing harassment from 2016 to October 18, 2018; (b) from January 2018 to July 2018, several

On February 16, 2019, Complainant filed the instant EEO complaint, namely Agency No. 200P-0593-2019101161, alleging that the Agency subjected him to a hostile work environment and discriminated against him on the bases of age (56) and reprisal for prior protected EEO activity in several incidents spanning from September 2018 until January 2019. Complainant noted that he was including many claims that he had previously attempted to include in Agency No. 200P-0593-2018105281, but that were never adjudicated. Complainant indicated that he did not receive a Notice of Right to File in his prior EEO matter, so he did not file a formal complaint.

On March 26, 2019, Complainant requested to amend his complaint. On May 23, 2019, the Agency issued a Notice of Partial Acceptance. The Agency determined that Complainant's complaint referenced several events that were previously listed in Agency No. 200P-0593-2018105281. The Agency dismissed any claim concerning Complainant's dissatisfaction with the processing of Agency No. 200P-0593-2018105281, pursuant to 29 C.F.R. § 1614.107(a)(8). The Agency also determined that any claims that occurred on or before October 18, 2018, were previously raised in Agency No. 200P-0593-2018105281 and therefore also dismissed those claims pursuant to 29 C.F.R. §1614.107(a)(1).

Additionally, the Agency noted that on December 26, 2018, Complainant filed an appeal with the Merit Systems Protection Board (MSPB), which was docketed as MSPB No. SF-1221-19-0174-W-2.<sup>3</sup>

---

related matters about additional work consults and/or assignments and work schedule rotation issues; (c) several events pertaining to an August 10, 2018 performance counseling; (d); Pharmacy clinic closure on April 7, 2018 and related civil matters; (e) non-selection or interview for Home Based Primacy Care position on November 30, 2017; (f) he was denied a compressed work schedule and charged Leave Without Pay; (g) and he was issued a written counseling on June 6, 2018.

<sup>3</sup> In his December 26, 2018, MSPB appeal, Complainant alleged the following events: (a) ongoing harassment complaint from September 11, 2018, to December 26, 2018; (b) on September 11, 2018, management broke into his work locker and took private documents from his locker; (c) on November 2, 2018, management rated Complainant as unsuccessful on his performance appraisal which was not an appropriate rating; (d) on November 16, 2018, Complainant was accused of pharmacy work errors by a coworker (Pharmacist); (e) on November 23, 2018, he was required to perform additional work duties as a second pharmacist was not scheduled by management; (f) he was required to redo privacy training with no work time allowed by management; (g) on November 19, 2018, he was denied annual leave to care for a family member; (h) on November 27, 2018, management accused Complainant of privacy violation and Pharmacist filed complaint with the Privacy Officer against Complainant; (i) on November 30, 2018, and December 4, 2018, Complainant's computer access for work was denied by management; (j) on December 4, 2018, Complainant was detailed away from clinical duties by the Associate Pharmacy Director to perform administrative duties and not provided union representation; and (k) closure of Agency pharmacies as well as fraud, waste and abuse of federal money by the Agency.

The Agency found that his MSPB appeal raised claims which were sustainably similar to several claims Complainant was attempting to bring forth. The Agency stated that since Complainant elected to have his claims adjudicated by the MSPB and those claims also raised in Agency No. 200P-0593-2019101161 would be dismissed pursuant to 29 C.F.R. § 1614.107(a)(4).

Ultimately, the Agency stated that it would accept the following claims for investigation. Whether Complainant was subjected to a hostile work environment and discrimination based on age (56) and reprisal for his prior EEO Activity as evidenced when:

1. on January 23, 2019, Complainant discovered that the Associate Pharmacy Director blocked his access to the vault; and,
2. on March 14, 2019, Complainant was issued a proposed removal.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing.

On October 6, 2019, Complainant filed a motion to review the claims dismissed by the Agency. On June 19, 2020, the AJ issued their response. Regarding the Agency's dismissal of claims associated with Agency No. 200P-0593-2018105281, the AJ determined that Complainant had previously abandoned the claims when he failed to file a formal complaint regarding the matter identified as Agency No. 200P-0593-2018105281. Regarding the MSPB associated claims, the AJ determined that there were claims raised in the matter before them which were included in Complainant's pending MSPB appeal. The AJ provided Complainant with the option to either withdraw his claims before the MSPB with prejudice in order to process them as part of his current EEOC case or proceed with those claims before the MSPB.

On June 21, 2020, Complainant filed a pleading with the MSPB to voluntarily withdraw his appeal.<sup>4</sup> On June 30, 2020, Complainant filed a Motion to Reconsider the dismissal of the claims before the MSPB. On July 1, 2020, based on Complainant's withdrawal of his MSPB appeal, the AJ included the claims as they were no longer pending before the MSPB. The AJ stated that the accepted claims would be as follows:

1. on November 2, 2018, Complainant received a performance evaluation rating of unsuccessful;

---

<sup>4</sup> On November 17, 2020, the MSPB issued an order regarding Complainant's withdrawal request. The MSPB stated that Complainant failed to respond to two of the MSPB's request, resulting in the MSPB returning his appeal to the MSPB for consideration. The MSPB provided Complainant another opportunity to withdraw his Petition. Complainant later successfully withdrew his appeal.

2. on November 3, 2018, a colleague secretly planted a Botox prescription in Complainant's work area;
3. on November 16, 2018, Complainant was accused of committing an error;
4. on November 19, 2018, Complainant's request for annual leave was denied;
5. from November 23, 2018, to November 26, 2018, Complainant was assigned work including responding to a Congressional issue, reporting a missed call, and activating clinic administration medication;
6. on November 23, 2018, management failed to assign a second pharmacist;
7. from November 26, 2018, to November 30, 2018, Complainant was accused of committing a privacy violation and was subsequently ordered to retake privacy training;
8. in December 2018, Complainant did not have computer access;
9. on December 4, 2018, Complainant received a memorandum detailing him to administrative duties and his request for union representation was denied;
10. on January 23, 2019, Complainant discovered that the Associate Pharmacy Director, blocked his access to the vault;
11. on March 14, 2019, Complainant was issued a proposed removal.

On February 11, 2021, the Agency filed its Motion for Summary Judgment (Motion). The Agency acknowledged the AJ's reinstatement of claims 1 through 9 which were the claims raised before the MSPB. However, the Motion noted the claims were reinstated after the investigation was completed, and therefore the investigation did not contain any testimony or exhibits specific to those claims. Nonetheless, the Agency attached several exhibits addressing each claim in its Motion. Complainant opposed the Motion, and the Agency replied. On March 14, 2021, Complainant filed a motion to file a surreply. This surreply was denied by the AJ.

On June 28, 2021, the AJ determined that the complaint did not warrant a hearing and over Complainant's objections, issued a decision without a hearing. The AJ did not address all the claims. Instead, the AJ briefly discussed claim 1 and the background leading to claim 10. Ultimately, the AJ determined that, having considered the record and making all reasonable inferences in favor of Complainant, there were no material facts in dispute and granted the Agency's Motion.

The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged. This appeal followed.

### CONTENTIONS ON APPEAL

On appeal, Complainant asserts that the AJ erred in issuing summary judgment. Complainant asserts that the AJ was clearly biased and abused their judicial discretion when issuing the decision. For example, Complainant notes the denial of his attempted surreply. Complainant also asserts that the AJ violated EEO regulations when she failed to sanction the Agency for conflict of interest for allowing the same Agency Counsel to represent the Agency in both his removal action and this instant complaint. Complainant also notes that the decision fails to address each of the accepted claims and should therefore be vacated and remanded for a review of each claim.

In response, the Agency notes that Complainant has frequently relitigated cases and pleadings in an attempt to resurrect his complaints in any available forum. The Agency also notes that while the only claims accepted for investigation were claims 10 and 11, the AJ had determined that the complaint was adequately developed for summary disposition based on the Agency's submissions. The Agency agrees and requests that the Commission to affirm the Agency's decision implementing the AJ's finding of no discrimination or retaliation.

### STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

### ANALYSIS AND FINDINGS

#### *Procedural Dismissal*

Complainant did not specifically challenge the Agency's dismissal of claims that were associated with his prior Agency case number 200P-0593-2018105281. The Commission has the discretion to review only those issues specifically raised in an appeal. EEO MD-110, at Chap. 9, § IV.A.3. Since Complainant has not challenged the Agency's decision to procedurally dismiss claims associated with Agency case number 200P-0593-2018105281, we will not address those claims on appeal.

#### *Conflict of Interest*

Additionally, on appeal, Complainant raised concerns of conflict of interest.

Specifically, that the same Agency Counsel representing the Agency in his removal should not have been allowed to also represent the Agency in the instant matter. Complainant cited to the EEO MD-110, at Chap. 1 §IV.A. We note that EEO MD-110 does not specifically bar Agency Counsel from representing the Agency in a variety of manners. Instead, it provides examples of what to do when potential conflicts of interest might arise. Here, the Commission determines that Complainant has not shown that there was a conflict of interest warranting the bar of Agency Counsel.

### *Summary Judgment*

We must determine whether the AJ appropriately issued the decision without a hearing. The Commission's regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC's decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party's evidence and must draw justifiable inferences in the non-moving party's favor. Id. at 255. A "genuine issue of fact" is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A "material" fact has the potential to affect the outcome of a case.

In this matter, Complainant claimed that he was subjected to a hostile work environment and discriminated against based on several events. Here, the Agency initially dismissed several claims and only investigated claims 10 and 11. However, the AJ later reinstated claims 1 through 9. After the reinstatement of the claims, the Agency submitted its Motion for Summary Judgment (Motion). In its Motion, the Agency acknowledged that claims 1 through 9 were not part of the initial investigation. Yet, it argued that with the provision of relevant documentation, there would be sufficient information to warrant summary judgment in its favor. Based on those documents, and the record as a whole, the AJ determined that the record was sufficient to make a summary disposition on all eleven claims.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003). Based on the record, we do not find that the record had been developed with respect to claims 1-9. As such, we disagree with the AJ's assessment that the record was adequately developed. Even though the Agency provided several documents in its Motion, the Report of Investigation itself lacked affidavits from relevant individuals, including Complainant, as to claims 1-9 raised in support of Complainant's claim of harassment and discrimination.

Thus, we find that the investigative record is inadequately developed for a determination on the merits of Complainant's complaint. 29 C.F.R. 1613.216(a).

See Stewart v. Dep't of Homeland Sec., EEOC Request No. 0520070124 (Nov. 14, 2011) (inadequate investigation where agency officials who provided statements only provided an overview of the mechanics of the selection process and did not articulate the reasoning that produced applicant scores); O'Neill v. Dep't of State, EEOC Appeal No. 0120083597 (Jan. 15, 2009) (inadequate investigation when the record only contained generalized affidavit testimony regarding the process used to make promotion decision but no evidence that provided an individualized assessment as to why complainant was ranked "mid-ranked," which resulted in his non-promotion).

We note that with the reinstatement of claims 1-9, the AJ should have ordered the Agency to develop the record with respect to these claims that would aid the decision-maker in evaluating the merits of the complaint as a whole. See 29 C.F.R. § 1614.109(a) (once a hearing request is assigned to an AJ, the AJ assumes full responsibility for the adjudication of the complaint, including overseeing the development of the record); EEO MD-110, at Chap. 7 §V. Moreover, the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See EEO MD-110, at Chap. 7 §I (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e).

In summary, we find that the record was inadequately developed to issue a decision. An "appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." EEO MD-110, at Chap. 6 §I. Therefore, judgment as a matter of law in favor of the Agency should not have been granted. See Barry v. Dep't of Com., EEOC Appeal No. 0120093834 (June 30, 2011).

### CONCLUSION

Accordingly, the decision of the Equal Employment Opportunity Commission is to VACATE the Agency's decision implementing the AJ's decision finding of no discrimination, and to REMAND the case for further processing in accordance with this decision and the ORDER of the Commission, below.

### ORDER

The Commission ORDERS the following actions:

1. Within **thirty (30) calendar days** from the date this decision becomes final, the Agency shall forward the entire record of the instant complaint to the Hearings Unit of the EEOC Los Angeles District Office. In its transmittal letter, the Agency shall request that an Administrative Judge be assigned to this case to undertake a supplemental investigation to obtain the following evidence: 1) sworn statements from relevant individuals regarding claims 1 through 9.
2. After the supplemental investigation has been conducted, the AJ shall conduct a hearing on the complaint and issue a decision, unless it is determined that it is appropriate to issue

summary judgment on the matter, in accordance with 29 C.F.R. § 1614.109 and 29 C.F.R. § 1614.110.

The Agency is further directed to submit a report of compliance, as provided in the statement entitled “Implementation of the Commission’s Decision.” The report shall include supporting documentation verifying that the above-stated actions have been undertaken.

#### 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

December 13, 2022

Date