



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Federal Operations

P.O. Box 77960

Washington, DC 20013

[REDACTED]
Emmitt E.,¹
Complainant,

v.

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

Appeal No. 2023004008

Agency No. ATL-23-0349-SSA

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's final decision dated June 6, 2023, dismissing a formal 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

During the period at issue, Complainant worked as a Manager, GS 14 at the Agency's Fiscal Building Management Team in Birmingham, Alabama.

On April 18, 2023, Complainant filed a formal EEO complaint. The Agency identified Complainant's formal complaint as consisting of the following matters:

1. Whether the Agency subjected Complainant to non-sexual harassment based on disability (mental) and in reprisal for prior protected EEO activity, beginning in January 2018 and ongoing, in terms of threatening and sarcastic language including threat of insubordination, failure to provide reasonable accommodation, stripping of managerial duties, time and attendance issues including forcing to take Leave Without Pay (LWOP), failure to confer with Complainant regarding

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.

selections, berating and unfair treatment, written reprimand, intimidation and working conditions.

2. Whether the Agency failed to provide Complainant with a reasonable accommodation based on disability (mental), from October 18, 2022, and continuing, regarding his request for a soft touch keyboard.

On June 6, 2023, the Agency dismissed the formal complaint pursuant to 29 C.F.R. § 1614.107(a)(2), finding that the claims were never brought to the attention of an EEO Counselor.

The instant appeal followed.

ANALYSIS AND FINDINGS

EEOC Regulation 29 C.F.R. § 1614.107(a)(2) states, in pertinent part, that an agency shall dismiss a complaint or portion thereof which raises a matter that has not been brought to the attention of an EEO Counselor and is not “like or related” to a matter on which the complainant has received counseling.

Here, Complainant, through counsel, presented documentation demonstrating that the claims Complainant alleged in his formal complaint were all previously raised before the EEO Counselor. While the final agency decision indicates that Complainant initiated EEO Counselor contact on March 1, 2023, email correspondence Complainant submitted on appeal demonstrates that Complainant initiated EEO Counselor contact on September 20, 2022. The record includes an email, dated September 28, 2022, from the EEO Counselor confirming that Complainant had contacted the Agency’s “Civil Rights and Equal Opportunity Office on September 20, 2022, to request Equal Employment Opportunity (EEO) counseling.” In that email, the EEO Counselor indicated that she had unsuccessful attempts to contact Complainant and requested that Complainant contact her within 15 days. The record indicates that Complainant responded by deadline on October 7, 2022, and indicated that he was in the process of hiring an attorney.

The record indicates that on October 27, 2022, Complainant’s attorney emailed the EEO Counselor, submitted an amended informal complaint, and requested that the complaint be processed through the Agency’s Alternative Dispute Resolution/Mediation program. Our review of the amended informal complaint reflects that it included the bases, dates, and allegations of discrimination, and the responsible management officials alleged to have engaged in the discriminatory acts. Our review of the amended informal complaint further reflects that Complainant alleges the same claims in his amended informal complaint that he alleged in his formal complaint, subsequently submitted on April 18, 2023. The record indicates that the EEO Counselor acknowledged receipt of Complainant’s October 27, 2022 submission on November 7, 2022. However, there is no indication that the EEO Counselor ever acted on Complainant’s request to pursue mediation.

Instead, Complainant contacted the EEO Counselor after he received a March 1, 2023 reprimand, and on March 8, 2023, he received an email from the Harassment Prevention Officer informing him that his recent allegation of harassment had been assigned for review.

Thereafter, on April 5, 2023, the Agency emailed Complainant a Failure to Pursue Demand Letter and the Notice of Right to File a Formal Complaint (Notice). There is no indication why the Agency waited until April 5, 2023 to issue Complainant these letters when Complainant had provided his amended claims to the EEO Counselor in September 2022. Nevertheless, the April 5, 2023 letter stated, in pertinent part,

This notice is to inform you that, due to your failure to follow up with my result for relevant information (i.e. bases, dates, and allegations of discrimination, responsible management official allegedly engaging in discriminatory act, etc.), which is necessary in order to conduct a limited counseling inquiry (as outlined in Management Directive 110, Chapter 2, V.), I am required to hold a final interview and issue Your “Notice of Right to File a formal Discrimination Complaint.”

The letter also informed Complainant that he had to file the formal complaint within fifteen days of receipt of the Notice. The record reflects that Complainant, through counsel, timely filed the instant formal complaint on April 18, 2023, within the fifteen days and included claims Complainant previously raised with the EEO Counselor on September 20, 2022.

Here, the record supports a determination that the EEO Counselor already had the relevant information to conduct a limited inquiry because Complainant had already provided that information in his September 2022 amended informal complaint, and consequently, Complainant raised those same claims in the instant complaint. Because Complainant raised the claims in the instant complaint before the EEO Counselor in September 2022, the Agency’s decision to dismiss Complainant’s claim pursuant to 29 C.F.R. § 1614.107(a)(2) was improper. Therefore, remand the complaint consistent with our Order below.

CONCLUSION

We REVERSE the Agency’s final decision dismissing the formal complaint on the procedural grounds discussed above. We REMAND this matter 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 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

October 12, 2023

Date