



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Nathan S.,¹
Complainant,

v.

Louis DeJoy,
Postmaster General,
United States Postal Service
(Field Areas and Regions),
Agency.

Appeal No. 2023002745

Agency No. 4J450000623

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (“EEOC” or “Commission”) from the Agency's March 10, 2023 dismissal of 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 was employed by the Agency as a City Carrier, Q-01, for the Murray Carrier Annex in Cincinnati, Ohio.

On February 22, 2023, Complainant filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of race, sex, disability and/or reprisal for protected EEO activity. The Agency dismissed the complaint, pursuant to 29 C.F.R. § 1614.107(a)(1), for failure to state a claim. In its dismissal of the complaint, the Agency framed the claim raised as follows:

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.

[S]ince on or around September 2022, Complainant was denied Office of Workers' Compensation Programs ("OWCP") Continuation of Pay ("COP").

The Agency reasoned that Complainant's allegations amounted to an impermissible attempt to lodge a collateral attack against the Department of Labor's OWCP process, which is outside the purview of the EEOC. The Agency concluded that the proper forum for Complainant to raise his allegations was with the OWCP.

The instant appeal followed.

ANALYSIS AND FINDINGS

Under the regulations set forth at 29 C.F.R. Part 1614, an agency shall accept a complaint from an aggrieved employee or applicant for employment who believes that they have been discriminated against by that agency because of race, color, religion, sex, national origin, age or disability. 29 C.F.R. §§ 1614.103, .106(a). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 (Apr. 21, 1994). If the complainant cannot establish that they are aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

As an initial matter, we find that the Agency mischaracterized Complainant's complaint by listing a single claim, which it erroneously framed as a "denial" of the OWCP benefit of COP. On appeal, Complainant provides documentary evidence establishing that OWCP already accepted his claim for COP. A fair reading of Complainant's formal EEO complaint, as clarified by Complainant's appellate brief and the EEO Counselor's Report, identifies the following claims of discrimination:

1. Beginning September 9, 2022, for approximately one month, Management coded Complainant's leave incorrectly, depleting his annual and sick leave, and causing him to accrue approximately 42 hours of leave without pay ("LWOP").
2. Beginning September 9, 2022, and ongoing, Management delayed the processing of Complainant's OWCP claim by delaying COP payments but did not delay processing of other employees' OWCP claims.
3. Beginning on an unspecified date prior to September 2022 and ongoing, Management subjected him to harassment/a hostile work environment including but not limited to the above two claims, and comments that Complainant was "playing games" regarding his on-the-job injury.

Claim 1 states a claim because it identifies a harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. The Agency's rationale for the incorrect coding (OWCP-related error) goes to the merits of Complainant's complaint and is irrelevant to the procedural issue of whether he states a viable claim under Title VII, the Rehabilitation Act, and the 29 C.F.R. Part 1614 regulations. See Osborne v. Dep't of the Treas., EEOC Request No. 05960111 (Jul. 19, 1996).

Collateral Attack

An employee cannot use the EEO complaint process to lodge a collateral attack on another adjudicatory proceeding. Wills v. Dep't of Def., EEOC Request No. 05970596 (July 30, 1998). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's proceeding, such as workers' compensation and related OWCP processes. See Fisher v. Dep't of Def., EEOC Request No. 05931059 (Jul. 15, 1994) (challenge to agency's appeal within the workers' compensation process constitutes a collateral attack and fails to state a claim). The proper forum for claims related to the merits of an OWCP is with the Department of Labor. Pirozzi v. Dep't of the Navy, EEOC Request No. 05970146 (Oct. 23, 1998) (allegedly false statements made by agency to OWCP during OWCP's processing of a workers' compensation claim goes to merits of compensation claim).

Claim 2 contains two issues arising from Complainant's OWCP claim, which do not constitute a collateral attack, as they do not address the merits of Complainant's OWCP claim.

The Commission has recognized very narrow exceptions to the general prohibition on collateral attacks. See Ellis v. United States Postal Serv., EEOC Request No. 05920011 (Mar. 12, 1992) (discriminatory application of grievance process may state a claim). We have previously found that complainant's claim that a supervisor used the Worker's Compensation process in a discriminatory manner when compared to other workers or employees, states a claim under a narrow exception we have recognized. See Villa v. Dep't of the Treas., EEOC Appeal No. 01994737 (Nov. 16, 2000). On appeal, Complainant reasons that his supervisors "have decades of experience in post office management, they know what codes they are supposed to input," and that "nobody else in this office has had their workers compensation this severely messed up." Complainant is alleging discriminatory application of the OWCP process, and therefore states a claim within the narrow exception to collateral attacks.

Also, allegations that an agency delayed processing an OWCP claim because of discriminatory animus do not constitute a collateral attack. See Tien E. v. United States Postal Serv., EEOC Appeal No. 0120160741 (Mar. 3, 2016) citing Foster v. United States Postal Serv., EEOC Appeal No. 05950693 (May 16, 1996) (failure by agency to submit required paperwork to OWCP states a claim, noting that complainant "is not asserting that agency actions caused the OWCP to deny her claim, only that the payment of her claim was delayed by discriminatory agency inaction) other citations omitted.

Thus, Complainant's assertions that Management denied his COP payments through OWCP by, among other things, incorrectly coding Complainant's leave, then misleading the Union Steward who inquired about the coding on Complainant's behalf, state a claim.

Harassment

The Commission has held that a claim of harassment may survive if it alleges conduct that is sufficiently severe or pervasive to alter the conditions of the complainant's employment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Complainant alleges that he has experienced "daily" harassment by his supervisors since he began working at the Murray Carrier Annex nearly two years prior to the events in the instant complaint. In particular, Complainant asserts that much of the alleged harassment is based on sexual orientation and intersectional basis (race and sexual orientation). Yet, beyond the bare assertion of mistreatment (e.g. harassing comments questioning the legitimacy of his on the job injury), Complainant did not provide sufficient facts for these ongoing incidents to state a claim of harassment on their own. See Carlan v. Dep't of the Treas., EEOC Appeal No. 01A32447 (Aug. 1, 2003) (failure to state a claim where "Complainant has not identified when the events occurred, what happened, how she was directly disadvantaged, or how these matters altered the terms, conditions, or privileges of her employment.") Complainant's harassment allegation may serve as background information for a hostile work environment analysis for Claims 1 and 2, or if Complainant contacts an EEO counselor to amend this complaint with any specific allegations of harassment that occurred after filing the instant complaint.

New Allegations of Reprisal

On appeal, Complainant raises a new claim of reprisal. Specifically, Complainant alleges that the day before his mediation was scheduled regarding the instant complaint, supervisors attempted to intimidate him by bringing upper management to the office. He also alleges that his supervisors continue to harass him on the bases of race and sexual orientation. Complainant did not include these new claims in his formal complaint, so we have not considered them when rendering this decision. If Complainant wishes to pursue these new harassment and retaliation claims in an EEO complaint, then he must contact the Agency's EEO office and request an amendment to the instant complaint.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's complaint is REVERSED.

The complaint is hereby REMANDED to the Agency for further processing in accordance with this Decision and the Order below.

ORDER (E0618)

The Agency is ordered to process the remanded claims (defined herein) 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

September 18, 2023

Date