



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

██████████
Irvin C.,¹
Complainant,

v.

David S. Ferriero,
Archivist of the United States,
National Archives and Records Administration,
Agency.

Appeal No. 0120181352

Agency No. 1737STL

DECISION

Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency's decision dated February 15, 2018 dismissing his complaint of 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. Upon review, the Commission finds that Complainant's complaint was improperly dismissed pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Archives Technician, GS-4, at the Agency's National Personnel Records Center in St. Louis, Missouri.

On October 4, 2017, Complainant filed a formal complaint wherein he claimed that the Agency subjected him to discrimination and a hostile work environment on the bases of his race (Caucasian), sex (male), disability (left eye), and in reprisal for his prior protected EEO activity when:

1. On June 2, 2017, management denied him a promotion to the GS-5 grade level as an Archives Technician; and

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.

2. On May 18, 2017 and June 6, 2017, management told him to look elsewhere for a promotion to the GS-5 grade level.

On February 15, 2018, the Agency issued a final decision dismissing the complaint pursuant to 29 C.F.R. § 1614.107(a)(1) for failure to state a claim. The Agency reasoned that the two claims were insufficiently severe or pervasive to establish a cognizable hostile work environment claim. In addition, the Agency addressed the merits of the matter even though the claims were not accepted for an investigation. To that end, the Agency found that management officials had articulated legitimate, nondiscriminatory reasons for its actions. Namely, with regard to claim (1), Complainant did not and could not meet the eligibility standards at the time he applied for his promotion. Further, the Agency noted that Complainant received the promotion he sought four months later. With respect to claim (2), the Agency determined that the non-promotion and comment made by Complainant's Supervisor did not constitute sufficiently severe and persistent conduct to establish discriminatory or retaliatory harassment. The Agency noted that the Supervisor stated that nothing she said was intended as a threat. Thus, the Agency dismissed the complaint for failure to state a claim.

Thereafter, Complainant filed the instant appeal without submitting any arguments or contentions in support.

ANALYSIS AND FINDINGS

The Agency improperly dismissed the complaint for failure to state a claim.² Consistently, the Commission has held that an agency should not dismiss for failure to state a claim unless it appeared beyond doubt that no set of facts could entitle Complainant to relief. Cobb v. Dep't of the Treasury, EEOC Request No. 05970077 (Mar. 13, 1997). Moreover, we consider reprisal claims with a broad view of coverage. Carroll v. Dep't of the Army, EEOC Request No. 05970939 (Apr. 4, 2000). For purposes of claiming retaliation, an agency's adverse actions need not be "ultimate employment actions" that materially affect terms and conditions of employment. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999); see also EEOC Enforcement Guidance on Retaliation and Related Issues, No. 915.004 (Aug. 25, 2016).

The only questions for an agency to consider in determining whether a complaint states a claim are: (1) whether complainant is an aggrieved employee; and (2) whether complainant raises employment discrimination on a basis covered by EEO statutes. If these questions are answered in the affirmative, an agency must accept the complaint for processing regardless of its judgment of the merits. See Odoski v. Dep't of Energy, EEOC Appeal No. 01901496 (Apr. 16, 1990).

Specific to claim (1), Complainant is alleging that he was denied a promotion. This claim involving a failure to promote concerns harm to a term, condition, or privilege of Complainant's employment and therefore states an actionable claim.

² We additionally note that the Agency improperly proceeded to the merits of the claim without conducting an investigation.

In terms of claim (2), we find that the non-promotion and the remark to look elsewhere for a promotion by Complainant's Supervisor, considered collectively, could reasonably deter an individual from engaging in EEO activity and state a viable claim of discriminatory or retaliatory harassment.

CONCLUSION

Accordingly, we REVERSE the Agency's final decision dismissing Complainant's complaint and 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. 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 (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).

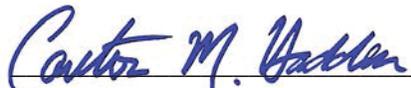
COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

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

July 3, 2019

Date