



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

[REDACTED]
Elbert H.,¹
Complainant,

v.

Jeff B. Sessions,
Attorney General,
Department of Justice
(Federal Bureau of Prisons),
Agency.

Appeal No. 0120170676
Agency No. BOP-2014-0759

DECISION

On December 5, 2016, 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 November 3, 2016, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUES PRESENTED

The issues presented are (1) whether Complainant filed the instant appeal in a timely manner and (2) whether the Agency discriminated against Complainant in reprisal for protected EEO activity when it sent him correspondence regarding a fitness-for-duty examination.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Correctional Officer/Senior Officer at the Agency's Schuylkill Federal Correctional Institute in Minersville, Pennsylvania.

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.

On September 5, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability and in reprisal for prior protected EEO when, on May 30, 2014, he received correspondence from management regarding a fitness-for-duty evaluation and threat of termination based on information received during the EEO hearing process.

Complainant filed a prior EEO complaint in 2011 regarding a request for reasonable accommodation for his service-connected disability. He requested a hearing before an EEOC Administrative Judge (AJ), and the Agency moved for summary judgment.² In a response that the Agency received on April 15, 2014, Complainant opposed the Agency's motion. In his response, Complainant stated,

I perform my duties with pain and have for over 11 years. I use my non-dominate arm to complete my duties as far as escorting inmates, lifting over shoulder height, and reaching. I take medication to sleep it is the only way to deal with the pain in my shoulder and arm. My VA disability was increased on July 5, 2011.

Complainant also stated the Agency had argued that his "condition was transitory and minor lasting six months or less." He asserted, "There [is] nothing transitory or minor with my disability even with the evidence the Agency submitted my condition lasted more than six months from October 2010 thru July 2011 this time period alone is more than six months."

In a reply dated April 21, 2014, the Agency argued that Complainant's response was not timely filed and did not refute the Agency's arguments.

In a May 9, 2014, email to Complainant, the Human Resources Manager (HR Manager) stated,

We have been notified by Central Office that you have provided information indicating you are unable to perform the duties of your position without experiencing pain. You indicated that you have been using your non-dominant arm to complete your duties, and have been experiencing this pain for over 11 years.

As we need to determine your fitness for duty, please provide us with the name and address of your treating physician. Upon receipt of this information, we will provide you with a letter requesting information regarding your fitness for duty.

² The record does not contain the pleadings. With his affidavit, Complainant submitted one page from his response to the Agency's motion and the first page of the Agency's reply to his response. The Agency's reply referred to its prior submission as a motion for summary judgment. In its final agency decision and in its argument on appeal, the Agency referred to its pleading as a motion to dismiss for failure to state a claim.

We will also be sending this information directly to your treating physician for completion.

The HR Manager asked Complainant to provide the information by May 16, 2014. In addition, she stated that Complainant would receive information about reasonable accommodation and would need to respond to the information.

Complainant replied on May 16, 2014, with the name and address of his Veterans Administration Medical Center's Orthopedic Clinic. On May 26, the HR Manager asked for the name of the physician that he sees at the Medical Center, and Complainant responded the next day with the names of his original doctor, who was no longer at the Medical Center, and the doctor who he believed had taken the original doctor's place.

In the meantime, the HR Manager sent Complainant a May 12, 2014, letter noting that Complainant "recently provided information to the agency" that he had been performing his job duties with pain and using his non-dominant arm to complete the duties. She stated, "Based on this information, it appears that you are unable to physically perform, without pain, the functions which are essential to your law enforcement position as a Senior Officer for the Federal Bureau of Prisons." She also stated that she had considered whether there were positions to which the Agency could reassign Complainant, that all positions at the correctional institution required "the ability to respond effectively to emergencies," and that the Agency would "not eliminate the essential function of responding to emergencies from any of its positions at the institution as a form of reasonable accommodation." She advised Complainant that, if he was interested in a position that was not in a correctional institution, he should complete a Request for Reasonable Accommodation form within 10 days. The HR Manager stated that Agency staff would try to find suitable vacant positions and asked that Complainant also look for positions that interested him.

In a May 23, 2014, letter to the Acting Warden and the HR Manager, Complainant asserted that it was not appropriate to ask him to seek another position. He noted that he had been back on full duty with no restrictions since July 15, 2011, and stated that he had demonstrated that he was "fully capable of meeting the medical requirements" of his position. Complainant stated,

I have performed all the essential functions of my law enforcement position without jeopardizing the security of the institution or the safety of staff or inmates, and I am not requesting reasonable accommodations. I have performed all the essential functions of my position without concerns of institution security or safety from supervisors or fellow staff members.

On June 12, 2014, the HR Manager sent Complainant an email asking him to sign and return an attached letter to his treating physician authorizing the release of "any information concerning [his] medical history." She also asked him to verify the name of his physician.

On September 5, 2014, Complainant's second-level supervisor called him to tell him that the Agency would not pursue a fitness-for-duty examination. The next day, he sent Complainant an email stating, "I have been advised to inform you that the Agency is no longer pursuing having you complete a Fit for Duty physical."

During the investigation of the instant complaint, the EEO Investigator asked the Agency to provide several documents relevant to the investigation. The HR Manager responded to the request. With respect to the request for a copy of "any requests for accommodation by the Complainant," the HR Manager stated,

The local institution does not have a copy of [Complainant's] request for reasonable accommodation. The letter for reasonable accommodation that was forwarded to [Complainant] resulted from his response during his initial EEO complaint. I was then contacted by the Employment Law and Ethics Branch in Central Office and directed to send him a reasonable accommodation letter and also to pursue a Fitness for Duty.

In his affidavit, Complainant stated that he had a service-connected disability, that he had surgery on his rotator cuff in October 2010, that he had no on-the-job or off-the-job limitations, and that he had been working full duty with no restrictions since July 15, 2011. He asserted that the Agency did not require other employees with impairments to undergo fitness-for-duty examinations. Complainant also asserted that the Agency had no basis for requiring a fitness-for-duty examination after his physician determined three years earlier that he could return to full duty without restrictions.

In her affidavit, the HR Manager stated that she became aware of Complainant's medical condition on December 10, 2010, when she received a doctor's note and Complainant's request to return to work in light-duty status. She was aware of Complainant's prior EEO complaint, which she stated "was based on his limited duty assignment." According to the HR Manager, she sent the May 12, 2014, letter to Complainant because, "[d]uring Complainant's prior EEO case, he made statements that he was unable to perform his duties without pain. It was determined Complainant should be sent a letter regarding reasonable accommodation." The HR Manager stated that the Agency never sent a letter to Complainant's physician because "Complainant failed to provide clarification of the first name of his treating physician." She asserted that Complainant did not receive correspondence regarding a fitness-for-duty examination but, instead, received correspondence regarding reasonable accommodation.

In response to the EEO Investigator's question about whether she was "notified by Central Office for Complainant to do a fitness for duty," the HR Manager replied, "All conversations with Central Office regarding this complaint are covered under the Attorney/Client privilege. I am not authorized to disclose this information." Similarly, in response to the EEO Investigator's question about whether there were any witnesses to corroborate her testimony, she stated, "My conversations with Central Office are covered under the Attorney/Client privilege. I am not authorized to disclose any information discussed during our conversations."

The EEO Investigator submitted the Report of Investigation to the Agency's EEO Office on February 7, 2015, and the EEO Complaints Section forwarded the file to the Agency's Complaint Adjudication Officer on April 7, 2015. In an August 29, 2016, memorandum to the EEO Officer, the Acting Complaint Adjudication Officer noted that the HR Manager had declined to answer two of the EEO Investigator's questions. Noting that the questions were relevant to Complainant's claims and that he was "not aware of any privilege for communications between Central Office personnel and" the HR Manager, the Acting Complaint Adjudication Officer asked the EEO Officer to provide the requested information.

According to the final agency decision, the HR Manager responded to the EEO Investigator's two questions in a letter that the Complaint Adjudication Office received on September 16, 2016. The decision, which quoted the HR Manager's responses³ to the questions, stated that the HR Manager provided the following information:

On April 30, 2014, I received an email from [named individual (Agency Attorney 1)], from the Office of General Counsel, Employment Law and Ethics, in Central Office stating that [Complainant] made the following statements in his EEO case: 1. He performs his duties with pain and has for over 11 years; 2. He uses his non-dominant arm to complete his duties (escorting inmates, lifting over shoulder height, reaching, etc.); and 3. He takes medication to sleep because it is the only way to deal with the pain in his shoulder and arm. As a result of [Complainant's] statements, [Agency Attorney 1] requested that a reasonable accommodation letter, and 8-point letter be issued to [Complainant]. I explained that an 8-point letter was previously sent to [Complainant's] physician at the Department of Veteran's Affairs Medical Center . . . during the limited duty process (in 2011), with no response. Based on this information, [Agency Attorney 1] directed me to send another 8-point letter to [Complainant's] physician. He further stated, if a response was not provided by [Complainant's] physician within 30 days, I should order a fitness for duty.

The decision stated that, in response to the EEO Investigator's question about corroborating witnesses, the HR manager stated,

Per the direction I received from [Agency Attorney 1], who was assigned the Complainant's EEO case, I sent an email to the Complainant on May 9, 2014, requesting that he provide me with the name of his treating physician by no later

³ The response letter is not in the record before us. We remind the Agency that it has an obligation to submit the complete file to the EEOC's Office of Federal Operations within thirty days of the notification that a complainant has filed an appeal. See 29 C.F.R. § 1614.403(3); EEOC Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), Chap. 9, at § IV.G. (Aug. 5, 2015). Complainant has not objected to the final agency decision's use of the letter and has not challenged the accuracy of the quotations. Accordingly, in this case only, we credit the final agency decision's description of the HR Manager's responses.

than May 16, 2014. This email also advised him that he would be receiving a Reasonable Accommodation letter, which was sent via certified mail on May 12, 2014. The Complainant signed in receipt of the certified mail containing the Reasonable Accommodation letter on May 14, 2014. On May 23, 2014, the Complainant provided a response to the Reasonable Accommodation letter. In the response he stated that he did not believe the request was appropriate at this time as he has been back to full duty since July 15, 2011, with no restrictions. He stated he was physically capable of performing correctional work safely and successfully. He further stated he has performed all the essential functions of his law enforcement position without jeopardizing the security of the institution [or] the safety of staff or inmates, and he is not requesting reasonable accommodation. After forwarding this letter to [Agency Attorney 1], he stated we should proceed with the 8-point letter. The Complainant did provide the last name of his current treating physician, but would not respond to the request to verify the first name of the treating physician, or sign the form for release of medical information. After 30 days (July 14, 2014) I relayed this information to [Agency Attorney 1], at the time he requested that I order the fitness for duty. On July 17, 2014, I forwarded the request to [named individual], National Employee Health Coordinator, in Central Office to schedule a fitness for duty. I explained to her why I was forwarding this request, and she indicated she would check into it and get back with me. On August 7, 2014, [the National Employee Health Coordinator] emailed me stating a fitness for duty is not indicated at this time. Following this determination, no further action was taken. I do not have any contact information for [Agency Attorney 1] or [the National Employee Health Coordinator] as I believe they are no longer working in the Bureau of Prisons.

In its final decision, the Agency found that it had not discriminated against Complainant on the basis of disability or in reprisal for prior protected EEO activity. The Agency determined that “[t]he record demonstrates that language from complainant’s EEO pleading did in fact lead directly to [the HR Manager’s] actions. The timing of [her] actions as well as her quotes using complainant’s language show that Complainant’s EEO pleading was the source of the potentially career-jeopardizing health information.”

Nonetheless, according to the Agency, “Complainant’s precise language, specifically his verb tense, is of critical importance in deciding this matter.” The Agency noted that “Complainant’s pleading used strictly present-tense descriptions,” which, in the Agency’s view, “creat[ed] the inference that his ability to respond to threats or emergencies was currently compromised at the time of his statement.” Although the Agency acknowledged that “it may have been ill-advised for [Agency Attorney 1 and the HR Manager] to attempt to handle this matter without consulting [the National Employee Health Coordinator] or other Central Office Human Resource personnel, there is no evidence of unlawful animus.” The Agency concluded,

Given the statement and the present-tense language used by Complainant, [the Agency's] request for follow up medical information was a reasonable step to determining if Complainant could perform the duties of his position. Accordingly, the record does not demonstrate that [agency] officials handled Complainant's health information inappropriately. Therefore, the record does not support the conclusion that [Agency] officials subjected Complainant to discrimination or retaliation.

CONTENTIONS ON APPEAL

On appeal, Complainant argues that the Agency's use of the statements in his pleading constituted retaliation. He maintains that Agency Attorney 1 and the HR Manager "continued to press for a fitness for duty for the sole reason of the information in the prior EEO complaint and for no other reason." In addition, he asserts that the delay between the August 7, 2014, National Employee Health Coordinator's email to the HR Manager and his September 5, 2014, notification that the Agency would not pursue a fitness-for-duty examination is additional evidence of retaliation.

In response, the Agency argues that Complainant did not file his appeal in a timely manner. It asserts that he filed the appeal "more than 30 days after [he] received notice of the" Agency's final decision.

The Agency also argues that Complainant did not establish that the Agency discriminated against him on the basis of disability or in reprisal for protected EEO activity. The Agency asserts that it had legitimate, nondiscriminatory reasons for its actions and that its requests related to a fitness-for-duty examination were job related and consistent with business necessity. In that regard, the Agency argues, "Given the present-tense language used by [Complainant] in his aforementioned statement, the Agency had a reasonable belief, based on objective evidence, that [Complainant's] ability to perform essential job functions was impaired by a medical condition."

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

ANALYSIS AND FINDINGS

1. Timeliness of Appeal

EEOC Regulation 29 C.F.R. § 1614.402 provides that appeals to the Commission must be filed within 30 calendar days after a complainant receives notice of the Agency's decision. In the absence of proof to the contrary, a complainant is presumed to have received an agency's final decision within five days of mailing. Dillard v. U.S. Postal Serv., EEOC Appeal No. 01A61673 (July 21, 2006).

In this case, the Agency's final decision is dated November 3, 2016, and Complainant filed his appeal on December 5, 2016. The Agency asserts that Complainant filed his appeal more than 30 days after he received the final decision, but it points to no evidence to support its assertion. The file contains no tracking information showing the date on which Complainant received the decision. Applying the five-day presumption, we find that Complainant received the final agency decision on November 8, 2016. Because Complainant filed his appeal within 30 days of that date, we find that he filed the appeal in a timely manner.

2. Correspondence Regarding Fitness-for-Duty Examination

The statutory anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a reasonable employee from engaging in protected activity. Burlington N. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); see also EEOC Enforcement Guidance on Retaliation and Related Issues, EEOC Notice No. 915.004, at II.B. (Aug. 25, 2016) (Enforcement Guidance on Retaliation) ("Retaliation expansively reaches any action that is 'materially adverse,' meaning any action that might well deter a reasonable person from engaging in protected activity."). A retaliation claim involves three elements: (1) protected activity, (2) materially adverse action taken by the employer, and (3) causal connection between the protected activity and the materially adverse action. Enforcement Guidance on Retaliation at II.A. Retaliatory harassing conduct is actionable if it is sufficiently material to deter protected activity, even if it is insufficiently severe or pervasive to create a hostile work environment. Id. at II.B.3.

Complainant engaged in protected activity when he filed his prior EEO complaint. His pleading in response to the Agency's motion was part of his protected EEO activity.

We find that the Agency subjected Complainant to a materially adverse action when it sent him correspondence requesting the name of his treating physician, asking him to sign a medical release, and proposing to conduct a fitness-for-duty inquiry or examination. Such correspondence is reasonably likely to deter a reasonable employee from engaging in protected activity and has a potentially chilling effect on the EEO process. Even though the Agency ultimately did not send Complainant for a medical examination, it let Complainant believe for almost four months that it intended to do so.

We further find that there is a direct causal connection between Complainant's protected EEO activity and the materially adverse action. The Agency expressly relied on statements that Complainant made in his pleading before the EEOC AJ as a basis for asserting that it needed to contact his physician to determine his fitness for duty. The Agency continued to pursue this action even after Complainant pointed out that he had been working on fully duty for nearly three years. It was not until the National Employee Health Coordinator became involved in the matter that the Agency retreated from its efforts. Even then, as Complainant noted, the Agency waited four weeks before notifying him that it was no longer pursuing a fitness-for-duty examination.

Moreover, it is clear that Attorney 1--the individual representing the Agency against Complainant in the matter involving his prior EEO complaint--directed the Agency's actions in this matter. Attorney 1 did not merely contact the HR Manager or the National Employee Health Coordinator about any ostensible concerns he had regarding Complainant's ability to perform his job. Instead, Attorney 1 contacted the HR Manager, twice instructed her to issue an "8-point letter" to Complainant, and told her to order a fitness-for-duty examination. It was more than "ill advised" for Attorney 1 and the HR Manager to proceed in this manner. It was per se reprisal. There simply is no place in the EEO process for such conduct. Cf. EEO MD-110 at IV. ("conflicts of interest can arise when agency representatives in offices, programs, or divisions within the agency with a legal defensive role play a part in the impartial processing").

Finally, there is no merit to the Agency's argument that it had a legitimate, nondiscriminatory reasons for its actions. There is direct evidence that the Agency took the materially adverse action because of Complainant's protected EEO activity. The attorney representing the Agency in Complainant's prior EEO complaint instigated the actions at issue here based on statements that Complainant made in his response to the Agency's motion in the prior EEO proceeding. The Agency's actions arose directly from Complainant's participation in the EEO process. Where there is direct evidence of discrimination, the circumstantial-evidence analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is inapplicable. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 ("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination") (quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

We find that the Agency discriminated against Complainant in reprisal for prior protected EEO activity when it sent him correspondence regarding a fitness-for-duty examination. Having found that the Agency engaged in reprisal, we need not determine whether the Agency discriminated against Complainant on the basis of disability.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's final decision and REMAND the complaint for further processing in accordance with our Order below.

ORDER

The Agency is ordered to take the following remedial actions within 120 calendar days after this decision is issued:

1. The Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of the Agency's reprisal. The Agency shall afford Complainant an opportunity to establish a causal relationship between the Agency's violation of the Rehabilitation Act and any pecuniary or non-pecuniary losses. Complainant shall cooperate in the Agency's efforts to compute the amount of compensatory damages he may be entitled to and shall provide all relevant information requested by the Agency. The Agency shall issue a new Agency decision determining Complainant's entitlement to compensatory damages within 60 calendar days after the date this decision is issued. The final decision shall contain appeal rights to the Commission. The Agency shall submit a copy of the final decision to the Compliance Officer at the address set forth below.
2. The Agency shall provide eight (8) hours of training to the responsible management officials, including Attorney 1 and the HR Manager, regarding their responsibilities under the Rehabilitation Act. The training shall have a special emphasis on these employees' responsibilities with respect to Section 501 of the Rehabilitation Act of 1973 and the prohibition against reprisal.
3. The Agency shall consider taking appropriate disciplinary action against the responsible management officials, including Attorney 1 and the HR Manager. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).
4. The Agency shall post a notice in accordance with the paragraph below entitled "Posting Order."

The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

POSTING ORDER (G0617)

The Agency is ordered to post at its Schuylkill Federal Correctional Institute located in Minersville, Pennsylvania copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which 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 to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in 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). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your 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 31, 2018

Date