



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

[REDACTED]
Lloyd B.,¹
Complainant,

v.

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

Appeal No. 2022004336

Agency No. NY-22-0452-SSA

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated July 28, 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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Operations Supervisor, GS-12, at the Agency's New Jersey Field Office in Toms River, New Jersey.

On June 28, 2022, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the basis of religion and in reprisal for prior protected EEO activity. The Agency accepted the formal complaint and framed Complainant's claim as follows:

Complainant was subjected to harassment starting on May 4, 2022, and continuing, when he received a decision from the Harassment Prevention Office (HPO) that his allegations did not meet the legal definition of harassment.

The Agency dismissed the complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim, reasoning that the complaint was a collateral attack on the proceedings of another forum,

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.

specifically, the Agency's "HPO process," which is an internal investigative process for harassment complaints.

The instant appeal followed. On appeal, Complainant argues in part, that a conflict of interest exists by the Agency's Office of Civil Rights and Equal Opportunity (OCREO) personnel having jurisdiction over his EEO complaint. He argues that the OCREO Director is not independent because she issued/signed the Agency decision dismissing his harassment claim and is one of the officials who harassed him. Complainant explains that the OCREO Director's dismissal was "self-serving" because she "dismissed her own claim against herself." In addition, he argues that the dismissal was issued in retaliation for his prior EEO activity. Specifically, he alleges that he named the Center Director of OCREO as the discriminating official in his prior EEO complaint, so staff at OCREO are incapable of making an unbiased decision for that reason. Unlike the instant complaint, Complainant describes that the Agency correctly identified that there was a conflict of interest with his prior complaint (Agency No. COI-22-0595). He argues that COI-22-0595 was transferred outside of OCREO's jurisdiction to the Conflict of Interest (COI) Department, and that the instant complaint "should have been sent to COI" as well. The record contains an email from the COI Department acknowledging that there was a conflict of interest with OCREO processing COI-22-0595 because the complaint was against the Center Director of OCREO.

The Agency filed a brief in response, arguing that its dismissal should be upheld because Complainant failed to state a claim. The Agency did not address the conflict of interest issue.

ANALYSIS AND FINDINGS

EEOC Management Directive (MD-110), Chapter I, (August 5, 2015) provides that, "[a]gencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts." MD-110 goes on to explain that, "it is a conflict of interest on its face for an EEO investigator or a complaints manager to be responsible for processing a complaint in which they have been charged with participating in the discrimination against the complainant." See Smith v. United States Postal Service, EEOC Request No. 05920962 (September 7, 1993); Schultz v. Department of the Navy, EEOC Appeal No. 0120063798 (November 16, 2007).

The Commission finds that it was clearly a conflict of interest for the OCREO Director to issue a decision dismissing Complainant's harassment claim because the OCREO Director was the official charged with discrimination.

Furthermore, we find that Complainant alleged a viable claim of retaliation that requires further investigation. The anti-retaliation provisions of the employment discrimination statutes seek to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of the statutes' basic guarantees and are not limited to actions affecting employment terms and conditions. Burlington Northern & Santa Fe Railroad. Co. v. White, 548 U. S. 53, 126 S. Ct. 2405 (2006).

To state a viable claim of retaliation, Complainant must allege that: 1) he was subjected to an action which a reasonable employee would have found materially adverse, and 2) the action could dissuade a reasonable employee from making or supporting a charge of discrimination. Id. See also EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (August 25, 2016); Carroll v. Department of the Army, EEOC Request No. 05970939 (April 4, 2000). Here, Complainant alleged that the OCREO dismissed his complaint in retaliation for naming an OCREO official in a prior EEO complaint.

CONCLUSION

Accordingly, the Agency's decision dismissing the complaint is REVERSED. We REMAND the complaint for further processing in accordance with this decision and applicable regulations. On remand the Agency must ensure that the individuals responsible for processing the remanded allegations are not individuals charged by Complainant as participating in the harassment or retaliation that he was subjected to.

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:



Carlton M. Hadden, Director
Office of Federal Operations

January 4, 2023

Date