



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Emanuel W.,¹
Complainant,

v.

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

Appeal No. 2023002790

Agency No. 4E-920-0016-23

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated March 8, 2023, dismissing his complaint of unlawful employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant 29 C.F.R. § 1614.107(a)(1) for failure to state a claim and 29 C.F.R. § 1614.107(a)(2), for untimely EEO Counselor contact.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a City Carrier at the Agency's Highland Post Office facility in Highland, California. On February 17, 2023, Complainant filed a formal complaint alleging that the Agency subjected him to discrimination on the bases of disability (heart condition) and reprisal for prior protected EEO activity under Section 501 of the Rehabilitation Act of 1973 when:

1. Beginning 2021, management did not accept Complainant's medical documentation and ignored his medical condition.
2. In 2021, Complainant's medical insurance lapsed.

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.

3. On September 8, 2022, Complainant was issued a Notice of Removal for Absent without Leave (AWOL).²

On March 8, 2023, the Agency dismissed the complaint for untimely contact with an EEO Counselor. The Agency reasoned that the Complainant's November 9, 2022, contact was not within the 45-day time frame after the allegedly discriminatory event. In its dismissal, the Agency also dismissed claim 2 on a separate basis for failure to state a claim due to a collateral attack on the proceedings of another forum, the U.S. Office of Personnel Management (OPM).

The instant appeal followed. In Complainant's brief in support of his appeal, he opposes the Agency's dismissal of his complaint for both untimeliness and failure to state a claim. Notably, the Complainant asserts that his complaint is timely because (1) he did not have constructive knowledge of the EEO complaint process and applicable time periods, (2) his medical condition rendered him unable to contact an EEO Counselor within the applicable time period, and (3) there was a discrete act that occurred during the 45-day time period.

ANALYSIS AND FINDINGS

Timeliness

EEOC Regulation 29 C.F.R. § 1614.105(a)(1) requires that complaints of discrimination 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.

The record discloses that latest of the alleged discriminatory events occurred on September 10, 2022, but Complainant did not initiate contact with an EEO Counselor until November 9, 2022, which is sixty (60) days after he received his Notice of Removal and well beyond the forty-five (45) day limitation period.

EEOC regulations provide that the agency or the Commission shall extend the time limits when the individual shows that he was not notified of the time limits and was not otherwise aware of them, that he did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he was prevented by circumstances beyond his control from contacting the Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. 29 C.F.R. §1614.105(a)(2).

Complainant asserts, inter alia, that his severe heart condition rendered him unable to meet the applicable time period to contact an EEO Counselor.

² The record reveals that the Notice of Removal for Absent without Leave (AWOL) dated September 8, 2022, was delivered to Complainant's address via Express Mail on September 10, 2022. See Complainant File at 56-57.

When a Complainant claims that a physical condition prevents him from meeting a particular filing deadline, we have held that in order to justify an untimely filing, the Complainant must be so incapacitated by the condition as to render him physically unable to make a timely filing. See Zelmer v. USPS, EEOC Request No. 05890164 (March 8, 1989).

On appeal, Complainant explains that he went to urgent care approximately 12 times between September and November 2022. See Complainant File at 7. During this time, Complainant stated that he was so incapacitated that he could not initiate EEO contact, because he was fighting for his life. Id. Complainant was also excused from work by his physician during the applicable time period. See Complainant's Appellate Brief at 24-25. Additionally, Complainant stated that after a moment of medical stability, he immediately initiated EEO contact. Id. at 7.

Complainant, therefore, has presented persuasive argument and evidence warranting an extension of the time limit to contact an EEO Counselor.³ As such, the Commission will treat the complaint as timely, due to Complainant's incapacity during the applicable time period.

Failure to State a Claim

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or disabling condition. 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 he is aggrieved, the agency shall dismiss a complaint for failure to state a claim. 29 C.F.R. § 1614.107(a)(1).

The Agency dismissed claim 2 as a collateral attack on the OPM Federal benefits administration process. This Commission has held that an employee cannot use the EEO complainant process to lodge a collateral attack on another proceeding. See Wills v. Dep't of Defense, EEOC Request No. 05970596 (Jul. 30, 1998); Kleinman v. United States Postal Serv., EEOC Request No. 05940585 (Sept. 22, 1994). A claim that can be characterized as a collateral attack, by definition, involves a challenge to another forum's adjudicatory proceeding. See Lingad v. United States Postal Serv., EEOC Request No. 05930106 (Jun. 23, 1994).

In claim 2, the Complainant alleges that his medical insurance lapsed as a result of the Agency's discriminatory and retaliatory actions. Complainant's claim does not seek to challenge the result of OPM's administration of benefits process.

³ Since the Commission has deemed the EEO Counselor contact timely, it will not address the additional arguments made within the Agency's dismissal of the complaint or the Complainant's Appellate Brief regarding the timeliness of the complaint.

Instead, Complainant is claiming that the decision to refuse his medical documentation and later retroactively cancel his medical insurance was made as a result of discrimination and retaliation on the part of the Agency. See, e.g., Complainant v. Dep't of Justice, EEOC Appeal No. 0120122277 (Sept. 20, 2012). Thus, the Commission finds that the claim does not seek to collaterally attack the OPM benefits administration process and sufficiently states a claim that requires investigation and further processing.

CONCLUSION

Accordingly, the Agency's final decision dismissing Complainant's 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. 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 7, 2023

Date