



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

[REDACTED]
Sonny M.,¹
Complainant,

v.

Michael S. Regan,
Administrator,
Environmental Protection Agency,
Agency.

Appeal No. 2022004134

Hearing No. 570-2020-01056X

Agency No. 2019-0080-HQ

DECISION

On July 28, 2022, 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 July 1, 2022, final decision 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. For the following reasons, the Commission VACATES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Chemical Engineer, GS-0893-13, at the Agency's Regulation Implementation Division, Office of Land and Emergency Management facility in Washington, D.C.

On August 24, 2019, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the bases of national origin (Israel), religion (Jewish), and in reprisal for prior protected EEO activity when:

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 May 3, 2019, his supervisor, the Associate Division Director (ADD), issued him a “Letter of Warning;”
2. On March 28, 2019, ADD sent him an email, removing him as a Watch Officer, accusing him of false misconduct and performance issues, and containing anti-Semitic tropes;
3. Following the May 3rd letter, Complainant was further harassed by unreasonable delays in leave approval and by rescinding his authority to issue determinations;
4. In August 2018, ADD attempted to remove him as an Advisory Council member by accusing him of speaking to a colleague about the confidential work of the Council;
5. On or about August 2018, the Chair of the Advisory Council, became visibly angry, started yelling, and told him to “go to hell” when he attempted to share his account of events;
6. On or about October 2018, ADD requested that Complainant provide documentation, illustrating the work he had accomplished during a telework day;
7. On July 8, 2019, he was constructively discharged when he submitted his Letter of Resignation due to the ongoing harassment; and
8. He was locked out of his computer on his last day.

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 requested a hearing but the AJ denied the hearing request on the grounds that the complaint was a mixed-case complaint, and therefore Complainant did not have the right to a hearing. The AJ remanded the complaint to the Agency.

The Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. The Agency found that Claim 7 constituted a mixed claim and provided Complainant with appeal rights to the Merit Systems Protection Board (MSPB). The Agency determined that the remainder of Complainant’s complaint was non-mixed and provided Complainant with appeal rights to the Commission.

The instant appeal followed.

Following the docketing of this appeal, the MSPB issued a decision on October 19, 2022, in which it dismissed Claim 7 for lack of jurisdiction.

ANALYSIS AND FINDINGS

A fair reading of the AJ's decision is that the AJ dismissed Complainant's hearing request, finding that claim 7 was a mixed-case claim and that the remaining allegations were "inextricably intertwined" with the removal claim. A mixed case complaint is a complaint of employment discrimination filed with a federal agency, related to or stemming from an action that can be appealed to the MSPB. 29 C.F.R. § 1614.302(a)(1). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. *Id.* If a complainant is dissatisfied with the Agency's final decision on a mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the Agency's final decision. 29 C.F.R. §1614.302(d)(1)(ii). Upon review, we find that the AJ improperly dismissed Complainant's complaint in its entirety.

The Commission abandoned the practice of finding non-appealable claims to be "inextricably intertwined" with appealable claims. *Jillian B. v. Dep't of the Navy*, EEOC Appeal No. 0120170532 (Apr. 30, 2019). MSPB generally does not have jurisdiction over non-appealable matters, even if they are connected with appealable matters, and the doctrine of inextricably intertwined constituted a request for an MSPB Administrative Judge to hear matters that may not be within the jurisdiction of the MSPB. *Complainant v. Inter-American Found.*, EEOC Appeal No. 0120132968 (Jan. 8, 2014). The only exception is the situation in which a non-appealable matter is a proposed action that becomes final, in which case the proposal is said to "merge" with the final action. *Wilson v. Dep't of Vet. Aff.*, EEOC Appeal No. 0120122103 (Sept. 10, 2012). In this case, all claims except Claim 7 are non-appealable actions, meaning they cannot be appealed to the MSPB due to lack of jurisdiction. See 5 C.F.R. § 1201.3. Therefore, we conclude that the AJ erred in dismissing Complainant's hearing request for Claims 1 through 6 and Claim 8.

The Agency properly processed Claim 7 as a mixed case claim, and its final decision provided Complainant appeal rights to the MSPB for this claim. See 5 C.F.R. § 1201.3. As noted, the MSPB issued a decision on October 19, 2022, finding it did not have jurisdiction over Claim 7. At that stage, Claim 7 became non-mixed, and the Agency was obligated to process the claim as if it were not mixed. 29 C.F.R. § 1614.302(c)(2)(ii) ("If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint."). Therefore, we remand the entire complaint for reinstatement of Complainant's hearing request.

CONCLUSION

Accordingly, the Agency's final decision is VACATED, and the complaint is REMANDED to the Agency for further processing in accordance with this decision and the ORDER herein.

ORDER

Within 30 calendar days of the date this decision is issued, the Agency shall submit to the Hearings Unit of the EEOC's Memphis District Office a renewed request for a hearing on this complaint on behalf of Complainant, the complete complaint file, and a copy of this appellate decision. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109, and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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

November 9, 2023

Date